



RULES OF NATURAL JUSTICE

Handbook for Members of University Tribunals
and Administrative Decision-Making Bodies

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I. INTRODUCTION

Identifying the rules of natural justice in the varied circumstances which confront administrative decision-makers has proven to be a formidable task not only for the bodies themselves but also for the courts charged with supervising and controlling their actions and decisions. The rules of natural justice are presumed to apply to bodies entrusted with judicial or quasi-judicial functions only. No such presumption arises with respect to bodies charged with performing administrative functions.

On the other hand, an administrative authority does have a “duty to act fairly” in arriving at decisions with potentially serious adverse effects on someone’s rights, interests or status. In Quebec, since 1996, the “duty to act fairly” has been legislatively imposed on administrative bodies by way of [An Act respecting Administrative Justice](#). Sections 2 to 8 of the Act summarize and incorporate over twenty-five years of case-law.

In the past, the courts have made an effort to distinguish the duty to act fairly from that of observing the rules of natural justice. They considered the duty to act fairly as being specifically applicable to the more policy-oriented traditionally administrative sphere of decision-making and have suggested that it incorporates a less onerous procedural content than the duty to observe natural justice. Since the Supreme Court of Canada’s decision in *Knight*,¹ however, this distinction has blurred.

This does not mean that the duty to act fairly applies equally and in the same way to all administrative decisions. The Supreme Court identified five criteria to identify when, and how, the duty to act fairly applies to a specific decision of an administrative body. **The duty to act fairly is flexible and changes from situation to situation, depending upon:**

- the nature of the function being exercised
- the nature of the decision to be made
- the relationship between the body and the individual
- the effects of that decision on the individual’s rights and
- the legitimate expectations of the person challenging the decision.²

¹ *Knight v. Indian Head School Division No. 19*, 1990 CanLII 138 (S.C.C.)

² *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (S.C.C.)

At the same time, the courts tend to pay a significant amount of deference to the policies and procedures of specialized decision-making bodies, provided basic safeguards are met.

Universities are one type of administrative body among many. In *Kane*,³ the Supreme Court recognized that “it is the duty of the courts to attribute a large measure of autonomy of decision to a tribunal, such as a Board of Governors of a University, sitting in appeal, pursuant to legislative mandate.” Nevertheless, in that case the Court did intervene since the Board had suspended a professor without first providing him with the opportunity to be heard and as such did not respect the rule of *audi alteram partem*. Canada’s highest court has also determined, in other cases, that universities are public bodies in regard to certain public services they offer, although the Supreme Court did not go so far as to consider universities governmental bodies, thereby leaving them out of the reach and purview of the *Canadian Charter of Rights and Freedoms*.

Since these decisions were rendered, courts in Quebec have been more inclined to intervene in the decisions made by universities despite a tradition of restraint in these matters. **The Quebec Court of Appeal has repeatedly confirmed that the duty to act fairly applies to universities.** As such, modern Canadian universities are no longer exclusively private institutions, thereby making them increasingly the object of what are called “extraordinary” legal recourses such as judicial review of their decisions, mandamus and actions in nullity. By way of these recourses, an individual can, among other things, have a decision of the university quashed or reversed, or compel a university to take certain actions.

Members of Concordia University’s committees and governing bodies need to be aware that their decisions must be made in conformity with the requirements of the law, the relevant University policies and regulations since these decisions may come under judicial scrutiny. With this in mind, this Handbook is intended to serve as a framework and guide for Concordia University’s committees and governing bodies tasked with decision-making functions. **It is not, however, intended to substitute for legal counsel, and readers are invited to contact the Office of the General Counsel as the need arises.**

Please note that the term “**body**” is used throughout this handbook, in a generic sense, to refer to administrative decision-making bodies such as committees.

³ *Kane v. Board of Governors of U.B.C.*, 1980 CanLII 10 (S.C.C.)

II. NATURAL JUSTICE

As noted in the Introduction, University bodies have not, to date, been qualified by the courts as being quasi-judicial bodies. Rather, they have been classified as being administrative committees or “domestic” tribunals not subject to the full plethora of procedural rights guaranteed by the rules of natural justice. University bodies do, however, have a “duty to act fairly”, a lower standard.

That being said, it is useful to have an overview of the more stringent rules of natural justice even if they are unlikely to apply, in all of their scope, to University bodies. In addition, the majority of our practices and policies do, in fact, satisfy the requirements of the rules of natural justice.

Natural justice has been described as “fair play in action – the principles and procedures which in any particular situation or set of circumstances are right and just and fair”.⁴ Its rules have been traditionally divided into two parts:

Audi alteram partem – the duty to give persons affected by a decision a reasonable opportunity to present their case.

Nemo iudex in causa sua debet esse – the duty to reach a decision untainted by bias.

“Those two rules are the essential characteristics of what is often called natural justice. They are the twin pillars supporting it.”⁵

Within each of these rules are specific duties that have been recognized by the courts.

Audi Alteram Partem (The Right to be Heard)

The content of this rule is flexible and varies from situation to situation depending upon the nature of the function being exercised. For instance, in disciplinary situations involving allegations of misconduct, where the parties are the equivalent of prosecutor and defendant, the resemblance to an ordinary trial will normally be greater than in the case of a decision-making

⁴ *Wiseman v. Borneman* [1971] A.C. 297.

