

## Fairness: The Bedrock of Ombuds Practice in Canada

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### Résumé de l'article

L'équité et la justice sont des concepts de longue date dans les discussions sur l'éthique et la moralité. Et l'équité, ou le principe d'équité procédurale, en tant que fondement de la pratique des ombudsmans au Canada, crée une responsabilité pour les ombudsmans de promouvoir et de tenir les institutions et les individus responsables des processus et des décisions éthiques. Bien que l'engagement efficace en cas de conflit constitue également une partie importante de notre travail, la pratique des ombudsmans canadiens est fermement fondée sur le principe d'équité. L'équité a été décrite comme un concept flexible et spécifique au contexte, son contenu devant être déterminé par les circonstances individuelles du cas. Cette approche flexible permet aux ombudsmans de contribuer à humaniser la bureaucratie pour ceux qui doivent y naviguer, en encourageant les règles, les processus et les décisions qui soutiennent la diversité et la multiplicité des contextes, des expériences et des perspectives. Cela donne aux ombudsmans une façon de définir l'équité qui ne signifie pas traiter tout le monde de la même façon, ce qui est une interprétation de l'« équité » qui crée et perpétue l'iniquité et l'injustice. Ceci est soutenu par la jurisprudence canadienne de la Cour suprême du Canada qui intègre l'égalité et l'inclusion dans le concept d'équité. La Charte des droits et libertés, les valeurs canadiennes et la diversité de la population canadienne influencent la norme d'équité d'une manière qui aide les ombudsmans à promouvoir l'équité d'une manière inextricable.

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## Fairness: The Bedrock of Ombuds Practice in Canada

Shirley R. Nakata<sup>a</sup>

### Résumé

L'équité et la justice sont des concepts de longue date dans les discussions sur l'éthique et la moralité. Et l'équité, ou le principe d'équité procédurale, en tant que fondement de la pratique des ombudsmans au Canada, crée une responsabilité pour les ombudsmans de promouvoir et de tenir les institutions et les individus responsables des processus et des décisions éthiques. Bien que l'engagement efficace en cas de conflit constitue également une partie importante de notre travail, la pratique des ombudsmans canadiens est fermement fondée sur le principe d'équité. L'équité a été décrite comme un concept flexible et spécifique au contexte, son contenu devant être déterminé par les circonstances individuelles du cas. Cette approche flexible permet aux ombudsmans de contribuer à humaniser la bureaucratie pour ceux qui doivent y naviguer, en encourageant les règles, les processus et les décisions qui soutiennent la diversité et la multiplicité des contextes, des expériences et des perspectives. Cela donne aux ombudsmans une façon de définir l'équité qui ne signifie pas traiter tout le monde de la même façon, ce qui est une interprétation de l'« équité » qui crée et perpétue l'iniquité et l'injustice. Ceci est soutenu par la jurisprudence canadienne de la Cour suprême du Canada qui intègre l'égalité et l'inclusion dans le concept d'équité. La Charte des droits et libertés, les valeurs canadiennes et la diversité de la population canadienne influencent la norme d'équité d'une manière qui aide les ombudsmans à promouvoir l'équité d'une manière inextricable.

### Mots-clés

ombudsmans, équité procédurale, droit administratif, diversité, équité

### Abstract

Fairness and justice are longstanding constructs in the discussions around ethics and morality. And fairness, or the principle of procedural fairness, as the bedrock of Ombuds practice in Canada, creates a responsibility for Ombuds to advance and hold institutions and individuals accountable to ethical processes and decisions. While effective conflict engagement forms a significant part of our work as well, Canadian Ombuds practice is firmly founded on and delivered through a fairness lens. Fairness has been described as a flexible and context-specific construct, its content to be determined by the individual circumstances of the case. In this flexible approach lies the opportunity for Ombuds to help humanize bureaucracy for those who must navigate it, by encouraging rules, processes and decisions that support the diversity and multiplicity of contexts, experiences and perspectives. It gives Ombuds a way to define fairness that does not mean treating everyone the same, which is an interpretation of "fairness" that actually creates and perpetuates inequity and unfairness. This is supported by Canadian jurisprudence from the Supreme Court of Canada that embeds equality and inclusivity into the concept of fairness. The Charter of Rights and Freedoms, Canadian values and the diversity of the Canadian populace inform the standard of fairness in a way that support Ombuds to advance fairness in a way that is inextricable from equity.

### Keywords

ombuds, procedural fairness, administrative law, diversity, equity

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## INTRODUCTION

Fairness and justice are longstanding constructs in the discussions around ethics and morality. And fairness, or the principle of procedural fairness, as the bedrock of Ombuds practice in Canada, creates a responsibility for Ombuds to advance and hold institutions and individuals accountable to ethical processes and decisions. While effective conflict engagement forms a significant part of our work as well, Canadian Ombuds practice is firmly founded on and delivered through a fairness lens (1,2). Administrative law, the body of public law in which the principle of procedural fairness resides, provides the broader framework for Ombuds practice in Canada.

