PRINCIPLES OF ADMINISTRATIVE LAW

Sixth Edition

by

David Phillip Jones, Q.C.
B.A.(Hons.) (McGill), B.C.L., M.A. (Oxon.)

and

Anne S. de Villars, Q.C.
B.Sc. (Southampton), LL.B. (Alberta)

both of
de Villars Jones
Barristers and Solicitors
Edmonton

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1. Introduction

As discussed in Chapter 8, following *Nicholson*, the old distinction between quasi-judicial and administrative decisions has been rendered unimpor-

tant and of little use "... *since both the duty to act fairly and the duty to act judicially have their roots in the same general principles of natural justice.*"[1] We now refer to the "duty to be fair" or "procedural fairness" as overarching terms which incorporate all of the rules of natural justice and which apply to all quasi-judicial and administrative decisions.

Thus, the duty to be fair has evolved so that it now applies to every public authority making an administrative decision which affects the rights, privileges or interests of an individual[2] (but not an administrative decision that is legislative in nature). In Canada today, this includes a myriad of authorities ranging from the single delegate issuing dog licenses to major boards wielding great power over Canadian people and business.[3] This chapter and the next will consider the *content* of the duty to be fair and its two fundamental principles: *audi alteram partem* (the right to hear the other side – discussed in this chapter) and *nemo judex in sua causa debet esse* (the rule against bias – discussed in the next chapter).

The principle *audi alteram partem* is an imperative which translated means "hear the other side!" More generally, it refers to the requirement in administrative law that a person must know the case being made against him or her and be given an opportunity to answer it before the delegate making the decision. Beyond that, however, the content of the principle is often difficult to determine in particular circumstances, and what fairness requires has altered over time and continues to evolve.[4]

Overall, the scope and extent of the duty to be fair depends on the circumstances of the case and the subject matter.[5] Since fairness depends on the specific context of the case, it is impossible to lay down hard and fast requirements about what does and does not constitute a fair hearing. In some cases, the enabling statute will provide a code of conduct for the hearing.[6] However, in many other cases, the statute is silent and the tribunal, and court if called upon, must determine what procedure is fair in the circumstances.

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1 *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653 (S.C.C.); *Nicholson v. Haldimand-Norfolk (Regional Municipality) Commissioners of Police* (1978), [1979] 1 S.C.R. 311 (S.C.C.). For a discussion of the historical development of these principles see Chapter 8, and the Third Edition of this work, Chapters 8 and 9.

2 *Cardinal v. Kent Institution* (1985), 16 Admin. L.R. 233 (S.C.C.).

3 This was recognized by the Supreme Court of Canada in *C.U.P.E. v. Ontario (Minister of Labour)* (2003), 50 Admin. L.R. (3d) 1 (S.C.C.), where Justice Binnie stated at para. 149: "Given the immense range of discretionary decision makers and administrative bodies, the test [for determining the standard of review] is necessarily flexible, and proceeds by principled analysis rather than categories, seeking the polar star of legislative intent." Similarly, Justice Bastarache noted at para. 13: "[The pragmatic and functional approach] recognizes that the diversity of the contemporary administrative state includes different types of decision makers."

4 See R.F. Reid and H. David, *Administrative Law and Practice*, 2d ed. (Toronto: Butterworths, 1978) at 49-104.

5 Although the content of the rule has also varied with then current notions of the importance of individual rights as against the greater public good and vice versa and with the prevailing fashion of more or less judicial activism.

6 See for example the *Regulated Health Professions Act*, S.O. 1991, c. 18, sch. 2 and the *Police Act*, R.S.A. 2000, c. P-17, s. 20.

As noted by Madame Justice L'Heureux-Dubé in *Baker v. Canada (Minister of Citizenship & Immigration)*[7] (with four other judges concurring) "... the duty of fairness is flexible and variable, and depends on an appreciation of the context of the particular statute and the rights affected ...".[8] She observed that:[9]

> The existence of a duty of fairness does not determine what requirements will be applicable in a given set of circumstances. As I wrote in *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653, at p. 682, "the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case". All of the circumstances must be considered in order to determine the content of the duty of procedural fairness: *Knight*, at pp. 682-83; *Cardinal*, *supra*, at p. 654; *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170, *per* Sopinka J.

She then went on, however, to enunciate certain factors relevant to determining the content of fairness:[10]

> Although the duty of fairness is flexible and variable, and depends on an appreciation of the context of the particular statute and the rights affected, it is helpful to review the criteria that should be used in determining what procedural rights the duty of fairness requires in a given set of circumstances. I emphasize that underlying all these factors is the notion that the purpose of participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, 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.

The factors identified by Justice L'Heureux-Dubé J. include:

1. The nature of the decision being made and the process followed in making it. The closer the administrative process is to judicial decision-making, the more likely it is that procedural protections closer to the trial model will be required.
2. The nature of the statutory scheme and the terms of the statute pursuant to which the body operates. The role of the decision in the statutory scheme helps determine the content of the duty of fairness. Greater procedural protections are required when there is no appeal procedure

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7 (1999), 14 Admin. L.R. (3d) 173 (S.C.C.).
8 *Ibid.* at 192; see also *Mavi v. Canada (Attorney General)*, 2011 SCC 30 (S.C.C.).
9 *Ibid.* at 191-92.
10 *Ibid.* at 192-94.

or the decision determines the issue and further requests cannot be submitted.

3. The importance of the decision to the individual or individuals affected. The more important or the greater impact the decision has, the more stringent are the procedural protections. This is a significant factor. The court in *Baker* commented:

> The more important the decision is to the lives of those affected and the greater its impact on that person or those persons, the more stringent the procedural protections that will be mandated. This was expressed, for example, by Dickson J. (as he then was) in *Kane v. University of British Columbia* [1980] 1 S.C.R. 1105 (S.C.C.) at p. 1113:
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> > 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.[11]

4. The legitimate expectations of the person challenging the decision. The doctrine of legitimate expectations is part of the doctrine of procedural fairness. If a claimant has a legitimate expectation that a certain procedure will be followed, the duty of fairness requires this procedure to be followed. If a claimant has a legitimate expectation that a certain result will be reached, fairness may require more extensive procedural rights than might otherwise be accorded. The doctrine of legitimate expectations does not create substantive rights outside the procedural domain. The "circumstances" affecting procedural fairness take into account the promises or regular practices of administrative decision-makers. It will be generally unfair of the decision-makers to act contrary to their representations as to procedure or to go back on substantive promises without giving the person affected significant procedural rights.

5. The choices of procedure made by the agency itself, particularly if procedure is a matter of discretion or if the agency possesses expertise in determining appropriate procedures. Important weight must be given to the choice of procedures made by the agency and its institutional restraints.[12]

This list of factors is not exhaustive. Generally, however, it is imperative that individuals who are affected by administrative decisions be given the opportunity to present their case in some fashion. They are entitled to have decisions affecting their rights, interests, or privileges made using a fair, impartial, and open process which is appropriate to the statutory, institutional,

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11 *Ibid.*

12 *Ibid.* at 192-94.

and social context of the decision being made.[13] With those factors enunciated in *Baker* in mind, a court must determine whether the procedure that was used in reaching any given decision was, in fact, fair, impartial, and open. This involves a detailed review of the circumstances of each case and a determination of whether the factors were applied properly.

Although it is clear that what constitutes a fair procedure depends on the context and the circumstances of each case, and although the concept is eminently variable, this chapter will attempt to flesh out the elements which go to make up a fair procedure. The chapter is divided into three main parts: the first part deals with the procedural steps taken by an administrative tribunal which lead up to a hearing, including a discussion of how the form of the hearing is determined; the second part discusses the elements of fair procedure during the course of an oral hearing; and the third part considers how a tribunal should handle any procedural post-hearing matters in a fair way.

It should be noted at this point that the standard of review analysis, required in all other administrative law cases coming before the courts for scrutiny, is not required in cases dealing with procedural fairness.[14] The standard of review deals with the intensity of scrutiny which a reviewing or appellate court must bring to a tribunal's decision; or conversely, how deferential the court will be to tribunal decisions. This analysis applies to the review of decisions for substantive errors. It does not apply to issues of procedural fairness.

The fairness of a proceeding is not measured by the standards of "correctness" or "reasonableness". It is measured by whether the proceedings have met the level of fairness required by law. Confusion has arisen because when the court considers whether a proceeding has been procedurally fair, the court makes this decision. In other words, the court decides whether the proceedings were correctly held. There is no deference to the tribunal's way of proceeding. It was either fair or it was not.

The use of the word "correct" in these two circumstances must not be confused. Where the court is reviewing for substantive errors, the standard of review – correctness or reasonableness – is applied and the court will defer to the tribunal's decision accordingly. Where the court is reviewing for procedural errors, the tribunal must have proceeded correctly as the court will determine. There is no deference.[15]

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13 See also: *Ruby v. Canada (Solicitor General)*, 2002 SCC 75 (S.C.C.) at para. 39; *Chiarelli v. Canada (Minister of Employment & Immigration)*, [1992] 1 S.C.R. 711 (S.C.C.) at p. 743; *Therrien c. Quebec (Ministre de la justice)*, 2001 SCC 35 (S.C.C.) at p. 82; *Mavi v. Canada (Attorney General)*, 2011 SCC 30 (S.C.C.).

14 See Chapter 12.

15 *Moreau-Bérubé c. Nouveau-Brunswick*, [2002] 1 S.C.R. 249 (S.C.C.); *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539 (S.C.C.); *Hennig v. Institute of Chartered Accountants of Alberta*, 2008 ABCA 241 (Alta. C.A.) at para. 12; *Ontario Provincial Police Commissioner v. MacDonald*, 2009 ONCA 805 (Ont. C.A.); *Bowater Mersey Paper Co. v. C.E.P., Local 141*, 2010 NSCA 19 (N.S. C.A.).