⁵ *Kanda v. Government of the Federation of Malaya*, [1962] A.C. 322, 337, as quoted by the Alberta Court of Appeal in *R. v. Law Society of Alberta*, (1967) 64 D.L.R. (2d) 140, 151 (Alta C.A.).

process affecting many people and containing broad considerations of policy. There is, however, an absolute minimum content to the rule:

*“Generally, however, it is imperative that individuals who are affected by administrative decisions be given the opportunity to present their case in some fashion. They are entitled to have decisions affecting their rights, interests, or privileges made using a fair, impartial, and open process which is appropriate to the statutory, institutional, and social context of the decision being made.”*⁶

The procedural rights available to an individual in any given circumstance relate mainly to the notice given to the individual, the preparation of the hearing, the hearing *per se* and representation by counsel. Other rights attach to the decision itself and certain post-hearing matters.

Each of these are considered below:

Notice of the Hearing

The right of a person to defend him/herself in the face of a decision potentially affecting his/her rights or interests necessarily implies that the person must receive prior notice of the facts on which the decision will be based. Failure to give proper notice is itself a denial of natural justice and of fairness.

The notice must be communicated to the interested party, preferably in writing.⁷ In addition to specifying the date and place of the hearing, the notice must be sent in a timely manner (i.e., sufficiently in advance of the hearing), adequately describing the relevant facts and allegations so that a party may respond to them and outlining who will be present at the hearing, what the hearing will entail and the possible effects the decision may have on the rights and interests of the person.⁸ What constitutes adequate notice will depend upon the complexity of the matter and whether an urgent decision is essential.

⁶ David Phillip JONES and Anne S. de VILLARS, *Principles of Administrative Law (4th edition)*, Thomson Carswell, 2004, p. 251.

⁷ *Ridge v. Baldwin* [1964] A.C. 40

⁸ *Wong v. University of Saskatchewan*, 2006 SKQB 405

In *R. V. Ontario Racing Commissioners*,⁹ Mr. Justice Haines emphasized that a notice that complies with the principles of natural justice means “a written notice setting out the date and subject-matter of the hearing, grounds of the complaint, the basic facts in issue and the potential seriousness of the possible result of such hearing”. In the event that the procedure or purpose of the inquiry is changed, the body may be required to send a new notice to the parties.¹⁰

Failure to give proper notice does not respect the rules of natural justice¹¹ and will result in the invalidation of the decision.¹²

Preparation for the Hearing

The *audi alteram partem* rule requires not only that the party concerned be given prior notice of the precise purpose of the inquiry or hearing but also that the person be given sufficient information to prepare his/her case.

As to the disclosure of information, this implies that the party concerned be apprised of reports and documents in the body’s possession that may be prejudicial to his/her case. While this does not mean that the party must be given access to all information held by the body, he/she should at least have access to all the information the tribunal relied upon when it made its decision.¹³ That information should also be disclosed in due time since the party must have sufficient time to prepare for the hearing.

There are, however, restrictions on this right to information.¹⁴ These restrictions concern questions of confidentiality¹⁵ and access to information laws. Furthermore, a body is not required to communicate information that is already in the possession of the parties or

⁹ *R. v. Ontario Racing Commissioners* (1969) 8 D.L.R. (3d) 624 at 628 (Ont. H.C.)

¹⁰ *Confederation Broadcasting Limited v. Canadian Radio-Television and Telecommunications Commission* [1971] S.C.R. 906 at 922).

¹¹ *Supermarchés Labrecque v. Flamand*, [1987] 2 S.C.R. 219

¹² *Cardinal c. Kent*, [1985] 2 R.C.S. 643; *Wong v. University of Saskatchewan*, 2006 SKQB 405

¹³ *S.E.P.Q.A. v. Canada (C.C.D.P.)*, [1989] 2 S.C.C. 897.

¹⁴ In Québec, the majority of these limits placed on public bodies, like Concordia University, are delineated in *An Act respecting access to documents held by public bodies and the Protection of personal information*, R.S.Q. c. A-2.1

¹⁵ *Cadieux v. Établissement Mountain*, [1985] 1 F.C. 378.

information that they are presumed to know.¹⁶ As well, a body is not required to disclose facts that are in the public domain.¹⁷

The Hearing

Of all the procedural requirements forming part of the obligation to observe the principles of natural justice or of fairness, those related to the hearing are the most important. The abundance of case-law makes it clear that the minimal requirement is that everybody affected by an administrative decision has a right to a hearing.

There is a broad spectrum of possible forms that the hearing can take, ranging from court-like oral hearings to the purely administrative paper-only process commonly referred to as a “paper hearing”. Whatever the form of the hearing, it has to be fair, impartial and appropriate in the specific circumstances of the case (depending of the statute and the rights affected).¹⁸

Hearing in Person

In certain circumstances, it may suffice for an individual to submit observations in writing provided, of course, that he/she is aware of all the facts. The duty to act fairly does not imply an oral hearing and written submissions have been found to be sufficient where the body is concerned with purely technical matters that may easily be dealt with through written communication only.¹⁹ A structured hearing is not always required.²⁰ Of course, each party to a hearing must be subject to the same rules such that a hearing must either be oral or in writing and cannot be oral for certain litigants and written for others (in the same case). All interested persons must be treated equally.

