

From Natural Justice to Fairness: Thresholds, Content, and the Role of Judicial Review

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I. Introduction

People are affected by a wide variety of decisions made on a daily basis by public authorities—from Cabinet ministers to bureaucrats, tribunals, agencies, boards, commissions, and other public authorities. The one thing these decisions have in common is that, in general, they must be made pursuant to a fair procedure.

The development of a “duty of fairness” is one of the great achievements of modern administrative law. It promotes a better-informed decision-making process, leading to better public policy outcomes, and helps to ensure that individuals are treated with respect in the administrative process. As we will see, the duty is context-specific: its content is articulated having regard to the circumstances surrounding the relevant decision and can be tailored to suit the wide variety of decision-making contexts to which it applies.

This chapter traces the development of the duty, considers the threshold for its application, and fleshes out the contents of the duty. The most common means to attack an adverse administrative decision is to impugn the procedure pursuant to which the decision was made, and the chapter concludes with a consideration of judicial oversight of the duty and the consequences of an unfair procedure. Some practical implications flowing from the duty are discussed by Freya Kristjanson and Leslie McIntosh in Chapter 6, *Advocacy Before Administrative Tribunals*.

II. From Natural Justice to Fairness

The availability of procedural protection in administrative law once depended on the way in which a decision was characterized. “Judicial” and “quasi-judicial” decisions were required to be made in accordance with the rules of natural justice: *audi alteram partem*, which requires a decision-maker to “hear the other side” in a dispute before deciding, and *nemo iudex in sua causa*, which precludes a man from being a “judge in his own cause.”¹

¹ See, generally, William Wade & Christopher Forsyth, *Administrative Law*, 10th ed. (Oxford: Oxford University Press, 2009), chapters 13-14.

So-called administrative decisions—virtually any decision other than a judicial or quasi-judicial decision—could be made without any procedural impediments. The dichotomy between judicial and administrative decisions made administrative law “formalistic”² in nature, and judicial review proceedings focused on the nature of the power exercised rather than the impact of its exercise. To obtain procedural protection, an applicant had to convince a court that a particular decision could properly be characterized as judicial or quasi-judicial. A successful applicant would receive the full range of natural justice protection. An unsuccessful applicant would receive no procedural protection at all.

The growth of the modern regulatory state—and with it the number of important administrative decisions made by everyone from bureaucrats to administrative tribunals and ministers of the Crown—made change inevitable. It was indefensible that important decisions could be made without any procedural protection being afforded simply because they were classified as administrative in nature. Following the lead of the House of Lords in *Ridge v. Baldwin*,³ the Supreme Court of Canada abandoned the all-or-nothing approach to the provision of procedural protection in *Nicholson v. Haldimand-Norfolk (Regional) Police Commissioners*.⁴ *Nicholson* concerned the summary dismissal of a probationary police constable some 15 months into his term of service. He was not given a reason for his dismissal, nor was he given notice or allowed to make any representations prior to his dismissal. Regulations made under provincial legislation provided that police officers could not be penalized without a hearing and right of appeal, but added that the Board of Commissioners of Police had authority “to dispense with the services of any constable within eighteen months of his becoming a constable.”⁵

Under the traditional common-law approach that would have been the end of the matter; *Nicholson* was not entitled to a hearing before his dismissal, nor could his dismissal be characterized as the sort of “judicial or quasi-judicial” decision to which natural justice protection applied. It was an administrative matter and, as such, *Nicholson* would not have been entitled to any protection at all. In these circumstances, a 5:4 majority of the Supreme Court held that a general duty of “procedural fairness” applies to administrative decisions. Writing for a majority of the Court, Chief Justice Laskin justified the new duty as follows:

[T]he classification of statutory functions as judicial, quasi-judicial or administrative is often very difficult, to say the least; and to endow some with procedural protection while denying others any at all would work injustice when the results of statutory decisions raise the same serious consequences for those adversely affected, regardless of the classification of the function in question.⁶

² Frederick Schauer discusses some of the vices, and virtues, of formalism in *Thinking Like a Lawyer: A New Introduction to Legal Reasoning* (Cambridge, MA: Harvard University Press, 2009) at 29-35.

³ [1964] A.C. 40 (H.L.) (dismissal of chief constable of Borough of Brighton without notice or right to be heard at meeting of watch committee).

⁴ [1979] 1 S.C.R. 311 [*Nicholson*].

⁵ *Ibid.* at para. 5, citing the *Police Act*, R.S.O. 1970, c. 351, Reg. 680, s. 27(b).

⁶ *Ibid.* at para. 23.

On this approach, the ability of the board to dismiss Nicholson for any reason (or none at all) was irrelevant. Plainly, Nicholson could not claim the procedural protection the regulations afforded to those with 18 months of service (that is, an oral hearing with a right of appeal) but, according to Laskin C.J., it did not follow that he must be denied any protection at all. Nicholson was entitled to be treated fairly, not arbitrarily; he was entitled to be told why he was being dismissed and given an opportunity to make submissions—orally or in writing, at the board’s discretion—before he was dismissed.

Laskin C.J. did not reject the distinction between administrative and judicial or quasi-judicial decisions in *Nicholson*. Instead, he accepted as a common-law principle the notion that “in the sphere of the so-called quasi-judicial the rules of natural justice run, and that in the administrative or executive field there is a general duty of fairness.”⁷ However, in subsequent cases the “duty of fairness” came to replace natural justice as the organizing principle in administrative law and, as a result, there is no longer any reason to differentiate between the two concepts or the spheres in which they operate.⁸ The duty of fairness applies across the spectrum of decisions that public authorities may make and the requirements of the duty vary in accordance with the relevant circumstances.

“Fairness” has become short form for procedural fairness, but it is important not to lose sight of the essentially procedural character of the duty. The duty of fairness is concerned with ensuring that public authorities act fairly in the course of *making* decisions, not with the fairness of the actual decisions they *make*. The duty of fairness has nothing to say about the outcome of particular decisions, and in particular does not require that the decisions of public authorities be considered “fair”—a subjective and contestable concept that Canadian administrative law eschews.⁹

The duty of fairness promotes sound public administration and the accountability of public decision-makers by ensuring that decisions are made with input from those affected by them; well-informed decisions are likely to be better decisions, and decisions made pursuant to transparent, participatory processes promote important rule-of-law values. Fairness is,

⁷ *Ibid.* at para. 22, citing *Bates v. Lord Hailsham*, [1972] 1 W.L.R. 1373 at 1378 (Ch. D.).

⁸ This is not a uniquely Canadian development. In *Kioa v. West* (1985), 159 C.L.R. 550, Mason J. summed up English and Australian law as follows:

It has been said on many occasions that natural justice and fairness are to be equated And it has been recognized that in the context of administrative decision-making it is more appropriate to speak of a duty to act fairly or to accord procedural fairness. This is because the expression “natural justice” has been associated, perhaps too closely associated, with procedures followed by courts of law (at para. 30).

Nevertheless, the language of natural justice survives in most jurisdictions and is often used interchangeably with fairness terminology. In New Zealand, for example, the *New Zealand Bill of Rights Act 1990* includes a right to natural justice (s. 27), but the right is understood as a codification of the duty of fairness. See P. Rishworth, G. Huscroft, R. Mahoney, & S. Optican, *The New Zealand Bill of Rights* (Melbourne: Oxford University Press, 2003), chapter 27.

⁹ Under the approach set out by the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 [*Dunsmuir*], substantive decisions may be reviewed for legal correctness in some cases or reasonableness in others. Even in this context, however, judicial review is not concerned with the substantive “fairness” of a decision.

in this sense, a means to an end. But the importance of the duty transcends its instrumental purpose. The duty of fairness is important in its own right, for it ensures that people are allowed to participate meaningfully in decision-making processes that affect them. In other words, the duty protects dignitary interests by requiring that people be treated with respect. As we will see, both rationales support the Court's strict remedial approach in cases where the duty is breached: procedurally unfair decisions are quashed and remitted to be made in accordance with the required procedural protection.¹⁰

In general, the duty of fairness requires two things, both of which are modern restatements of venerable natural justice protections: (1) the right to be heard, and (2) the right to an independent and impartial hearing.¹¹ Fairness is a common-law concept and, subject only to compliance with the *Canadian Charter of Rights and Freedoms* (the Charter), may be limited or even ousted by ordinary legislation. Such is its importance, however, that courts will require specific legislative direction before concluding that this has occurred. In *Kane v. Bd. of Governors of U.B.C.*, Justice Dickson put the point this way: "To abrogate the rules of natural justice, express language or necessary implication must be found in the statutory instrument."¹² This is justified on the basis that courts presume that the legislature intended procedural protection to apply, even if nothing is said. As Justice Byles stated in *Cooper v. Board of Works for Wandsworth District*, "[A]lthough there are no positive words in a statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of the legislature."¹³ On this approach, the courts acknowledge the supremacy of the legislature and at the same time confer heightened, quasi-constitutional protection upon the common-law duty of fairness.¹⁴

The duty of fairness is codified to varying degrees in Canadian legislation. At the federal level, the *Canadian Bill of Rights* protects a "right to a fair hearing in accordance with the

¹⁰ *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643 at para. 23 [*Cardinal*], discussed in the text below.

¹¹ The right to an independent and impartial hearing is discussed by Laverne Jacobs in Chapter 8, *Caught Between Judicial Paradigms and the Administrative State's Pastiche: "Tribunal" Independence, Impartiality, and Bias*.

¹² [1980] 1 S.C.R. 1105 at 1113. For its part, the High Court of Australia has rendered it difficult, if not virtually impossible, for legislation to limit or oust procedural protection, outlining a presumption that it is "highly improbable that Parliament would overthrow fundamental principles or depart from the general system of law, without expressing its intention with *irresistible clearness*." See *Saeed v. Minister for Immigration and Citizenship*, [2010] H.C.A. 23 (23 June 2010) at para. 15 (emphasis added).

¹³ (1863), 14 C.B. (N.S.) 180 at 194. In *Daganayasi v. Minister of Immigration*, [1980] 2 N.Z.L.R. 130 at 141, Cooke J. (as he then was) stated that the availability of fairness protection depends "either on what is to be inferred or presumed in interpreting the particular Act ... or on judicial supplementation of the Act when this is necessary to achieve justice without frustrating the apparent purpose of the legislation" (internal citations omitted).

