Fairness: The Right to Be Heard

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Learning Outcomes

After reading this chapter, you will understand

- the sources of fairness procedures for departments and tribunals and other agencies;
- the factors that determine the appropriate level of procedural fairness to be provided by a department or a tribunal or other agency;
- the two main principles or "pillars" of common law procedural fairness;
- the rights and duties entailed by the first principle of procedural fairness—the right to be heard;
- what constitutes adequate notice of a tribunal's proceedings; and
- the exceptions to and limits on the duty of departments and tribunals and other agencies to ensure that parties receive the rights entailed by the right to be heard.

> *The Islands Protection Society is an environmental body that is comprised of approximately 1200 members. It concerns itself with matters of environmental interest in the Queen Charlottes. The society has filed a notice of appeal with respect to [two permits to spray pesticides on 300 hectares of timber on the Queen Charlotte Islands]. The society has requested that the appeals be conducted by way of oral public hearings. The [Environmental Appeal] Board denied this request and concluded that the appeals would be determined solely on the basis of written submissions. … It is agreed that generally, in the absence of legislation, there is no absolute obligation upon an administrative tribunal to hold oral hearings in order to comply with the rules of natural justice. However, in this case the clear implication from the legislation is that an oral hearing is required. … The legislation in this case contemplates the holding of open public hearings with full participation by interested parties. The Lieutenant Governor in Council has deemed the spraying of pesticides to be of such significance that it has given concerned members of the community who are not parties to the action the right to appeal or intervene. The issue of whether the board ought to either set aside or uphold the granting of the permits is of obvious public importance. It would be fundamentally wrong and against the rules of natural justice to hear and determine matters of such public importance without holding public hearings in which oral evidence and representations can be heard.*
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> *Islands Protection Society v Environmental Appeal Board* (1986), 8 BCLR (2d) 30

As discussed in Chapter 3 (The Foundations of Administrative Law), today all government decision-makers must follow fair procedures when making decisions that affect people's rights, privileges, and interests. Unlike in the past, the distinction between administrative and quasi-judicial decisions no longer governs whether procedural fairness is required. However, what specific procedures *are* required still depends to some extent on the nature of the decision, including where it falls on the decision-making spectrum, from purely administrative to quasi-judicial.

For officials and bodies that follow an informal decision-making process, the duty to be fair often only entails giving notice of the intended decision and an opportunity to respond to the individual or individuals who will be affected by the decision. For tribunals that hold formal hearings, however, fairness often requires more elaborate procedures; these apply to tribunal staff as well as to tribunal members, and they apply both inside and outside the hearing room.

Where Procedural Fairness Rules Are Found

Procedural fairness rules are found in agencies' enabling statutes, in other statutes under which agencies make decisions, in common law principles applied by the courts, and in the *Canadian Charter of Rights and Freedoms*, the *Canadian Bill of Rights*, and Quebec's *Charter of Human Rights and Freedoms*. As discussed in Chapter 3, section 35 of the *Constitution Act, 1982* also requires adequate consultation with First Nations before development decisions are made that may affect Indigenous land claims.

Several provinces have statutes that create uniform procedural fairness requirements for a variety of tribunals and, in some cases, for other agencies.

While the procedures that tribunals must follow to ensure fairness are usually set out in their enabling statutes, the statutes that grant powers to internal government decision-makers are often silent about the procedures that those decision-makers must follow. These procedures may be set out in departmental guidelines or policies. For the minimum requirements that a bureaucrat *must* follow in a particular case, it is often necessary to look to common law fairness principles and try to apply them to that case.

Procedural fairness is "contextual," not absolute. That is, the amount of fairness required depends on the context. The more serious the consequences of a procedure, the greater the fairness required. In *Baker v Canada (Minister of Citizenship and Immigration)*,[1] the Supreme Court said that in determining the appropriate level of fairness and the specific procedures that must be followed by a tribunal or other agency, one should look at

- the nature of the decision (where it falls on the spectrum from administrative to quasi-judicial decision-making processes);
- the nature of the statutory scheme (for example, where the statute does not provide for an appeal from an administrator's decision, more fairness safeguards may be warranted in making the initial decision than if an appeal were available);
- the importance of the decision to the affected person;
- the extent to which the person affected has legitimate expectations of a particular process; and
- the extent to which the legislature intended the decision-maker to have discretion to choose its own procedure.

Permissible Departures from Common Law Procedural Fairness Requirements

If a statute or regulation sets out a more specific fairness requirement than the common law in a particular situation, the statutory requirement takes precedence, regardless of whether it is more onerous or less onerous than the common law requirement.

For example, in Ontario, a person is entitled to refuse medical treatment unless a doctor convinces the Consent and Capacity Board that the patient lacks the mental capacity to make an informed decision. The *Health Care Consent Act, 1996*[2] requires that the hearing take place within seven days of a patient application to the board to overturn a doctor's decision that the patient lacks capacity. This short time frame takes precedence over the general rule that each side must be given adequate notice of the hearing. In other circumstances, under other statutes, "adequate" notice might be a month; in this case, adequacy is determined by the fact that the hearing itself must be held within seven days.

Similarly, although the evidence and arguments presented by one party must usually be shared with other parties, some statutes permit an adjudicator to scrutinize the information provided by one party without sharing it with the other parties in

1 [1999] 2 SCR 817.

2 SO 1996, c 2, Schedule A.

cases where allowing others to see the information would result in serious harm or loss to the party who provided it. Statutes that give the public a right of access to government records while protecting personal privacy generally fall into this category. If the government refuses an applicant access to a document, this decision can be appealed to a tribunal. The tribunal will scrutinize the document to determine whether to order the government to release it, but the applicant will not be permitted to see the document, even though this would help the applicant argue his or her case effectively. If the applicant saw the document, he or she would win by default, the government would lose by default, and the proceedings would, effectively, be unnecessary.

The Common Law Principles of Procedural Fairness

As mentioned in Chapter 3, the basic principles of procedural fairness may be reduced to just two: the right to be heard and the right to an unbiased decision-maker. Each of these pillars of procedural fairness has a number of components. This chapter discusses the components of the right to be heard. The components of the right to an unbiased decision-maker are discussed in Chapter 7, Fairness: Bias.