In other circumstances, the principles of natural justice require a hearing in person, to permit, among other things, the concerned person to cross-examine witnesses. These circumstances generally imply serious matters such as disciplinary matters or occur where a decision turns on credibility.

¹⁶ *Confederation Broadcasting v. Canadian Radio-Television and Telecommunications Commission* [1971] S.C.R. 906

¹⁷ *North Coast Air Services Ltd. v. C.C.T.*, [1972] C.F. 390, 408 (C.A.)

¹⁸ *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (S.C.C.)

¹⁹ *Komo Construction inc. v. CRT du Québec*, [1968] S.C.C. 172.

²⁰ *Knight v. Indian Head School Division No. 19*, 1990 CanLII 138 (S.C.C.)

Hearing *in camera*

The “right of a person... to a public hearing” set out in section 23 of the [Quebec Charter of Human Rights and Freedoms](#) is available only to the parties themselves and not to the general public. In the absence of a legal obligation or a rule enacted by the body, the decision-making authority has a margin of discretion. **It should be noted that no university committee has been held to be a “tribunal” pursuant to the Quebec Charter and therefore section 23 would not apply to a university, in any case. Accordingly, decision-making bodies of the University are not required to hold public hearings but can do so if they so chose.** In deciding whether to hold a public hearing, a body should take into consideration the interests involved, including the protection of one party’s reputation and the protection of any declarations made in confidence.

Presentation of Relevant Evidence

Allowing a person to submit any relevant evidence relating to the matters set out in the notice of hearing is an essential component of a person’s right to a hearing.²¹ That said, an administrative tribunal is entitled to weigh the probative value of evidence and can refuse to consider certain evidence in appropriate circumstances.

Hearing of Witnesses

The right to call witnesses and cross-examine the other party’s witnesses applies only in the context of oral hearings and often entails lengthy hearings and delays. It is another essential component of the right to be heard but it can be limited due to the informality of the administrative process. Whether a person has the right to call witnesses will depend on the context and circumstances of each situation.

Cross-Examination of Witnesses

Generally, in the context of simple administrative procedures, the right to cross-examine witnesses must be specifically set out by statute since courts tend to interpret legislative silence on that matter as not conferring a litigant the right to cross-examine witnesses.²² Moreover, since cross-examination is a component of the adversarial process, it is not appropriate in every

²¹ *Roberval Express v. Transport Drivers Union*, [1982] 2 S.C.R. 888

²² *Irvine v. Canada (Pratique restrictive de commerce)*, [1987] 1 S.C.R. 181.

context. Some situations do call for cross-examination: when section 35 of the [Quebec Charter of Human Rights and Freedoms](#) applies (for example, if a person is accused in front of a quasi-judicial tribunal or a commission of inquiry) or in disciplinary matters.²³ For the courts to intervene, there must be a refusal by a body to allow cross-examination and that refusal must operate to thwart the person in his/her attempt to present a full defence.

Adjournment of the Hearing

A party may request an adjournment of the hearing and obtain a reasonable delay in order to take cognisance of new facts and to respond adequately to them. However, the body possesses the discretionary authority to deny or to accept a request for adjournment as long as in making its decision it takes into account the reasons being advanced in support of the postponement, the rights of the other interested parties as well as the consequences of the adjournment and ensures that it is not abusive, unjust or arbitrary. Refusal of a request for adjournment may be considered an infringement of the rules of natural justice if it results in irreparable prejudice to the person requesting it, provided the prejudice does not flow from his/her own neglect.²⁴

Representation by Counsel

Observance of the *audi alteram partem* rule does not necessarily imply a right to be represented by legal counsel. Section 7 of the [Canadian Charter of Rights and Freedoms](#) does not provide for a right to counsel in every given situation. For example, the Supreme Court found, in *Dehghani v. Canada (Minister of Employment and Immigration)*,²⁵ that a party does not have the right to counsel in circumstances of routine information gathering.

The [Québec Charter of Human Rights and Freedoms](#) provides, at section 34, that “every person has a right to be represented by an advocate or to be assisted by one before any tribunal”. **As noted previously, to date, university bodies have not been found to be “tribunals” within the meaning of the Quebec Charter and therefore do not have a legal entitlement to be represented by legal counsel. Furthermore, the Quebec Court of Appeal has held that students do not have a right to counsel before university hearings.**²⁶

²³ *Hajee v. York University*, 11 OAC 72, 1985

²⁴ *Spiegel v. Seneca College*, [2003] O.J. No. 652 (Div. Ct.)

²⁵ *Dehghani v. Canada (Minister of Employment and Immigration)*, 1993 CanLII 128 (S.C.C.)

²⁶ *Ahvazi v. Concordia University*, 1992 CanLII 3119 (QC C.A.)

Re-opening of the Inquiry or Hearing

A body has the authority to re-open an investigation or hearing upon the request of an interested party in order to take into account new facts. A refusal to re-open an investigation may be justified by the fact that the request is purely dilatory, that a deadline must be adhered to, or that the proof would not be pertinent. Once again, an evaluation must be made as to whether the refusal of the request would lead to serious prejudice for the party making the request, assuming that he/she is not at fault. The body should at least hear the party seeking to re-open the hearing since a plain refusal to even hear what the party has to say could be deemed a denial of the principles of natural justice.