¹⁴ This point was put strongly by the High Court of Australia in *Electrolux Home Products Pty. Ltd. v. Australian Workers' Union* (2004), 221 C.L.R. 309 at 329: "The presumption is not merely a common sense guide to what a Parliament in a liberal democracy is likely to have intended; it is a working hypothesis, the existence of which is known both to Parliament and the courts, upon which statutory language will be interpreted. The hypothesis is an aspect of the rule of law."

principles of fundamental justice for the determination of his rights and obligations.”¹⁵ Procedural protection has been codified more specifically in provincial legislation in Alberta,¹⁶ British Columbia,¹⁷ Ontario,¹⁸ and Quebec.¹⁹ In addition, it is important to note that federal and provincial legislation may establish procedural requirements, short of a complete code, that apply in particular contexts. It is not unusual for legislation or regulations to particularize, for example, notice requirements and rights to make submissions for particular tribunals. The common-law duty of fairness supplements existing statutory duties and fills the gap where none exist. Section 7 of the Charter provides a constitutional backstop for procedural protection, but, as we will see, this right applies in a narrower range of circumstances than the duty of fairness.²⁰

Given the wide range of decisions to which the duty of fairness applies, the protection afforded by the duty is necessarily flexible rather than fixed. Although the language of the duty of fairness speaks of the right to a “hearing,” this does not mean that formal, oral hearings are required. Oral hearings will sometimes be required by the duty of fairness, but they are not the norm. The modern state could not function if an oral hearing were required every time an administrative decision of some sort were made—a problem not only for the state but also for those who benefit from, or are subject to, the burden of administrative decisions. In practice, the content of the duty is informed by the context in which a particular decision is made and varies in accordance with a number of factors. In other words, the duty may be satisfied by different protection in different decision-making contexts. Thus, to say that the duty of fairness applies to a particular decision-making process is to say little. Everything depends on what the duty is understood as requiring in the circumstances, and this has a normative dimension: fairness requires the procedural protection the courts think *ought* to be required before a decision is made in particular circumstances. An oral hearing

¹⁵ S.C. 1960, c. 44, s. 2(e). In *Duke v. The Queen*, [1972] S.C.R. 917 at 923, Justice Fauteux discussed this provision as follows: “Without attempting to formulate any final definition of those words, I would take them to mean, generally, that the tribunal which adjudicates upon his rights must act fairly, in good faith, without bias, and in a judicial temper, and must give to him the opportunity adequately to state his case.” In *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486 at para. 58 [*Re B.C. Motor Vehicle Act*], Justice Lamer noted that the principles of fundamental justice in the *Bill of Rights* were contextually limited to procedural matters because of their qualification of the right to a fair hearing. He proffered a more expansive definition of fundamental justice in s. 7 of the *Canadian Charter of Rights and Freedoms*, among other things because s. 7 is set out in the context of deprivations of life, liberty, and security of the person, which he considered more fundamental rights. Evan Fox-Decent and Alexander Pless discuss the relevance of Charter protection in greater depth in Chapter 12, *The Charter and Administrative Law: Cross-Fertilization or Inconstancy?*

¹⁶ *Administrative Procedures and Jurisdiction Act*, R.S.A. 2000, c. A-3.

¹⁷ *Administrative Tribunals Act*, S.B.C. 2004, c. 45.

¹⁸ *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22.

¹⁹ Quebec has codified procedures in several statutes. The *Civil Code of Quebec*, R.S.Q., c. C-1991; the *Charter of Human Rights and Freedoms*, R.S.Q., c. C-12; *Administrative Justice Act*, R.S.Q., c. J-3; and the *Code of Civil Procedure*, R.S.Q., c. C-25 are discussed in Denis Lemieux, “The Codification of Administrative Law in Quebec” in Grant Huscroft & Michael Taggart, eds., *Inside and Outside Canadian Administrative Law* (Toronto: University of Toronto Press, 2006).

²⁰ The impact of the Charter on administrative law is discussed by Evan Fox-Decent and Alexander Pless in Chapter 12, *The Charter and Administrative Law: Cross-Fertilization or Inconstancy?*

might be required in some cases, involving processes similar to those used in the judicial system. In other contexts, however, the requirement to provide a hearing may be satisfied by as little as an exchange of written correspondence prior to a decision being made.

Two questions arise when judicial review proceedings are brought alleging a breach of the duty of fairness. First, has the threshold for the application of the duty been met? Second, what does the duty of fairness require in the relevant circumstances? It is important to emphasize that courts require decisions about threshold and content of the duty of fairness to be made correctly. If they are not, the substantive decision made in a particular matter will be quashed and remitted to be remade in accordance with the appropriate procedures.

An order quashing a decision for a breach of the duty of fairness does not, in theory, affect the substantive decision that might be made subsequently; it means only that the decision must be remade in accordance with the appropriate procedures. In practice, however, it may be difficult for a decision-maker to reach the same substantive decision on a rehearing. Fair procedures may make it easier to argue in support of particular substantive outcomes on a rehearing; moreover, there may be impediments—practical or political—to reaching the same decision on a rehearing. Thus, success on an application for judicial review on fairness grounds may have the indirect effect of helping an applicant to secure a preferred substantive outcome. At the very least, it will give the applicant another chance to obtain that outcome, and ensures that the substantive decision will be made on a well-informed basis in any event. Even if the same substantive decision is reached following a rehearing, it will have a greater claim to legitimacy.

III. The Threshold Test: When Is Fairness Required?

A. Rights, Privileges, and Interests

Subject to some exceptions, discussed below, it is well established that the duty of fairness applies to the decisions of public authorities—for example, executive actors, tribunals, and officials acting pursuant to statutory authority—that affect an individual's *rights, privileges, or interests*.²¹ There is little dispute about the meaning of these terms because they are not meant to limit the availability of fairness protection. On the contrary, their purpose is to expand the range of decisions subject to the fairness duty beyond the narrower range of decisions traditionally required to be made in accordance with natural justice protection.

Taken as a whole, the concepts of rights, privileges, and interests are sufficiently broad in scope to cover most decisions made by public authorities that affect or have the potential to affect an individual in important ways, even in the absence of any sort of substantive entitlement. So, for example, although prison inmates may have no right to early release, once the

²¹ Justice Le Dain summed up the Court's case law in this way in *Cardinal*, *supra* note 10 at para. 14:

[T]here is, as a general common law principle, a duty of procedural fairness lying on every public authority making an administrative decision which is not of a legislative nature and which affects the rights, privileges or interests of an individual.

Thus, we will not be concerned with procedural entitlements that may arise in a variety of private contexts—for example, decisions made by private clubs that may affect the rights of their members. In these contexts, entitlements are likely to arise out of contractual terms, express or implied, rather than public law.

state establishes a parole system of some sort, they are entitled to procedural fairness in its operation.

B. Constitutional Protection²²

When, and to what extent, does the Charter require the provision of procedural protection?²³ Section 7 of the Charter provides as follows:

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Despite the conjunctive nature of its language, it is well established that s. 7 protects a single right: the right not to be deprived of life, liberty, or security of the person except in accordance with the principles of fundamental justice. The Supreme Court of Canada has held that the principles of fundamental justice subsume procedural fairness protection,²⁴ but the right does not constitutionalize the duty of fairness per se. Section 7 applies only in the context of deprivations of life, liberty, and security of the person, and this establishes a higher threshold than simply demonstrating that a right, privilege, or interest is affected.

For example, an application to renew a taxi licence may give rise to an entitlement to fairness protection at common law, but it does not give rise to Charter protection because the denial of a licence does not constitute a deprivation of life, liberty, or security of the person. Licensing is, in this context, an economic matter, and the Court has not interpreted s. 7 of the Charter as including economic rights.²⁵ Thus, ordinary legislation could limit or even oust the application of the duty of fairness to the licensing scheme without infringing the Charter.

In the event that a deprivation of life, liberty, or security of the person is found not to be in accordance with the principles of fundamental justice, it is highly unlikely that it will be considered justified under s. 1 of the Charter. The Court has held that infringement of s. 7 may be considered justified only in “extraordinary circumstances where concerns are grave and the challenges complex.”²⁶

²² The development of duty to consult in the context of Aboriginal rights and its link to the duty of fairness is discussed in David Mullan, “The Supreme Court and the Duty to Consult Aboriginal Peoples: A Lifting of the Fog?” (2012) C.J.A.L.P. 233 at 241-45. See also the discussion by Janna Promislow and Lorne Sossin in Chapter 13, In Search of Aboriginal Administrative Law.

²³ The impact of the Charter on administrative law is discussed by Evan Fox-Decent and Alexander Pless in Chapter 12, The Charter and Administrative Law: Cross-Fertilization or Inconstancy?

²⁴ *Re B.C. Motor Vehicle Act*, *supra* note 15. More controversially, the Court held that the principles of fundamental justice include a substantive component, despite the apparent intention of the framers to limit the right to matters of procedure. See Peter Hogg, *Constitutional Law of Canada*, looseleaf (Scarborough, ON: Carswell, 1997) at para. 44.10(a).

²⁵ *Gosselin v. Quebec (Attorney General)*, [2002] 4 S.C.R. 429 at paras. 80-82. However, the Court left open the possibility that s. 7 might be interpreted to include positive obligations in future cases. See the discussion in Grant Huscroft, “A Constitutional ‘Work in Progress’? The Charter and the Limits of Progressive Interpretation” in Grant Huscroft & Ian Brodie, eds., *Constitutionalism in the Charter Era* (Toronto: LexisNexis, 2004).

²⁶ See *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] 1 S.C.R. 350 at para. 66, citing *Re B.C. Motor Vehicle Act*, *supra* note 15 at para. 85, per Lamer J. (listing “exceptional conditions such as natural disasters, the outbreak of war, epidemics, and the like”).

IV. Limitations on the Application of the Duty of Fairness

Although the duty of fairness applies to a broad range of decision-making contexts, there are limitations on the reach of the duty, both inherent in the concept and imposed on the concept by the courts. Significant limitations on the duty are discussed below.

A. The Duty Applies to Decisions

The duty of fairness governs decision-making processes, which is another way of saying that the duty applies only in contexts in which *decisions* may be made. In principle, it does not apply to investigations or advisory processes that may occur prior to the commencement of a formal decision-making process.²⁷ This is so because the imposition of fairness duties at a preliminary stage may well compromise the relevant processes. To take an obvious example, it would be absurd to require officials charged with responsibility for investigating breaches of the law to provide notice before commencing their investigations. In any case, the exclusion of fairness prior to the commencement of a formal decision-making process will normally be mitigated by the requirement to observe the duty at the formal decision-making stage.

Nevertheless, investigations and advisory processes may have a considerable impact on affected persons. For example, the reputation of anyone caught up in a public investigation may be adversely affected and the need for fairness protection will be clear.²⁸ Public inquiries may have significant consequences for those required to be involved and fairness protection will be provided here as well, often pursuant to legislation codifying the duty.²⁹ Fairness protection may be required for ostensibly preliminary decisions, where a formal determination is made subsequently, if the preliminary decision has *de facto* finality. For example, invariable acceptance by the ultimate decision-maker of the results of an investigation or advice from a preliminary decision-maker suggests that the real decision is being made at the preliminary stage, and in order for the duty of fairness to do its work, it should apply here.

²⁷ This limitation is reflected in the Ontario *Statutory Powers Procedure Act*, *supra* note 18, s. 3(2)(g): procedural requirements do not apply to “one or more persons required to make an investigation and to make a report, with or without recommendations, where the report is for the information or advice of the person to whom it is made and does not in any way legally bind or limit that person in any decision he or she may have power to make.”

²⁸ Human rights investigations are a good example. Where a commission has an investigative function and the authority to refer a matter to a tribunal for a formal hearing, fairness may be required at the investigative stage. See e.g. *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307 [*Blencoe*].

²⁹ The Supreme Court discussed the basic fairness principles relevant to public inquiries in *Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System in Canada—Krever Commission)*, [1997] 3 S.C.R. 440. Peter Carver discusses the law of public inquiries in Chapter 16, *Getting the Story Out: Accountability and the Law of Public Inquiries*, and see, generally, Allan Manson & David Mullan, eds., *Commissions of Inquiry: Praise or Reappraise?* (Toronto: Irwin Law, 2003).