The Requirement to Provide a Hearing: The First Pillar of Procedural Fairness

Whenever a government decision-maker intends to make a decision that will substantially affect a person's individual rights, privileges, or interests, that person must be given an opportunity to be heard. However, this does not always mean that the person must be given a "hearing," in the sense of a formal procedure like that of a court, where witnesses are sworn in, asked questions, and cross-examined. Rather, it means that all the information necessary for the decision-maker to make a fair decision must be received and considered. In this chapter, the term "hearing" is used to denote both the opportunity to be "heard" by an administrator and the more formal hearing required when the decision-maker is a tribunal.

hearing
refers both to the opportunity to be "heard" by an administrative decision-maker, in the sense of being notified of an intended decision and given an opportunity to respond, and to the more formal hearing required when the decision-maker is a tribunal, including the various procedural safeguards that are appropriate given the nature and complexity of the issues involved and the seriousness of the consequences of the decision to the parties and the public

There is no single formula for a **hearing**. In some cases, the presentation of the necessary information in writing will be considered a hearing; in other cases, the presentation of oral evidence and cross-examination of witnesses will be considered a hearing. In general, the higher the stakes are, the more procedural safeguards are necessary for a procedure to be considered a "hearing."

There is often a decision-making "ladder." On the bottom rung is a decision such as a decision to issue a licence or permit or to grant a benefit, made by a departmental official. Procedural fairness is required, but will often be fulfilled by very informal procedures. There is sometimes a middle rung between the initial decision and a formal hearing before a tribunal—a relatively informal review by a different official of the department. If this review does not resolve the conflict, there is often a third rung on the ladder: an appeal to an independent tribunal. It is at this stage that the most rigorous procedures for fairness are required, such as disclosure of all relevant

documents and evidence, an oral hearing, cross-examination, a right to be represented by a lawyer or agent, and a right to reasons for the tribunal's decision.

In proceedings before a tribunal, the complexity and comprehensiveness of the procedures required for a hearing depend on the nature and complexity of the issues involved and the seriousness of the consequences of the decision to the parties and the public. For example, suppose that two parties oppose each other and the credibility of witnesses is in issue. A process that does not allow parties to know what witnesses have said about them and does not provide an opportunity for cross-examination will not be considered a hearing—or it will be considered an unfair hearing. Where there is only one party, a less formal process will sometimes meet the procedural fairness requirements of a hearing.

If a court conducting a judicial review or appeal of a decision-making process is not satisfied that the process was fair, it may say that the decision-maker failed to hold a hearing, or it may characterize the process as an unfair hearing. "Hearing" and "fair hearing" are sometimes used interchangeably.

As mentioned, the general procedural administrative statutes that govern provincial tribunals specify the minimum procedures that will be considered a "hearing" or a "fair hearing": in Ontario, the *Statutory Powers Procedure Act*[3] (SPPA); in Alberta, the *Administrative Procedures and Jurisdiction Act*[4] (APJA); in Quebec, the *Administrative Justice Act*[5] (AJA); and in British Columbia, the *Administrative Tribunals Act*[6] (ATA). For a summary of the statutes of general application for Ontario, Alberta, Quebec, and British Columbia, refer back to Table 3.1.

In Ontario, the requirements for a fair hearing before tribunals subject to the SPPA are generally more stringent than the requirements for hearings before tribunals that are not subject to the SPPA. Historically, one of the most significant differences between tribunals subject to the SPPA and other tribunals was that tribunals under the SPPA were generally required to hold oral hearings—hearings in which the parties, witnesses, and tribunal members were all physically present—and to permit cross-examination of all witnesses. Amendments to the SPPA in the 1990s changed this, allowing tribunals to hold written and electronic hearings without parties' consent as long as such hearings do not prejudice any of the parties. In electronic hearings, some form of cross-examination of witnesses may still be required; in written hearings, the exchange of written questions and answers may be substituted for oral cross-examination.

Some tribunals that are not subject to the SPPA are specifically authorized by legislation to hold their inquiries in writing—for example, hearings by a board of review under sections 14(3) and (5) of Ontario's *Family Benefits Act*.[7] Others can do this without legislation because the courts accept that the issues they deal with can be addressed in writing without creating unfairness, or because any potential unfairness in holding a written hearing is outweighed by the negative effects of holding a hearing where all parties are present.

3 RSO 1990, c S.22.

4 RSA 2000, c A-3.

5 CQLR c J-3.

6 SBC 2004, c 45.

7 RSO 1990, c F.2.

The Requirement to Give All Parties an Opportunity to Be Heard

In addition to the duty of fairness it owes to the person who initiates the process or from whom rights or privileges may be taken away, a tribunal has a duty to ensure that all other parties and persons who may be substantially affected by the decision are given an adequate opportunity to present their cases. This principle is expressed in the Latin phrase *audi alteram partem*, which means "hear the other side."

> *One man's word is no man's word; we should quietly hear both sides.*
>
> Johann Wolfgang von Goethe

An adequate right to be heard usually implies a measure of equality, although precise equality is not always necessary. As mentioned, for all parties to be "heard," it is not always necessary for all parties to present oral evidence in the presence of the tribunal and for witnesses to be cross-examined. In some cases, as long as each party has had an opportunity to submit written material and to respond to the other parties' written material, the hearing will be considered a fair one. In other cases, nothing less than a right to be present, give testimony orally, and cross-examine opposing witnesses will conform to the *audi alteram partem* principle.

Components of the Right to Be Heard

The Right to Notice

notice
a document that informs a person of a legal proceeding that may affect the person's interests or in which the person may have a right to participate

All parties and other persons whose rights, privileges, or interests may be substantially affected by a tribunal's decision are entitled to **notice** of the proceeding. This includes an explanation of the reason for the hearing, which usually involves setting out the decision or proposed decision that will be reviewed by the tribunal, the reasons for the decision, and the legal and/or policy basis for the decision. The notice must also state the date, time, and location of the hearing.

The purpose of notice is to give the parties sufficient information about the subject matter of the hearing to allow them to prepare their case, and to give them enough time to do so. The notice should also give the parties a reasonable opportunity to make any arrangements necessary to allow them to attend the hearing themselves, and to allow their representatives and witnesses (if any) to be present as well. If persons other than the parties may be affected by the tribunal's decision, these individuals must also be given notice; the notice should provide these other persons with information about their right to apply for party status or to participate in the proceeding in other ways.

Thus, to be considered adequate, the notice must

1. provide participants with an explanation of what the hearing is about that is sufficient to allow them to prepare to address the issues, and
2. provide them with sufficient time to prepare.

Adequate notice also involves scheduling the hearing at a time when affected persons can participate.

Sometimes the tribunal is responsible for drafting the notice explaining what the hearing is about and giving notice to the appropriate individuals, and sometimes the notice is drafted by the decision-maker whose decision the tribunal will review. For example, when a person appeals a municipality's land-use planning decision to the Ontario Municipal Board, the board sets the date for the hearing but the municipality is responsible for sending out the notices.