The Decision

Depending upon the case, that observance of *audi alteram partem* implies that the person affected has the right to a decision (a) handed down by persons who have heard all the evidence; (b) based substantially on the evidence submitted at the hearing; (c) setting out the reasons therefore; and (d) that is reviewable by the persons making it, should they later become aware that natural justice or fairness was not observed.

Decisions by persons who have heard all the evidence

Members of the body must have heard the evidence and taken into consideration the arguments of the interested parties in order to be able to validly participate in the decision-making. In *Québec (Commission des affaires sociales) c. Tremblay*,²⁷ the Supreme Court stated as follows: “It is the quorum, and only the quorum, which has the responsibility of rendering a decision”.

Decision based substantially on the evidence submitted at the hearing

It is a commonly accepted principle of natural justice that the administrative body, in its decision-making process, must solely rely on the evidence submitted at the hearing. The leading case on this point is that of *Giroux v. Maheux*,²⁸ decided by the Quebec Court of Appeal.

²⁷ *Tremblay v. Quebec (Commission des affaires sociales)*, 1992 CanLII 1135 (S.C.C.)

²⁸ *Giroux v. Maheux* [1947] B.R. 163

Reasons for the decision

In the past, there did not exist any general requirement for members of administrative bodies, nor for judges, to give reasons for their decisions. This has changed since the Supreme Court rendered its judgment in the case of *Baker*.²⁹ *Baker* does not create a requirement that reasons be provided for all decisions emanating from bodies but rather holds that written reasons may be required depending on the circumstances of a given case. The more important the nature and content of a decision, the more likely that it must be reasoned in writing. Where a decision is written and reasoned, they must be sufficient to allow the reader to identify how the body reached its conclusion.

The right to a hearing and decision within a reasonable period of time

Interested parties are entitled to a hearing and decision within a reasonable delay. However, what constitutes a reasonable period of time remains undefined and variable. Where a person has not waived their right to a hearing within a reasonable time by virtue of an agreement or their conduct, the following is examined to ascertain whether a delay is reasonable: the inherent time requirements of the case; the actions of the party invoking unreasonable delays that may have exacerbated said delays; the limits on institutional resources; and the total degree of the prejudice to the person invoking the delays.³⁰ Notwithstanding the foregoing, in an administrative context, the delay should be relatively short due to the underlying objective that administrative conflicts be resolved quickly.³¹

Nemo Judex in Causa Sua Debet Esse (The Rule Against Bias)

In order to have a decision by a public officer or body set aside for bias, it is not necessary to prove without a doubt that prejudice or bias existed. The existence of circumstances likely to give rise to an **apprehension of bias** need only exist.³² That being said, mere suspicion of bias will not suffice. There must be a reasonable apprehension that a body or officer did not or will not act impartially.

There are two main categories of bias: bias in law and institutional bias.

²⁹ *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (S.C.C.)

³⁰ *R. v. Morin*, [1992] 1 S.C.R. 771

³¹ *Sumner Sports inc. (Syndic de)*, J.E. 99-1918 (C.A.)

³² *Kane v. Board of Governors of the University of British Columbia* [1980] 1 S.C.R. 1105 at 1116

Bias in Law*Interests and Relationships*

A reasonable apprehension of bias can be presumed where a judge or member of an administrative body has an interest in the matter he/she is called upon to decide. Most often, the interest is pecuniary but it may also arise from a personal friendship or from a family or professional relationship with the person likely to be affected by the decision. If a member of a body believes that his/her interests or relationships would lead to a reasonable apprehension of bias, he/she should declare the situation and, if necessary, step down. Nonetheless, a party's failure to raise an allegation of bias in a timely fashion where he/she is aware that bias might exist may constitute a waiver of his/her right to object at a later time.

Pecuniary interest

The guiding principle set down by the courts is that direct pecuniary interest, however small, disqualifies a person from acting. This was demonstrated in *Mosakalyk-Walker v. Ontario College of Pharmacy*,³³ where it was held that a member of a disciplinary committee of a self-governing profession who was engaged in negotiations to purchase pharmacies owned by a person then before the committee in a matter of discipline had a direct pecuniary interest likely to raise a reasonable apprehension of bias.

Family relationship and personal friendship

An interest stemming from a family relationship or a personal friendship suffices to raise a reasonable apprehension of bias. In *R. v. Sussex Justices*,³⁴ the judges were to render a decision with respect to a person summoned to appear before them for reckless driving. It was decided that the presence of the assistant clerk of the court who, as was customary, retired with the judges, could raise a reasonable apprehension of bias because the clerk's brother and associate were counsel for the victim of the accident and had, on the victim's behalf, filed for civil damages.

³³ *Mosakalyk-Walker v. Ontario College of Pharmacy* [1975] 58 D.L.R. (3d) 665 (Ont. Div. Ct.)

³⁴ *R. v. Sussex Justices* [1924] 1 K.B. 256

Professional relationship

A previous professional relationship between a member of the body and a person applying to the body may, in some instances, be a cause for a reasonable apprehension of bias.³⁵

Attitudinal bias

A member of a body may raise a reasonable apprehension of bias by the way he/she acts towards the person that his/her decision is to affect either prior to, during a hearing or at the time a decision is made. A reasonable apprehension of bias may exist even if bias is not real but only reasonably perceived.