B. The Duty Does Not Apply to Legislative Decisions

The Supreme Court of Canada has long insisted that the duty of fairness does not apply to legislative decisions or functions.³⁰ In *Re Canada Assistance Plan (B.C.)*, the Court expressed the point categorically: “[T]he rules governing procedural fairness do not apply to a body exercising purely legislative functions.”³¹

The Court has never explained what it means by “legislative” functions, but it is clear that primary legislation, whether passed by Parliament or a provincial legislature, is not subject to the duty of fairness. It is not exempt because it has no impact on rights, privileges, or interests. On the contrary, legislation is likely to have a profound impact for large numbers of people because it applies generally. It is exempt from the duty of fairness because any meaningful conception of a separation of powers between the legislature and the courts demands it. In *Reference re Resolution to Amend the Constitution*, the Court essayed the relationship between the legislature and the courts as follows:

How Houses of Parliament proceed, how a provincial legislative assembly proceeds is in either case a matter of self definition, subject to any overriding constitutional or self-imposed statutory or indoor prescription. It is unnecessary here to embark on any historical review of the “court” aspect of Parliament and the immunity of its procedures from judicial review. Courts come into the picture when legislation is enacted and not before (unless references are made to them for their opinion on a bill or a proposed enactment). It would be incompatible with the self regulating—“inherent” is as apt a word—authority of Houses of Parliament to deny their capacity to pass any kind of resolution. Reference may appropriately be made to art. 9 of the *Bill of Rights* of 1689, undoubtedly in force as part of the law of Canada, which provides that “Proceedings in Parliament ought not to be impeached or questioned in any Court or Place out of Parliament.”³²

This rationale for exempting legislative functions from the duty of fairness was reiterated in *Wells v. Newfoundland*. In that case, the Newfoundland Legislature passed legislation abolishing a quasi-judicial position to which Wells had been appointed. Wells’s argument that he should have been accorded procedural fairness was rejected summarily by the Court, which stated as follows:

[L]egislative decision making is not subject to any known duty of fairness. Legislatures are subject to constitutional requirements for valid law-making, but within their constitutional boundaries, they can do as they see fit. The wisdom and value of legislative decisions are subject only to review by the electorate.³³

There is no guarantee that political accountability will be meaningful, of course, but this is no concern of the courts. No one has the right to prevail in the political process, no matter

³⁰ *Attorney General of Canada v. Inuit Tapirisat*, [1980] 2 S.C.R. 735 at 757 [*Inuit Tapirisat*], citing *Bates v. Lord Hailsham*, [1972] 3 All E.R. 1019 (Ch. D.).

³¹ [1991] 2 S.C.R. 525 at para. 60.

³² [1981] 1 S.C.R. 753 at 785.

³³ [1999] 3 S.C.R. 199 at para. 59. However, Wells succeeded in a contract suit against the Crown, the Court holding that the legislation abolishing his position had not abrogated his right to seek damages against the Crown for breach of his contract of employment.

how sympathetic his or her cause may seem, as *Authorson v. Canada (Attorney General)*³⁴ demonstrates. In that case, Parliament passed legislation retrospectively limiting the amount of money owed to disabled war veterans—decades of interest on pension and benefit funds—to whom the Crown owed fiduciary duties. The law affected thousands of veterans, none of whom was given notice of the proposed change to the law. In class action proceedings, *Authorson* argued that the legislation infringed the right not to be deprived of the enjoyment of property except by due process of law under the *Canadian Bill of Rights* (s. 1(a)), as well as the right to a fair hearing in accordance with the principles of fundamental justice for the determination of one's rights and obligations (s. 2(e)).

This argument succeeded at trial and in the Ontario Court of Appeal, but was given short shrift in the Supreme Court of Canada. The Court emphatically rejected the notion that the *Canadian Bill of Rights* established due process procedures with regard to the passage of legislation, and reiterated that the common law had nothing to add:

The respondent claimed a right to notice and hearing to contest the passage of s. 5.1(4) of the *Department of Veterans Affairs Act*. However, in 1960, and today, no such right exists. Long-standing parliamentary tradition makes it clear that the only procedure due any citizen of Canada is that proposed legislation receive three readings in the Senate and House of Commons and that it receive Royal Assent. Once that process is completed, legislation within Parliament's competence is unassailable.³⁵

If the rationale for the exemption of legislative functions is clear, however, the idea of exemption by category is problematic, because it recalls the long-discredited distinction between administrative and judicial or quasi-judicial decisions. It invites argument over the meaning of the term “legislative” and makes for all-or-nothing outcomes. If an applicant for judicial review succeeds in convincing a court that a decision is subject to the duty of fairness, the court will determine the required procedure and quash the decision if there has been a failure to observe it. But if the public authority succeeds in convincing the court that its actions are legislative in nature, then the duty of fairness will not apply and the court will have nothing to say about any procedures adopted or their adequacy.

The categorical exemption of legislative functions becomes especially problematic as it extends beyond primary legislation to include secondary legislation and policy decisions, both of which are discussed below.

1. Are Cabinet and Ministerial Decisions Covered by the Legislative Exemption?

Cabinet and ministerial decisions are not subject to the legislative exemption per se, but it will often be easy to characterize Cabinet and ministerial decisions as legislative in nature and, as a result, they will be exempted from the duty.

³⁴ 2003 SCC 39, [2003] 2 S.C.R. 40 [*Authorson*].

³⁵ *Ibid.* at para. 37. The Court held that the protection of s. 2(e) is limited to “the application of law to individual circumstances in a proceeding before a court, tribunal or similar body” (para. 61).

Attorney General of Canada v. Inuit Tapirisat provides a good example. In that case, the federal Cabinet rejected an appeal from a decision made by the Canadian Radio-television and Telecommunications Commission (CRTC) without allowing the petitioning group to be heard. The Cabinet heard from the utility and the CRTC and took advice from ministerial officials, but the petitioning group was essentially left out of the proceedings. Justice Estey considered the Cabinet's power to be legislative in nature, in part because the legislation authorized Cabinet to overturn a decision of the CRTC on its own motion. This, he said, was "legislative action in its purest form."³⁶ Estey J. buttressed this position by accentuating the practical difficulties inherent in extending the duty of fairness. He did not want to burden the Cabinet with hearing requirements and expressed concern about undermining the Cabinet's public policy-making role.

Inuit Tapirisat has been subject to extensive criticism on the basis that it overstates the difficulties inherent in applying the duty of fairness to Cabinet decisions. After all, the duty is flexible and its content could be tailored to address some of the concerns raised by Estey J.³⁷ (To take an obvious example, it is difficult to conceive of circumstances in which the Cabinet would be required to hold an oral hearing.) Moreover, the case for exempting Cabinet decisions from the duty of fairness may be thought weaker than the case for exempting primary legislation, because Cabinet decision making is not subject to political scrutiny in the same way. Nevertheless, it is not surprising to find the courts wary of scrutinizing the decisions of the executive branch of government, even for limited procedural purposes. The potential for conflict between the courts and the executive is great.

In other contexts, the Court has emphasized the unique role and responsibilities of the executive branch as a reason for not extending the duty of fairness to ministerial decisions. In *Idziak v. Canada (Minister of Justice)*, Justice Cory discussed the minister of justice's exercise of discretionary authority to issue a warrant of surrender in an extradition case as follows:

Parliament chose to give discretionary authority to the Minister of Justice. It is the Minister who must consider the good faith and honour of this country in its relations with other states. It is the Minister who has the expert knowledge of the political ramifications of an extradition decision. In administrative law terms, the Minister's review should be characterized as being at the extreme legislative end of the *continuum* of administrative decision-making.³⁸

Decisions involving particular individuals are most likely to give rise to the application of the duty of fairness to Cabinet and ministerial decisions, but, as *Idziak* demonstrates, even in this context the Court may be reluctant to impose procedural requirements for a variety of reasons.

³⁶ *Supra* note 30 at 754.

³⁷ See e.g. *Minister for Arts, Heritage and Environment v. Peko-Wallsend Ltd.* (1987), 75 A.L.R. 218 (Fed. Ct., Aust.) (assuming that Cabinet decisions are subject to the duty of fairness, the ability to make a written submission to the responsible minister suffices). I am grateful to Matthew Groves for this reference.

³⁸ [1992] 3 S.C.R. 631 at 659 (emphasis in original).

2. *Is Subordinate Legislation Covered by the Legislative Exemption?*

Political self-interest often ensures that consultation occurs prior to the passage of legislation, even where there is no formal requirement for it. There will, however, be times when it is not in the political interest to consult before legislating and the argument for fairness protection in these contexts may seem strong, especially with regard to subordinate legislation.³⁹

Arguably, there is less reason to be concerned about judicial interference in the political process where subordinate legislation is concerned because subordinate legislation is made pursuant to executive authority and democratic accountability may be minimal. American experience with “notice and comment” requirements demonstrates that procedural requirements are not unworkable.⁴⁰ Nevertheless, as Andrew Green explains in greater detail in Chapter 4, *Regulations and Rule Making: The Dilemma of Delegation*, in general the courts have not imposed procedural requirements on the subordinate law-making function. Such requirements as exist in particular contexts have been established by legislation.

However, there are exceptions. For example, in the unique circumstances of *Homex Realty and Development Co. v. Wyoming (Village)*,⁴¹ the Supreme Court of Canada concluded that passage of a municipal bylaw was subject to the duty of fairness. It did so because it was clear that the village’s motivation for passing the bylaw was an ongoing dispute it had with a particular developer. In these circumstances, the Court held that the village was not allowed

³⁹ Geneviève Cartier, “Procedural Fairness in Legislative Functions: The End of Judicial Abstinence?” (2003) 53 U.T.L.J. 217.

⁴⁰ *Administrative Procedures Act*, 5 U.S.C. § 553 provides as follows:

- (a) This section applies, according to the provisions thereof, except to the extent that there is involved—
 - (1) a military or foreign affairs function of the United States; or
 - (2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.
- (b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—
 - (1) a statement of the time, place, and nature of public rule making proceedings;
 - (2) reference to the legal authority under which the rule is proposed; and
 - (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.
 Except when notice or hearing is required by statute, this subsection does not apply—
 - (A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or
 - (B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.
- (c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose

See, generally, Peter L. Strauss, *Administrative Justice in the United States*, 2d ed. (Durham, N.C.: Carolina Academy Press, 2002) at 220-22.

⁴¹ [1980] 2 S.C.R. 1011 [*Homex Realty*].

to couch its actions in a form designed to oust the application of the duty of fairness.⁴² This makes the point that substance is more important than form where the legislative exemption is concerned.

3. Are Policy Decisions Covered by the Legislative Exemption?

The legislative exemption includes decisions that may be described as “policy” decisions as well as decisions that are general in nature. In *Martineau v. Matsqui Institution Disciplinary Board*, Justice Dickson observed that “[a] purely ministerial decision, on broad grounds of public policy, will typically afford the individual no procedural protection.”⁴³ In *Knight v. Indian Head School Division No. 19*, Justice L’Heureux-Dubé noted that many administrative bodies have been required to assume duties traditionally performed by legislatures, and distinguished “decisions of a legislative and general nature” from “acts of a more administrative and specific nature.”⁴⁴

The rationale for exempting policy decisions from the duty is similar to that of formal legislative decisions. Both are inherently political in nature and are, in principle, subject to political accountability. Thus, in *Imperial Oil Ltd. v. Quebec (Minister of the Environment)*, the Supreme Court held that in exercising discretionary power to require an oil company to undertake site decontamination measures (at its own expense), Quebec’s environment minister was performing a political role in choosing from among the policy options allowed under provincial environmental protection legislation and was not subject to fairness obliga-

⁴² The majority of the Court characterized the bylaw as quasi-judicial rather than legislative in substance. Justice Dickson (dissenting on the remedial point) put the case for procedural fairness protection more simply, *ibid.* at 1052-53:

What we have here is not a by-law of wide and general application which was to apply to all citizens of the municipality equally. Rather, it was a by-law aimed deliberately at limiting the rights of one individual, the appellant Homex. In these circumstances, I would hold that Homex was entitled to some procedural safeguards. This does not mean that the municipality was under a duty to observe the procedures appropriate to a court of law. But, at a minimum, it was under a duty to give Homex notice of the proposed by-law and the opportunity to be heard.