Although the first element of adequate notice is particularly important, it is not always followed. Decision-makers whose decisions are being reviewed by a tribunal do not always explain their decisions in a form that allows the person challenging their decision to know exactly what they decided or why. This leads to confusion at hearings, as well as to unnecessary complexity, cost, and delay. For example, it may be necessary to grant an adjournment in order for the person affected by a decision to be given further details regarding what was decided and why before the hearing can proceed.

Limits on the Right to Notice

In the absence of a statutory or Charter requirement, the right to notice does not always include a requirement for disclosure of evidence beyond the bare minimum required to inform a party of the case it must meet. Disclosure of evidence means providing parties with all relevant information in the other side's possession that may be useful as evidence at the hearing. The purpose of disclosure is to give all parties, before the hearing begins, a reasonable opportunity to know the evidence that will be produced against them, as well as evidence in the possession of other parties that may help them. It gives a party an opportunity to produce, at the hearing, evidence that supports its position that is in the possession of an opposing party but that the other party may not put before the tribunal because it would not help that party's case. Disclosure thus prevents "trial by ambush."

At common law, traditionally there was no general procedural fairness requirement for advance disclosure of evidence in proceedings before tribunals, only the right of parties to know the basic substance of the proceeding. Instead, the common law required that, on the presentation of surprise evidence by one party, a request by the other party for an adjournment be granted to allow the other party to prepare a response.

Although the courts have traditionally been unwilling to recognize advance disclosure of evidence as generally being a component of procedural fairness, they have stated that there may be circumstances where disclosure is necessary to ensure procedural fairness. Courts have held that procedural fairness requires disclosure of evidence beyond the minimum requirements for notice in certain cases where the proceedings have serious consequences for an individual, such as disciplinary proceedings and human rights adjudication. The right to disclosure is also enhanced when a Charter right is involved.[8]

In its 2005 decision in *May v Ferndale Institution*, the Supreme Court of Canada expanded the common law requirement for disclosure. The court held that the duty of procedural fairness generally requires a statutory decision-maker to disclose the information that he or she relied on in reaching a decision.[9]

8 *Charkaoui v Canada (Citizenship and Immigration)*, 2008 SCC 38, [2008] 2 SCR 326.

9 2005 SCC 82, [2005] 3 SCR 809 at para 92.

particulars
details that explain or clarify matters related to evidence, arguments, or remedies disclosed before or in the course of a proceeding—for example, details and clarifications of allegations made by one party against another, or, where the tribunal staff presents the case, details of allegations made by the tribunal staff against a party

Section 5.4(1) of the SPPA gives tribunals the power to require disclosure of particulars in addition to evidence as long as the tribunal has made rules governing this process. **Particulars** are details that explain or clarify matters related to evidence, arguments, or remedies disclosed before or in the course of a proceeding—for example, details and clarifications of allegations made by one party against another or, where the tribunal staff presents the case, details of allegations made by the tribunal staff against a party.

Most tribunals have rules related to disclosure requirements. For example, Rule 16 of the Human Rights Tribunal of Ontario Rules of Procedure states the following with regard to disclosure of documents.

RULE 16 DISCLOSURE OF DOCUMENTS

16.1 Not later than 21 days after the Tribunal sends a Confirmation of Hearing to the parties, each party must deliver to every other party (and file a Statement of Delivery):

a. a list of all arguably relevant documents in their possession. Where a privilege is claimed over any document the party must describe the nature of the document and the reason for making the claim; and,

b. a copy of each document contained on the list, excluding any documents for which privilege is claimed.

16.2 Unless otherwise ordered by the Tribunal, not later than 45 days prior to the first scheduled day of hearing, each party must deliver to every other party (and file a Statement of Delivery):

a. a list of documents upon which the party intends to rely; and

b. a copy of each document on the list or confirmation that each document has already been provided to the other parties in accordance with Rule 16.1.

16.3 Unless otherwise ordered by the Tribunal, not later than 45 days prior to the first scheduled day of hearing, each party must file with the Tribunal:

a. a list of documents upon which the party intends to rely; and

b. a copy of each document contained on the list.

16.4 No party may rely on or present any document not included on a document list and provided to other parties in accordance with Rules 16.1 and 16.2, and filed with the Tribunal under Rule 16.3, except with the permission of the Tribunal.

The Requirement to Retain Evidence

In *Charkaoui v Canada (Citizenship and Immigration)*,[10] the Supreme Court established a new procedural fairness requirement that an investigator must retain evidence that it may be necessary to disclose to a tribunal or party in the future in order to ensure a fair hearing

10 *Supra* note 8.

at that time. The court initially expanded procedural fairness to include a requirement to retain evidence only in cases where the evidence may have an impact on a proceeding with serious consequences—for example, a deportation hearing that may result in the deportation of a party to a country where he or she may face torture or death.

The Right to Be Present

Parties have the right to be present at a hearing before a tribunal throughout the entire hearing process. This allows them to participate effectively in the process leading up to the decision, and to respond to all evidence and arguments brought by another party (or, in cases where tribunal staff are the "prosecutors" or accusers, by the tribunal). No part of a hearing should be conducted without all parties being present, unless a party has voluntarily given up his or her right to attend or has engaged in conduct that justifies depriving him or her of this right. (Barring a party from being present is limited to extreme circumstances—for example, where a party's conduct is so disruptive that it is impossible for the tribunal to conduct a hearing with that party present.)

One implication of the right to be present is that tribunal members may not discuss the matter with a party in the absence of any of the other parties.

The right to be present includes the right to attend any site visit that the tribunal might hold. (Site visits, or "taking a view," as they are sometimes called, are discussed in Chapter 11, Presenting Evidence at a Hearing.)

In a written hearing, the right to be present takes the form of a right to receive all relevant information presented to the tribunal and to be given a reasonable opportunity to respond to it.

In an electronic hearing, the right to be present is satisfied if all parties are able to hear each other and the adjudicator in a teleconference, or to see and hear everyone else in a video conference.

Limits on the Right to Be Present

Several circumstances exist in which a tribunal may proceed in the absence of a party:

- If a party has been served with notice of a hearing and does not attend, a tribunal may proceed in the party's absence. If a party does not attend, the adjudicator must be satisfied that the party was properly served with notice of the hearing. If there is satisfactory evidence that the party was served, the hearing may proceed in the party's absence. (It is usually reasonable to expect a tribunal to wait at least 30 minutes and to ask one of the other parties or tribunal staff to contact the party and find out the reason for the party's absence before proceeding.)
- Where a party persists in disrupting proceedings, the tribunal may exclude the party to maintain order.
- If a party "walks out" of a hearing as a form of protest, the party has waived his or her right to be present.
- In rare circumstances, the sensitivity of evidence may justify allowing a party's representative, but not the party, to have access to the evidence—for example, where the tribunal rules that the evidence must be kept confidential and there is compelling reason to believe that the party will not maintain confidentiality.

