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Disclosure Issues in Administrative Proceedings

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Introduction

In this age of WikiLeaks, social networking and *The Millennium Trilogy*,[1] the issue of disclosure is both front page news and bedside reading. At its best, disclosure can separate truth from fiction; at its worst, disclosure can simply bury the truth with fiction, and kill more trees. The right to disclosure is a vital component of procedural fairness in administrative proceedings, and originates in the principle *audi alteram partem*.[2] Procedural fairness requires that individuals, whose rights, privileges or interests are to be affected by an administrative decision-making process, be provided with adequate information in order to know and respond to the case to be met.

While the right to a fair hearing is well established, the content of the duty of fairness is a flexible standard that will be determined in the specific circumstances of each case. The nature, scope and timing of a party or tribunal's disclosure obligation will vary in each case, depending on the particular statutory scheme, the tribunal's own rules, and a number of other factors.

In this paper we focus primarily on pre-hearing documentary disclosure. This includes disclosure between parties before an administrative proceeding, as well as disclosure from the particular tribunal to the parties before it. Both types of disclosure are governed by the overarching requirement of procedural fairness.

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[1] The *Millennium Trilogy* comprises the three bestselling fictional novels *The Girl with the Dragon Tattoo*, *The Girl Who Played with Fire* and *The Girl Who Kicked the Hornets' Nest* by the late Swedish author Stieg Larsson. A predominant theme in the series is the difference between misleading disclosure achieved through formal, official channels versus true disclosure achieved through surreptitious means, mainly computer hacking.

[2] This Latin maxim translates as "hear the other side."

Administrative Disclosure as a Component of Procedural Fairness

Individuals whose rights, privileges and interests are to be affected by an administrative decision making process must be afforded a fair hearing that adheres to principles of natural justice and procedural fairness. The procedural fairness principle *audi alteram partem* translates as "hear the other side" and is understood to encompass the right of an affected party to be afforded a fair hearing. A fair hearing may include one or more of the following components: the right to notice of a potential decision, the right to disclosure, the right to a hearing, the right to make submissions and the right to written reasons for a decision.[3]

Disclosure provides an affected party with the opportunity to participate meaningfully in the decision-making process. As Justice L'Heureux-Dubé explained in the *Baker v. Canada (Minister of Citizenship and Immigration)*, the purpose of procedural fairness participatory rights "is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker."[4] Disclosure reduces the element of surprise in administrative proceedings and enables a party to review the alleged facts, respond to such facts with rebutting evidence, and prepare submissions explaining how they should be weighed and analyzed.[5]

Disclosure in Civil and Criminal Proceedings

Outside of the administrative sphere, in criminal and civil proceedings, the bar for disclosure is set very high. In the civil context, the *Rules of Civil Procedure* require that the parties exchange all relevant material in either party's possession or control, whether or not it is intended to be

[3] Grant Huscroft, "The Duty of Fairness: From *Nicholson* to *Baker* and Beyond," *Administrative Law in Context,* Colleen M. Flood, Lorne Sossin, Eds. (Toronto: Emond Montgomery, 2008) at 129-130.
[4] *Baker v. Canada (Minister of Citizenship and Immigration),* [1999] 2 S.C.R. 817 at para. 22 [*Baker*].
[5] Sara Blake, *Administrative Law in Canada, 4th Ed.* (Markham, ON: LexisNexis, 2006) at 36.

relied upon at trial. Documentary discovery may be followed by oral discovery,[6] and parties have the opportunity to move for further or better disclosure in advance of trial. Further, each party's disclosure obligation is ongoing, and includes the requirement to produce any relevant document discovered after any initial exchange of documents. Therefore, at least in theory, the civil disclosure standard provides for complete and timely mutual disclosure with the objective of eliminating surprise at trial.

In criminal proceedings, the right to disclosure was developed through the common law and in accordance with *Charter* principles. In the seminal decision *R. v. Stinchcombe*, the Supreme Court held that the prosecution must disclose to the accused all relevant material in its possession, which includes "not only that which the Crown intends to introduce into evidence but also that which it does not," whether inculpatory or exculpatory.[7] The court held that the "right to make full answer and defence is one of the pillars of criminal justice on which we heavily depend to ensure that the innocent are not convicted."[8] *Stinchcombe* places an onerous one-sided disclosure obligation on the Crown, and there is no reciprocal disclosure obligation from the accused to the prosecution. The Supreme Court has since affirmed that the principles enunciated in *Stinchcombe* do not apply in administrative proceedings.[9]

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[6] Civil courts are increasingly moving towards limited oral discovery, and, in Ontario, claims under $100,000.00 in the Simplified Procedure stream are limited to one hour of oral discovery: see *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, Rule 76.04(2).

[7] *R. v. Stinchcombe*, [1991] 3 S.C.R. 326 at para. 29 [*Stinchcombe*].

[8] *Ibid.* at para. 17.