In *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, the Court asserted that the requirements of procedural fairness and legislation governing a municipality “may require that the municipality comply with certain procedural requirements, such as notice or voting requirements” (para. 12) and did not mention *Homex*. However, the Court went on to say that municipalities make quasi-judicial as well as legislative decisions and that the two are treated differently:

Formal reasons may be required for decisions that involve quasi-judicial adjudication by a municipality. But that does not apply to the process of passing municipal bylaws. ... The reasons for a municipal bylaw are traditionally deduced from the debate, deliberations and the statements of policy that give rise to the bylaw. ... [T]he municipality is [not] required to formally explain the basis of a bylaw. (paras. 29-30)

⁴³ [1980] 1 S.C.R. 602 at 628, cited with approval in *Re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525 at para. 60.

⁴⁴ [1990] 1 S.C.R. 653 at para. 26 [*Indian Head School*].

tions beyond those in the Act.⁴⁵ Governments are elected to make policy decisions and must be allowed to do so, provided that they comply with relevant constitutional requirements.

But acceptance of the political rationale does not resolve the difficulties surrounding the exemption of policy decisions. Although legislative functions may be identified by the formalities that surround the legislative process, it can be considerably more difficult to identify a policy decision. Moreover, given different judicial perceptions about institutional roles, accountability, and legitimacy, we should expect to find inconsistent decisions. In truth, it is easy for a court to characterize a decision as a policy decision if it simply does not want to interfere in a particular case.

C. The Duty Does Not Apply to Public Office Holders Employed Under Contracts

Although the duty of fairness developed in the context of public office holders in cases such as *Nicholson* and *Indian Head School*, in *Dunsmuir v. New Brunswick*⁴⁶ the Court overruled its earlier approach and held that the law will no longer draw a distinction between public office holders and other employees in dismissal cases. If the terms of an individual's employment are governed by contract, then ordinary private law contractual remedies will apply in the event of his or her dismissal, regardless of the public nature of the employment concerned. By abandoning the distinction between public office holders and contractual employees, the Court hoped to simplify the application of the law, obviating the need for litigation concerning the nature of an individual's employment.⁴⁷

Following *Dunsmuir*, it will be assumed that a contract of employment addresses procedural fairness issues. If it does not, the normal common- or civil-law principles will govern. In either event, protection from wrongful dismissal will be governed by private law contract principles. The Court conceived of two exceptions. First, employees not protected by employment contracts, or subject to employment at pleasure, will still be protected by the duty of fairness. Second, the duty of fairness may arise by necessary implication in some statutory contexts.

⁴⁵ [2003] 2 S.C.R. 624, [2003] 2 S.C.R. 624 [*Imperial Oil*]. The *Environment Quality Act*, R.S.Q., c. Q-2, s. 31.42 provided procedural protection, including a requirement that notice be given to interested persons and that reasons for the decision be given. The Court's remarks concerning the nature of the minister's decision were made in the context of an argument that the minister was not impartial, and as a result, was in breach of the bias rule of the duty of fairness.

⁴⁶ *Supra* note 9.

⁴⁷ Nevertheless, *Dunsmuir* necessarily limits the protection of public employees to some extent. It will no longer be possible for public office holders to be restored to their positions, because that remedy is not available for breach of contract. The Court acknowledges as much, but argues that the duty of fairness did not include a reinstatement remedy, given that public office holders could be dismissed provided only that the proper procedures were followed. There is no doubt, however, that reinstatement to a position following a breach of the duty of fairness—even on an ostensibly temporary basis while a new decision is waiting to be made—was a considerable motivation for bringing judicial review proceedings.

D. The Duty May Be Suspended or Abridged in the Event of an Emergency

The duty of fairness establishes duties that must be observed *before* a decision can be made. There will, however, sometimes be circumstances in which procedural requirements cannot be met without risking harm of one sort or another.

In an emergency situation, compliance with the duty of fairness may be suspended until after the required decision has been made. For example, in *Cardinal v. Director of Kent Institution*, the Court held that although the duty of fairness applied to the imposition of isolation or segregation of prison inmates in “apparently” urgent or emergency circumstances (the inmates alleged to have been involved in a hostage taking were transferred to another institution and placed in isolation to secure prison order), “there could be no requirement of prior notice and an opportunity to be heard before the decision. ... [T]he process of prison administration, because of its special nature and exigencies, should not be unduly burdened or obstructed by the imposition of unreasonable or inappropriate procedural requirements.”⁴⁸ However, once a recommendation to end the segregation of prisoners had been made by the review body, the duty of fairness required that the prison director inform the inmates of his intended decision to reject the recommendation, provide reasons, and afford them an opportunity to contest his intended decision. The Court regarded this as a minimal amount of fairness that would not undermine the administration of the prison.

To what extent will a court defer to a decision-maker as to the existence of circumstances justifying the suspension or abridgment of fairness? Deference to the government in regard to national security matters is to be expected, but care must be taken to ensure that public authorities are not overzealous in apprehending urgent or emergency circumstances. There should be few cases in which minimal fairness procedures cannot be provided before a decision is made.

V. The Content of the Duty of Fairness

As we have seen, the extension of the duty of fairness to a wide range of administrative decisions in *Nicholson* was facilitated by the decision to make the content of duty flexible and context-specific. Thus, fairness requires compliance with some, but not necessarily all, of the requirements of natural justice.⁴⁹ Fairness is a *minimum* duty that must be met—a floor for procedural protection rather than a ceiling. In determining whether the duty of fairness has been met, courts ask whether the procedural protection provided in particular circumstances was adequate, not ideal.⁵⁰

Consider the position of those involved in the following three scenarios and the scope of the procedural protection that is appropriate in each.

⁴⁸ *Supra* note 10 at paras. 16, 22.

⁴⁹ *Martineau v. Matsqui Inmate Disciplinary Board*, [1980] 1 S.C.R. 602 at 630.

⁵⁰ As Justice Evans put it in *Waycobah First Nation v. Attorney General of Canada*, 2011 FCA 191 at para. 32, “[T]he duty of fairness affords individuals an adequate, not the optimum, opportunity to inform the decision-maker of their case.”

1. *Criminal law prosecution.* The criminal law provides a good point of comparison for procedural fairness in administrative law. The stakes for a person charged with a criminal offence are high. Accused persons are at risk of losing their liberty and are subject to significant consequences, both direct and indirect, as a result of the charges they face. In these circumstances, nothing less than full procedural protection will do: an accused person is entitled to a formal, oral hearing before an independent and impartial judge. This protection has long been afforded and is now codified in the Charter (s. 11(d)), which also includes the following protection:

- the right to be informed of the offence (11(a)),
- the right to be tried within a reasonable time (11(b)),
- disclosure of the evidence and case to be met,⁵¹
- the right to counsel (10(b)),
- the right to call evidence and cross-examine witnesses,
- the presumption of innocence (10(d)), and
- a written decision with reasons.⁵²

None of these protections is controversial in the context of criminal law, but some have little relevance in the context of administrative proceedings. Administrative proceedings are typically informal, do not involve oral hearings, and do not take place before judges. Although some administrative proceedings have much in common with a criminal proceeding (for example, disciplinary hearings in professional contexts), in general, a lower standard of protection will usually suffice.

2. *Human rights adjudication.* Human rights legislation is designed to be remedial rather than punitive, so, in principle, the stakes for a respondent to a human rights complaint are lower than for an accused person facing a criminal charge. But the consequences may nevertheless be significant: consider the possible harm to reputation a respondent may suffer by being accused of an act of discrimination; the costs in terms of time and money of defending a complaint; and the damages the respondent may ultimately be ordered to pay by a human rights tribunal. Given these possible repercussions, the respondent will want to test the evidence against him or her, and in order to do so, an oral hearing with many of the protections available in the context of criminal prosecution is required. But some of those protections will apply in attenuated form. For example, human rights litigation usually takes place before tribunals whose members may be part-time or fixed-term appointees who do not enjoy the high level of independence that judges do,⁵³ and the proceedings are less formal in nature. But the essence of the matter will be the same: the respondent to a human rights complaint is entitled to be represented by counsel and has the right, for example, to call evidence, cross-examine witnesses, and make

⁵¹ *R. v. Stinchcombe*, [1991] 3 S.C.R. 326 [*Stinchcombe*].

⁵² *R. v. REM*, 2008 SCC 51, [2008] 3 S.C.R. 3.

⁵³ See the indicia of independence set out in *Valente v. The Queen*, [1985] 2 S.C.R. 673, including security of tenure, financial security, and institutional independence.

and reply to arguments. Such procedures may be set out in the legislation or accompanying rules or regulations, but to the extent that they are not, they will be governed by the duty of fairness.

3. *Licensing regulation.* Consider a regulated industry in which possession of a licence is required in order to work. Those in the industry have an important interest in obtaining and maintaining their licences, but it does not follow that they are entitled to an oral hearing on all licensing matters. The importance of the matter is a consideration, but the needs of the state must also be considered. Oral hearings are expensive and time-consuming, and will not ordinarily be necessary to deal fairly with a licence application. Indeed, in a straightforward case it will ordinarily be enough to allow an applicant to apply for a licence by completing an application form and providing the required information, following which a decision can be made based on consideration of the relevant criteria.

It is not difficult to imagine circumstances in which greater fairness might be required. Suppose, for example, that a licensing authority has information that raises concerns about an applicant's fitness to be granted, or to continue to hold, a licence, and that the authority proposes to rely on that information to deny the applicant's licence application or to revoke an existing licence. In these circumstances, the licensing authority should at least inform the applicant of the information and invite submissions in reply. Depending on the nature of the information, additional procedural protection may be required.

Duty of fairness concerns are least likely to arise in the context of tribunals required to provide oral hearings, because the procedure for those hearings is usually clear. Some tribunals operate pursuant to detailed legislation that establishes procedural requirements; others are empowered to establish their own procedures in secondary legislation. The Ontario Labour Relations Board is a good example of the latter approach. The chair of the Board has rule-making authority and the Board has developed its own procedural code.⁵⁴ The Canadian Transportation Agency is another example of a tribunal that has the authority to control its processes and make its own procedural rules.⁵⁵ Still other tribunals may operate pursuant to general statutory mandates such as that established by the Ontario *Statutory Powers Procedure Act*,⁵⁶ which establishes minimum default procedural provisions for Ontario tribunals required to provide oral hearings.

For a large range of administrative decision-makers, however, common-law considerations govern the scope and content of the duty of fairness. The leading case, *Baker*, is discussed below.

⁵⁴ *Labour Relations Act*, S.O. 1995, c. 1, Sch. A, s. 110(17).

⁵⁵ *Canada Transportation Act*, S.C. 1996, c. 10, s. 17.

⁵⁶ R.S.O. 1990, c. S.22.

A. *Baker v. Canada (Minister of Citizenship and Immigration)*⁵⁷

Mavis Baker was a visitor from Jamaica who remained in Canada as an illegal immigrant. She was employed as a live-in domestic worker for 11 years and during that time had four children, all of whom acquired Canadian citizenship by birth. In 1992 she was ordered to be deported. Immigration legislation required applicants for permanent residence to apply from outside Canada, meaning that Ms. Baker would have to apply from Jamaica. She applied for an exemption from this requirement pursuant to regulations that provided as follows:

The Minister is hereby authorized to exempt any person from any regulation made under subsection 114(1) of the Act or otherwise facilitate the admission to Canada of any person where the Minister is satisfied that the person should be exempted from that regulation or that person's admission should be facilitated owing to the existence of compassionate or humanitarian considerations.⁵⁸

Baker argued she had psychiatric problems that might worsen if she were forced to return to Jamaica. Moreover, two of her Canadian-born children depended on her for their care, and she was in regular contact with the other two. They, and she, would suffer emotional hardship if she were forced to return to Jamaica.