A member of a body may familiarize himself/herself with a file prior to the hearing and form an opinion as to the subject matter but he/she may not, at that stage, express an opinion in public. In *Castonguay v. Boudrias*,³⁶ it was found unacceptable for a coroner to have held a news conference before opening his public inquiry. In *Save Richmond Farmland Society v. Richmond (Township)*,³⁷ the Supreme Court said: “A member of a municipal council is not disqualified by reason of his bias unless he has prejudged the matter to be decided to the extent that he is no longer capable of being persuaded.”

During the hearing, animosity shown towards one of the parties or towards counsel may raise a reasonable apprehension of bias. The same holds true for hostility towards a friend or witness of one of the parties. The courts will not hesitate in sanctioning any hostile behaviour by a member of the body during a hearing. In the end, it is a question of manner.³⁸

As well, the courts have often found that private communications taking place during the hearing between the judge or chairperson of the administrative body and one of the parties, without the other party’s knowledge, are likely to give rise to a reasonable apprehension of bias. In *Kane*, cited earlier, the Board of Governors, sitting in appeal from a decision by a university president ordering the suspension of a faculty member had, while the decision was under advisement, called in the president to answer additional questions in the absence of the professor or of his counsel. The Supreme Court of Canada held that this was improper.

³⁵ *Committee for Justice and Liberty v. National Energy Board* [1978] 1 S.C.R. 369

³⁶ *Castonguay v. Boudrias* [1984] C.S. 33

³⁷ *Save Richmond Farmland Society v. Richmond (Township)*, 1990 CanLII 1132 (S.C.C.) see also *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 S.C.R.000

³⁸ *Brouillard dit Chatel v. R.* [1985] 1 S.C.R. 39 at 48

Certain behaviour occurring at the time the decision is made is susceptible of leading to a suspicion of reasonable apprehension of bias. For example, a reasonable apprehension of bias has been found in the following circumstances: where the representative of a party participates in deliberations following the hearing, where the reasons for the decision are written by prosecuting counsel even though he played no part in the decision-making process, or where the record reveals an accumulation of irregularities touching upon the merits.³⁹

That being said, there is little doubt that the university setting is unique. Many decisions are made in a collegial fashion and many members have relationships with one another. It would seem logical to assume that some of the more strict constraints regarding bias would be relaxed in a university setting.

Institutional Bias

Exercise of functions of a prosecutor and judge

Unless expressly provided for by statute, any exercise by a person of the functions of both prosecutor and judge is likely to raise a reasonable apprehension of bias. Such is the case, for example, where a person sits on a body deciding on a complaint or charge that he/she brought personally or that was filed on his/her recommendation. In *Conseil de section du Barreau du Québec v. E*,⁴⁰ the syndic brought a complaint against a lawyer but also sat on the disciplinary board that was to dispose of it. The Court of Appeal held that it was reasonable under the circumstances to believe that the syndic had a preconceived opinion against the accused.

Appeal from one's own decision

A reasonable apprehension of bias may be raised where a member of an administrative body sits in appeal of his/her own decision. In *R. v. Alberta Securities Commission*,⁴¹ a person had been refused registration as a securities broker by the Chairman of the Securities Commission, who later sat as one of the members hearing the appeal from that decision. The Alberta Supreme Court quashed the order of the Securities Commission on the ground of bias.

³⁹ *Fooks v. Alberta Association of Architects* [1982] 21 Alta. L.R. (2d) 306 (Alta. Q.B.); *Sawyer v. Ontario Racing Commission* [1979] 99 D.L.R. (3d) 561 (Ont. C.A.); *Bombardier, Inc. v. Métallurgistes Unis d'Amérique, Local 4588*, D.T.E. 83T-761 (Que. S.C.)

⁴⁰ *Conseil de section du Barreau du Québec v. E*. [1953] R.L. 257

⁴¹ *R. v. Alberta Securities Commission* [1962] 36 D.L.R. (2d) 199 (Alta. S.C.)

The Superior Court of Quebec, in *Fitzgerald c. Université Concordia*,⁴² ruled that the participation of the same person in two grade reviews of the same case gave rise to an apprehension of bias.

⁴² *Fitzgerald v. Université Concordia*, SOQUIJ AZ-95021452 (S.C.)

III. THE DUTY TO ACT FAIRLY

This duty arises from the same general principles as do the rules of natural justice. Its existence, scope and extent will depend on the factors as mentioned above: the nature of the decision to be made; the relationship between the body and the individual; the effects of that decision on the individual's rights; the legitimate expectations of the person challenging the decision and finally, a judge would also take into account and respect the choices of procedure made by the body itself. In general, a decision of a preliminary nature will not be subject to the duty to act fairly whereas a final decision may be subject to it. Finally, a decision must be significant and have an impact on an individual in order for the duty to act fairly to arise.