(e) Form of Hearing

The previous section discussed the requirement that parties have a right to know and answer any case to be made against them. However, the manner or form in which parties know the case being made against them and how they answer it varies from case to case and, like all aspects of procedural fairness, is context specific.

At one extreme, there is the full judicial procedure model where the administrative tribunal is formal, closely resembling a court. Apart from the manner of appointment of the adjudicator, it is hard to tell the two fora apart. Procedures before both involve oral hearings, swearing in of witnesses, cross-examination of witnesses, argument, and reply.[117] At the other extreme, there is a purely administrative model where the tribunal is very informal with no oral hearing (everything is done by written submissions), no opportunity for the parties to meet face to face, nor to put questions, no opportunity for parties to argue against each others' submissions, nor even to know the identity of the decision-maker.[118] And there is every variation of procedure between these extremes. But whatever the procedure adopted by the decision-maker, it must be fair and impartial to those involved and be appropriate to the circumstances.[119]

As stated above, what is fair in the circumstances of an individual case has varied over time. Generally speaking, there is a greater degree of participation allowed to those affected by an administrative decision in the early 21st century than was the case 100 years ago. This reflects the changing public perspective of the greater importance of individual rights (as exemplified by the *Charter*) above the rights of society as a whole.

In the early 20th century, many areas of activity came to be regulated by statutes. Many of these statutes, but not all, contained explicit procedural provisions concerning notice and the right to a hearing. The courts then had to face the question of how far these provisions had gone in replacing the common law. Did the *absence* of procedural provisions in the statute mean that the tribunal was absolute governor of its own procedure and could ignore the right to notice and a hearing, or did the common law still operate? If the common law did still operate, to what extent did it supplement the incomplete statutory code of procedure?

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117 For example, s. 47(1) of the *Police Act*, R.S.A. 2000, c. P-17, which deals with hearings into complaints as to the actions of a police officer. Most disciplinary proceedings of professionals contain similar statutory provisions, for example the *Architects Act*, R.S.A. 2000, c. A-44, Part 5 and the *Legal Profession Act*, R.S.A. 2000, c. L-8, Part 3 to name but two.

118 For example, s. 77 (4) of the *Health Information Act*, R.S.A. 2000, c. H-5 gives Alberta's Information and Privacy Commissioner the discretion to order oral submissions only ir inquiries under that Act.

119 The right to a hearing cannot be ousted by agreement by the parties where the statutory o regulatory context mandates a hearing: *Rosen v. Saskatoon District Health Board*, [2001 10 W.W.R. 19 (Sask. C.A.).

The culmination of the long development of this area of the law[120] is exemplified in the decision of the Supreme Court of Canada in *Baker*,[121] which makes it clear that every person affected by an administrative decision has a right to a hearing. What *form* of hearing "... depends on an appreciation of the context of the particular statute and the rights affected ...".[122] All of the circumstances must be considered in the specific context of the case in order to determine what kind of a hearing will be sufficient. What the court must keep in mind is how to ensure a fair and open procedure.[123]

> I emphasize that underlying all these factors is the notion that the purpose of participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, 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.

Thus, although parties are entitled to a hearing, the duty to be fair does not necessarily mean an *oral* hearing is required[124] (or the other procedures that generally accompany the right to a hearing).[125] In fact, if it did, the process of government would grind to a halt because thousands of decisions are made every day without oral hearings. First resort must be had to the enabling statute giving the tribunal its jurisdiction. If the statute provides a code of procedure, then *ipso facto* that defines the content of fair procedure.[126] Generally speaking, however, statutes do not contain a complete and detailed code of procedure. Some are silent and many more give only partial guidance. Within those parameters, a tribunal can set its own procedures. It could, for example, decide that a fair hearing can be extended without the decision-maker ever seeing the

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120 For a review of the development of this aspect in England, see generally Third Edition of this work at 238-49 and, specifically: *Cooper v. Wandsworth Board of Works* (1863), 143 E.R. 414 (Eng. C.P.); *Local Government Board v. Arlidge*, [1915] A.C. 120 (U.K. H.L.) (the "*Arlidge* Case"); *Errington v. Minister of Health* (1934), [1935] 1 K.B. 249, [1934] All E.R. Rep. 154 (Eng. C.A.); *Franklin v. Minister of Town & Country Planning* (1947), [1948] A.C. 87, [1947] 2 All E.R. 289 (U.K. H.L.); *R. v. Gaming Board for Great Britain*, [1970] 2 All E.R. 528 (Eng. C.A.). For a review of the development of this aspect from the Canadian perspective, see Chapter 8.

121 (1999), 14 Admin. L.R. (3d) 173 (S.C.C.).

122 *Ibid.* at 192.

123 *Ibid.*

124 An exchange of written materials may suffice, *Mobil Oil Canada Ltd. v. Canada-Newfoundland (Offshore Petroleum Board)* (1994), 21 Admin. L.R. (2d) 248 (S.C.C.) at p. 269. See also *Murphy v. Dowhaniuk* (1986), 22 Admin. L.R. 81 (B.C. C.A.).

125 For example, the right to notice of a hearing is integral to the right to a hearing, whether oral or not. The requirement of a hearing may also entail the right to cross-examine witnesses, the right to counsel, the right to reasons, and the right to know the case to be met and to be heard by the party making the decision.

126 *Friends of the Oldman River Society v. Assn. of Professional Engineers, Geologists & Geophysicists (Alberta)* (2001), 199 D.L.R. (4th) 85 (Alta. C.A.), leave to appeal refused, 2001 CarswellAlta 1519, [2001] S.C. C.A. No. 366 (S.C.C.) is an example of both the type of hearing and the type of notice being dependent upon the enabling statute.

applicant in person. Provided the factors articulated in *Baker* for determining the scope of fairness are followed,[127] then it is likely that the procedure used by a tribunal will pass judicial muster.

In the sixth edition of *Administrative Law: Cases, Text, and Materials*, the authors comment on the distinction:

> Like many terms in administrative law, the phrase "oral hearing" can have different meanings. In this section, we use it in the sense of a face to face encounter with the actual decision maker (or someone formally and legally deputed by that decision maker to hear and receive evidence) and, where relevant, the other party or parties. In this sense, it can be contrasted with hearings that take place purely in writing or on the basis of electronically generated data and also with decision making-processes where conclusions are based on interviews but not conducted by the actual decision maker or in the presence of other parties.[128]

If there is no statutory requirement for an oral hearing, the general presumption is that the tribunal may establish its own procedure.[129] However, in keeping with the movement towards a more functional and pragmatic analysis of what constitutes procedural fairness, the right to an oral hearing has been held to depend on the circumstances. In *Pett v. Greyhound Racing Assn. Ltd.*, Lord Denning stated that "[i]n matters affecting reputation or livelihood or serious import ... fairness demands an oral hearing".[130] However in *Murphy v. Dowhaniuk*,[131] the British Columbia Court of Appeal noted that an oral hearing is not always necessary if an alternative means of placing evidence before the tribunal is sufficient.

Three Supreme Court of Canada decisions on the requirement of an oral hearing, all in the context of immigration law, must be considered: *Singh v.*

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127 For a review of the factors, see "Introduction", above.

128 (Toronto: Emond Montgomery, 2010) at 315.

129 But where a statute does contemplate an oral hearing, the failure to provide one amounts to a breach of procedural fairness: *Sarg Oils Ltd. v. Alberta (Environmental Appeal Board)* (1996), 36 Admin. L.R. (2d) 134 (Alta. Q.B.). See also *Robertson v. Edmonton (City)* (1990), 44 Admin. L.R. 27 (Alta. Q.B.), where the relevant statute, the *Planning Act*, contemplated some sort of oral hearing, but did not specify the exact procedure. The city council instituted a five minute time limit on presentations. This was acceptable, without more, as an appropriate exercise of its ability to use its own procedure. However, a breach of procedural fairness occurred in this case because the applicants had been told that there would be no time limitation.

130 (1968), [1968] 2 W.L.R. 1471, [1969] 1 Q.B. 125 (Eng. C.A.) at p. 1476 [W.L.R.]. In *Willette v. Royal Canadian Mounted Police Commissioner* (1984), 10 Admin. L.R. 149 (Fed. C.A.), the Federal Court of Appeal ruled that an oral hearing was warranted in professional disciplinary matters. See also *Khan v. University of Ottawa* (1997), 2 Admin. L.R. (3d) 298 (Ont. C.A.). A majority of the Court of Appeal ruled that a law student appealing a grade deserved an oral hearing given the circumstances of the case and the consequences of an adverse finding with respect to her credibility.

131 (1986), 22 Admin. L.R. 81 (B.C. C.A.).

Canada (Minister of Employment & Immigration),[132] *Suresh v. Canada (Minister of Citizenship & Immigration)*,[133] and *Chieu v. Canada (Minister of Citizenship & Immigration)*[134] where the court examined the issue in light of both the *Canadian Bill of Rights*[135] (in *Singh*) and the *Charter* (in all three).

(i) Constitutional and Quasi-Constitutional Rights to Oral Hearings

In *Singh v. Canada (Minister of Employment & Immigration)*,[136] there were two judgments, concurring in result, but differing in approach. Mr. Justice Beetz addressed the question of whether an oral hearing was required under the terms of the *Canadian Bill of Rights*; while Madame Justice Wilson examined the issue from the perspective of s. 7 of the *Charter*. Both concluded that the circumstances of the case required an oral hearing.

The case dealt with the former *Immigration Act*[137] provisions relating to convention refugee status. Under the Act, a person claiming to be a refugee could apply to the Minister for a refugee designation. The Refugee Status Advisory Committee advised the Minister and, if the application was rejected, the applicant could seek a redetermination by the Immigration Appeal Board. The board was required to allow the matter to go to a hearing, if, on the basis of material submitted, "... there was reasonable grounds to believe that a claim would, upon a hearing of the application, be established."