The discretionary power involved in assessing compassionate and humanitarian considerations was exercised in the name of the minister by an immigration officer. That officer denied Baker's request for an exemption on the advice of another officer, Officer Lorenzo, whose written memorandum was provided to Baker and is set out below:

PC is unemployed—on Welfare. No income shown—no assets. Has four Cdn.-born children—four other children in Jamaica—HAS A TOTAL OF EIGHT CHILDREN.

Says only two children are in her "direct custody." (No info on who has ghe [sic] other two.)

There is nothing for her in Jamaica—hasn't been there in a long time—no longer close to her children there—no jobs there—she has no skills other than as a domestic—children would suffer—can't take them with her and can't leave them with anyone here. Says has suffered from a mental disorder since '81—is now an outpatient and is improving. If sent back will have a relapse.

Letter from Children's Aid—they say PC has been diagnosed as a paranoid schizophrenic.—children would suffer if returned—

Letter of Aug. '93 from psychiatrist from Ont. Govm't.

Says PC had post-partum psychosis and had a brief episode of psychosis in Jam. when was 25 yrs. old. Is now an out-patient and is doing relatively well—deportation would be an extremely stressful experience.

Lawyer says PS [sic] is sole caregiver and single parent of two Cdn. born children. PC's mental condition would suffer a setback if she is deported etc.

This case is a catastrophe [sic]. It is also an indictment of our "system" that the client came as a visitor in Aug. '81, was not ordered deported until Dec. '92 and in APRIL '94 IS STILL HERE!

⁵⁷ [1999] 2 S.C.R. 817 [*Baker*].

⁵⁸ *Immigration Regulations, 1978, SOR/78-172, as am. by SOR/93-44.*

The PC is a paranoid schizophrenic and on welfare. She has no qualifications other than as a domestic. She has FOUR CHILDREN IN JAMAICA AND ANOTHER FOUR BORN HERE. She will, of course, be a tremendous strain on our social welfare systems for (probably) the rest of her life. There are no H&C factors other than her FOUR CANADIAN-BORN CHILDREN. Do we let her stay because of that? I am of the opinion that Canada can no longer afford this type of generosity. However, because of the circumstances involved, there is a potential for adverse publicity. I recommend refusal but you may wish to clear this with someone at Region.

There is also a potential for violence—see charge of “assault with a weapon.” [Capitalization in original.]

Baker sought judicial review of the minister’s decision, arguing among other things that the minister failed to observe the requirements of the duty of fairness. She argued that she should have been granted an oral interview before the decision-maker; that her children and their fathers should have been given notice of the interview; that they should have been allowed to make submissions at the interview; and that the fathers of her children should have been given permission to attend the interview with counsel. She argued, in addition, that she was entitled to reasons for the minister’s decision and that the immigration officer’s notes gave rise to a reasonable apprehension of bias. The decision to deny Baker’s application was upheld in the Federal Court and she appealed to the Supreme Court of Canada.

The Supreme Court of Canada held that Baker was entitled procedural fairness protection, but the content of the duty was minimal in the circumstances. An oral hearing was not required. It was enough that she was permitted to submit complete written documentation and that reasons for the minister’s decision were provided—albeit that the Court accepted the immigration officer’s memorandum to another officer fulfilled the reasons requirement.⁵⁹

For present purposes, the important point is that the Court used *Baker* as the occasion to reiterate the purpose of the duty of fairness and set out a number of criteria relevant to determining its content. Justice L’Heureux-Dubé described the purpose of the duty of fairness as follows:

[T]he purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, 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.⁶⁰

Baker follows on from L’Heureux-Dubé J’s decision in *Indian Head School Division*, in which she argued that the duty of fairness was “entrenched in the principles governing our

⁵⁹ Officer Lorenz’s notes were provided in response to Baker’s counsel’s request for reasons, and in the absence of any other record, the Court treated them as the reasons for the decisions. The conclusion that the notes revealed bias was enough to quash the decision, but the Court went on to hold that the minister’s discretionary decision was subject to review for reasonableness, and was not reasonable because it paid insufficient attention to the interests and needs of the children and the hardship that a return to Jamaica might cause Ms. Baker. The decision was also quashed on this basis and remitted for reconsideration.

⁶⁰ *Baker*, *supra* note 57 at para. 22.

legal system.”⁶¹ At the same time, however, she emphasized the importance of respecting the needs of administrative decision-makers:

It must not be forgotten that every administrative body is the master of its own procedure and need not assume the trappings of a court. The object is not to import into administrative proceedings the rigidity of all the requirements of natural justice that must be observed by a court, but rather to allow administrative bodies to work out a system that is flexible, adapted to their needs and fair. As pointed out by de Smith, the aim is not to create “procedural perfection” but to achieve a certain balance between the need for fairness, efficiency and predictability of outcome.⁶²

The criteria set out in *Baker* are designed to give effect to these aims.

B. The Baker Synthesis

L’Heureux-Dubé J. enumerated five criteria relevant to determining the content of the duty of fairness in particular circumstances:

1. the nature of the decision being made and the process followed in making it;
2. the nature of the statutory scheme and the terms of the statute pursuant to which the body operates;
3. the importance of the decision to the individual or individuals affected;
4. the legitimate expectations of the person challenging the decision; and
5. the choices of procedure made by the agency itself.⁶³

L’Heureux-Dubé J. did not intend these criteria to be exhaustive and the Court has recently reiterated as much. In *Canada (Attorney-General) v. Mavi*, Justice Binnie noted:

[T]he obvious point is that the requirements of the duty in particular cases are driven by their particular circumstances. The simple overarching requirement is fairness, and this “central” notion of the “just exercise of power” should not be diluted or obscured by jurisprudential lists developed to be helpful but *not* exhaustive.⁶⁴

It is important to note, too, that none of the *Baker* criteria is, in theory, more important than any other. It is not unusual for courts to conclude that some criteria support a high degree of procedural protection in particular circumstances while others suggest that a lower degree of protection suffices. In every case, courts must determine the requirements of the duty of fairness protection by making an overall appraisal of the circumstances.

Each of the criteria set out in *Baker* is addressed below.

⁶¹ *Indian Head School*, *supra* note 44 at para. 46.

⁶² *Ibid.* at para. 49 (internal citation omitted).

⁶³ *Baker*, *supra* note 57 at paras. 23-27.

⁶⁴ 2011 SCC 30, [2011] 2 S.C.R. 504 para. 42 (emphasis in original).

1. *The Nature of the Decision Being Made and the Process Followed in Making It*

Although the classification of decisions as judicial, quasi-judicial, or administrative is no longer important in determining the threshold question—*whether* procedural protection must be provided—decisions that are considered judicial or quasi-judicial in nature are likely to demand more extensive procedural protection than administrative decisions. L’Heureux-Dubé J. put the point this way: “The more the process provided for, the function of the tribunal, the nature of the decision-making body, and the determinations that must be made to reach a decision resemble judicial decision making, the more likely it is that procedural protections closer to the trial model will be required by the duty of fairness.”⁶⁵

Given that the development of the duty of fairness was predicated on the irrelevance of the nature of the decision in question, it may seem odd that the nature of the decision remains relevant to determining the content of the duty. However, the nature of the decision is only one of several considerations and it will often be uncontroversial. For example, greater procedural protection is likely to be required in an adjudicative context than a regulatory one.

2. *The Nature of the Statutory Scheme and the Terms of the Statute Pursuant to Which the Body Operates*

It is important to pay close attention to the legislation that authorizes a particular decision to be made. The requirements of fairness may be minimal in the context of steps that are preliminary to a formal decision-making process. For example, as noted above, investigatory procedures are not normally subject to the duty of fairness even though they might give rise to proceedings in which fairness protection will be required. Greater fairness protection will usually be required if a final decision must be made, but a decision need not be final in order to attract a high degree of fairness protection. Enhanced procedural protection may be required if a second level of proceedings is envisaged, in order to allow meaningful participation in those proceedings. For example, the existence of a right of appeal is an important consideration in deciding whether and to what extent reasons for a first-level decision are required.

3. *The Importance of the Decision to the Individual or Individuals Affected*

The content of the duty of fairness increases in proportion to the importance of the particular decision to the person it affects. L’Heureux-Dubé J. referred to the context of employment in making this point, citing Justice Dickson’s observation in *Kane v. Bd. of Governors of U.B.C.* that “[a] high standard of justice is required when the right to continue in one’s

⁶⁵ *Baker*, *supra* note 57 at para. 23.

⁶⁶ [1980] 1 S.C.R. 1105 at 1113.

profession or employment is at stake.”⁶⁶ However, many things short of adverse impact on one’s career or livelihood may support claims for greater procedural protection.

4. *The Legitimate Expectations of the Person Challenging the Relevant Decision*

The doctrine of legitimate expectation may extend the content of the duty of fairness on the basis of the conduct of public authorities in particular circumstances. For example, a person might be led to understand that he or she will be afforded particular procedural protection, such as an oral hearing before a particular decision is made, even though that level of protection would not otherwise be required. In these circumstances, the person may have a legitimate expectation that an oral hearing will be held and, if this is so, the public authority will be required to hold an oral hearing before the relevant decision can be made.

Legitimate expectation began as a threshold inquiry—a means of extending the applicability of the duty of fairness—but in *Baker* the Court subsumed the concept within the considerations relevant to determining the content of the duty.⁶⁷ Legitimate expectations of procedural protection may arise out of conduct such as representations, promises, or undertakings or past practice or current policy of a decision-maker. The Court summarized the concept in this way in *Canada (Attorney General) v. Mavi*:

Where a government official makes representations within the scope of his or her authority to an individual about an administrative process that the government will follow, and the representations said to give rise to the legitimate expectation are clear, unambiguous and unqualified, the government may be held to its word, provided the representations are procedural in nature and do not conflict with the decision maker’s statutory duty. Proof of reliance is not a requisite.⁶⁸

More controversially, a legitimate expectation may also arise if a person is led to expect a particular *outcome* from a decision-making process. A public authority might have policies that suggest such an outcome, or perhaps an official may give an undertaking that a particular decision will be made. For example, an undertaking that a licence will be granted may give rise to a legitimate expectation that a person will receive a licence.

However, a legitimate expectation that a particular decision will be made, as opposed to an expectation that a particular procedure will be followed in making a decision, raises different concerns. Fundamentally, public authorities must be entitled to change their minds; indeed, they may sometimes be required to do so to protect the public interest. As a result,

⁶⁷ *Supra* note 57 at para. 26. The inspiration for the legitimate expectation argument in *Baker* came from the controversial decision of the High Court of Australia in *Minister for Immigration and Ethnic Affairs v. Teoh* (1995), 183 C.L.R. 273, in which a majority of that Court held that Australia’s ratification of the International Convention on the Rights of the Child gave rise to a legitimate expectation that the best interests of the child would be a primary consideration for the minister in making discretionary decisions on deportation. However, *Teoh* is not mentioned in the Court’s decision in *Baker*.

⁶⁸ [2011] 2 S.C.R. 504 at para. 68 [*Mavi*].

the doctrine of legitimate expectation does not require that expectations of particular substantive outcomes must be fulfilled. In the example above, there is no entitlement to the grant of the licence. However, before a legitimate expectation of receiving a licence can be dashed, the person given the undertaking will be entitled to enhanced procedural fairness protection. For example, he or she may be entitled to notice of the intention not to grant the licence and a right to make submissions before the decision to deny the licence is made.