The application of the duty to act fairly is flexible and its content will vary according to the circumstances of each case. It has been described as the observance of the rudiments of natural justice for a limited purpose in the exercise of functions that are not analytically judicial but rather administrative. It has been suggested that the proper approach is to see the content of natural justice as gradually but perceptibly diminishing the nearer one approaches the administrative end of the decision-making spectrum. Leading cases in this area include: *Re Nicholson and Board of Commissioners of Police*; ⁴³*Knight*⁴⁴ and *Baker*.⁴⁵

The first case dealt with the arbitrary dismissal, without a hearing of any kind, of a probationary police officer. The Ontario police regulations only required a hearing in the case of the discharge of a constable who had served eighteen months or more. Chief Justice Laskin of the Supreme Court contrasted “the rules of natural justice in their traditional sense of notice and hearing with an opportunity to make representations and with reviewability of the decision” with “the less onerous duty of acting fairly”. This less onerous duty does not require, in the interest of administrative efficiency and economy, a plurality of hearings or representations and counter-representations. Its minimal requirement, as described by the Court, is for the administrative body to communicate the grounds on which it is about to act upon and to allow the affected party to make its observations prior to the final decision.

The second case also dealt with dismissal. Knight had an employment contract with the Board which stipulated that it could be terminated with a three-month notice in writing or by resolution of the Board provided that the employee (Knight) shall be entitled to a fair hearing

⁴³ *Re Nicholson and Board of Commissioners of Police* [1978] 88 D.L.R. (3d) 671 (S.C.C.).

⁴⁴ *Knight v. Indian Head School Division No. 19*, 1990 CanLII 138 (S.C.C.)

⁴⁵ *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (S.C.C.)

and investigation pursuant to the relevant legislation. The employment was terminated by a resolution but Knight was not given a fair hearing. The Court ruled that Knight was entitled to a fair hearing and set out the first three criteria described above as to how the duty to be fair may apply to certain administrative decisions: “The existence of a general duty of fairness depends on: (i) the nature of the decision to be made by the administrative body; (ii) the relationship existing between that body and the individual; and (iii) the effect of that decision on the individual's rights.”

Baker sums up and completes a vast chapter in administrative law spanning over twenty years. It completes the ruling in *Knight* by adding two more criteria to the ones that already existed. In *Baker*, the Supreme Court held as follows:

- “One important consideration is the nature of the decision being made and the process followed in making it. [...] 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.”
- “A second factor is the nature of the statutory scheme and the “terms of the statute pursuant to which the body operates”: [...] The role of the particular decision within the statutory scheme and other surrounding indications in the statute helps determine the content of the duty of fairness owed when a particular administrative decision is made. Greater procedural protections, for example, will be required when no appeal procedure is provided within the statute, or when the decision is determinative of the issue and further requests cannot be submitted.”
- “A third factor in determining the nature and extent of the duty of fairness owed is the importance of the decision to the individual or individuals affected. The more important the decision is to the lives of those affected and the greater its impact on that person or those persons, the more stringent the procedural protections that will be mandated.”
- “Fourth, the legitimate expectations of the person challenging the decision may also determine what procedures the duty of fairness requires in given circumstances. Our Court has held that, in Canada, this doctrine is part of the

doctrine of fairness or natural justice, and that it does not create substantive rights.”

- “Fifth, the 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.”

In general, a decision of a preliminary nature will not be subject to the duty to act fairly whereas a final decision may be subject to it. These types of decisions can be seen as being closer to the policy-oriented, traditionally administrative decisions and may be informal, with “paper hearings” and no more than the gist of the relevant information being made available to the affected individual. This point of view was endorsed in a decision of the Supreme Court of Canada, *Martineau v. Matsqui Institution Inmate Disciplinary Board* (No. 2),⁴⁶ where Dickson J. wrote the following:

“A function that approaches the judicial end of the spectrum will entail substantial procedural safeguards. Between the judicial decisions and those which are discretionary and policy-oriented will be found a myriad of decision-making processes with a flexible gradation of procedural fairness through the administrative spectrum.”

In addition to the foregoing, the courts have ruled that following constitute some of the general components of the duty to act fairly:

- Courts have held that the duty to act fairly requires that a person accused of having committed an act be informed of the accusation and the facts surrounding the accusation in a manner that allows them to respond.⁴⁷
- The disclosure of evidence is not required to be exhaustive at the preliminary stage. However, where a decision is made based on evidence of which the party concerned has not been informed, a breach of the duty to act fairly has necessarily occurred.⁴⁸

⁴⁶ *Martineau v. Matsqui Institution Inmate Disciplinary Board* (No. 2), [1979] 13 C.R. 1

⁴⁷ *Université du Québec à Trois-Rivières et Syndicat des professeurs de l'Université du Québec à Trois Rivières*, D.T.E. 2001T-184 (T.A.); *Université Laval c. Syndicat des chargées et chargés de cours de l'Université Laval* (C.S.N.), D.T.E. 99T-924 (T.A.)

- Exceptionally, where important questions of credibility are raised, the simple opportunity of a party to present written representations may be insufficient and an oral hearing may be required.⁴⁹
- Despite the foregoing, the duty to act fairly does not require a body to hear oral testimony or allow for the cross-examination of witnesses.⁵⁰
- The duty to act fairly does not entitle the parties to representation by counsel.⁵¹
- If the decision of the body is likely to have an important effect on a party, the body may be required to provide written reasons for its decision as well as mention the nature of issues raised,⁵² and the internal recourses that are available to contest the body's decision.⁵³
- An individual cannot claim that there is a reasonable apprehension of bias solely based on the fact that the body in question sanctioned him in the past.⁵⁴

In the final analysis, the question to be answered is: Did the tribunal or body, on the facts of the particular case, act fairly towards the person claiming to be aggrieved and did it follow fairly its own rules of procedure?