There were seven appellants whose cases were consolidated because the main issues to be addressed were essentially the same. The Minister, acting on the advice of the Refugee Status Advisory Committee, determined that none of the appellants was a refugee. They appealed to the Immigration Appeal Board. The board denied the application to proceed to a hearing, based on s. 71(1), that there were no "... reasonable grounds to believe that a claim could, upon the hearing of the application, be established...". Each appellant then sought judicial review by the Federal Court of Appeal, which was denied. The result of rejecting their appeals was either a deportation order (where the appellants were seeking admission into Canada at a port of entry) or a removal order (where the appellants were under investigation as to whether they should be removed after having been admitted to Canada).

Mr. Justice Beetz examined the scheme of the former *Immigration Act* to determine whether s. 71(1) infringed s. 2(e) of the *Canadian Bill of Rights*.[138]

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132 (1985), 12 Admin. L.R. 137 (S.C.C.).
133 (2002), 37 Admin. L.R. (3d) 159 (S.C.C.).
134 (2002), 37 Admin. L.R. (3d) 252 (S.C.C.).
135 R.S.C. 1970, App. III.
136 *Singh, supra* note 132.
137 R.S.C. 1985, c. I-2 (since repealed). Now see the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27.
138 S.C. 1960, c. 44. Section 2 reads as follows:

> 2. Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, the abridgement or infringement of any of the rights or freedoms herein recognized and

First, he concluded that the "... process of determining and redetermining appellants' refugee claims involves the determination of rights and obligations for which the appellants have, under s.2(e) ... the right to a fair hearing in accordance with the principles of fundamental justice."[139] Secondly, the question was whether the appellants had received a "... fair hearing in accordance with principles of fundamental justice." Beetz J. noted that the appellants' claims to refugee status "... have been finally denied without their having been afforded a full oral hearing at a single stage of the proceedings before any of the bodies or officials empowered to adjudicate upon their claim on the merits."[140]

He emphasized, however, that the principles of fundamental justice will not always require an oral hearing, quoting the *Inuit Tapirisat* case for support:

> The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the Tribunal is acting, the subject-matter that is being dealt with, and so forth.[141]

Beetz J. accepted the appellants' submissions that where life or liberty may depend on findings of fact and credibility, the opportunity to make written submissions or to reply in writing to allegations, is not sufficient. He quoted portions of Pigeon J.'s dissenting judgment in *Ernewein v. Canada (Minister of Employment & Immigration)*[142] to illustrate that the principles of procedural fairness, even apart from the requirements of fundamental justice in the *Bill of Rights*, are that justice must appear to be done, and that these rights are not to be excluded by inference. He concluded that in all the circumstances of the case, the appellants were denied their fundamental right to a hearing. For Beetz J., the nature of the legal rights involved and the severity of the consequences to the individual concerned determined the content of fundamental justice.[143]

In her judgment, Madame Justice Wilson held that the procedures in the former *Immigration Act* were incompatible with s. 7 of the *Charter* and not justifiable under s. 1. She noted that the Act imposed limitations on the hearing that were incompatible with principles of procedural fairness and, therefore, concluded that in order for the appellants to succeed they had to establish that Parliament's decision to exclude procedural fairness infringed the *Charter*.

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declared, and in particular, no law of Canada shall be construed or applied so as to ...

(e) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations.

139 *Singh, supra* note 132 at 155.

140 *Ibid.*

141 *Inuit Tapirisat of Canada v. Canada (Attorney General)*, [1980] 2 S.C.R. 735 (S.C.C.) at p. 747.

142 (1979), [1980] 1 S.C.R. 639 (S.C.C.) at p. 657.

143 *Singh, supra* note 132 at 157. He drew an interesting distinction in his discussion of the consequences. Threats to life and liberty are relevant, not to whether the *Bill of Rights* applies, "but with respect to the *type of hearing which is warranted in the circumstances.*" [Emphasis added.]

She examined the nature of the right to an oral hearing, and its relationship to fairness, procedural fairness and fundamental justice. An oral hearing is not required in all circumstances.

> If "the right to life, liberty and security of the person" is properly construed as relating only to matters such as death, physical liberty and physical punishment, it would seem on the surface at least, that these are matters of such fundamental importance that procedural fairness would invariably require an oral hearing. I am prepared, nevertheless, to accept for present purposes that written submissions may be an adequate substitute for an oral hearing in appropriate circumstances.
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> I should note, however, that even if hearings based on written submissions are consistent with principles of fundamental justice for some purposes, they will not be satisfactory for all purposes. In particular, I am of the view that where a serious issue of credibility is involved, fundamental justice requires that credibility be determined on the basis of an oral hearing ...
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> As I have suggested, the absence of an oral hearing need not be inconsistent with fundamental justice in every case. My greatest concern about the procedural scheme envisaged by ss. 45 to 58 and 70 and 71 of the *Immigration Act* is not, therefore, with the absence of an oral hearing in and of itself, but with the inadequacy of the opportunity the scheme provides for a refugee claimant to state his case and know the case he has to meet.[144]

In this case, the issue focussed on legislation which specifically authorized the use of procedures that were not consonant with principles of fundamental justice, thus necessitating resort to the *Charter*. However, the judgments, although dealing with constitutional issues, also may be equally applicable about the requirement of oral hearings in administrative law generally.

Although their arguments focus on the nature of "fundamental justice" under the *Bill of Rights* and the *Charter*, principles of procedural fairness in administrative law are elements of fundamental justice[145] and both judgments were directed to the procedural elements. Further, the interpretation of "fundamental justice" in the *Canadian Bill of Rights*, on which Beetz J. based his decision, has been quite narrow itself.

Wilson J. referred to a test of procedural fairness laid out in *R. v. Duke*[146] that held that fundamental justice includes, at least, that the tribunal "... must act fairly, in good faith, without bias and in a judicial temper, and must give

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144 *Ibid.* at 190.

145 For example, substantive issues of law are encompassed in principles of fundamental justice, but not in procedural fairness or fairness.

146 [1972] S.C.R. 917 (S.C.C.).

to him the opportunity adequately to state his case."[147] Both Beetz J. and Wilson J. pointed to the importance of oral testimony when issues of credibility are involved. Clearly, the factors cited by the court in both judgments are important in assessing, in the administrative context, whether a tribunal will breach the duty to be fair if it refuses to hold an oral hearing.[148]

In another immigration case, *Suresh v. Canada (Minister of Citizenship & Immigration)*,[149] the court reiterated that what is required will depend on the circumstances. After a discussion of the factors from *Baker* and having weighed these factors together in all of the circumstances,[150] the Court held that the procedural protections required by s. 7 of the *Charter* did not extend to requiring the Minister to conduct a full oral hearing or a complete judicial process, but did require more than the total absence of procedural safeguards in s. 53(1)(b) of the former *Immigration Act* and certainly more than what Suresh received. The "more" had to do with Suresh knowing all the information and material on which the Minister was relying to make her decision – ie. the requirement of disclosure[151] – and his having a full opportunity to respond to the case presented to the Minister. The Court held, however, that this could be adequately accomplished simply through written submissions.

In a third immigration case, *Chieu v. Canada (Minister of Citizenship & Immigration)*,[152] the issue focussed on whether the proper interpretation of s. 70(1)(b) of the former *Immigration Act* permitted the Immigration Appeal Division (I.A.D.), when deciding whether to issue a removal order from Canada, to consider potential foreign hardship in the country to which a permanent resident would likely be removed. Pursuant to s. 52 of the Act, which controls the country of removal, either the individual being removed or the Minister,

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147 *Ibid.* at 923.

148 For example see *Idziak v. Canada (Minister of Justice)*, [1992] 3 S.C.R. 631, 9 Admin. L.R. (2d) 1 (S.C.C.), reconsideration/rehearing refused (1992), 9 Admin. L.R. (2d) 1n (S.C.C.). Idziak was denied an oral hearing, because the decision to be made by the Minister was essentially one relating to whether there were any extenuating circumstances mitigating against his extradition. The extradition proceedings themselves were all conducted according to fair procedures. His application to the Minister had included all the relevant information; there was no case raised against him on the issue in question, therefore no need to cross-examine anyone. The information provided by him was all the information the Minister had before him when he made the decision.

149 2002 SCC 1, 37 Admin L.R. (3d) 159 (S.C.C.).

150 With respect to the fifth factor, the court made the following comments (at para. 120):

> The final factor we consider is the choice of procedures made by the agency. In this case, *the Minister is free under the terms of the statute to choose whatever procedures she wishes* in making a s. 53(1)(b) decision. As noted above, *the Minister must be allowed considerable discretion in evaluating future risk and security concerns*. This factor *also suggests a degree of deference to the Minister's choice of procedures since Parliament has signaled the difficulty of the decision by leaving to the Minister the choice of how best to make it.* At the same time, *this need for deference must be reconciled with the elevated level of procedural protections mandated by the serious situation of refugees* like Suresh, who if deported may face torture and violations of human rights in which Canada can neither constitutionally, nor under its international treaty obligations, be complicit. [Emphasis added.]

151 For a review of this case from a disclosure perspective see "Knowing the Case to be Met – Disclosure", above.

152 2002 SCC 3, 37 Admin. L.R. (3d) 252 (S.C.C.).

which is the usual case, selects the country of removal. Hence, the Minister argued that the potential foreign hardship in the country of removal was a consideration for the Minister to make, not the I.A.D.