## THE ADMINISTRATIVE LAW FRAMEWORK

Administrative law is basically the "operational principles and rules by which public decision-makers function" (3). Public decision-makers are those agencies to whom the legislative branches of government have delegated authority and responsibility to create, implement and administer rules and processes. They include, for example, regulatory boards, post-secondary institutions, local governments and various tribunals. Administrative law guides the processes by which such agencies make decisions, the substance of those decisions and how any errors are remedied by the courts. In essence, administrative law is the body of public law that is intended to protect the individual against the misuse or abuse of authority and maladministration by public decision-makers.

Administrative law is often referenced alongside the principle known as "the Rule of Law". Simply put, no one is above the law, especially those who hold and can wield power. In the context of administrative law, the Rule of Law is most commonly associated with judicial review – the oversight role that the judiciary has over administrative tribunals and its ultimate authority

to interpret laws and hold delegates (public decision-makers) accountable. But the Rule of Law also has an interesting relevance to the framework of Ombuds practice. One articulation of the fundamental purpose of the Rule of Law is to limit the abuse of administrative power and protect the ruled against the aggression of those who rule (4). This interpretation is consistent with former Chief Justice Beverley McLachlin of the Supreme Court of Canada when she said that the Rule of Law is based on an expectation that public power should only be exercised where it can be justified to citizens in terms of rationality and fairness (5).

Administrative law therefore provides the perfect foundation for Ombuds practice. With the Rule of Law in the background, administrative law is of paramount importance in the Ombuds toolbox and can help us work within our particular contexts to identify, call out and help address maladministration, administrative injustice and unfairness and most importantly, help to humanize bureaucracy for the individuals who must navigate it. Administrative law provides Ombuds with the legal framework to advance, promote and protect the core and central value of Ombuds work: fairness.

## THE PRINCIPLE OF PROCEDURAL FAIRNESS

Procedural fairness has been described as “the bedrock of administrative law” (3) and in turn, it would be fitting to say that it is the bedrock of Ombuds practice in Canada. And, in the Canadian context, it is important to note that fairness has been described as being a Charter (6) value and as being informed by other Charter values.

The Supreme Court of Canada neatly defined the principle of procedural fairness (7):

The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decisions affecting their rights, interests or privileges made using a fair, impartial, and open process, appropriate to the statutory, institutional, and social context of the decision.

### The Threshold and Content of Procedural Fairness

There are two questions to consider in determining the applicability and nature of procedural fairness in any given case: when does procedural fairness apply (*threshold*) and if it does apply, what does fairness require (*content*)?

Procedural fairness is triggered when an individual's rights or interests are at stake. In other words, administrative agencies must treat someone fairly whenever an administrative decision could affect someone's rights or interests. This was not always the case. The duty of fairness was found to apply only to judicial or quasi-judicial tribunals until a 1979 Supreme Court of Canada decision held that a general duty of fairness applies to administrative tribunals exercising executive or administrative powers. In that case, the Supreme Court of Canada stated: “to endow some with procedural protection while denying others any at all would work injustice when the results of statutory decisions raise the same serious consequences for those adversely affected ...” (8).

Once the threshold is met and a right to procedural fairness is established, the next step is to determine the content of fairness for that case. Fairness has been described as being flexible and context-specific and it is this fundamental characteristic that Ombuds can use to advance their mandate. In this flexible approach lies the opportunity for Ombuds to help humanize bureaucracy by encouraging rules, processes and decisions that support the diversity and multiplicity of contexts, experiences and perspectives. It gives Ombuds a way to define fairness that does not mean treating everyone the same, which is an interpretation of “fairness” that actually creates and perpetuates inequity and unfairness.

The courts have provided guidance in determining the content of fairness in a given case. In the *Baker* decision (7), the court set out five criteria to be considered, noting that this was not an exhaustive list:

1. Nature of the decision and the process
2. Nature of the statutory scheme
3. Importance of the decision for the individual affected
4. Legitimate expectations of the parties
5. Procedures chosen by the tribunal

These factors will be used to weight and determine the content of fairness in the circumstances of the particular case. In broad terms, the greater the potential jeopardy to a person's rights, interests or privileges the more exacting will be the requirements for fairness.

### Two Fundamental Cornerstones of Fairness

While fairness is flexible and context-specific, there are two fundamental cornerstones of procedural fairness:

1. The right to be heard
2. The right to an unbiased decision-maker

The right to be heard is an individual's right to have the opportunity to tell their side of the story and respond to allegations that concern them. Because of the flexible and context-specific nature of procedural fairness, how this right is to be exercised needs to be determined using the *Baker* criteria. In some circumstances the right to be heard needs to be exercised in person, and in other cases that right can be exercised in writing, or by phone. Notice and disclosure are both essential to the right to be heard. An individual needs to have notice that there is a matter concerning them that might affect their interests or rights and also needs to have sufficient disclosure of the allegations and the information the decision-maker has in relation to the same.