The Right to Be Represented

Parties have the right to present their own case or to have their case put forward by a lawyer or other representative. Moreover, parties have a right to choose who will represent them, and the tribunal must make reasonable efforts to accommodate the schedule of a party's representative. This right of representation generally includes the right to have the representative question the client's own witnesses and cross-examine the witnesses called by other parties, to raise objections to procedures or the admissibility of evidence, and to make submissions.

Generally, the right to be represented before a tribunal does not include the right to have the government pay for a lawyer where a party cannot afford one. However, as mentioned in Chapter 4 (The Charter and Its Relationship to Administrative Law), the Charter has expanded the right to representation to include a right to state-funded legal assistance where an individual is indigent and the interests at stake are so serious and the proceedings so complex that the individual would not receive a fair hearing without legal representation.[11]

Limits on the Right to Be Represented

It is good practice for the tribunal or its members to advise parties as early as possible of their right to be represented, to inquire whether parties intend to be represented, and to ask how much time they will need to find representation and what efforts they will make. If the tribunal has taken these steps, it is in a much better position to establish whether a party has taken reasonable steps to obtain representation and to refuse an adjournment that it believes is being requested for the purposes of creating delay.

Parties are not always entitled to their first choice of representative. If a hearing date has been set, lawyers and agents have a responsibility to the tribunal and to their clients not to accept retainers if they know that they will not be available on that date. There may be exceptional cases where a representative is justified in accepting a case even though he or she is not available on the date set for the hearing (for example, where a party's efforts to find other counsel have been unsuccessful, or where the lawyer or agent has an intimate knowledge of the case that other representatives do not possess). In some circumstances, however, the tribunal may be justified in refusing to adjourn a hearing when a party chooses a representative who is not available on the date scheduled for the hearing, even if this will result in the party losing the opportunity to be represented. Obviously, any step that will deprive a party of his or her right to be represented should be taken only if the party is first given a reasonable opportunity to find a representative who will be available on the date of the hearing, and only after considering all the implications for the parties and the public purse.

In some cases, a tribunal may also have the power to refuse to allow a party to be represented by someone who is incompetent or unethical. At common law, the inherent right of a tribunal to control its own process may be a sufficient basis for a tribunal choosing to bar such representatives from appearing before it. Under section 23(3) of the SPPA, tribunals may refuse to allow any representative who is not a lawyer or a

11 *New Brunswick (Minister of Health and Community Services) v G (J)*, [1999] 3 SCR 46.

paralegal licensed by the Law Society to take part in the proceedings if the conduct of the representative demonstrates that he or she is not competent to perform the task, or if he or she does not comply at the hearing with the duties and responsibilities of an advocate or adviser. If the tribunal prevents a representative from participating, under some circumstances fairness may require the tribunal to adjourn the proceedings to afford the affected party an opportunity to find another representative. In other circumstances, however, it may be reasonable to require the party to continue without a representative. Parties must sometimes accept responsibility for their choice of representatives.

The right to be represented does not give a party an absolute right to an adjournment to obtain representation. A party is entitled to a *reasonable* opportunity to find a lawyer or other suitable representative. However, if the tribunal finds that the party has not taken advantage of the opportunity and a delay will cause serious inconvenience to other parties and raise the cost of the hearing, the tribunal may be justified in refusing an adjournment to allow a party to find a lawyer or agent. Many tribunals have specific rules about how to request an adjournment and on what basis one will be granted, so it is always essential to review any rules, guidelines, or policies.

The Right to Present Evidence

Before a tribunal, parties have the right to present evidence in order to establish the facts in a case. Only after the facts are clear is it possible to determine how the law should apply to them.

Parties must have a reasonable opportunity to produce relevant information in an attempt to prove the facts they want the tribunal to accept and to disprove unfavourable allegations by other parties. Usually, the main witnesses are the parties themselves. However, parties often call others as witnesses and may also present documents, pictures, and physical objects as evidence.

A corollary of the right of a party to present evidence is that there must be an appropriate mechanism to enable a party to require other persons who have relevant information to provide it to the tribunal. Usually, this mechanism is a **summons** (sometimes called a "subpoena") issued by the tribunal to a witness that requires the witness to attend the hearing, bring relevant documents, and present evidence. Failure to comply with a summons issued under the SPPA is an offence. For Ontario tribunals that are not subject to the SPPA, their governing statute may make it an offence to ignore a summons.

summons
a document issued to a witness by a tribunal or court that requires the witness to attend the hearing, bring relevant documents, and present evidence; sometimes called a "subpoena"

Limits on the Right to Present Evidence

The right to present evidence does not always mean that a party has the right to present evidence orally in the presence of tribunal members. In some circumstances, an electronic or written hearing may be sufficient. Moreover, a tribunal may refuse to receive information for various reasons—for example, because the information was not disclosed in advance of the hearing in compliance with the tribunal's rules of procedure, or because it is irrelevant or unreliable. (For a more detailed discussion of the reasons why a tribunal may refuse to receive evidence, see Chapter 11, Presenting Evidence at a Hearing, and Chapter 12, Management and Control of the Hearing Process.)

The Right to Cross-Examine

In a hearing before a tribunal, parties have the right to know the evidence being brought against them and to respond to it. They must have a fair opportunity to learn of any information that is unfavourable to them and to correct or contradict it.

In an oral hearing, the second part of this right—that is, the opportunity to respond—generally requires the tribunal to provide each party with an opportunity to cross-examine the other party's witnesses, unless there is some other, equally effective method of testing a witness's evidence. The purpose of cross-examination is to give parties an opportunity to challenge the evidence given by the other side's witnesses. The right to cross-examine witnesses in adversarial proceedings has been described as "fundamental" and "a vital element" of the system.[12] It may show that the evidence is untrue, bring out additional significant facts, or shed a different light on a witness's testimony.

Where a tribunal is permitted to hold a written hearing or inquiry, or is not subject to the SPPA or some other statutory duty to allow cross-examination, the tribunal may meet the requirements of procedural fairness by giving a party access to all the written evidence and submissions on which the tribunal may rely, as well as the opportunity to respond in writing to the evidence and submissions.

Limits on the Right to Cross-Examine

The right to cross-examine does not mean that a party or a party's representative is allowed to ask irrelevant, inflammatory, abusive, or repetitive questions. Ontario's SPPA and British Columbia's ATA give members of tribunals to which these statutes apply the right to place reasonable limits on cross-examination, and it is likely that the inherent right of tribunals not governed by these statutes to control their process gives them the same authority.