A different form of hearing was contemplated for each section; a s. 70 (1)(b) decision envisioned a full hearing while a section 52 decision not necessarily so. The Supreme Court held that Parliament intended the I.A.D. to have a broad discretion to allow permanent residents facing removal to remain in Canada if it would be equitable to do so. As a result, the court should not narrow this discretion contrary to the plain intention of Parliament and leave consideration of this factor only to the Minister or the courts on judicial review. This was not the intention of Parliament.[153]

> Parliament has equipped the I.A.D. with all of the tools necessary to ensure that the requirements of natural justice are met when removing individuals from Canada, including providing for an oral hearing, the calling and cross-examination of witnesses, the tendering of evidence, the giving of reasons (when requested), and a right to seek judicial review of the I.A.D.'s decision (during which time the statutory stay of the removal order is in place). That these procedures are designed to meet the requirements of natural justice can be inferred from Wilson J.'s statement in *Singh, supra*, at p. 199, that a hearing before the I.A.B., the I.A.D.'s predecessor, is "a quasi-judicial one to which full natural justice would apply". These procedures help ensure that any relevant *Charter* rights will be respected. Parliament did not give the Minister similar tools for making ss. 52 or 114(2) decisions, where no oral hearing is required, no witnesses can be called, and a statutory stay is not provided either pending the decision or if judicial review is sought.
>
> As Cory J. stated, in dissent, in *Pushpanathan, supra*, at para. 157, when an individual faces removal from Canada:
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> > ... it would be unthinkable if there were not a fair hearing before an impartial arbiter to determine whether there are "substantial grounds for believing" that the individual to be deported would face a risk of torture, arbitrary execution, disappearance or other such serious violation of human rights. In light of the grave consequences of deportation in such a case, there must be an opportunity for a hearing before the individual is deported, and the hearing must comply with all of the principles of natural justice. As well, the individual in question ought to be entitled to have the decision reviewed to ensure that it did indeed comply with those principles.

153 *Ibid.* at paras. 69-71.

> The protections provided in relation to a s. 70(1)(b) appeal to the I.A.D. satisfy these requirements. *While the Minister's decisions under ss. 52 and 114(2) may well accord with the requirements of natural justice in most cases, I am concerned that this will not always be the case. Baker, supra*, is one example of an instance where the Minister's decision was procedurally deficient. It fell to this Court to clarify that the principles of natural justice guarantee certain rights to individuals who make a s. 114(2) application, including a right to make written submissions to the Minister's delegate who actually makes the decision, a right to receive brief reasons for the decision, and a right to an unbiased decision maker. However, it is clear that the procedural protections required may vary with the context of the case: *Singh, supra*, at p. 213, per Wilson J.; *R. v. Lyons*, [1987] 2 S.C.R. 309, at p. 361, per La Forest J.; *Syndicat des employés de production du Québec et de l'Acadie v. Canada (Canadian Human Rights Commission)*, [1989] 2 S.C.R. 879, at pp. 895-96, per Sopinka J.; *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653, at p. 682, per L'Heureux-Dubé J.; *Pearlman v. Manitoba Law Society Judicial Committee*, [1991] 2 S.C.R. 869, at p. 882; and *Dehghani, supra*, at p. 1076.
>
> When faced with the problem of a statute which can be read in two ways, one that accords with the principles of natural justice and one that does not, this Court has consistently adopted the interpretation that favours a fuller assurance that the requirements of natural justice will be met: *Alliance des Professeurs Catholiques de Montréal v. Quebec Labour Relations Board*, [1953] 2 S.C.R. 140, at p. 166, per Fauteux J.; *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311, at p. 328, per Laskin C.J.; and *Singh, supra*, at p. 200, per Wilson J. Therefore, for the purposes of this appeal, a reading of the Act which allows permanent residents to have foreign hardship considered by the I.A.D., where a likely country of removal has been established, is preferable. [Emphasis added.]

(ii) Common Law and Statutory Requirements for Oral Hearings

The cases consistently hold that there is no common law right to an oral hearing *per se*. In *Pacific Rim Credit Union v. British Columbia (Attorney General)*,[154] the court noted that the right to an oral hearing "... depends in large part on the terms of the statute and regulations which govern the procedures before a particular tribunal."[155]

In *McInroy v. R.*,[156] the Federal Court held that while the duty to act fairly applies to purely administrative actions, that duty does not necessarily include

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154 (1988), 32 Admin. L.R. 49 (B.C. S.C.).
155 *Ibid.* at 58.
156 (1985), 13 Admin. L.R. 8 (Fed. T.D.).

the requirement of an oral hearing. Interestingly, the case involved issues of credibility. A prison inmate was transferred to another institution on the basis of allegations that he was involved in certain disciplinary offenses. He denied the allegations in written submissions, but further requested an oral hearing which was denied. The court found that it was sufficient that he had notice of the proceedings and an opportunity to respond to the allegations in writing. The court found there was no duty at either common law or in the statute to hold a full hearing. This seems to be contrary to the position taken by the Supreme Court in *Singh*, but the two most important factors cited by Beetz J. were the nature of the legal rights at issue and the severity of the consequences to the individuals concerned. While not expressly examined in the Federal Court's decision, the fact that McInroy's rights were not substantially adversely affected may have been an element in the court's reasoning.

In *Murphy v. Dowhaniuk*,[157] the court accepted the Workers Compensation Board's conclusion that an oral hearing is unnecessary if the alternative means of placing evidence before it is sufficient. Dowhaniuk injured Murphy while at work. Murphy's counsel sought an oral hearing so that, in particular, he could cross-examine witnesses to determine whether horseplay was involved in the accident.[158] The board denied him this opportunity and found that, although horseplay was involved, it was not a sufficient deviation from the course of Murphy's employment to take the situation out of the Act. The board reached this conclusion based on affidavit evidence only. The court upheld the board's decision because the board had reached the conclusion that Murphy's counsel wished to establish by cross-examination (that is, that horseplay had been involved). Written submissions were sufficient.

It might be argued that had counsel had the opportunity to cross-examine on the affidavit evidence, he might have been able to demonstrate a different degree of horseplay, thus taking the issue out of the Act and leading to a different conclusion. The facts were in dispute and Murphy's rights were adversely affected with serious consequences for him. This seems to satisfy the criteria established in *Singh* and should have secured Murphy an oral hearing.

In *Toronto Independent Dance Enterprise v. Canada Council*,[159] the Federal Court identified several factors to consider when determining whether an oral hearing is required. The dance enterprise had been receiving Canada Council grants for several years. After several warnings about the operation of the group, additional annual grant applications were rejected, without an oral hearing. In deciding that an oral hearing was not necessary, Rouleau J. raised the distinction between rights and benefits,[160] concluding that only a 'benefit' was involved here and when a benefit is involved, the decision to grant an oral

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157 *Murphy, supra* note 124.

158 The issue was whether Murphy's injury "arose out of and in the course of his employment." If so, Murphy was restricted to a claim under the *Workers Compensation Act*, R.S.B.C. 1979, c. 437.

159 (1989), 38 Admin. L.R. 231 (Fed. T.D.).

160 Although note that in *Singh, supra* note 132, per Wilson J. at 187, this distinction was found to be irrelevant for *Charter* purposes.

hearing is purely discretionary. Secondly, he implied that the standard is lower because the Council was not staffed by public officials. Thirdly, he emphasized that the Council had the authority to establish its own procedures and that the courts should not be quick to interfere. Finally, he noted that it would be impossible to grant a hearing to all applicants. Thus, for the sake of efficiency, some should not be entitled to this aspect of *audi alteram partem.*

An oral hearing has been required for a rehearing, despite there being no new facts or legal arguments and where the same tribunal was sitting on review as had heard the original application;[161] the requirement has been extended to the sanctioning stage of an administrative process;[162] an oral hearing was held after a decision was insufficient;[163] and, when there was conflicting evidence regarding a central issue.[164] Oral hearings themselves must be conducted in accordance with principles of procedural fairness.[165]

The Supreme Court discussed the right to an oral hearing in *Baker v. Canada (Minister of Citizenship & Immigration).*[166] This case involved an applicant who had entered Canada illegally but who had supported herself for 11 years before being diagnosed as paranoid schizophrenic and obtaining welfare. She had four children, all born in Canada. She was ordered deported but she applied for an exemption from the requirement to apply for permanent residence from outside of Canada based on humanitarian and compassionate grounds. With counsel's help, she filed her application with supporting documentation which indicated she was making progress towards recovery but might relapse if forced to return to Jamaica where there was no treatment. She was the sole caregiver for two of her children and co-depended on her other two children. An immigration officer denied her request on the ground that there were insufficient humanitarian and compassionate grounds to exempt her from the requirement to process her application for permanent residence outside the country. No reasons were given. However, there were notes provided by the investigating immigration officer to the immigration officer who made the decision.[167] Ms. Baker applied for judicial review.

On the subject of the right to an oral hearing, Madam Justice L'Heureux-Dubé commented on what the duty of fairness required in these circumstances and held that, in this case, the circumstances did not warrant an oral hearing. In balancing these factors, the court held that the circumstances required:[168]

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161 *Membres de l'Assoc. des consommateurs industriels de gaz c. Régie du gaz naturel* (1988), 42 Admin. L.R. 291 (C.S. Que.).

162 *Fog Cutter Inc. v. New Brunswick (Liquor Licensing Board)* (1989), 38 Admin. L.R. 123 (N.B. Q.B.).

163 *Barrett v. Northern Lights School Division No. 133*, [1988] 3 W.W.R. 500 (Sask. C.A.).

164 *Cadillac Investments Ltd. v. Northwest Territories (Labour Standards Board)* (1993), 24 Admin. L.R. (2d) 81 (N.W.T. S.C.), but the court acknowledged that generally the type of hearing is a matter within the discretion of the board.

165 *Kane v. University of British Columbia*, [1980] 3 W.W.R. 125 (S.C.C.).

166 (1999), 14 Admin. L.R. (3d) 173 (S.C.C.).

167 The Supreme Court would later hold these notes as sufficient to constitute the reasons for the decision and sufficient to make a finding of bias on the part of the immigration officer.

168 *Baker, supra* note 166 at paras. 32-34.