⁴⁸ *Association des ingénieurs-professeurs de sciences appliqués de l'Université de Sherbrooke (AIPSA) et Université de Sherbrooke*, D.T.E. 2007T-132; *Khan v. Ottawa (University of)*, 1997 CanLII 941 (ON C.A.); *Kane v. Board of Governors of the University of British Columbia* [1980] 1 S.C.R. 1105

⁴⁹ *Khan v. Ottawa (University of)*, 1997 CanLII 941 (ON C.A.)

⁵⁰ *Knight v. Indian Head School Division No. 19*, 1990 CanLII 138 (S.C.C.); *Komo Construction c. Québec (Commission des relations de travail)*, [1968] R.C.S. 172; *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (S.C.C.); *Université Laval c. Syndicat des chargées et chargés de cours de l'Université Laval (C.S.N.)*, D.T.E. 99T-924 (C.A.); *Marouf c. Université Concordia*, 2006 QCCS 3082; *Nguyen c. Université de Sherbrooke*, J.E. 2002-86 (C.A.); *Irvine v. Canada (Restrictive Trade Practices Commission)*, [1987] 1 S.C.R. 181

⁵¹ *Ahvazi c. Concordia University*, 1992 CanLII 3119 (QC C.A.); *Re Polten and Governing Council of the University of Toronto*, 59 D.L.R. (3D 197)

⁵² *Dupont c. Université du Québec à Trois-Rivières*, J.E. 2008-2261 (C.A.); *Université de Montréal c. Charles*, J.E. 92-1256 (C.A.); *Knight v. Indian head school division no. 19*, 1990 CanLII 138 (S.C.C.); *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (S.C.C.)

⁵³ *Hazanavicius c. McGill University*, J.E. 2008-1145 (C.S.)

⁵⁴ *Marouf c. Université Concordia*, 2006 QCCS 3082; *Kadi c. Université de Sherbrooke*, 2008 QCCS 6750

The implied procedural content of the duty to act fairly at each level will, of course, be affected by the more or less detailed University regulations already in existence for the various bodies. In some situations, not only are notices to the parties and hearings with the opportunities to make representations provided for, but the right to bring witnesses and to be present when the other parties or their witnesses are heard are required as well. At the very least, each Concordia decision-making process provides for a review or an appeal with a hearing at that stage.

IV. ADMINISTRATIVE LAW RECOURSES

A number of recourses are available to interested persons to seek redress for breaches of the rules of procedural fairness.

Mandamus

A *mandamus* order may be issued by a Superior Court and is “an order demanding a person to perform a duty or an act which is not of a purely private nature”.⁵⁵ It may be issued if a court considers that an official of a corporation or of a public body omits, refuses or neglects to accomplish either an act which he or she is by law bound to perform or to exercise a duty expressly or explicitly imposed by law. Orders of *mandamus* have been issued in the university context (*Edosa v. Concordia University*, C.S. Montréal no. 500-05-027-950-789, December 1979; *Mélanson v. Université de Montréal*, J.E. 82-453 (C.S.); *Kamena v. École Polytechnique de Montréal*, J.E. 84-838 (C.S.); *Fitzgerald c. Université Concordia*, J.E. 95-1090 (C.S.).

- Three motions in *mandamus* to force a university to recognize equivalencies from other universities have been rejected.⁵⁶ There was a procedure for equivalencies but the students did not qualify. The Superior Court considered that it is the university’s discretion to elaborate such rules and its obligation is limited to respecting them.

⁵⁵ Article 844 Code of Civil Procedure of Quebec.

⁵⁶ *Sampaio v. Université du Québec* SOQUIJ AZ-95021042 (S.C.); *Friesen c. Université du Québec* SOQUIJ AZ-95021741 (S.C.); *Roger c. Université du Québec* SOQUIJ AZ-95021735 (S.C.)

- A motion in *mandamus* was granted to reintegrate a professor who had lost the position of “directeur de module” since his dismissal had not been done according to the prescribed procedure.⁵⁷
- A motion in *mandamus* was granted ordering that a new jury be selected to evaluate a student’s doctoral thesis due to bias within the review jury. The student then obtained his Ph.D. and subsequently sued the university for damages. The Court of Appeal dismissed his claim for damages on the ground that granting a motion in *mandamus* for bias does not mean necessarily that the administration should be held responsible for damages sustained by the student.⁵⁸

Quo Warranto

The aim of this recourse is the removal of a person occupying or exercising an office illegally in any corporation or non-incorporated association.⁵⁹ In *Deguisse v. Lesage* [1945] C.S. 40, an order of *quo warranto* was issued against the Dean of a Faculty in a Quebec university.