The concept of legitimate expectation is akin to promissory estoppel, an equitable doctrine that offers relief from reliance on promises that do not give rise to enforceable contracts,⁶⁹ but there are important differences.⁷⁰ The Supreme Court of Canada has on several occasions reiterated that a legitimate expectation affords only procedural protection, whereas a successful claim of estoppel may result in the enforcement of substantive promises.⁷¹

5. *The Choices of Procedure made by the Agency Itself*

The content of the duty of fairness affects more than just the person whose rights, privileges, or interests are at stake in a particular case. It also affects the decision-maker, who may be required to make decisions in hundreds, if not thousands, of additional cases and all those whose rights, privileges, or interests will be affected by those decisions. If the Court is to establish a workable standard, the procedural choices made by the decision-maker must be taken into account in determining the requirements of the duty of fairness. After all, the decision-maker will have superior knowledge of not only its needs but also the needs of the community it serves, and its procedural choices are worthy of respect as a result. As the Court noted in *Baker*:

[T]he analysis of what procedures the duty of fairness requires should also take into account and respect the choices of procedure made by the agency itself, particularly when the statute leaves to the decision-maker the ability to choose its own procedures, or when the agency has an expertise in determining what procedures are appropriate in the circumstances. While this,

⁶⁹ See, generally, Stephen M. Waddams, *The Law of Contracts*, 6th ed. (Aurora, ON: Canada Law Book, 2010) at paras. 195-206. Estoppel is understood as a defensive concept—a “shield” rather than a “sword”—and, in general, does not result in the enforcement of non-contractual promises.

⁷⁰ Justice Binnie discusses the differences between estoppel, which he suggests may rarely be available in public law contexts, and legitimate expectation in his concurring opinion in *Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services)*, 2001 SCC 41, [2001] 2 S.C.R. 281.

⁷¹ Note that English law has taken a different path. English courts have come to allow substantive expectations to be protected by the doctrine, rather than simply procedural expectations, and the process–substance distinction has become blurred. The leading case is *R. v. North and East Devon Health Authority, ex p. Coughlan*, [2001] Q.B. 213 (C.A.). Timothy Endicott argues that *Coughlan* is not an unusual or problematic decision. On his account, legitimate expectation must embrace substantive protection, and the substantive protection afforded by the doctrine can be explained as an example of *Wednesbury* unreasonableness—i.e., no reasonable public authority can exercise discretionary power to disappoint a legitimate expectation because to do so would be to abuse its power. At the same time, however, he recognizes that the protection afforded by the doctrine must be tempered with comity toward administrative authorities and that judges should defer to good reasons for disappointing a legitimate expectation. See Endicott, *Administrative Law*, 2d ed. (Oxford: Oxford University Press, 2011) 289-95.

of course, is not determinative, important weight must be given to the choice of procedures made by the agency itself and its institutional constraints.⁷²

Thus, one of the important tasks for decision-makers in responding to applications for judicial review is to educate the court as to the needs of their processes, which may reflect compromises necessary to allow decisions to be made within a reasonable time frame and at a reasonable cost.

It is not clear how significant the procedural choices of decision-makers will turn out to be in determining the content of procedural fairness protection. L'Heureux-Dubé J. stated that "important weight" must be given to the decision-maker's choice of procedure, but this provides little meaningful guidance, especially if the other criteria support claims to greater procedural protection.

C. Specific Components of the Duty of Fairness

Although most of the procedural rights protected by the duty of fairness are well established, their parameters are open to argument in particular contexts. Some of the most important aspects of the duty of fairness are discussed below.

1. Notice

Notice is the most basic aspect of the duty of fairness. It is the starting point for participation in any decision-making process and involves consideration of the following questions:

- Who is proposing to make a decision?
- What is the nature of the decision to be made?
- When will the decision be made?
- Where will the decision be made?
- Why is the decision being made?
- How is the decision to be made?

The requirements of notice are often prescribed in a tribunal's rules of procedure or in legislation governing hearing procedures. Where they are not, litigation may arise over questions concerning the timeliness and sufficiency of notice. Was it timely, in the sense that it provided adequate time to allow the recipient to respond? Did it provide sufficient information to allow the recipient to make an informed response? The overarching requirement of the duty of fairness is the idea of reasonableness. Thus, the general rule has aptly been stated as follows: "[N]otice must be adequate in all circumstances in order to afford to those concerned a reasonable opportunity to present proofs and arguments, and to respond to those presented in opposition."⁷³

The requirement to provide notice should be understood as an ongoing duty: it arises prior to the making of a decision and continues throughout the course of a decision-making

⁷² *Baker, supra* note 57 at para. 27 (internal citations omitted).

⁷³ Donald J.M. Brown & John M. Evans, *Judicial Review of Administrative Action in Canada*, looseleaf (Toronto: Canvasback, 1998), vol. 2 at 1200 [Brown & Evans].

process. A party whose rights, privileges, or interests are at stake is entitled to participate meaningfully in the decision-making process, and in order to do so must be kept apprised of any relevant issues that arise during the course of a hearing.

2. Disclosure

Must information held by a decision-maker be disclosed in order to ensure a fair decision-making process? If so, how much?

The concept of disclosure is well known in the context of the criminal law. In *R. v. Stinchcombe*, the Supreme Court of Canada held that the Crown must disclose “all relevant material” to the defence in a criminal prosecution.⁷⁴ This decision flowed from the nature of the prosecution process and, in particular, the notion that the role of the prosecution is not to secure conviction, but, instead, to put all the relevant evidence before the court to ensure that there is a fair trial. As Justice Sopinka put it, “the fruits of the investigation which are in the possession of counsel for the Crown are not the property of the Crown for use in securing a conviction but the property of the public to be used to ensure that justice is done. In contrast, the defence has no obligation to assist the prosecution and is entitled to assume a purely adversarial role toward the prosecution.”⁷⁵

Proponents of administrative justice soon argued that the *Stinchcombe* disclosure principle ought to apply in administrative law, but this was rejected by the Court in *May v. Ferndale Institution*:

It is important to bear in mind that the *Stinchcombe* principles were enunciated in the particular context of criminal proceedings where the innocence of the accused was at stake. Given the severity of the potential consequences the appropriate level of disclosure was quite high. In these cases, the impugned decisions are purely administrative. These cases do not involve a criminal trial and innocence is not at stake. The *Stinchcombe* principles do not apply in the administrative context.⁷⁶

Although this appears to be a categorical rejection of the *Stinchcombe* principle in administrative law, the Court made clear that “the duty of procedural fairness generally requires that the decision-maker discloses the information he or she relied upon. The requirement is that the individual must know the case he or she has to meet.”⁷⁷ Thus, the question is not *whether* disclosure is required in administrative proceedings, but *how much* disclosure is required in particular proceedings?⁷⁸

⁷⁴ *Supra* note 51.

⁷⁵ *Ibid.* at para. 12.

⁷⁶ 2005 SCC 82, [2005] 3 S.C.R. 809 at para. 91, per LeBel and Fish JJ.

⁷⁷ *Ibid.* at para. 92.

⁷⁸ Disclosure of information held by the public authority may be distinguished from the concept of discovery, which refers to information held by an opposing party involved in litigation. As Freya Kristjanson and Leslie McIntosh note, discovery is unusual in the context of administrative proceedings and gives rise to a number of concerns for counsel in arguing a case. See the discussion by Freya Kristjanson and Leslie McIntosh in Chapter 6, Advocacy Before Administrative Tribunals.

Tribunals required to hold oral hearings are likely to have disclosure obligations spelled out in rules that govern their procedures or in generic procedural statutes such as Ontario's *Statutory Powers Procedure Act*. But there is considerable scope for the duty of fairness to require disclosure on an ad hoc basis, and courts have held that some circumstances, such as professional discipline and the possibility of a loss of livelihood, require a high level of disclosure.⁷⁹

It is often argued that disclosure obligations must be tempered or limited by the needs of the authorities in particular circumstances or the rights of other persons. For example, in parole hearings or prison discipline cases, there may be concerns about the personal safety of informants and a need to keep their identity secret. Criminal investigative material—for example, wiretap and search warrant information⁸⁰ and sensitive national security information⁸¹—may also need to be kept confidential.

How is fairness to be maintained in these circumstances? The answer is that the disclosure duty can be tailored to the needs of particular circumstances. Information can be vetted by a court to determine its materiality and relevance and may be disclosed only to counsel, with instructions limiting its further dissemination. Disclosure after the fact, along with judicial review and rights of appeal, may mitigate any fairness concerns, as the Court suggested in *Ruby v. Canada (Solicitor General)*.⁸² Ultimately, the duty of fairness is satisfied if a party has sufficient information to make informed submissions in regard to a particular matter.

3. Oral Hearings

Oral hearings are often demanded, but seldom required. They are not usually necessary to reach an informed decision on an administrative matter and there are good reasons for not granting them, including the expense and delay they occasion. The administrative process would grind to a halt if the duty of fairness required an oral hearing before any decision could be made.

In what circumstances will the common law require that an oral hearing be provided, as opposed to a hearing “on the papers”? The short answer is that it depends on the relevant circumstances. Nevertheless, some of the circumstances in which an oral hearing will be required are well settled. For example, an oral hearing will be required where a decision depends on findings of witness credibility. This was the basis for the Supreme Court's decision in *Singh v. Minister of Employment and Immigration*,⁸³ in which the Court held that a person claiming Convention refugee status was entitled to an oral hearing. That was because refugee status depended on whether claimants had a “well-founded fear of persecution” in their homeland, and this was not something that could be sorted out on the basis of a paper

⁷⁹ See e.g. *Sherriff and Attorney General for Canada*, 2006 FCA 139.

⁸⁰ *Ruby v. Canada (Solicitor General)*, 2002 SCC 75, [2002] 4 S.C.R. 3 [*Ruby*].

⁸¹ See e.g. *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350 and *Charkaoui v. Canada (Citizenship and Immigration)*, 2008 SCC 38, [2008] 2 S.C.R. 326.

⁸² *Supra* note 80.

⁸³ [1985] 1 S.C.R. 177.

hearing. Claimants had to be given the opportunity to provide evidence in person—to tell their story—not simply because of the importance of the matter to them, but also because the decision-making authorities could not determine factually disputed evidence without seeing and hearing from the claimant.

Singh was decided under both s. 7 of the Charter and s. 2(e) of the *Canadian Bill of Rights*, because the legislation in question specifically denied an oral hearing. Where legislation does not preclude an oral hearing, however, recourse to constitutional and quasi-constitutional remedies will not be necessary. The common law may require that an oral hearing be held.⁸⁴

4. Right to Counsel

There is no right to counsel in the context of administrative proceedings. Although the right to counsel is constitutionally protected by s. 10(b) the Charter, the protection of that right is limited to circumstances of “arrest or detention.” In *British Columbia (Attorney General) v. Christie*, the Court noted that the right to counsel was understood historically as relevant only in the context of the criminal law, rather than something required by the rule of law itself, and concluded that there was no general constitutional right to counsel. The Court reasoned that such a right would render the specific protection afforded by the Charter redundant:

We conclude that the text of the Constitution, the jurisprudence and the historical understanding of the rule of law do not foreclose the possibility that a right to counsel may be recognized in specific and varied situations. But at the same time, they do not support the conclusion that there is a general constitutional right to counsel in proceedings before courts and tribunals dealing with rights and obligations.⁸⁵

In proceedings that are determined without an oral hearing, it is uncontroversial that a party may be represented by counsel—that is, there will be no cause for a decision-maker to refuse to deal with a party through his or her counsel. Representation by counsel is usual in the context of oral hearings, and the right to be represented by counsel is often set out in legislation. The right may extend beyond counsel to representation by a lay representative, depending on the nature of the proceedings and their sophistication.