> ... a full and fair consideration of the issues, and the claimant and others whose important interests 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.
>
> *However, it also cannot be said that an oral hearing is always necessary to ensure a fair hearing and consideration of the issues involved. The flexible nature of the duty of fairness recognizes that meaningful participation can occur in different ways in different situations.* The Federal Court has held that procedural fairness does not require an oral hearing in these circumstances: see, for example, *Said*, *supra*, at p. 30.
>
> I agree that an oral hearing is not a general requirement for H & C decisions. An interview is not essential for the information relevant to an H & C application to be put before an immigration officer, so that the humanitarian and compassionate considerations presented may be considered in their entirety and in a fair manner. In this case, the appellant had the opportunity to put forward, in written form through her lawyer, information about her situation, her children and their emotional dependence on her, and documentation in support of her application from a social worker at the Children's Aid Society and from her psychiatrist. These documents were before the decision-makers, and they contained the information relevant to making this decision. *Taking all the factors relevant to determining the content of the duty of fairness into account, the lack of an oral hearing or notice of such a 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 of the factors point toward a more relaxed standard.* The opportunity, which was accorded, for the appellant or 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 added]

In *Baker*, the Supreme Court has confirmed that procedural fairness cannot only be satisfied through the means of an oral hearing because the flexible nature of the duty of fairness recognizes that meaningful participation can occur in different ways in different situations. Whether to grant an oral hearing is a matter of discretion. The form of hearing may be of a summary type procedure. A full blown traditional type of "judicial" hearing is not required absent statutory requirement.[169] The presence of conflicting evidence does not

169 *LeClair v. Manitoba (Director, Residential Care)*, [1999] 9 W.W.R. 583 (Man. C.A.).

necessarily dictate that an oral hearing is necessary. In some cases, written submissions will suffice.[170]

(iii) Right of Reply

The right of reply is a right that almost invariably exists in an oral hearing, and may, in the appropriate circumstances exist where written representations are made.[171]

> It is common ground that at oral hearings it is the invariable practice to allow reply by the party bearing the onus. It is not easy to see why this practice should vary where the representations are made in writing...(Here) fairness required that the party bearing the onus of proof should have the right of reply, and that the failure to provide such an opportunity constituted a reviewable error.[172]

(iv) Bifurcated Hearings

Hearings may be divided into two parts: an initial hearing on liability and, if liability is found, a separate hearing on penalty. However, there are instances where the court has found that both aspects of the hearing may be heard in one session; submissions on penalty being made before the tribunal has ruled on the liability issue. It goes without saying that an affected party must have the opportunity to make submissions on both aspects of the hearing.[173]

In *Doman v. British Columbia (Superintendent of Brokers)*,[174] two brokers were found guilty of insider trading, and were fined and had their trading licences restricted all in one hearing. It was the Commission's usual practice to hold only one hearing. The British Columbia Court of Appeal held that, in the circumstances of the case, a single hearing was inadequate to meet the requirements of procedural fairness. It was untenable to accept submissions on penalty before the Commission had ruled on whether confidential information had passed from one broker to another in the circumstances of their complete denial of the allegation.

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170 *Cougar Aviation Ltd. v. Canada (Minister of Public Works & Government Services)* (2000), 2000 CarswellNat 2925, [2000] F.C.J. No. 1946 (Fed. C.A.).

171 See for example *Madsen v. Canada (Attorney General)* (1996), 39 Admin. L.R. (2d) 248 (Fed. T.D.). But see *Bowater Mersey Paper Co. v. C.E.P., Local 141*, 2010 NSCA 19 (N.S. C.A.) in which the court rejected an argument that failure to notify a party that the other party's rebuttal "had legs" and give an opportunity for a surrebuttal amounted to a breach of procedural fairness.

172 *Goyal v. Canada (Minister of Employment & Immigration)* (1992), 4 Admin. L.R. (2d) 159 (Fed. C.A.) at pp. 160-61. See also *Puxley v. Canada (Treasury Board – Transport)* (1994), 24 Admin. L.R. (2d) 43 (Fed. T.D.).

173 See *McDonough v. Nova Scotia (Police Commission)* (1993), 126 N.S.R. (2d) 40 (N.S. S.C.); *Moore v. New Brunswick Real Estate Assn.*, 2007 NBCA 64 (S.C.C.), leave to appeal refused 2008 CarswellNB 12 (S.C.C.).

174 (1998), 113 B.C.A.C. 91 (B.C. C.A.), leave to appeal refused (1999), 132 B.C. A.C. 252 (note) (S.C.C.), leave to appeal refused (1998), 133 B.C. C.A. 65 (note) (S.C.C.).

Subsequently, the British Columbia Court of Appeal considered the case of *Watson v. British Columbia (Securities Commission)*,[175] where the same arguments were raised as in *Doman*. Again, the court accepted the argument that there should have been separate hearings for the two phases:[176]

> In my opinion, the separation of the penalty phase from the liability phase is a natural separation. I accept the arguments of counsel for the appellant that until the fact of liability is known, and the severity of the culpability has been found, and the specific offences on which liability has been found to exist are known, it is not in the usual case possible to make an informed and pointed argument on the question of penalty. The person who has been found to have been guilty is prejudiced, in counsel's submission which I accept, if he does not know what offences he is answerable for at the time he is making his submission on the question of penalty.

The court suggested that it would be a rare case where a person found guilty should not be permitted to make separate submissions on penalty once the nature of the offences of which he is found guilty are known.

However, there are other cases where procedural fairness has been found not to have been breached where liability and penalty are dealt with in a single hearing.

In *Moore v. New Brunswick Real Estate Assn.*,[177] the New Brunswick Court of Appeal held that one disciplinary hearing on both liability and penalty, in accordance with the policy of the Real Estate Association's disciplinary committee, did not breach the duty of fairness.[178]

Mr. Justice Robertson considered both *Doman* and *Watson*, which he said might lead one to conclude that the better practice is for tribunals to adopt a general policy of holding a separate hearing for the penalty phase of any matter. He indicated that such a policy might be justified "[H]aving regard to the nature of the tribunal involved in both *Doman* and *Mackenzie* ...."[179] He noted that Securities Commission proceedings have an air of quasi-criminal proceedings and the allegations of misconduct can lead to loss of livelihood for the guilty trader. For this, a separate hearing on penalty may be needed to preserve impartiality. However, there are other circumstances where allegations of professional misconduct may be dealt with summarily and without requiring a separate penalty hearing. It is for the tribunal to decide whether to adopt a one-hearing policy, and if it does so, it takes the chance that there may be cases where a separate penalty hearing is called for. Such cases are where

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175 1999 BCCA 625 (B.C. C.A.).

176 At para. 10.

177 2007 NBCA 64 (N.B. C.A.), leave to appeal refused 2008 CarswellNB 12, 2008 CarswellNB 13 (S.C.C.).

178 The case was argued on the basis of a bias argument, and the court held that the process did not amount to actual bias or institutional bias. Bias will be discussed more fully in Chapter 10.

179 At para. 20.

the allegations of professional misconduct are substantial in nature and the penal consequences are severe. The accused person must be able to make informed arguments with respect to penalty if the rules of fair procedure are to be followed. If he cannot do so without first knowing the findings against him, then there must be two hearings to avoid any allegation of prejudice on the part of the tribunal.

(f) Legitimate Expectations

Another issue which arises at the pre-hearing stage is the doctrine of legitimate expectations. The doctrine of legitimate expectations is part of the doctrine of fairness but it does not create substantive rights, only procedural protections. It is based on the principle that "... the 'circumstances' affecting procedural fairness take into account the promises or regular practices of administrative decision-makers, and that it will generally be unfair for them to act in contravention of representations as to procedure, or to backtrack on substantive promises without according significant procedural rights."[180]

In *Baker*, legitimate expectations were listed as the fourth factor affecting the content of the duty of fairness.[181]

> Fourth, the legitimate expectations of the person challenging the decision may also determine what procedures the duty of fairness requires in given circumstances. Our Court has held that, in Canada, this doctrine is part of the doctrine of fairness or natural justice, and that it does not create substantive rights: *Old St. Boniface*, *supra*, at p. 1204; *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525, at p. 557. As applied in Canada, if a legitimate expectation is found to exist, this will affect the content of the duty of fairness owed to the individual or individuals affected by the decision. If the claimant has a legitimate expectation that a certain procedure will be followed, this procedure will be required by the duty of fairness: *Qi v. Canada (Minister of Citizenship and Immigration)* (1995), 33 Imm. L.R. (2d) 57 (F.C.T.D.); *Mercier-Néron v. Canada (Minister of National Health and Welfare)* (1995), 98 F.T.R. 36; *Bendahmane v. Canada (Minister of Employment and Immigration)*, [1989] 3 F.C. 16 (C.A.). Similarly, if a claimant has a legitimate expectation that a certain result will be reached in his or her case, fairness may require more extensive procedural rights than would otherwise be accorded: D. J. Mullan, *Administrative Law* (3rd ed. 1996), at pp. 214-15; D. Shapiro, "Legitimate Expectation and its Application to Canadian Immigration Law" (1992), 8 *J.L. & Social Pol'y* 282, at p. 297; *Canada (Attorney General) v. Human Rights Tribunal Panel (Canada)* (1994), 76 F.T.R. 1. Nevertheless, the doctrine of legitimate expectations cannot lead to

180 *Baker*, *supra* note 166 at para. 26. See also *Amalorpavanathan v. Ontario (Ministry of Health and Long-term Care)*, 2013 ONSC 5415 (Ont. Div. Ct.).

181 *Ibid.* at para. 26.

> substantive rights outside the procedural domain. This doctrine, as applied in Canada, is based on the principle that the "circumstances" affecting procedural fairness take into account the promises or regular practices of administrative decision-makers, and that it will generally be unfair for them to act in contravention of representations as to procedure, or to backtrack on substantive promises without according significant procedural rights.