Judicial Review

This recourse flows from the exercise by the Superior Court of its superintending and reforming power. The Superior Court may annul a decision rendered by a tribunal subject to its power or prevent the tribunal from rendering a decision. The Superior Court has determined that a university committee is a tribunal subject to its superintending and reforming power. In one case where judicial review from a decision of a university committee occurred, the Superior Court refused to overturn a decision of Concordia’s Executive Committee to suspend a student for having assaulted the Vice-Rector.⁶⁰ The Court found that Concordia had properly applied its Policy on the Treatment of Student Disciplinary Matters in Exceptional Cases in that the student was given proper notice of the allegations against him and had the opportunity to present his version of events. The Court also found that the rules of procedural fairness did not require that the student be given the opportunity to cross-examine witnesses and the Court refused to overturn the decision of the Executive Committee.

⁵⁷ *Salazar v. Université du Québec à Hull*, SOQUIJ AZ- 93021730 (S.C.)

⁵⁸ *Aubin v. Université de Montréal*, SOQUIJ AZ-91021148 (S.C.); *Aubin v. Université de Montréal*, SOQUIJ AZ-97021312 (S.C.); *Aubin v. Université de Montréal*, SOQUIJ AZ-50076187 (C.A.)

⁵⁹ Article 838 CCP.

⁶⁰ *Marouf v. Université Concordia*, SOQUIJ AZ-50377139 (S.C.)

Action in nullity

This action, which flows from the exercise of the superintending and reforming power of the Superior Court, can be used against any Quebec corporation to annul a decision. In making its determination, the court will intervene only if it considers that a decision constitutes an abuse of right, denial of justice, fraud or bad faith. Whether a decision is quasi-judicial, administrative or regulatory is irrelevant in considering an action in nullity.

In *Côté v. Université du Québec à Hull*,⁶¹ three students were accused of plagiarism and were suspended from the university for one semester. One admitted that only her part of the common project contained plagiarized material and claimed sole responsibility for said plagiarism. The university did not take that admission into account and sanctioned members of the group equally and thereby did not respect its own regulation. The decision to suspend the other two students was therefore annulled by the court.

In *Fitzgerald v. Université Concordia*, the University had not respected its regulation concerning marks and grade review. The Superior Court declared the whole process null and forced the University to take into account the fact that the plaintiff passed an examination, thereby giving him the required GPA to obtain the degree. It is interesting to point out that the Court did not directly compel the University to grant the degree to the student but it held that in light of its decision, the University would more than likely have to grant the degree.

In *Syndicat des professeurs et des professeures de l'Université du Québec à Trois-Rivières v. Université du Québec*,⁶² the court refused to annul a decision appointing the Rector of the University. The complainant had argued that the University had not respected its regulation by consulting more than the required number of people on the appointment. The court found that the regulation had been respected because it set out the minimum number of people that needed to be consulted, rather than a maximum.

In *Nguyen v. Université de Sherbrooke*,⁶³ the court refused to intervene in a decision of the University expelling a student, due to behavioral problems, in his final year of medical school. The Court of Appeal found that the University's internal regulation for expelling students was

⁶¹ *Côté v. Université du Québec à Hull*, SOQUIJ AZ-98021175 (S.C.)

⁶² *Syndicat des professeurs et des professeures de l'Université du Québec à Trois-Rivières v. Université du Québec*, SOQUIJ AZ-50108380 (C.A.)

⁶³ *Nguyen v. Université de Sherbrooke*, SOQUIJ AZ-50108320 (C.A.)

followed and that courts should only intervene when there is a breach of established procedures. The Court also ruled that administrative procedures can be different than judicial processes.

In *Bisaillon v. Université Concordia*,⁶⁴ the complainant sought to annul a decision of the University not to appoint him to a particular body of the University. The Superior Court refused to intervene on grounds that the complainant was not entitled to sit on the body of the University.

V. CANADIAN AND QUEBEC CHARTERS OF RIGHTS AND FREEDOMS

To date, the Supreme Court of Canada has refused to qualify universities as being governmental actors or agencies, and therefore the [Canadian Charter of Rights and Freedoms](#) has been held to not apply to universities.⁶⁵

While the [Québec Charter of Human Rights and Freedoms](#) does apply to universities, it must be noted that the Québec Court of Appeal decided that the Senate Appeal Committee on Academic Misconduct of Concordia University was not a quasi-judicial tribunal and therefore that the right to counsel outlined in the Québec Charter did not apply.⁶⁶

⁶⁴ *Bisaillon v. Université Concordia*, SOQUIJ AZIMUT AZ-99021983 (S.C.)

⁶⁵ *McKinney v. Board of Governors of Guelph University* [1990] 3 S.C.R. 229

⁶⁶ *Ahoazi v. Concordia University*, J.E. 92-760

VI. CONCLUSION

This handbook provides an overview of the judicially recognized components of the rules of natural justice and the duty to act fairly. It cannot be overemphasized that this is not a “how to” collection of rules that must be followed to the letter. Rather, it is a reference guide for the use of University committees when they are deciding upon what procedures to implement. University committees are not judicial or quasi-judicial bodies and as such have considerable discretion in enacting their procedures. As long as basic safeguards are met, University committees have significant latitude in establishing their own rules of procedure. However, once these rules are established, they must be respected.

The Office of the General Counsel is available for consultation and would be pleased to review rules of procedure or answer specific questions with any interested committees. Please do not hesitate to call us at 4854.