At the same time, the right to counsel should not be understood in all or nothing terms. Even where there is a right to counsel, the right may be subject to limits. There will often be good reasons to limit the role of counsel in particular proceedings: although counsel may be of considerable benefit to the represented party, the involvement of counsel in administrative proceedings is likely to occasion additional cost, delay, and related problems for the administrative decision-maker, in addition to other parties to the proceedings.

Of course, it is one thing to have a right to be represented by counsel and another to be able to exercise that right: legal counsel is expensive, and as a practical matter may be beyond

⁸⁴ See e.g. *Khan v. University of Ottawa* (1997), 34 O.R. (3d) 535 (C.A.), requiring that an oral hearing be held in the circumstances of an improbable factual claim made in the context of a grade appeal.

⁸⁵ 2007 SCC 21, [2007] 1 S.C.R. 873 at para. 27.

the reach of many in the administrative process. The Court acknowledged as much in rejecting the existence of a general right to counsel and considered cost to be a primary reason for denying the existence of such a constitutional right:

This general right to be represented by a lawyer in a court or tribunal proceedings where legal rights or obligations are at stake is a broad right. It would cover almost all—if not all—cases that come before courts or tribunals where individuals are involved. Arguably, corporate rights and obligations would be included since corporations function as vehicles for individual interests. Moreover, it would cover not only actual court proceedings, but also related legal advice, services and disbursements. ... [T]he logical result would be a constitutionally mandated legal aid scheme for virtually all legal proceedings, except where the state could show this is not necessary for effective access to justice.⁸⁶

The Court has held, however, that where a deprivation of life, liberty, or security of the person is at stake, the principles of fundamental justice may in some cases require the provision of counsel in the administrative process.⁸⁷

5. *Right to Call Evidence and Cross-Examine Witnesses*

The right to call and cross-examine witnesses is normally part of the right to an oral hearing. The right is not absolute, however; administrative actors control their own procedures and may limit the exercise of the right.⁸⁸ The guiding principle is that parties must be afforded a reasonable opportunity to present their cases. In *Innisfil (Township) v. Vespra (Township)*, Justice Estey emphasized that the right of cross-examination is not to be withheld on the basis of a judgment by the tribunal that it is of limited utility: “The decision to exercise the right is solely that of the holder of the right. He, of course, must exercise it at his peril as is the case in any other administrative or judicial proceeding where such a right arises.”⁸⁹

6. *Timeliness and Delay*

Administrative decision-makers are not usually under specific statutory timelines for holding hearings or making decisions. Nor is there a Charter right to have an administrative matter heard or determined within a reasonable time—no equivalent to the right to a trial within a reasonable time (s. 11(b)), which applies only to persons charged with an *offence*.

It was inevitable that the question of delay would arise in the context of the administrative proceedings, for despite the relative advantages administrative tribunals are presumed

⁸⁶ *Ibid.* at para. 13.

⁸⁷ *New Brunswick (Minister of Health and Community Services) v. G.(J.)*, [1999] 3 S.C.R. 46 (applicant at risk of losing custody of children in proceedings brought by the state).

⁸⁸ This is reflected in procedural legislation such as Ontario’s *Statutory Powers Procedure Act*, *supra* note 18, s. 3(2) and British Columbia’s *Administrative Tribunals Act*, *supra* note 17, s. 38(2), both of which provide rights to cross-examination while permitting tribunals to limit examination and cross-examination to what they consider sufficient in the circumstances.

⁸⁹ [1981] 2 S.C.R. 145 at 171.

to enjoy over courts—their ability to provide more efficient, less formal, and less expensive justice—administrative tribunal processes are often anything but speedy. It is not unusual for litigation before administrative tribunals to take longer than a criminal law prosecution involving the most serious offences. Many hearing days may be required to address a matter, and the need to balance the schedules of counsel and tribunal members—many of whom may be part-time members—can exacerbate the problem. Hearing days may be spread over many months and decisions may not be made for many months following the conclusion of a hearing.

Delay in the administrative process can have significant consequences, as the facts of *Blencoe v. British Columbia (Human Rights Commission)*⁹⁰ demonstrate. In that case, a former minister in a British Columbia government sought an order staying human rights tribunal proceedings in complaints against him, over 30 months after the date the complaints were filed. During that time his political career came to an end: he was dismissed from Cabinet, expelled from his caucus, and suffered from depression. The majority of the Supreme Court concluded that, in some circumstances, delay in the administrative process might rise to the level of a deprivation of liberty or security of the person under s. 7 of the Charter, which would violate the right if not in accordance with the principles of fundamental justice. In addition, the majority concluded that “undue” delay in an administrative proceeding might impair the fairness of a hearing, and could result in an abuse of process even if the fairness of a hearing were not compromised. However, the majority of the Court concluded that the delay did not infringe either s. 7 of the Charter or the duty of fairness in Blencoe’s case.

The minority of the Court chose to deal with the matter solely on administrative law grounds and set out three considerations that had to be balanced in considering complaints of administrative delay:

(1) *the time taken compared to the inherent time requirements* of the matter before the particular administrative body, which would encompass legal complexities (including the presence of any especially complex systemic issues) and factual complexities (including the need to gather large amounts of information or technical data), as well as reasonable periods of time for procedural safeguards that protect parties or the public;

(2) *the causes of delay beyond the inherent time requirements of the matter*, which would include consideration of such elements as whether the affected individual contributed to or waived parts of the delay and whether the administrative body used as efficiently as possible those resources it had available; and

(3) *the impact of the delay*, considered as encompassing both prejudice in an evidentiary sense and other harms to the lives of real people impacted by the ongoing delay. This may also include a consideration of the efforts by various parties to minimize negative impacts by providing information or interim solutions.⁹¹

⁹⁰ *Supra* note 28. See also the discussion of *Blencoe* by Evan Fox-Decent and Alexander Pless in Chapter 12, The Charter and Administrative Law: Cross-Fertilization or Inconstancy?

⁹¹ *Blencoe*, *supra* note 28 at para. 160 (italicized portions underlined in original).

The minority emphasized the importance of a contextual inquiry into the problem, eschewing the sorts of time limits or guidelines that caused so much difficulty in the context of the criminal law.⁹² In the context of administrative proceedings, there were important interests, apart from those of persons complaining of delay, that had to be considered—in Blencoe’s case, the interests of the women who complained of sexual harassment. The state was not Blencoe’s antagonist, and staying the ability of the human rights tribunal to hold the hearing would deny the complainants their right to have their complaints heard. Thus, although they considered that the delay in Blencoe’s case constituted an abuse of process, the minority of the Court considered that a stay of proceedings was inappropriate and would have made an order to expedite the proceedings instead.

Following *Blencoe*, it is clear that delay in providing a hearing—or, presumably, in rendering a decision⁹³—may breach the duty of fairness and may even rise to the level of a Charter breach. But the normal remedy for delay is likely to be an order in the nature of mandamus, requiring the tribunal to perform its duty expeditiously.

7. *The Duty to Give Reasons*

Historically, there was no duty on administrative decision-makers to give reasons. That changed in *Baker*, when Justice L’Heureux-Dubé stated simply:

In my opinion, it is now appropriate to recognize that, in certain circumstances, the duty of procedural fairness will require the provision of a written explanation for a decision. The strong arguments demonstrating the advantages of written reasons suggest that, in cases such as this where the decision has important significance for the individual, when there is a statutory right of appeal, or in other circumstances, some form of reasons should be required.⁹⁴

The scope of the duty established in *Baker* is limited, at least in principle. Reasons are not required for all decisions; rather, they are required in “certain circumstances.” L’Heureux-Dubé J. spelled out two such circumstances, and these reflect the dignitary and instrumental rationales that underlie the duty of fairness itself. Reasons are required if a particular decision has “important significance” for an individual, because public actors demonstrate respect for those affected by their decisions by justifying the decisions they make. Reasons are also required if a statutory appeal process exists to facilitate the workings of that process. It is difficult, if not impossible, to determine whether to appeal a particular decision and which sorts of arguments to make on appeal if no explanation is provided for that decision.

⁹² The Charter right to trial within a reasonable time has given rise to the extreme remedy of having charges stayed, most controversially in *R. v. Askov*, [1990] 2 S.C.R. 1199, which resulted in tens of thousands of charges being stayed or withdrawn. The Court revisited the decision in *Askov* in *R. v. Morin*, [1992] 1 S.C.R. 771 and tightened things considerably.

⁹³ For an Australian example, see *NAIS v. Minister for Immigration and Multicultural and Indigenous Affairs* (2005), 228 C.L.R. 470 (hearing spread over several years, culminating in a decision by the Refugee Review Tribunal five years following the commencement of the claim violates fairness). For a New Zealand example, see *Ngunguru Coastal Investments Ltd. v. Maori Land Court*, [2011] N.Z.A.R. 354 (three-year delay in rendering a reserve decision by land court violates fairness).

⁹⁴ *Baker*, *supra* note 57 at para. 43.

Baker left open a potentially large residual discretion for courts to require reasons: reasons may be required in “other circumstances.” Moreover, *Baker* contemplates flexibility in complying with the duty to give reasons. The requirement is to provide “some form of reasons” and, as a result, reasons may vary in length and formality in different circumstances. This reflects the wide variety of decision-makers covered by the duty and their relative abilities. Not all decisions are made by lawyers nor are they made on the basis of sophisticated submissions that help guide the decision-maker, and these considerations must be taken into account in determining the nature and scope of the duty to provide reasons. This is typified by the facts of *Baker* itself: the Court accepted that informal notes prepared by one immigration officer for the advice of another satisfied the duty.⁹⁵

Two main concerns are likely to arise with regard to the duty to provide reasons. First, there may be a failure to provide reasons in circumstances in which a court concludes that reasons were required.⁹⁶ Second, questions may arise as to the adequacy of reasons proffered in particular circumstances, and it may be argued that inadequate reasons are tantamount to no reasons at all, and hence a violation of the duty.⁹⁷ As this argument suggests, there may be considerable overlap between the question *whether* reasons have been given and questions concerning the quality of reasons proffered in a particular case—the latter being a matter for substantive rather than procedural review.

The Court rejected a bifurcated approach to procedural and substantive questions about the duty to provide reasons in *Newfoundland and Labrador Nurses’ Union v. Newfoundland and Labrador (Treasury Board)*.⁹⁸ The Court emphasized that reasons need not be provided in all cases and asserted that *Baker* does not establish that the quality of the reasons proffered in a particular case is a question of procedural fairness. On the contrary, as Justice Abella pointed out, the threshold for satisfying the requirement to provide reasons is very low:

It strikes me as an unhelpful elaboration on *Baker* to suggest that alleged deficiencies or flaws in the reasons fall under the category of a breach of the duty of fairness and that they are subject to a correctness review. ... [If] there *are* reasons, there is no such breach. Any challenge to the reasoning/result of the decision should therefore be made within the reasonableness analysis.⁹⁹

This seems clear enough, but Abella J. went on to endorse an observation made by David Dyzenhaus that the concept of deference to a decision requires “respectful attention to the

⁹⁵ The concession of counsel that these were in fact the reasons for the minister’s decision facilitated the Court’s decision—the notes were proffered in response to the request of Baker’s counsel for reasons.

⁹⁶ See e.g. *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*, 2004 SCC 48, [2004] 2 S.C.R. 650 at para. 13 (reasons for municipal council’s refusal of rezoning application “serves the values of fair and transparent decision-making, reduces the chance of arbitrary or capricious decisions, and cultivates the confidence of citizens in public officials”). Cf. *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2 (reasons not required for passing municipal bylaws, as opposed to municipal decisions involving quasi-judicial adjudication).