In *Centre hospitalier Mont-Sinaï c. Québec (Ministre de la Santé & des Services sociaux)*,[182] Mr. Justice Binnie considered whether the respondent hospital had a reasonable expectation that a permit recognized the de facto change in the character of the hospital's operations.

Over several years, with the full knowledge of government officials and with public funding, Mount Sinai Hospital changed the character of its operations, but not its permit. The hospital wished to obtain a permit which accurately reflected its mix of services. A series of Ministers were aware, co-operative and encouraging. They promised on several occasions to renew the permit to reflect the reality of the situation after the move.[183] After the move was complete, a formal application for an accurate permit was made. The formal request was refused based upon financial reasons (which all judges found to be groundless). However, the government continued to fund the new facility and allowed it to operate without the permit.

The hospital applied for *mandamus* to force the Minister to exercise his discretion to issue a permit reflecting reality.[184] The hospital argued it was entitled to the permit for several reasons:

- it had an acquired right to the permit and the factual situation should be regularized;
- procedural fairness entitled it to a permit;
- legitimate expectations entitled it to a permit;
- the Minister was estopped from refusing to issue the permit; and,
- the ongoing refusal constituted an abuse of discretion.

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182 2001 SCC 41, 200 D.L.R. (4th) 193 (S.C.C.).

183 Justice Binnie for the minority sums up the interactions as follows at para. 8:

> This case is not the simple scenario of an application for a permit followed by a refusal "in the public interest." From 1984 onwards the respondents worked closely with Ministry regulators. A web of understandings and incremental agreements came into existence with the concurrence indeed encouragement of successive Ministers. What perhaps began with an abstract notion of "the public interest" became, through private initiative and ministerial response, a specific embodiment of the public interest in terms of bricks and mortar, facilities and locations. Not only did successive Ministers subscribe to this embodiment of the public interest, they encouraged the respondents to act on it. If this were a private law situation there would likely be a breach of contract. This is not, of course, a private law situation.

184 The relevant law provided that the Minister was required to issue modified permits under s. 138 of the *Act respecting health services and social services*, R.S.Q., c. S-5 , if he formed the opinion, as a matter of policy, that the public interest was served by the modified permit.

Most of these arguments would lead only to procedural relief – a new hearing. But the hospital sought substantive relief – a permit. The Minister argued that none of the grounds advanced entitled the hospital to substantive relief (the permit). In particular, it contended that estoppel could not be used against the Minister.

The Court rejected the hospital's arguments concerning legitimate expectations[185] on the basis that the doctrine can be used to compel only procedural – not substantive – relief. In doing so, the Supreme Court of Canada affirmed certain long-standing authorities including the principles about legitimate expectations established in *Old St. Boniface*.[186] Justice Binnie reiterated that the doctrine of legitimate expectations looks to the conduct of the delegate in the exercise of statutory power including established practices, conduct or representations that can be characterized as clear, unambiguous and unqualified.[187]

Subsequent to *Mont Sinaï*, cases can be found holding that the concept of legitimate expectation as a part of procedural fairness both has and has not been made out.

(i) Moreau-Bérubé c. Nouveau-Brunswick

Although both of the lower courts[188] in *Moreau-Bérubé c. Nouveau-Brunswick* had held that the principles of natural justice had been breached when the Judicial Council had not put the provincial court judge on notice that it was considering a penalty more severe than the one recommended by the investigative panel, the Supreme Court – surprisingly, in our view – held that the requirements of procedural fairness had been complied with.[189]

After acknowledging that the requirements of procedural fairness applied to the proceedings in question, Madam Justice Arbour noted that no assessment

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185 The majority did, however, rule that the past actions of the government and the successive Ministers amounted to an actual exercise of the Minister's discretionary authority and, therefore, the majority ordered the Minister to issue the modified permit as he had failed to act in accordance with a prior exercise of discretion so the criteria for the issuance of an order of mandamus were met. See Bastarache J.'s decision at paras. 99-100.

186 *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)* (1990), [1991] 2 W.W.R. 145 (S.C.C.) where Sopinka J. stated at 177:

> The principle developed in these cases is simply an extension of the rules of natural justice and procedural fairness. It affords a party affected by the decision of a public official an opportunity to make representations in circumstances in which there otherwise would be no such opportunity. The court supplies the omission where, based on the conduct of the public official, a party has been led to believe that his or her rights would not be affected without consultation.

187 *Centre hospitalier Mont-Sinaï*, *supra* note 182 at para. 29.

188 (1999), 218 N.B.R. (2d) 256, 558 A.P.R. 256, 1999 CarswellNB 622, [1999] N.B.J. No. 320 (N.B. Q.B.), affirmed 2000 NBCA 12, 233 N.B.R. (2d) 205, 601 A.P.R. 205, 194 D.L.R. (4th) 664, 2000 CarswellNB 429, [2000] N.B.J. No. 368 (N.B. C.A.), reversed [2002] 1 S.C.R. 249 (S.C.C.).

189 2002 SCC 11, 36 Admin. L.R. (3d) 1 (S.C.C.); see also *Mavi v. Canada (Attorney General)*, 2011 SCC 30 (S.C.C.); *Agraira v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 SCC 36 (S.C.C.); *Amalorpavanathan v. Ontario (Ministry of Health and Long-term Care)*, 2013 ONSC 5415 (Ont. Div. Ct.).

of the appropriate standard of judicial review was required, beyond "fairness" in the particular situation.[190] She then rejected the argument that the judge had a reasonable expectation[191] that the Judicial Council would not impose a more serious penalty than the recommended reprimand, at least without putting her on specific notice that it was contemplating such a course of action:[192]

> The respondent argues that she had a reasonable expectation that the Council would not impose a penalty more serious than a reprimand for three main reasons:
>
> 1. The inquiry panel had recommended a reprimand, and had found that the respondent was able to continue performing her duties as a Provincial Court judge.
>
> 2. The Council, though it had the discretion to suspend her pending the inquiry's outcome, had allowed the respondent to discharge her judicial function for more than a year following her impugned comments. This, the respondent argues, created an expectation that the Council would proceed on the basis that she was able to continue performing her duties as a judge.
>
> 3. Dismissal had never been expressly contemplated or argued by any person at any level of the inquiry prior to the delivery of that sanction.
>
> Under s. 6.11(3), the respondent had the "right to make representations to [the Council] either in person or through counsel and either orally or in writing, *respecting the [panel's report]* prior to the taking of action by the Judicial Council" (emphasis added). She essentially argues that when the panel recommended something less than removal from the bench, they indirectly took away her ability to argue against that sanction, and that her representations to the Council would have been affected had she known that a recommendation for removal from the bench was being considered.
>
> I am not persuaded by any of these arguments. *The doctrine of reasonable expectations* does not create substantive rights, and does not fetter the discretion of a statutory decision-maker. Rather, it *operates as a component of procedural fairness, and finds application when a party affected by an administrative decision can establish a legitimate*

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190 *Ibid.* at para. 74.

191 In their dissent in *Mackin v. New Brunswick (Minister of Justice)*, [2002] 1 S.C.R. 405 (S.C.C.), LeBel and Binnie JJ. rejected the application of the legitimate expectation doctrine as not being applicable either to substantive rights or legislative bodies, in the context of changes to the method of remunerating supernumerary provincial court judges (paras. 162-163).

192 *Moreau-Bérubé, supra* note 188 at paras. 76-83.

expectation that a certain procedure would be followed: Reference re Canada Assistance Plan (B.C.), [1991] 2 S.C.R. 525, at p. 557; Baker, *supra*, at para. 26. *The doctrine can give rise to a right to make representations, a right to be consulted or perhaps, if circumstances require, more extensive procedural rights. But it does not otherwise fetter the discretion of a statutory decision-maker in order to mandate any particular result*: see D. Shapiro, *Legitimate Expectation and its Application to Canadian Immigration Law* (1992), 8 J.L. & Social Pol'y 282, at p. 297.

In the circumstances of this case, I cannot accept that the Council violated Judge Moreau-Bérubé's right to be heard by not expressly informing her that they might impose a sanction clearly open to them under the Act. The doctrine of legitimate expectations can find no application when the claimant is essentially asserting the right to a second chance to avail him- or herself of procedural rights that were always available and provided for by statute... . Regardless of the fact that the panel made a recommendation that it was not mandated to make, the Council had a clear and plain discretion to choose between three options. *I do not believe that the respondent, a judge, who had legal advice throughout, could have misapprehended the issues that were alive before the Judicial Council. She never asserted making such an error until it was raised by Angers J. on judicial review.*

The fact that a recommendation for dismissal was not discussed prior to being issued is also not relevant. The Council has no obligation to remind the respondent to read s. 6.11(4) carefully. While the Council might have opted, as a part of their procedure, to remind Judge Moreau-Bérubé that the Council would not be bound by any recommendations made by the inquiry panel, they chose not to, and that was within their discretion... .

In coming to the conclusions they did, the Court of Appeal and Angers J. relied in particular on *Michaud*, *supra*. I agree with Drapeau J.A. that *Michaud* is distinguishable. In that case, the recommended sanction was a product of a joint submission and the affected person made no representations. By contrast, *Judge Moreau-Bérubé's counsel made arguments before the tribunal to the effect that no reprimand should be administered, contrary to the recommendation of the inquiry panel. This demonstrates that the respondent was well aware that the Council was not bound by the recommendations of the inquiry panel and that it would come to its own independent decision about the sanction that was appropriate in light of the misconduct. She herself was urging the Council to disregard the recommendation of the inquiry panel.*

> *I agree with the comments of Drapeau J.A. who noted that [TRANSLATION] "it is undeniable that at each step where she had the right, Judge Moreau-Bérubé was fully heard" (para. 150). Acknowledging that the nature of these disciplinary proceedings imposes on the Council a stringent duty to act fairly, I can find no breach of the rules of natural justice in the context of this case.* [Emphasis added.]