[9] *May v. Ferndale Institution*, [2005] 3 S.C.R. 809 at para. 91. In *May v. Ferndale* a number of penitentiary inmates challenged their involuntary reclassification and transfer from minimum to medium security facilities. The inmates argued that their liberty had been deprived in a manner that was unlawful as they had not been provided with all the information relied upon in making the reclassification decision. The inmates also argued that *Stinchcombe* principles applied in light of the liberty interests at stake. The Supreme Court disagreed that *Stinchcombe* applied in the circumstances, holding, at para. 90, that the impugned decisions were "purely administrative." The court held, at para. 95, that while there was an onerous disclosure obligation in the circumstances, this obligation was derived from the enabling legislation and the factors outlined in *Baker*, not the common law principles enunciated in *Stinchcombe.* But see *Sheriff v. Canada (Attorney General)*, [2006] F.C.J. No. 580 (C.A.) at para. 29, where the Federal Court of Appeal held that *Stinchcombe* principles apply in the context of a professional disciplinary proceeding, and the affected party must be provided with all relevant documents, included those on which the prosecution does not intend to rely.

Using *Baker* to Determining the Appropriate Level of Administrative Disclosure

While the civil and criminal rules represent the "gold standard" for disclosure, disclosure requirements in the administrative sphere are much more flexible, and will depend on the context of the particular proceeding and the rights affected.

In *Baker v. Canada (Minister of Citizenship and Immigration)*, the Supreme Court outlined a non-exhaustive list of factors that must be analyzed in order to determine the appropriate level and content of procedural fairness in a given administrative proceeding. According to Justice L'Heureux-Dubé, the type of process that will be required to ensure a fair proceeding is "flexible and variable" and will depend on "the context of the particular statute and the rights affected."[10] In short, whether a party is entitled to a minimum, intermediate, or high level of procedural fairness, and in turn disclosure, is determined by reference to the *Baker* factors. As disclosure in administrative proceedings is a component of procedural fairness, the nature, scope and timing of a party's or tribunal's disclosure obligation is determined in accordance with the *Baker* test. The five non-exhaustive *Baker* factors are as follows:

1) The nature of the decision being made and the process followed in making it. The closer the administrative proceeding is to judicial decision-making, the more likely it is that procedural protections closer to the trial model will be required.

2) The nature of the statutory scheme and the terms of the statute pursuant to which the body operates. The role of the decision in the statutory scheme helps determine the content of the duty of fairness. Greater procedural protections are required when there is no appeal procedure or the decision determines the issue and further requests cannot be submitted.

3) The importance of the decision to the individual or individuals affected. The more important or the greater the impact the decision has, the more stringent are the procedural protections.

[10] *Baker*, *supra* note 3 at paras. 20-22.

4) The legitimate expectations of the person challenging the decision. The doctrine of legitimate expectations is part of the doctrine of procedural fairness. If a claimant has a legitimate expectation that a certain procedure will be followed, the duty of fairness requires this procedure to be followed.

5) The choices of procedure made by the agency itself, particularly where 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.[11]

In practice, an analysis of the disclosure obligation in an administrative proceeding should begin with the fifth *Baker* factor, by asking whether the agency or tribunal has specified rules concerning the timing and extent of disclosure. This is a matter of reading and interpreting the administrative agency's rules of practice or equivalent guidelines, which are often accessible online.

Importantly, however, *Baker* reminds us that the tribunal's own rules and procedures are not the final word when it comes to determining whether the disclosure provided is sufficient to ensure a fair process. It is always open to a party to argue that a heightened level of disclosure is required in light of the remaining *Baker* factors. Further, the common law *Baker* factors will determine the extent of disclosure that is required when there are no tribunal guidelines regarding disclosure, or when the existing guidelines are general in nature.

The tribunal's own disclosure rules or practices must also be considered alongside any applicable legislative procedural codes, such as the *Statutory Powers Procedure Act*.[12] The *SPPA* applies to administrative proceedings in Ontario where the tribunal in question is required to hold a hearing before making a decision.[13] Note that there is no comparable federal legislation, although some provinces have similar acts to the *SPPA*.[14] The *SPPA* provides a basic framework for

[11] *Baker*, *supra* note 3 at paras. 23-28.
[12] R.S.O. 1990, c. S.22 [*SPPA*].
[13] *Ibid.*, s. 3.
[14] See for e.g.: *Administrative Tribunals Act*, S.B.C. 2004, c. 45, and *Administrative Procedures and Jurisdiction Act*, R.S.A. 2000, c. A-3.

administrative disclosure both in the absence of, or in addition to a tribunal's own rules of practice. Moreover, where a tribunal that is required to hold a hearing has developed its own procedural rules, such rules must be consistent with the *SPPA*. The relevant disclosure provisions of the *SPPA* are as follows:

> **Disclosure**
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> 5.4 (1) If the tribunal's rules made under section 25.1[15] deal with disclosure, the tribunal may, at any stage of the proceeding before all hearings are complete, make orders for,
>
> (a) the exchange of documents;
> (b) the oral or written examination of a party;
> (c) the exchange of witness statements and reports of expert witnesses;
> (d) the provision of particulars;
> (e) any other form of disclosure.
>
> **Other Acts and regulations**
>
> (1.1) The tribunal's power to make orders for disclosure is subject to any other Act or regulation that applies to the proceeding.
>
> **Exception, privileged information**
>
> (2) Subsection (1) does not authorize the making of an order requiring disclosure of privileged information.