Whether a tribunal has the right to disallow cross-examination in order to ensure an inexpensive and expeditious hearing may vary from case to case. The Workplace Safety and Insurance Appeals Tribunal allows a limited form of cross-examination in some circumstances, which it calls "cross-questioning." (For a discussion of the limits on "friendly" cross-examination, see Chapter 11.) Ontario's Information and Privacy Commissioner requires parties at oral hearings to direct questions to witnesses through the adjudicator.

The Requirement That the Person Who Hears Must Decide

The person who hears a case is the only person who may decide the case. This has two implications. First, it is generally improper for an adjudicator who was absent for any part of a hearing to take part in making the decision. There may, however, be exceptions, such as when all parties consent and there is an effective way of informing a new or substitute tribunal member of the evidence heard in his or her absence. Second, it is improper for anyone associated with a tribunal—such as the chair, other tribunal members, or tribunal staff—to put pressure on a hearing panel to make the decision in favour of one party or another or to change an intended decision.

12 *Howe v Institute of Chartered Accountants of Ontario* (1994), 27 Admin LR (2d) 118 at 137 (CA), per Laskin JA (dissenting); *Innisfil Township v Vespra Township*, [1981] 2 SCR 145 at 166.

In a recent decision, *Mary Shuttleworth v Licence Appeal Tribunal*,[13] the Ontario Divisional Court confirmed that when a tribunal makes a decision, it must guard against creating a reasonable apprehension of a lack of independence of the decision-makers. The Divisional Court noted that institutional consultation could be present as long as there are safeguards in place.[14] The court found that in *Shuttleworth*, the safeguards were not in place. In April 2019, the Court of Appeal for Ontario upheld the Divisional Court's decision.[15] (See the box feature for more on the *Shuttleworth* decision.)

Justice Sossin, former Dean of Osgoode Hall Law School (2010–2018) provides an insightful commentary on the *Shuttleworth* case. He points out the importance of having quality assurance review procedures such as peer and legal review in place, while still being able to adhere to the fundamental principle of tribunal independence.

SHUTTLEWORTH, ADJUDICATIVE ETHICS, AND THE MODERN TRIBUNAL

At the beginning of October, 2018, Osgoode Professional Development hosted the 13th Annual National Forum on Administrative Law and Practice—which I have the privilege to co-Chair with Sean Gaudet of the Department of Justice and Brendan Van Niejenhuis of Stockwoods LLP. The two day gathering featured a range of discussions about the future of administrative law, from the imbroglio around the standard of review to the impact of algorithms, from the doctrinal limits on the duty to consult and accommodate to the potential for Reconciliation with Indigenous Peoples. The conference concluded with a panel on administrative justice ethics, and in the context of that discussion, I returned to a case that has been gnawing at me since it was released by the Divisional Court this summer—*Mary Shuttleworth v Licence Appeal Tribunal*, 2018 ONSC 3790.

Shuttleworth involved an auto insurance dispute before the License Appeal Tribunal (LAT)—which took over jurisdiction for these disputes in April 2016. LAT, in turn, is part of the Safety Licensing Appeals and Standards Tribunals Ontario (SLASTO). The issue in *Shuttleworth* was a determination of what constituted a "catastrophic impairment." In Ontario, every automobile insurance policy in the province provides its own insured with access to prescribed benefits if they are injured in a motor vehicle accident, regardless of fault. Under this scheme, LAT resolves disputes and determine an insured's entitlement to benefits under the Statutory Accident Benefits Schedule (SABS). Under the SABS, there is a $50,000 limit on medical and rehabilitation benefits and a $36,000 limit on attendant care benefits. However, these limits are increased to $1,000,000 if the insured is deemed to have suffered a "catastrophic impairment," as defined by the indicia set out in the Guides to the Evaluation of Permanent Impairment.

In 2012, the Applicant, Mary Shuttleworth, suffered severe injuries following a head-on collision. The LAT Adjudicator decided that the Applicant's injuries were not severe enough to qualify for benefits for catastrophic impairment under the

13 2018 ONSC 3790.

14 *Ellis-Don Ltd v Ontario (Labour Relations Board)*, 2001 SCC 4, [2001] 1 SCR 221.

15 *Shuttleworth v Ontario (Safety, Licensing Appeals and Standards Tribunals)*, 2019 ONCA 518

SABS—the calculation was just below what would have qualified as "catastrophically impaired."

Two months after the decision was released, Ms. Shuttleworth's counsel received an anonymous letter indicating that after the LAT Adjudicator made her decision, the decision was reviewed by the Executive Chair of the Safety Licensing Appeals and Standards Ontario ("SLASTO") who requested that the Adjudicator change the decision to make the Applicant "not catastrophically impaired."

After a freedom of information request, the record before the Divisional Court showed only an exchange between the Executive Chair of SLASTO and the adjudicator in the Shuttleworth decision indicating the Executive Chair had made some editorial suggestions and that these were appreciated by the adjudicator. There was no indication either that the comments went to material, substantive issues or that the outcome of the decision changed as a result. Nonetheless, the Divisional Court quashed the LAT decision on the basis of the duty of fairness principle that the person who hears the case must decide it. Developed in the context of labour decisions in *Consolidated Bathurst/Ellis Don* in which a "full board" meeting was held to discuss broader implications of a forthcoming decision, the Supreme Court set out conditions that have to be met before such consultation is constituent with fairness, including the fact that the consultation must be initiated by the adjudicator, not a Chair or designate, that the consultation cannot alter findings of fact made by the adjudicator who has heard and considered the evidence, and finally that the adjudicator must be free to disregard the advice coming from the consultation.

In *Shuttleworth*, it appeared that the review was initiated by the Executive Chair. The adjudicator wrote:

> "[35] I just wanted to thank you for your helpful review of this decision and to let you know that I have met with [legal counsel] and am working on revising it (for the umpteenth time, this was not a first draft!) to re-organize it a bit, tighten it up and clarify some points in keeping with your suggestions. And try to make it shorter.
>
> I also wanted to point out that this will take more time, and although I will do my best to meet recent deadlines for this and my three other decisions, I just wanted to advise in advance that the deadlines may be affected somewhat.
>
> I look forward to discussing this decision with you."

While there was no basis to conclude that the decision changed as a result of these editorial suggestions, there also was no basis to conclude that the decision did not change. There was no indication of pressure on the adjudicator or that she was not free to disregard the advice, and there was indication that the suggestions by the Executive Chair were welcomed. Notwithstanding this context, the Divisional Court concluded the duty of fairness had been breached:

> "[64] The review was conducted by a person at a superior level of authority without a request from the adjudicator to do so. There is no evidence as to the nature of the changes made by the executive chair although counsel for the Tribunal swore that decision-makers are free to make whatever decision they wish.
>
> [65] The executive chair's review is in breach of the first requirement set out in Consolidated Bathurst and applied in Ellis-Don that consultation

> cannot be imposed by a superior level of authority within the administrative hierarchy, but can only be requested by the adjudicator herself. This breach creates a reasonable apprehension of lack of independence."