With the greatest of respect, this passage seems to mix up two questions: (1) did the Judicial Council have the statutory power to impose removal from office, and (2) were the procedures which it used in exercising its powers "fair"? An affirmative answer to the first question does not necessarily entail an affirmative answer to the second question. Nor does the fact that a decision-maker has been given authority to choose its procedure necessarily determine whether the procedure actually chosen is "fair".

While there may be no obligation on a decision-maker to remind a party to read the applicable legislation carefully, and while there is no doubt that the decision-maker in this case had the power to impose the sanction it did, surely the central question has to be: "In all the circumstances, was the procedure which was used unfair to this particular person?" Ultimately, that is a question for the court – ultimately, indeed, for the highest court. Of course the Supreme Court's decision that the procedure in this case was not unfair is final; but it is troubling that two lower courts reached the opposite conclusion on this very point. This indicates that "fairness" – like other determinations of whether the appropriate standard of review has been breached – is clearly in the eye of the beholder.

(ii) The Retired Judges Case

The Supreme Court of Canada also held that the requirements for the application of the legitimate expectation doctrine had not been met in *C.U.P.E. v. Ontario (Minister of Labour)*.[193] In rejecting the Ontario Court of Appeal's ruling that the unions had a legitimate expectation that the Minister would appoint arbitrators from the recognized list of labour arbitrators, Mr. Justice Binnie provided the following analysis:[194]

> The doctrine of legitimate expectation is "an extension of the rules of natural justice and procedural fairness": *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525, at p. 557. It looks to the conduct of a Minister or other public authority in the exercise of a discretionary power including established practices, conduct or representations that can be characterized as clear, unambiguous and unqualified, that has induced in the complainants (here the unions) a reasonable expectation that they will retain a benefit or be consulted before a contrary decision is taken. To be "legitimate", such expec-

193 2003 SCC 29, 50 Admin. L.R. (3d) 1 (S.C.C.) (the "*Retired Judges* Case").
194 *Ibid.* at paras. 131-133 and 146.

> tations must not conflict with a statutory duty. See: *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170; *Baker, supra*; *Mount Sinai, supra*, at para. 29; *Brown and Evans, supra*, at para. 7-2431. Where the conditions for its application are satisfied, the Court may grant appropriate procedural remedies to respond to the "legitimate" expectation.
>
> The Court of Appeal concluded, at para. 105, that "the Minister interfered with the legitimate expectations of the appellants and other affected unions, contrary to the principles and requirements of fairness and natural justice" and ordered the Minister to restrict his appointments to the s. 49(10) roster.
>
> *In my view, with respect, the conditions precedent to the application of the doctrine are not established in this case... .*
>
> In my view, the evidence does not establish a firm "practice" in the past of appointing from a HLDAA list, or from the s. 49(10) list, or proceeding by way of "mutual agreement". A general promise "to continue under the existing system" where the reference to the system itself is ambiguous, and in any event was stated by the Minister to be subject to reform, cannot bind the Minister's exercise of his or her s. 6(5) discretion as urged by the unions under the doctrine of legitimate expectation. [Emphasis added.]

(iii) The Pacific International Securities Case

Taken together, the *Moreau-Bérubé* and *Retired Judges* cases might well indicate that it will be quite hard to find cases where the legitimate expectation doctrine will be able to be successfully used.

However, by contrast, the decision of the British Columbia Court of Appeal in *British Columbia (Securities Commission) v. Pacific International Securities Inc.*[195] is an example of a case where the court found that a legitimate expectation did exist. Identifying legitimate expectation as to procedure as one of the five factors from *Baker* to be used to determine the content of the duty of fairness. Mr. Justice Smith held as follows:[196]

> The legitimate expectations of participants in the hearing are another contextual consideration that informs the nature and degree of procedural fairness required. Here, the Commission has created legitimate expectations as to the level of particularization. Although it is not subjected to any statutory or regulatory requirement to provide particulars, it has prepared and published policy documents, including policies relating to Commission hearings. They proclaim a policy of full

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195 [2002] 8 W.W.R. 116 (B.C. C.A.).

196 *Ibid.* at para. 14.

> disclosure and provide, *inter alia*, that "... the Executive Director will disclose to each respondent particulars of the allegations in sufficient detail to give the respondent a fair opportunity to know and meet the case against the respondent" (Policy Doc. No. 15-601, s. 2.5(b)). Thus, the appellants are legitimately entitled to expect to receive particulars that meet this standard.

However, although the appellants had a legitimate expectation to receive particulars of the alleged offence, the Court of Appeal ruled that the Commission had in fact complied with that obligation.

(iv) Agraira

In *Agraira v. Canada (Minister of Public Safety and Emergency Preparedness)*,[197] the Supreme Court of Canada once again rejected a legitimate expectation argument. While the court agreed that the doctrine has a strong foundation in Canadian administrative law, as a result of *Baker*, it held that there had been no breach of legitimate expectations, and thus procedural fairness, in the case at hand.

The court cited from Brown and Evans as follows:[198]

> The distinguishing characteristic of a legitimate expectation is that it arises from some conduct of the decision-maker, or some other relevant actor. Thus, a legitimate expectation may result from an official practice or assurance that certain procedures will be followed as part of the decision-making process, or that a positive decision can be anticipated. As well, the existence of administrative rules of procedure, or a procedure on which the agency had voluntarily embarked in a particular instance, may give rise to a legitimate expectation that such procedures will be followed. Of course, *the practice or conduct said to give rise to the reasonable expectation must be clear, unambiguous and unqualified.* [Emphasis added.]

The court then went on to cite from Binnie J.'s decision in *Mavi*[199] with respect to what is meant by "clear, unambiguous and unqualified":

> Generally speaking, government representations will be considered sufficiently precise for purposes of the doctrine of legitimate expectations if, had they been made in the context of a private law contract, they would be sufficiently certain to be capable of enforcement.

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197 2013 SCC 36 (S.C.C.).

198 D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at s.7:1710.

199 *Mavi v. Canada (Attorney General)*, 2011 SCC 30, [2011] 2 S.C.R. 504 (S.C.C.) at para. 68.

(g) Summary of Duty of Fairness in Pre-Hearing Procedures

It is now generally accepted that the duty of fairness applies to the pre-hearing stages of the administrative process where decisions are made that affect individuals. But the duty of fairness is flexible and variable, and its content depends on the context of the particular statute and the circumstances of the case, including the rights affected. Just because the duty exists, its existence does not determine what requirements will be applicable in a given set of circumstances.

In *Baker*, the Supreme Court provided a list of factors which courts must consider when determining the content of the duty of fairness, but the list is not exhaustive.

3. Oral Hearing Processes

This part of the chapter will examine what elements of fair procedure apply in the context of oral hearings.[200] Where a tribunal has granted a party an oral hearing, the content of the duty of fairness varies, as always, with the context and the circumstances of each case. The trappings and formalities of the traditional court room setting often do not lend themselves well to administrative hearings. In many cases, one of the advantages of the administrative tribunal's process is its informality. The rules of judicial procedure do not apply to administrative tribunals where each tribunal, subject to its enabling statute, is master of its own procedures.

(a) Cross-examination of Witnesses

When an oral hearing is held, rather than a hearing based solely on written submissions and documents, the right to call witnesses and to cross-examine them is generally part of the procedure protected by the duty of fairness.

The right to cross-examination, like the right to an oral hearing, depends on a variety of circumstances. Clearly it may be required by statute, but where the statute is silent, and the tribunal is the governor of its own procedure, the common law is reluctant to impose courtroom procedures and technical rules of evidence. The tribunal is master of its own procedure and a right to cross-examine witnesses does not necessarily follow from a right to be represented by counsel.[201] The very nature of cross-examination is adversarial, and this

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200 As discussed in the previous section, it must be emphasized that the rules of procedural fairness do not require that a hearing be oral. See for example *Stuart v. Haughley Parochial Church Council*, [1935] Ch. 452 (U.K.), affirmed [1936] Ch. 32 (U.K.) (lay electoral commission). See also discussion under "Pre-Hearing Procedures – Form of Hearing", above.

201 *Del Zotto v. Minister of National Revenue*, [2000] 4 F.C. 321 (Fed. C.A.), leave to appeal refused (2001), 268 N.R. 196 (note) (S.C.C.).

may be incompatible with the nature of the tribunal.[202] Neither the right to call witnesses, nor the right to cross-examine witnesses is unlimited. A tribunal can reasonably limit both.[203] However, cross-examination may be a necessary element of procedural fairness where important issues of credibility are raised, where there is no other effective means of refuting the allegations or arguments of the other side,[204] or where there is conflicting expert evidence.[205]

Three cases are particularly noteworthy on the issue of cross-examination of witnesses at administrative hearings: *Innisfil*, *Maclab* and *Murray*.

(i) Innisfil (Township) v. Vespra (Township)

The Supreme Court of Canada has examined the issue of when a tribunal will be required to allow cross-examination in order to fulfil the requirements of procedural fairness. In *Innisfil (Township) v. Vespra (Township)*,[206] Estey J. provided the historical backdrop for the differences in requirements between courts of law and administrative tribunals, and in particular the requirement for the opportunity to cross-examine:[207]

> It is within the context of a statutory process that it must be noted that cross-examination is a vital element of the adversarial system applied and followed in our legal system, including, in many instances, before administrative tribunals since the earliest times. Indeed the adversarial system, founded on cross-examination and the right to meet the case being made against the litigant, civil or criminal, is the procedural substructure upon which the common law itself has been built. That is not to say that because our court system is founded upon these institutions and procedures that administrative tribunals must apply the same techniques. Indeed, there are many tribunals in the modern

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202 See *Wolfe v. Robinson* (1961), [1962] O.R. 132 (Ont. C.A.), where the Ontario Court of Appeal held that there was no right to cross-examine witnesses at a coroner's inquest because there is no accused; see also *Syncrude Canada Ltd. v. Michetti* (1993), 7 Alta. L.R. (3d) 382 (Alta. Q.B.), reversed 1994 CarswellAlta 266 (Alta. C.A.), additional reasons 1995 CarswellAlta 1027 (Alta. C.A.) where Perras J. noted that the Workers' Compensation Board Appeals Commission operated on an inquiry model, and had no procedure or practice for cross-examination. Given that, and the applicant's ability to respond both orally and in written submissions, there was no breach of procedural fairness. This was reversed on appeal (1994), 28 Admin. L.R. (2d) 155 (Alta. C.A.), additional reasons (1995), 165 A.R. 89 (Alta. C.A.). According to the appellant court, as the expert sought to be cross-examined was also an advisor to the decision maker, the boards' refusal to allow either cross-examination or the use of written interrogations, as well as other deficiencies, took the board out of jurisdiction.

