

SECTION 1: PROCEDURAL FAIRNESS

(1) SOURCES OF PROCEDURAL OBLIGATIONS

- a) Enabling statute
- b) Subordinate legislation
- c) Policies and guidelines
- d) Charter of Rights
- e) Bill of Rights
- f) Common law
- g) General Procedural Statutes, e.g.,
 - i. Ontario's Statutory Powers Protection Act (SPPA)
 - ii. Alberta's Administrative Procedures and Jurisdiction Act (APJA)
 - iii. Quebec's An Act Respecting Administrative Justice
 - iv. B.C.'s Administrative Tribunals Act (ATA).
 - v. Other procedural codes and laws, (e.g., Ontario's Human Rights Code)

(2) PROCEDURAL OBLIGATION TRIGGERS

(A) Common Law Trigger

(a): Knight "Three-Prong" Trigger of (nature, relationship and impact)

i. Nature:

- **Knight v. Indian Head School Div.** - the 3-Prong Trigger that will determine whether there is a duty of fairness are: nature of decision, relationship between the parties, and impact of the decision on the individual.
- **Knight** - "*a decision of preliminary nature will not in general trigger a duty to act fairly*"

- **Re Abel and Advisory Review Board** - if a recommendation virtually affects or influences the final decision, then a duty of fairness applies.

ii. **Relationship:**

- **Re Webb (1978)** - a privilege holder is entitled to a duty of fairness just like a right holder, but to a lesser degree than a right holder
- **Hutfield v. Board of Fort Saskatchewan General Hospital District No. 98** - modifies Re Webb to say that even mere privilege seekers (applicants) are entitled to a minimal duty of fairness protection.

iii. **Impact:**

- **Nicholson v. Haldimand-Norfolk (Regional) Police Commissioner** – policeman on probation terminated without reasons. Court held that the more serious the consequences of the dismissal, the more need for greater fairness. And the existence of a duty of fairness no longer depends on classifying the power involved as “administrative” or “quasi-judicial” (legislative).

Exceptions to Knight Three-Prong Rule:

***I.* Preliminary Investigations**

- **Knight v. Indian Head School** – L’Heureux Dube J stated that a “decision of a preliminary nature will not in general trigger the duty to act fairly, whereas a decision of a more final nature may have that effect.
- **Dairy Producer Cooperative Ltd. v. Saskatchewan** – Report of investigative officer which found “probable cause” for sexual harassment claims not under duty to act fairly, because she had no power to affect the rights of the parties but to report to the Commission which will then decide if the matter should proceed or not.
- **Hawrish v. Cundall (Sask QB)** – investigative committee of law society which recommended suspension of member not bound to act fairly in the broad sense of the term because its recommendations did not affect rights of Hawrish. Committee’s duty was analogous to prosecutor who decides if a process should be initiated which may ultimately affect the rights of a person.

- **Guay v. Lafleur** – SCC held Guay had no right to hearing before an officer appointed to conduct inquiry because officer’s function was “purely administrative”; the officer was only meant to investigate financial affairs of some taxpayers.

- **Exceptions to the rule in preliminary investigations**

- **Blencoe v. British Columbia** – B faced allegation of sexual harassment. The same Commission that had investigative functions also had authority to refer matter to tribunal on human rights for a formal hearing. Court held that in that circumstances, fairness may be required at the investigative stage.
- **Canada (Attorney-General) v. Canada (Commission of Enquiry)** – (Krever Commission) – SCC held that there is no duty of fairness if a commission of inquiry makes a finding that is not legally binding as a conclusion of law on a criminal or civil liability. If otherwise, the commission must ensure there is procedural fairness in the conduct of the inquiry..

2. ***Policy Decisions*** and decisions that are general in nature may not be covered.

- **Imperial Oil Ltd v. Quebec (Minister of the Environment)** – Governments are elected to make policy decisions and must be allowed to do so, provided they comply with relevant constitutional requirements.

3. ***Dunsmuir Exception*** - **Dunsmuir v. New Brunswick** - Duty of procedural fairness does not apply to public office holders employed under contracts. Contract of employment should govern relations, not public law.

4. **Inspections & Recommendations** – Generally, no duty to provide oral hearings, since the functions were not judicial

- **Re Training School Advisory Board** – Board refusal to disclose reports upheld because “the board does not decide anything”.
- **Re Munro (1993)** – Sask CA held that Committee failed in its duty of procedural

fairness by not providing Munro with copy of discipline as contained in committee's report and in its recommendation that his teaching certificate be cancelled without an opportunity to address the issue of sanctions.

Exceptions to the exceptions in the rule of inspections & Recommendations

- **Re Abel and Advisory Board** – (affirmed by Court of Appeal) decision of Advisory Review Board quashed notwithstanding the non-binding nature of its report, because report is of vital concerns to applicants.

(b) Common Law Trigger: Legitimate Expectation

- **Old St. Boniface Residents Association Inc. v. Winnipeg (City)** - The court supplies the omissions where, based on the conduct of the public official, a party has been led to believe that their rights would not be affected without consultation.
- **Furey (1991)** – Legitimate expectation will apply to an administrative decision affecting procedure. Legitimate expectation creates procedural rights, not substantive rights.
- **Canada (Attorney General) v. Mavi** - generally speaking, government representations will be considered sufficiently precise for the purposes of the doctrine of legitimate expectations if, had they been made in the context of a private law contract, they would be sufficiently certain to be capable of enforcement.

Exceptions to the doctrine of Legitimate Expectations:

1. Legislative Decisions

- **Re Canada Assistance Plan (B.C.)** - “rules governing procedural fairness do not apply to a body exercising purely legislative functions”.
- **Re Reference re Resolution to Amend the Constitution** – how Parliament proceeds is a matter of self-definition. Courts only come into the picture after legislation is enacted, not before, (unless references are made to the court for its opinion on any Bill or a proposed amendment)