From all indications, what occurred in Shuttleworth was a common form of quality assurance (QA) review. At several tribunals with which I am familiar, a QA process of some kind is common, typically involving a peer member or staff lawyer reviewing draft decisions to provide input ranging from proofreading grammar, to ensuring a basis in the record for conclusions, to consistent interpretations of key statutory provisions and internal clarity and coherence in decisions.

The best practice in relation to QA protocols is for them to be set out in written form, and to make clear that the ultimate decision rests with each adjudicator. While the Divisional Court's decision envisions adjudicators deciding to forego peer consultation altogether (as opposed to declining to adopt suggestions which are made as a result of the consultation), it is not clear that such conduct would be consistent with an adjudicator's ethical obligations.

All tribunals in Ontario (and many others elsewhere) have accountability frameworks under sections 7 and 8 of *Adjudicative Tribunals Accountability, Governance and Appointments Act, 2009.* The Divisional Court rightly focused on the absence of a written QA protocol. But that statutory framework also requires member codes of conduct—those codes of conduct, in turn, often include requirements to participate in quality assurance. The Health Profession Appeal and Review Board and Health Services Appeal and Review Board (on which I serve, though my views do not represent those of the Boards), for example, include the following ethical requirement under the heading "Quality and Consistency":

> "Members should ensure that decisions are prepared in accordance with the Boards' guidelines on form and language, and meet the Boards' standards for quality decision-making.
>
> Members should recognize the public interest through consistency and predictability in the exercise of their independent decision-making authority by considering relevant facts and evidence and/or information as well as law and jurisprudence."

After *Shuttleworth*, a number of tribunals are revisiting their QA frameworks. Some whose frameworks are informal are seeking to reduce them to writing. Some are trying to develop a distinction between editorial suggestions (which are permitted) and suggestions which go to the merits of the decision (which are prohibited). Some are trying to limit QA review to those who have no authority over adjudicators.

While these variations and distinctions may be well-founded, arguably, once the Board determines as a matter of institutional policy that all draft decisions will go through peer QA review, it should not be up to an individual member whether to participate in this process, as this becomes a "standard for quality decision-making." These institutional QA practices are not in themselves at odds with the independence of individual tribunal members provided that the ultimate decision, including whether to accept QA suggestions, must rest with the individual adjudicator. In my view, once this safeguard is assured, as a matter of ethical competency, participating in QA protocols ought to be universal. In my view, adjudicators who sincerely believe they have nothing to learn from the input of peers, and that their decisions should

not be subject QA consideration with a view to improvement, simply fall short of the minimum competencies for tribunal-based adjudication.

While I think the Divisional Court's analysis seemed detached from the institutional realities of how modern tribunals work, the decision is ultimately a welcome point of departure for a dynamic of administrative justice that merits more scrutiny than it gets.

Source: "Shuttleworth, Adjudicative Ethics and the Modern Tribunal," *Lorne Sossin's Law Blog*, (8 October 2018), online (blog): <http://sossinblog.osgoode.yorku.ca/2018/10/shuttleworth-adjudicative-ethics-and-the-modern-tribunal/>. Used with permission.

Exceptions and Limits to This Requirement

Subject to certain statutory restrictions,[16] if one member of a panel of adjudicators cannot complete a hearing (for example, as a result of prolonged illness or death), the remaining members may complete the hearing and render a decision. Generally, a new member or adjudicator cannot take the place of the member who cannot complete the hearing partway through the hearing unless all parties consent to the replacement, and it is improper for the tribunal to put any pressure on the parties to accept such an arrangement.

In some cases, however, the parties may agree that, rather than continuing with fewer members, it would be better to have a new member join the panel and to permit that member to rely in part on a transcript or agreed statement of the evidence given earlier in the hearing. In a case where the hearing is held by a single tribunal member, the member's departure would mean that the hearing had to start over. To avoid this, the parties might prefer to have the member's replacement read transcripts or agreed statements of the evidence and complete the hearing using this information.

The rule that only a member who hears a case can decide it does not prohibit that member from seeking the advice of other tribunal members, tribunal counsel, or tribunal staff (a practice sometimes known as "collegial decision-making"). However, there are limits on the scope of such consultation. First, unless the consultation is required by statute, it must be voluntary; it is improper for the tribunal chair or other members to put pressure on the adjudicator to consider their views. Second, the consultation should be limited to questions of law and policy. If new issues or legal arguments are raised as a result of consultation, the parties should be given an opportunity to address them. Finally, the tribunal member must not rely on evidence or facts provided by his or her colleagues without taking precautionary steps. The member must notify all parties that he or she is considering relying on other evidence, and must give the parties an opportunity to challenge not only the accuracy of the evidence but also the member's right to consider it. (The right to consultation is discussed in more detail in Chapter 13, Conduct Outside the Hearing.)

16 For example, the remaining members may not be permitted to render a decision where a statute requires that the panel include representatives of groups opposed in interest (such as management and a labour union) and the remaining members do not include a representative of each interest group, or where the statute specifies that a panel must consist of a certain number of members.

The Requirement to Base the Decision Solely on the Evidence

Unlike decisions made by administrators—who generally have no duty to disclose all the information they have relied on in making a decision—parties before a tribunal have the right to expect that the tribunal's decision will be based on the facts established at the hearing, and not on other information. An adjudicator who relies on facts within his or her own knowledge or on facts learned outside the hearing compromises the integrity of the hearing process. Not only is there a possibility that such information is incorrect, but parties would not have an opportunity to respond to it or to influence how the adjudicator uses it.

Exception to This Requirement

There is an exception to the rule that an adjudicator must rely solely on the facts established at the hearing in making a decision. The exception is known as **judicial notice** or **administrative notice**. Adjudicators are entitled to "take notice" of facts that would be known to a well-informed member of the community (for example, that Ontario is a province of Canada) or that would be known by a well-informed member of a professional group, particularly when the tribunal consists of members of that profession. (This exception is described in more detail in Chapter 13.)

judicial notice
the exception to the rule that an adjudicator must rely solely on the facts established at the hearing in making a decision; the acceptance by a court or tribunal of certain facts that would be known to a well-informed member of the community or by a well-informed member of a professional group; also called "administrative notice" or "official notice"

administrative notice
see judicial notice

The Right to Be Heard in a Timely Manner and to Receive a Decision Without Undue Delay

A basic tenet of our legal system is, "Justice delayed is justice denied." The right to be heard within a reasonable time and to receive a decision without delay is now recognized as an aspect of procedural fairness, although traditionally it was not. It was, however, sometimes recognized as an instance of the decision-maker declining jurisdiction. A person subject to an administrative action, whether before a tribunal or by a bureaucrat, has a common law right to completion of proceedings and receipt of a decision without undue delay. Where the delay prejudices a person—for example, by impairing his or her ability to receive a fair hearing—it will be considered a breach of procedural fairness if it is longer than necessary, if the individual is not responsible for it, and if the agency has no good explanation for the delay.[17]

The Requirement to Give Reasons for the Decision

It is now established at common law that procedural fairness requires tribunals and other decision-makers to provide reasons for their decisions, at least in situations where the decisions may seriously affect an individual's rights, privileges, or interests, or where reasons are necessary for the exercise of a right of appeal. This duty is also reflected in Alberta's APJA (s 7), Quebec's AJA (ss 5 and 13), and British Columbia's ATA (s 51). Section 17(1) of Ontario's SPPA requires decision-makers to provide reasons where requested by a party.