203 *Kirchmeir v. Boulanger*, 2000 ABCA 324 (Alta. C.A.).

204 See *Puxley v. Canada (Treasury Board - Transport)* (1994), 24 Admin. L.R. (2d) 43 (Fed. T.D.); *Djakovic v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2010 BCSC 1279 (B.C. S.C.).

205 *Johnson v. Alberta (Workers' Compensation Board Appeals Commission)*, 2011 ABCA 345 (Alta. C.A.).

206 [1981] 2 S.C.R. 145 (S.C.C.), varied [1982] 1 S.C.R. 1107 (S.C.C.).

207 *Ibid.* at 166-68.

> community which do not follow the traditional adversarial road. On the other hand, where the rights of the citizens are involved and the statute affords him the right to a full hearing, including a hearing of his demonstration of his rights, one would expect to find the clearest statutory curtailment of the citizen's right to meet the case made against him by cross-examination.... .
>
> The procedural format adopted by the administrative tribunal must adhere to the provisions of the parent statute of the Board. The process of interpreting and applying statutory policy will be the dominant influence in the workings of such an administrative tribunal. Where the Board proceeds in the discharge of its mandate to determine the rights of the contending parties before it on the traditional basis wherein the onus falls upon the contender to introduce the facts and submissions upon which he will rely, the Board's technique will take on something of the appearance of a traditional court. Where, on the other hand, the Board, by its legislative mandate or the nature of the subject matter assigned to its administration, is more concerned with community interests at large, and with technical policy aspects of a specialized subject, one cannot expect the tribunal to function in the manner of the traditional court. This is particularly so where the Board membership is drawn partly or entirely from persons experienced or trained in the sector of activity consigned to the administrative supervision of the Board. Again where the Board in its statutory role takes on the complexion of a department of the executive branch of government concerned with the execution of a policy laid down in broad concept by the Legislature, and where the Board has the delegated authority to issue regulations or has a broad discretionary power to license persons or activities, the trappings and habits of the traditional courts have long ago been discarded.

In this case, the Court found that the appellant had a right to cross-examine a ministry official who had introduced a letter stating government policy. It further held that he could not be deprived of that right only because an appellate court thought that it would not advance his case. Nor was the right to cross-examination being used to challenge the executive level of government and engage the tribunal in political action. "It is merely an exercise by a party properly before the Board on an annexation application of a right accorded to that party by the Legislature."[208]

(ii) Strathcona (Municipality) v. Maclab Enterprises Ltd.

In *Strathcona (Municipality) v. Maclab Enterprises Ltd.*,[209] the Alberta Court of Appeal refused to quash a decision by the Provincial Planning Board.

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208 *Ibid.* at 174.

209 [1971] 3 W.W.R. 461 (Alta. C.A.), leave to appeal refused [1971] S.C.R. xii (S.C.C.). But

The board had admitted into evidence a report by an expert who was unavailable for cross-examination. The court noted that the board had allowed the parties an opportunity to answer any of the points raised by the expert's report, and that they had done so by filing reports of two other experts. Given the board's statutory right to determine its own procedure and rules of practice, and the fact that the respondents were able to respond with their own experts' reports, they had received a fair opportunity to correct or contradict the evidence of the other expert:

> It does not follow that the refusal of or the placing of limitations upon the right of cross-examination will always require that the court quash an order made in proceedings in which these restrictions are enforced. If he is afforded an equally effective method of answering the case against him, in other words is given "a fair opportunity to correct or controvert any relevant statement brought forward to his prejudice ... the requirements of natural justice will be met.[210]

(iii) Murray v. Rocky View (Municipal District No. 44)

In *Murray v. Rocky View (Municipal District No. 44)*,[211] the Alberta Court of Appeal used the same reasoning to determine that the Development Appeal Board had not met the requirements of procedural fairness in its refusal to allow cross-examination. The issue arose over development approval of a park. Three members of the board chose to go on a fact-finding mission and visited several parks similar to the one proposed. The court found that the refusal to allow cross-examination, by itself, was not contrary to procedural fairness. However, when combined with the new evidence gathered by the board members, which the parties were unable to contradict or correct in any other manner, the limitation of cross-examination was unfair and contrary to the principles of procedural fairness. A new appeal was ordered to be heard by members of the board who had not visited the other sites.

In summary, the courts will examine a refusal to allow cross-examination upon the basis of whether the procedure is fair, whether the tribunal exercises its discretion in good faith and whether the tribunal listens to both sides.[212] The relevant circumstances will include whether there is a *lis inter partes*, whether someone's rights are affected and whether there is conflicting evidence.[213] For example, in a disciplinary hearing, where someone's reputation and livelihood is at stake, or where issues of credibility arise, the right to cross-examine will

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see *Johnson v. Alberta (Workers' Compensation Board Appeals Commission)*, 2011 ABCA 345 (Alta. C.A.) where the court ordered cross examination was required where there were conflicting expert reports.

210 *Ibid.* at 464.

211 (1980), 12 Alta. L.R. (2d) 342 (Alta. C.A.), leave to appeal refused (1980), 14 Alta. L.R. (2d) 86 (Alta. C.A.).

212 *Lipkovits v. Canadian Radio-Television & Telecommunications Commission* (1982), [1983] 2 F.C. 321 (Fed. C.A.), leave to appeal refused (1983), 72 C.P.R. (2d) 288 (S.C.C.).

213 *Jackson v. Region 2 Hospital Corp.* (1994), 24 Admin. L.R. (2d) 220 (N.B. Q.B.).

usually be present.[214] However, if there are no issues of credibility and there are other means to determine the facts and ensure full and fair disclosure, cross-examination will not necessarily be required.[215] Similarly, where proceedings are at a preliminary or investigatory stage, there is no right to cross-examination.[216] Tribunals must treat evidence, such as depositions which cannot be cross-examined on, with caution, and keep in mind the fact that there has not been cross-examination on the evidence when determining its weight.[217]

(b) Evidentiary Considerations

The fact that the strict traditional rules of evidence do not apply to administrative tribunals does not mean that tribunals have complete discretion to determine what evidence they will hear.[218] Firstly, the tribunal must not abuse its discretion by basing its decision on insufficient or no evidence, nor on irrelevant considerations.[219] As in other areas of the *audi alteram partem* rule, the tribunal must exercise its discretion to hear evidence in a manner consistent with procedural fairness. In *R. v. Deputy Industrial Injuries Commissioner,*[220] Diplock L.J. listed certain rules for the tribunal. He first confirmed that, in the absence of any statutory requirement, a hearing need not be held. In that case, a delegate *must* consider all written material submitted to him, including the written decision of the lower tribunal which is being appealed. He *may* also consider material from other sources which constitutes "evidence". Such "evidence" is:

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214 *Carlin v. Registered Psychiatric Nurses' Assn. (Alberta)* (1996), 39 Admin. L.R. (2d) 177 (Alta. Q.B.); *Willette v. Royal Canadian Mounted Police Commissioner* (1984), 10 Admin. L.R. 149 (Fed. C.A.); *B. v. W.* (1985), 16 Admin. L.R. 99 (Ont. H.C.); *Armstrong v. Royal Canadian Mounted Police Commissioner* (1994), 24 Admin. L.R. (2d) 1 (Fed. T.D.), affirmed (1998), 156 D.L.R. (4th) 670 (Fed. C.A.) where the court held that the absence of a statutory right of cross-examination did not violate the principles of procedural fairness; but see *Kuntz v. College of Physicians & Surgeons (British Columbia)* (1987), 24 Admin. L.R. 187 (B.C. S.C.), affirmed 1988 CarswellBC 744 (B.C. C.A.) where, although the court recognized that the petitioner's right to continue his profession was at stake, and thus there was a high standard of justice required, the court found that there was no right to cross-examine. The court found that the petitioner would be able to correct or controvert any facts through means other than cross-examination. The Court of Appeal affirmed this decision noting that the matter was only at a preliminary stage and that the judge did not preclude the possibility that such a right could exist at a later stage in the proceedings: (1988), 31 Admin. L.R. 179 (B.C. C.A.).

215 See *B. v. W., ibid.*

216 *Onischak v. British Columbia (Council of Human Rights)* (1989), 38 Admin. L.R. 258 (B.C. S.C.); *Irvine v. Canada (Restrictive Trade Practices Commission)* (1987), 24 Admin. L.R. 91 (S.C.C.).

217 *Four Star Management Ltd. v. British Columbia (Securities Commission)* (1990), 43 Admin. L.R. 274 (B.C. C.A.), leave to appeal refused [1991] 1 S.C.R. xv (S.C.C.).

218 For further discussion on evidence and administrative tribunals see J.L.H. Sprague, "Evidence before Administrative Agencies: Let's All Forget the "Rules" and Just Concentrate on What We're Doing" (1994-1995) 8 C.J.A.L.P. 263.

219 See Chapter 7.

220 (1964), [1965] 1 Q.B. 456 (Eng. C.A.) at pp. 488, 490.