



PROCEDURAL FAIRNESS

NB: SoR = Correctness (ish)

A

General **CL duty of PF** exists on a spectrum (*Nicholson*)
- Encompasses (1) right to be heard and (2) right to a fair hearing

Threshold:
are you owed any fairness at all?

Decision

that affects **rights, interests, privileges of an individual** (*Cardinal*)

Owed on admin **decisions not of a legislative nature** (*Wells; Authorson; RE: Canada Assistance Plan*)

Must also be final decisions - can't be preliminary (*Knight v Indian Head*)

Webb - rights include rights of rich as well as poor folks
Hutfield - applicable on licensing where denial casts a slur on reputation // subst for interests & rights: **sufficiently directly and substantially affected?**

- Cabinet/ministerial decisions/ policy decisions? (*Inuit Tapirisat*)
- Subordinate leg'n? (*Homex; Immigration Consultants*)

- *RE: Abel* [if the decision at issue is as good as final, then it is reviewable for PF, even if there is technically another step left]
- *Dairy Producers* [if findings @ an investigative stage don't determine outcome, no PF]
- *Irvine v Canada* [quasi-law enforcement process shouldn't be hampered, esp if PF is coming at a more decisive point]

B

Content:
Locating the duty of fairness along the spectrum

Baker 5 part/non-exhaustive test

Choices of procedure made by the agency itself

Should be respected where:
1. Statute allows tribunal to make own process OR
2. Agency has expertise in determining what processes are appropriate

Nature of Decision being made and process followed in making it

Nature of statutory scheme and terms pursuant to which the admin DM operates

Importance to the individuals affected
> importance => fairness

Legitimate Expectations

May increase content where:
1. Conduct of public authorities in certain circumstances (representations, promises, undertakings, past practice, current policy) lead to expectations of a certain process
2. "" lead to expectations of a particular outcome

Mavi

- only created where representations are clear, unambiguous, and unqualified.
- Proof of reliance on the reps not req'd.
Legit E created by the wording of the undertakings; gov't can't proceed w/o notice or w/o permitting sponsors to make a case for deferral or other modifications to enforcement procedures.

judicial/ quasi-judicial likely to demand more extensive procedural protection than admin decisions

< when steps are preliminary in a formal DM process
> where 2nd level of proceedings available
> final => fairness
> exceptional to normal regime = < fairness

EXAM TIP: End the Baker test by comparing the case at hand to other cases, esp. *Nicholson, Cardinal, Homex, Baker, Mavi* - state: I think this case deserves MORE PF than X but LESS than Y

C

Application:
Specific components of the duty

1. Notice [Enough **time & info** to allow informed response]
2. Disclosure/Discovery
3. Oral Hearings [Often req'd if issues of witness credibility are relevant (*Singh*) but otherwise not usually granted]
4. Counsel [Not a general constitutional guarantee *but* when s. 7 is engaged, POFJ may require provision of counsel in admin hearings (*New Brunswick (Minister of Health and Community Services) v G(J)*)]
5. Witnesses/Evidence
6. Timeliness/Delay [6. Delay may reach level of breach of s. 7 but probably not - and rights of other participants must be considered (*Blencoe*)]
7. Reasons [Where the decision has important significance for the individual, where there is a statutory right of appeal, or in other circs, some form of reasons should be req'd - *Baker*]

D

Charter/Bill of Rights?

- 1) Threshold met? [where life, lib, sec is challenged]
- 2) If yes, have they been impaired in accordance of POFJ? (*Suresh; Blencoe; Charkaoui*)
 - o Content of POFJ informed by CL (Oral hearings, disclosure, reasons, timeliness); CL also helps decide which bits apply to which circumstances
- 3) If no, can still look to:
 - a. CL principles of PF (*Baker*)
 - b. Bill of Rights (*Singh*)

IMPARTIALITY/INDEPENDENCE/BIAS

Test for all: Are you sufficiently free of factors that could interfere with your ability to make impartial decisions? (*Committee for Justice and Liberty*)

INDIVIDUAL BIAS → Use as is
 INSTITUTIONAL BIAS →
 INDEPENDENCE →

Are you sufficiently free of factors in a substantial number of cases (*Lippé*)

Are you sufficiently free of structural factors

IMPARTIALITY: the ideal state: truly open mind - no improper influences
BIAS: The evil: partiality toward a particular outcome
INDEPENDENCE: the means: measuring structural factors and relationships to try and ensure impartiality/eliminate bias

A.

Independence

Judicial Independence Framework
 - Security of tenure
 - Financial Security/remuneration
 - administrative control
 - [adjudicative independence - relational factor]

Structural factors

Would a reasonable, well-informed person, having thought the matter through, conclude that an admin DM is sufficiently free of factors which could interfere w/ his/her ability to make impartial judgments? (*Valente*)

Trying to reassert Admin Independence?

- Real life concerns - ministerial meddling in decisions & institutional "fit"? (*Keen*)
 - "high end of adjudicative spectrum"? - Not yet (*McKenzie*)

Crucial difference between cts and admin is the intrinsic connection between the administrative tribunals and the executive. (vs judicial independence which is typically understood as independence from the exec)

test for structural independence must be applied in light of functions being performed by trib, interests at stake (*Matsqui*)

No freestanding const'l guarantee of tribunal independence b/c cts occupy **different const'l role** than admin (*Ocean Port*)

1. Adjudicative role v. executive/policy-making?
2. Where gov't party to adjudication
3. Where expertise req'd for board members, total independence may not be possible (drawing from limited pool of candidates)
4. Self governing profession?
5. Statutorily prescribed (& const'lly consistent) structural independence issues are allowable

B.

Reasonable Apprehension of Bias

Individual Bias

Test is **reasonable apprehension of bias**, constituted by a belief which is:
 1. Reasonable, and
 2. Which would be held by reasonable and right-minded persons
 3. Who are applying themselves to the question and obtaining the required information

Pecuniary interest (if too indirect, it won't matter - *Energy Probe*)

Personal relationships [consider: significance of relationship; passage of time; structural allowances/expectations?]

Attitudinal predisposition towards a particular result

Institutional Bias

Admin policy-making is meant to further the law the tribunal has been mandated to administer; tension arises when such policies appear to infringe upon adjudicative independence
 What factors should be considered in looking at the system's structure? The tribunal, its operation in practice, and any safeguards that may be in place to prevent incidents of bias in practice.

Prior involvement in the matter [depends on extent of DM's prior involvement (*Committee for J+L; Imperial Oil*)]

Prior knowledge/information [depends on the nature and extent of DM's depth of knowledge (*Wewaykum; SEIU*)]

General test is RAB when an adjudicative context (*Chretien; Great A+P*) and "closed mind" when policy-making context (*Old St. Boniface*)

Test for Impartiality in a substantial number of cases: Whether the system is **structured** in a way that created the reasonable apprehension of bias on an institutional level.

Full board meetings

Consolidated Bathurst: as long as FBM is limited to LAW or POLICY (not factual issues) and, if any new grounds arise, the parties are allowed opp to respond, they're okay.
BUT
Tremblay: imposition of "consultation mtgs" is inappropriate influence

- Adjudicative independence and legislative process - how to give executive necessary information (*Communications...Union*)
 - multifunctionality = overlapping judge and prosecution functions (*Regie*)?
 - tribunal may set up its own measures in attempting to reduce RAB

Also consider:

Lead Cases [Policies cannot be adopted if doing so allows improper influence in DM (*Geza*)]