⁹⁷ See e.g. *Clifford v. Ontario Municipal Employees Retirement System* (2009), 312 D.L.R. (4th) 70 (Ont. C.A.); *Sussman v. College of Alberta Psychologists* (2010), 490 A.R. 304 (Alta. C.A.).

⁹⁸ 2011 SCC 62, [2011] 3 S.C.R. 708 [*Newfoundland Nurses’ Union*].

⁹⁹ *Ibid.*, at paras. 21-22. Remarkably, the Court did not discuss the conflicting authority in provincial appellate courts, *supra* note 97.

reasons offered or which could be offered in support of a decision.”¹⁰⁰ Dyzenhaus was not concerned with cases in which no reasons were provided; he was addressing a situation in which the reasons provided were “in some respects defective.”¹⁰¹ It would be more apt to have said “deficient,” for Dyzenhaus was concerned with the situation in which reasons were insufficient rather than problematic. This was the context in which he argued that a court could “supplement” the reasons for a decision.¹⁰²

Given that one reason for deferring to the decisions of administrative actors is to respect the decision of the legislature to confer decision-making authority on them, the extent to which a generalist court can legitimately “supplement” the reasons for decisions they make is surely contestable. This is supported by the more limited reading the majority of the Court gives to the concept of “reasons which could be offered” in *Alberta (Information and Privacy Commissioner) v. Alberta Teachers’ Association*.¹⁰³ In that case, Justice Rothstein described the concept as “apposite when the decision concerns an issue that was not raised before the decision maker,” and emphasized that courts are not to reformulate a tribunal’s reasons in order to render them reasonable.¹⁰⁴ On his account, the concept is useful mainly as a means of precluding the parties from misleading a tribunal by failing to raise a matter—in effect, causing the failure to provide reasons that is subsequently challenged on judicial review. Thus, Rothstein J.’s decision contemplates that it may sometimes be necessary to return a decision in order to allow a decision-maker to provide reasons on a particular matter, thereby allowing the Court to defer on an informed basis if the decision is reviewed subsequently.

All of this is to say that much requires clarification in future cases. At least this much is clear: a wholesale failure to provide reasons will constitute a breach of the duty of fairness. Following *Newfoundland Nurses’ Union*, however, the Court will not be concerned with the adequacy or sufficiency of reasons in determining whether the duty to provide reasons has been met. The focus will be on the substantive question: do the reasons, such as they are,

¹⁰⁰ David Dyzenhaus, “The Politics of Deference: Judicial Review and Democracy” in Michael Taggart, ed., *The Province of Administrative Law* (Oxford: Hart, 1997) 279 at 286 [Dyzenhaus] (emphasis added). Dyzenhaus’s observation was made prior to the establishment of a duty to give reasons in *Baker*, *supra* note 57, in the context of elaborating his “deference as respect” concept. Ironically, Dyzenhaus professed to being “undecided on the important topic of whether my argument entails the claim that there is a common law duty on tribunals to give reasons” (Dyzenhaus, *ibid.*, at n. 63), and went on to refer with apparent approval to the then common criticism that “a reason-giving requirement invites both judicial activism and distortion of the administrative process.”

¹⁰¹ Dyzenhaus, *ibid.* at 304.

¹⁰² “[E]ven if the reasons in fact given do not seem wholly adequate to support the decision, the court must first seek to supplement them before it seeks to subvert them.” Dyzenhaus, *ibid.*

¹⁰³ 2011 SCC 61, [2011] 3 S.C.R. 654. This case was released one day prior to the decision in *Newfoundland Nurses’ Union*, *supra* note 98, but is not mentioned in that judgment.

¹⁰⁴ Justice Rothstein refers with approval to *Petro-Canada v. British Columbia (Workers’ Compensation Board)*, 2009 BCCA 396 at paras. 53, 56, where the Court stated that respectful attention to the reasons “which could be offered in support of a decision” is not “carte blanche to reformulate a tribunal’s decision in a way that casts aside an unreasonable chain of analysis in favour of the court’s own rationale for the result.”

“allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes”?¹⁰⁵

VI. Judicial Review of the Duty of Fairness

It is well established that the requirements of the duty of fairness are independent of the merits of the substantive matter in issue and that breach of the duty voids a decision. The Supreme Court of Canada expressed the point categorically in *Cardinal*:

[T]he denial of a right to a fair hearing must always render a decision invalid, whether or not it may appear to a reviewing court that the hearing would likely have resulted in a different decision. The right to a fair hearing must be regarded as an independent, unqualified right which finds its essential justification in the sense of procedural justice which any person affected by an administrative decision is entitled to have. It is not for a court to deny that right and sense of justice on the basis of speculation as to what the result might have been had there been a hearing.¹⁰⁶

This statement of the law finds considerable support in English law and its rationale is best set out in the oft-quoted remarks of Justice Megarry:

It may be that there are some who would decry the importance which the courts attach to the observance of the rules of natural justice. “When something is obvious,” they may say, “why force everybody to go through the tiresome waste of time involved in framing charges and giving an opportunity to be heard? The result is obvious from the start.” Those who take this view do not, I think, do themselves justice. As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change. Nor are those with any knowledge of human nature who pause to think for a moment likely to underestimate the feelings of resentment of those who find that a decision against them has been made without their being afforded any opportunity to influence the course of events.¹⁰⁷

However, in *Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board*,¹⁰⁸ the Court endorsed the view expressed by Sir William Wade that “[a] distinction might perhaps be made according to the nature of the decision. In the case of a tribunal which must decide according to law, it may be justifiable to disregard a breach of natural justice where the demerits of the claim are such that it would in any case be hopeless.”¹⁰⁹ The

¹⁰⁵ The concept of reasonableness is addressed by Sheila Wildeman in Chapter 10, *Pas de Deux: Deference and Non-Deference in Action*.

¹⁰⁶ *Cardinal*, *supra* note 10 at para. 23.

¹⁰⁷ *John v. Rees*, [1970] Ch. 345 at 402.

¹⁰⁸ [1994] 1 S.C.R. 202 [*Mobil Oil*].

¹⁰⁹ William Wade, *Administrative Law*, 6th ed. (Oxford: Oxford University Press, 1988) at 535. This is repeated in H.W.R. Wade & C.F. Forsyth, *Administrative Law*, 10th ed. (Oxford: Oxford University Press, 2009) at 424.

Court refused to quash a decision in the face of a breach of procedural fairness in *Mobil Oil*, but did so on the basis that it would be “impractical” and “nonsensical” to do so, because, as a result of a cross-appeal, the tribunal would have no alternative but to reject the application in question. The Court described these circumstances as “exceptional,” and reiterated that it “would not wish to apply it [the exception] broadly.” Thus, *Cardinal* remains good law and the *Mobil Oil* exception should be rare.¹¹⁰

It is important to emphasize that although judicial review is concerned with deciding what the duty of fairness requires in the circumstances of a particular decision, the reviewing court’s decision is made *after* the decision is made, and is made in the knowledge that a finding that the duty of fairness was breached will result in the relevant decision being quashed.

The retrospective nature of fairness determinations brings to mind Jeremy Bentham’s complaint about the common law.¹¹¹ The problem is mitigated by the sort of institutional knowledge that builds up over time. Still, there may be a tendency for risk-averse administrators to provide more than the duty of fairness might otherwise be held to require in order to ensure that their decisions can withstand judicial review.

Judicial review of a decision on procedural grounds must be differentiated from judicial review on substantive grounds. The Supreme Court of Canada subjects substantive decisions to review on either a correctness or a reasonableness standard, pursuant to which the Court may defer to the decisions of an administrative agency.¹¹² No similar approach is taken with regard to the duty of fairness. Historically, compliance with the duty of fairness has been regarded as a jurisdictional question and, as such, a question that must be answered correctly. If it is not, then jurisdiction will be lost, the relevant decision will be quashed, and the decision-maker will be required to make a fresh decision in accordance with the correct procedure.

¹¹⁰ Nevertheless, some courts appear to have assumed the existence of a broader discretion to refuse to quash a decision where the duty of fairness has been breached. In *Veillette v. International Association of Machinists and Aerospace Workers*, 2011 FCA 32 at para. 16, the Federal Court of Appeal put the point this way: “Even a breach of the principles of natural justice or procedural fairness does not automatically invalidate the decision.” In addition to *Mobil Oil*, *supra* note 108, the Court cited *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41; *Halifax Employers Ass. Inc. v. Council of ILA Locals for the Port of Halifax*, 2006 FCA 82; *Société des arrimeurs de Québec v. Canadian Union of Public Employees, Local 3810*, 2008 FCA 237; *Palonek v. Canada (Minister of National Revenue—M.N.R.)*, 2007 FCA 281; and *Cartier v. Canada (Attorney General)*, 2002 FCA 384. Cf. *Persaud v. Canada (Citizenship and Immigration)*, 2011 FC 31 at para. 19, in which Justice Hughes of the trial division reads the *Mobil Oil* exception much more narrowly: “The point being made by the Supreme Court is that where a breach of natural justice or procedural fairness has been found the Court cannot refuse to send it back because it supposes that the case would be found to be futile. A rare exception exists where the remedy sought would not be relevant in the context of the matter presently before the Court.”

¹¹¹ Jeremy Bentham, *The Works of Jeremy Bentham*, ed. by John Bowring, vol. 5 (Edinburgh: W. Tait, 1843) at 235: “It is the judges (as we have seen) that make the common law. Do you know how they make it? Just as a man makes laws for his dog. When your dog does anything you want to break him of, you wait till he does it, and then beat him for it. This is the way you make laws for your dog: and this is the way the judges make law for you and me.” (First published in 1792 as “Truth Versus Ashurst; or, Law as It Is, Contrasted with what It Is Said to Be.”)

¹¹² *Dunsmuir*, *supra* note 9.

As we have seen, there is some room for deference when it comes to determining the content of the duty of fairness, because the procedural choices made by the decision-maker are one of the considerations courts must take into account. However, once the content of the duty in a particular context has been determined, the question for the court is simply whether the duty of fairness has been met on the facts of the case—a question that will yield a yes or no answer.

Violation of the duty of fairness will not result in the imposition of a substantive outcome by the court. The role of the court is to supervise the decision-making *process*—to ensure that the relevant decision has been made properly, not that the “proper” decision has been made. Although a successful application for judicial review on fairness grounds will result in an order quashing a decision and requiring it to be made anew, nothing necessarily prevents the decision-maker from reaching the same substantive decision. Nevertheless, as *Baker* demonstrates, a new hearing may well lead to a different outcome. Mavis Baker was subsequently granted the humanitarian and compassionate exception she sought and was allowed to stay in Canada.

Whether or not a different result obtains on a rehearing, the consequences of a breach of the duty of fairness may be significant. Administrative proceedings can take months—even years—and be hugely expensive for all those involved.¹¹³ An order quashing a decision may cause great inconvenience not only to those involved but also to the public interest, by requiring that proceedings be repeated, with all the associated cost and delay. Strict adherence to the automatic quashing remedy may result in problems from time to time. Moreover, the automatic nature of the remedy may turn out to be counterproductive to the protection of the right. It is possible that, in close cases, courts might err on the side of finding that the duty has been met, given the far-reaching consequences an order quashing a particular decision may have. As long as quashing is the usual remedy for a breach of fairness, courts may be circumspect in expanding the scope and content of the duty of fairness.

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¹¹³ See e.g. *Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System)*, *supra* note 29 (judicial review of commission of inquiry [the Krever commission] that held hearings over a two-year period).

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