The second cornerstone of procedural fairness is the right to an unbiased decision-maker. The historical roots of this right can be traced back to the phrase, "justice should not only be done, but be seen to be done." It goes to ensuring public confidence in the judicial and administrative decision-makers of our society and in that regard is a critical element of the Rule of Law. As this element of procedural fairness is about the mind or attitude of the decision-maker, it is about the appearance and perception of impartiality as actual bias is difficult, if not impossible to prove.

The legal test for bias has been stated as follows: "What would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude?" (9) Another way of framing the test came in an Alberta Court of Appeal case: "Did the decision-maker approach each case with an open mind which manifests a willingness to consider any good idea?" (10) Again, impartiality will be measured and assessed in the framework of *Baker* (7) and the flexible and context-specific nature of procedural fairness. For example, the test for bias will not be as stringent in cases where the decision-making relates to policy versus an individual's rights.

It is important to emphasize that the right to an unbiased decision-maker does not call for decision-makers to be blank slates (11). The Supreme Court of Canada, in *R v. S (RD)*, confirmed that the requirement is not to aspire for neutrality, but for impartiality, acknowledging that decision-makers are human beings and that

... there is no human being who is not the product of every social experience, every process of education, and every human contact with those with whom we share the planet. Indeed, even if it were possible, a judge free of this heritage of past experiences would probably lack the very qualities of humanity required of a judge. (11)

In describing the unbiased decision-maker in the *R v. S (RD)* case, the Supreme Court of Canada spoke of a "process of enlargement" as a precondition of impartiality; a reasonable person in Canada who is to assess bias is understood as member of a bilingual, multiracial and multicultural society, has knowledge of the Charter, and as a member of Canadian society is supportive of the principle of equality. This interpretation of impartiality is critical in informing our work as Ombuds. The requirement for impartiality does not require Ombuds to be blank slates or neutral. We can and should bring the diversity of our lived experiences, capacities and skills to our work through the lens of equity and inclusion that is firmly embedded in our legal system.

In the *Baker* decision, the need and expectation for decision-makers to be aware of and respond to diversity was made clear:

because they [immigration officials] necessarily relate to people of diverse backgrounds, from different cultures, races, and continents, immigration decisions demand sensitivity and understanding by those making them. They require a recognition of diversity, an understanding of others, and an openness to difference. (7)

This passage highlights for Ombuds the inextricable connection between fairness, equity and inclusion and, accordingly, our role and responsibility to hold our institutions' decisions and actions accountable. It is with this flexible, context-specific principle of procedural fairness – which is defined in a uniquely Canadian context – that Ombuds can do their work to enhance inclusivity and foster fairness that addresses some of the asymmetry of power between individual and institution.

## FAIRNESS IS A BASIC HUMAN NEED

Beyond the legal context, brain research has characterized fairness as a basic human need, like food, shelter and social interaction. Fairness is a social experience that our brains treat like a survival issue. When we are fairly treated, it lights up the reward systems in our brain. When we expect fairness but experience unfairness, the parts of the brain that are stimulated are associated with pain and disgust. As Ombuds, we are all too familiar with scenarios where people feel unfairly treated and what often follows is disengagement, distrust, frustration, conflict and prolonged and protracted proceedings.

Fairness is a critical and vital part of any environment in which we purport to value respect, dignity and equity of all individuals. There are few institutions or agencies for which such values are not core commitments or foundational to their strategic goals. Ombuds can leverage these institutional commitments along with broader Canadian social values to advocate for fairness that is relevant, meaningful and responsive.

Fairness – and the related concept of justice – is inextricably linked to notions of social stability, interdependence and equal dignity (12). Characterized as a virtue, fairness establishes moral standards for decisions that affect others (13). While fairness in the ombuds world is most often framed in the legal context, if we shift fairness to a moral duty that each of us holds in an interdependent social system, then perhaps the requirement to be fair can transcend the notion of legal liability to one of ethical responsibility. A “good, rational, caring society” (13) requires fair treatment of all, but especially by those who wield power over the powerless in the way decisions are made and the decisions themselves.

It has been said that Ombuds sit at the nexus between the governed and the governing (14). In that location, we have the privilege and the responsibility to call out, make commentary and advance recommendations for systemic improvements. The framework of administrative law, with the concept of the Rule of Law and the principle of procedural fairness, provide Ombuds with the tools and the maps we need to shape our day-to-day work in a way that is responsive to the constituencies we serve and is consistent with our particular mandates.

“There is space between the rules and that space is occupied by common sense and humanity” (15). Our work as Ombuds is supported by administrative law to animate that space.

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