17 *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 SCR 307.

Although decision-makers must now provide reasons, the courts did not initially require that these be detailed or well thought out. In *Baker*,[18] the case in which the Supreme Court first ruled that providing reasons for a decision is a component of procedural fairness, the court accepted the mere notes of an administrator as Citizenship and Immigration Canada's "reasons" for a decision to deport a woman under the *Immigration Act*.[19] In another case, a court accepted checking a box on a prescribed form as sufficient to fulfill the requirement to provide reasons.[20]

The courts have since described what constitutes sufficient or adequate reasons. Where reasons are required for procedural fairness, but no reasons are given, this omission is a breach of procedural fairness. However, where reasons are given, but are inadequate, this is not a breach of procedural fairness. In other words, deficiencies or flaws in the reasons given do not fall under the category of a breach of the duty of procedural fairness.[21]

This is not to say, however, that inadequate reasons have no legal consequences. Although inadequacy of reasons is not a "stand-alone" basis for quashing an administrative decision, a judicial review of a decision may succeed where the reasons for the decision do not support the decision. Where reasons for a decision are provided, for the decision to be upheld on judicial review it is necessary for the reasons to clearly explain how that decision was reached.

To be sufficient, reasons do not need to include all the arguments, statutory provisions, jurisprudence, or other details the judges presiding over the judicial review might have preferred. A decision-maker is not required to make an explicit finding on each element, however subordinate, leading to its final conclusion.[22] It has been said that in the context of administrative law, reasons must be sufficient to fulfill the purposes required of them, particularly to let the individual whose rights, privileges, or interests are affected know why the decision was made and to permit effective judicial review. The basis of the decision must be explained, and this explanation must be logically linked to the decision made.[23]

18 *Supra* note 1.

19 RSC 1985, c I-2.

20 *Liang v Canada (Minister of Citizenship and Immigration)*, [1999] FCJ No 1301 (TD).

21 *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708.

22 *Ibid* at para 16.

23 *Clifford v Ontario Municipal Employees Retirement System*, 2009 ONCA 670 at para 29.

CHAPTER SUMMARY

Traditionally, agencies were required to follow fair procedures, known as principles of natural justice, only when exercising their powers in a quasi-judicial manner. Today, all agencies must, at a minimum, give individuals who may be affected by their decisions an opportunity to comment before they make them.

All government decision-makers must follow fair procedures when making decisions that affect people's rights, privileges, and interests. However, what is "fair" depends on the nature and function of the decision-making body. Tribunals must apply the rules of procedural fairness more rigorously than other agencies, and their procedures resemble the procedures followed by courts more than those of other bodies do. While the requirements of natural justice for tribunals were dictated originally by the courts, today many of the rules of procedural fairness are prescribed by statute—either a statute that establishes a tribunal or other administrative body or sets out its powers, or, in some cases, a statute that has general application to a variety of tribunals.

One of the basic components of procedural fairness is the right to a hearing. The right to a hearing before a tribunal includes the right of parties to reasonable notice; to be present throughout the proceedings; to be represented by a lawyer or agent; to present and to challenge evidence; to have the decision made only by the person who heard the case, without interference by others; to have the decision based solely on the evidence; to be given reasons for the decision; and to be heard in a timely manner and receive a decision without undue delay.

KEY TERMS

administrative notice, 151
hearing, 138
judicial notice, 151
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particulars, 142
summons, 145

CASES TO CONSIDER

Disclosure and Fairness

Howe v Institute of Chartered Accountants (Ontario) (1994), 19 OR (3d) 483, 27 Admin LR (2d) 118 (CA)

FACTS: Howe was a chartered accountant who was charged by the Professional Conduct Committee of the Institute of Chartered Accountants of Ontario with breaching their Rules of Professional Conduct. An investigation report was written by J, who was advised by the committee that the report would be kept confidential. The committee therefore refused to disclose the report to Howe. Howe then applied to the Discipline Committee, which was to hear the case against him, for disclosure. That committee also refused disclosure. Howe applied to the Divisional Court for an order compelling disclosure. The Divisional Court refused the application, ruling that the application for judicial review was premature because there was an appeal remedy still available.

ISSUES: Was judicial review of a preliminary ruling appropriate? Was the refusal to disclose the report to Howe a breach of procedural fairness?

DECISION: The majority ruled that a court should interfere with a preliminary ruling, such as the tribunal's refusal to order disclosure of the report, only where the tribunal did not have jurisdiction. The panel of the Discipline Committee chosen to hear the case would have full authority to consider the request for disclosure when the hearing was convened, and a complete remedy for any decision it might make at the hearing would be available through an appeal. Moreover, the majority ruled that it was not clear that a refusal of a tribunal to order disclosure of evidence was a breach of procedural fairness.

Justice Laskin dissented. In this case, denying Howe access to the report impeded his ability to make full answer and defence, which meant that the committee's duty to act fairly required disclosure of the report unless it was privileged.

Would this case be decided differently today? See *May v Ferndale Institution*;[24] *Charkaoui v Canada (Citizenship and Immigration)*;[25] *Ontario (Human Rights Commission) v Dofasco Inc*;[26] and *Ruby v Canada (Solicitor General)*.[27]

Procedural Fairness and Legitimate Expectations

Baker v Canada (Minister of Citizenship and Immigration), [1999] 2 SCR 817

FACTS: Mavis Baker, a Jamaican citizen with Canadian-born children, was ordered deported and told to make her application for permanent resident status from outside Canada, as is normally required. She then applied for an exemption from this requirement, based on humanitarian and compassionate considerations. A senior immigration officer refused her request by letter, without providing reasons for the decision. However, she received the notes of the investigating officer, which were used by the senior officer in making his decision. Baker's application for judicial review was first heard by the Federal Court Trial Division, then by the Federal Court of Appeal, and finally by the Supreme Court of Canada.

ISSUE: What was the appropriate duty of procedural fairness in this case?

DECISION: The duty of procedural fairness depends on the particular statute and the rights affected. Factors that will affect the content of the duty of fairness include the nature of the decision and the process used to make it, the provisions of the relevant statute, the importance of the decision to the people affected, the legitimate expectations of the person challenging the decision, and the agency's choices of procedure.

There was no legitimate expectation affecting the content of the duty of procedural fairness in this case. Important interests were affected, but the lack of an oral hearing did not constitute a violation of the requirement of procedural fairness; the opportunity to produce full and complete written documentation was sufficient.

Nevertheless, the immigration officer's notes gave the impression that the decision might have been swayed by the fact that Baker was a single mother with several children and had been diagnosed with a psychiatric illness. This raised a reasonable apprehension of bias. Also, the notes did not indicate that the decision was made in a manner that properly considered the interests of the children. The immigration officer's decision was quashed.

REVIEW QUESTIONS

1. What factors determine the appropriate level of procedural fairness to be provided by a tribunal or other agency?
2. What three sources of law would you review to determine the procedures that a particular tribunal or agency must follow to ensure a fair hearing?
3. Explain what is meant by the phrase *audi alteram partem*.
4. What are the two characteristics of an adequate notice of a hearing?
5. Under what circumstances, if any, can a tribunal receive evidence or hear submissions in the absence of a party?
6. Does a party always have the right to be represented by a lawyer? If so, is the party always entitled to his or her first choice of lawyer? Does a party have a right to be represented by someone who is not a lawyer? Explain.
7. Does a party always have a right to cross-examine other witnesses? What methods other than cross-examination may a party use to challenge the evidence of an opposing party?
8. If a tribunal member is absent during the presentation of some of the evidence, under what circumstances may he or she participate in making the decision in the case?
9. List and briefly describe the various rights that a "fair hearing" entails.
10. What are the limits or exceptions to the duty of a decision-making body to ensure that parties receive all of the rights to which they are usually entitled in a hearing?

24 *Supra* note 9.

25 *Supra* note 8.

26 (2001), 57 OR (3d) 693 (CA).

27 2002 SCC 75, [2002] 4 SCR 3.

EXERCISES

1. The provincial government proposes to establish a fund to compensate travellers who do not get what they pay for after arranging a vacation through a travel agency. For example, if construction of their hotel is incomplete, the hotel is infested with cockroaches, and the chartered flight doesn't arrive to take them home, travellers would apply to the fund to be reimbursed for their losses.

   The fund would be established by amending the *Travel Agents Act*, which regulates this industry. The amendment would permit the government to make regulations determining who must pay into the fund, how much they must pay, how and under what circumstances travellers may make claims, and what criteria will be used in determining whether and how much to compensate travellers.

   Do the principles of procedural fairness require the government to provide any individuals or groups with an opportunity to be heard before it amends the statute?

   If so, who is entitled to procedural fairness and what kind of consultation or hearing would satisfy the requirements of procedural fairness that apply in this case?

2. The legislature passes the amendments to the *Travel Agents Act* and the minister of tourism proceeds to draft regulations to establish the compensation fund. The regulations provide that all licensed travel agencies must pay a specified amount into the fund each year. Every agency must pay the same amount, regardless of size and income. However, the amount may be increased or decreased based on the number of past claims against the agency. The minister announces the amount that each travel agency will be required to pay into the fund each year.

   The Consumers' Association of Canada complains that the amount of the payment is too low and that the criteria for compensation are too narrow to provide travellers with fair compensation. The travel agencies, on the other hand, claim that it is unfair to increase the amount of contribution based on claims against travel agencies because problems that travellers encounter are often beyond the agency's control. In addition, small agencies claim that the proposed contribution is too high and will put them out of business. They feel that it would be fairer to base the contributions of individual agencies on their annual incomes.

   a. Is the government required by principles of procedural fairness to provide any individuals or groups with an opportunity to be heard before making the regulation? If not, why not?

      If so, who is entitled to procedural fairness and what kind of consultation or hearing would satisfy the requirements of procedural fairness under these circumstances?

   b. Would your answer be any different if, in a letter to the Travel Agents' Association, the minister of tourism had stated two years earlier that he understood the need to take into account the size of travel agencies in setting fees and would consult with the association before making a regulation, but did not consult? Explain.

3. The regulation establishing the compensation fund has been made. It provides for aggrieved travellers to make claims to the fund. It states that a customer is entitled to be reimbursed for travel services paid for but not provided. The registrar of travel agencies, an official of the ministry, is designated to decide whether to approve claims.

   The registrar develops criteria for determining who is eligible—for example, the kind of information that customers must provide to support their claims—and guidelines and procedures governing the application process.

   Does procedural fairness require that the registrar provide an opportunity for consultation or a hearing before finalizing these criteria, guidelines, and procedures? If not, why not?

   If so, who is entitled to procedural fairness and what kind of consultation or hearing would satisfy the requirements of procedural fairness under these circumstances?

4. Amelia X applies for compensation from the fund. She alleges that she paid the Wings of a Dove Travel Agency for a vacation in a four-star hotel, but the hotel turned out to be a two-star hotel. The registrar is concerned about whether the information she has provided supports her claim and is considering refusing the claim.

   Does procedural fairness require that the registrar provide an opportunity for consultation or a hearing before refusing the claim? If not, why not? If so, who is entitled to procedural fairness and what kind of consultation or hearing would satisfy the

requirements of procedural fairness under these circumstances?

5. If the registrar refuses Amelia's claim, does procedural fairness require that she have a right to appeal the decision? If not, why not?
6. Suppose the *Travel Agents Act* does provide Amelia with a right to appeal the registrar's decision to a tribunal, the Travel Compensation Fund Appeal Board. Do the principles of procedural fairness apply to this tribunal? If not, why not?

   If so, what appeal procedures would satisfy the requirement for procedural fairness under these circumstances?

   Would the principles of procedural fairness require that anyone other than Amelia have an opportunity to participate in the appeal?

FURTHER READING

Sara Blake, *Administrative Law in Canada*, 6th ed (Toronto: LexisNexis Butterworths, 2017) ch 2.

Colleen Flood & Lorne Sossin, *Administrative Law in Context*, 3rd ed (Toronto: Emond, 2017).

Julie Maciura & Rebecca Durcan, *The Annotated Statutory Powers Procedure Act,* 2nd ed (Aurora, Ont: Canada Law Book, 2016).

Guy Régimbald, *Canadian Administrative Law,* 2nd ed (Markham, Ont: LexisNexis, 2015) ch 6.