Importantly, where the character of a party is at issue, the disclosure obligation of an administrative body conducting a hearing will be heightened. Section 8 of the *SPPA* provides:

> **Where character, etc., of a party is in issue**
>
> 8. Where the good character, propriety of conduct or competence of a party is an issue in a proceeding, the party is entitled to be furnished prior to the hearing with reasonable information of any allegations with respect thereto.

[15] Section 25.1 of the *SPPA* provides that a tribunal may make its own procedural rules, but that these rules shall be consistent with the *SPPA* and the tribunal's enabling legislation.

What must be disclosed?

There is no general rule regarding what must be disclosed in an administrative proceeding, and this reflects the fact that administrative disclosure is a flexible standard. Where the *Baker* factors indicate that a high level of procedural fairness is owed, complete disclosure may be required and a party or tribunal may be subject to an ongoing requirement to disclose all relevant materials in its possession or control. This high standard typically arises in professional disciplinary proceedings. It is the recognized practice of some administrative decision makers to adopt such a standard, and some courts have held that a *Stinchcombe*-like standard of disclosure applies to disciplinary proceedings.[16] Note, moreover, that s. 8 of the *SPPA* contemplates a more fulsome disclosure obligation when the good character, propriety of conduct or competence of a party is in issue.

In other proceedings, a party or tribunal will only be required to disclose the information on which it intends to rely. Accordingly, relevant material that will not be put before or relied upon by the decision maker in rendering its decision need not be disclosed.[17] In some cases, where an affected party is only entitled to a minimal level of procedural fairness, fairness may simply require that they receive a summary of the allegations and the nature of the decision to be made.[18]

What must be disclosed will also vary depending on the stage of the proceedings and the nature of the issues to be decided. The second *Baker* factor provides that greater procedural protections are required when there is no appeal procedure or the decision determines the issue and further requests cannot be submitted. As a corollary, where the administrative decision is an

[16] See for e.g.: *Sheriff v. Canada (Attorney General), supra* note 7.
[17] *Supra* note 4 at 37.
[18] *Ibid.* at 36.

interlocutory or preliminary one, or at an investigative stage,[19] a lower standard of procedural fairness, and in turn disclosure, may be appropriate. The Ontario Divisional Court case *Forestall v. Toronto Police Services Board* illustrates this principle.[20]

Forestall involved an application by a number of Toronto police officers to have their disciplinary proceedings prevented from proceeding to a hearing on the grounds that they had been denied procedural fairness at an interim decision by the Toronto Police Services Board. In its decision, the Board had granted an application made by the Chief of Police for relief from a statutory requirement to serve a hearing notice within six months of the date of the facts giving rise to the disciplinary allegations. The Chief of Police had requested additional time to proceed with the disciplinary hearings as there was an ongoing criminal investigation into the same facts giving rise to the disciplinary proceedings.

At the Divisional Court, the applicants took the position that the Board's decision should be set aside as a result of unfairness in the Board's procedure. In particular, the applicants argued that they ought to have been provided with the Crown's comprehensive investigative brief, and other materials related to the criminal investigation. The applicants submitted that they required this disclosure in order to respond to the Chief of Police's assertion that the delay in bringing the disciplinary proceedings was reasonable and justified. Further, the applicants suggested that they had a legitimate expectation of complete and full disclosure in light of an internal Toronto Police Service (TPS) policy that provided for "full disclosure" at least four weeks prior to the Board meeting.

[19] See for e.g.: *Masters v. Ontario*, (1994), 18 O.R. (3d) 551 (Div. Ct.), in which the Divisional Court held that a senior public servant, appointed at pleasure by the Premier, was entitled to minimal procedural fairness in the context of an internal investigation into the sexual assault allegations against him. See also *Howe v. Institute of Chartered Accountants of Ontario* (1994), 19 O.R. (3d) 483 (C.A.).
[20] [2007] O.J. No. 3059 (S.C.J. (Div. Ct.)) [*Forestall*].

The applicants' request for the Crown brief was denied by the TPS on the grounds that the policy was a past practice that was not binding, and which was currently under review. The TPS also denied the request on the grounds that disclosure of the investigative brief would be highly prejudicial to the parallel criminal proceedings.

The Divisional Court held that there was no denial of procedural fairness and that full disclosure of the investigative brief was not required at this pre-charge stage of the proceedings. The Court reasoned that the applicants had been provided with "a very detailed document" setting out the Chief's reasons for the delay, as well as a supplementary report, and had therefore been provided with necessary disclosure in order to respond to the delay application before the Board. The Court was careful to note that while full disclosure would be required prior to the disciplinary hearing, it was not required at this interlocutory stage. *Forestall* therefore stands for the proposition the adequacy of the disclosure provided may vary depending on the nature of the decision and the stage of the proceedings.

Exceptions to Disclosure

Common law rules regarding confidentiality and privilege apply to administrative proceedings. Simply because a high level of procedural fairness is required, does not mean that rules regarding privilege and confidentiality are waived. In *Pritchard v. Ontario (Human Rights Commission)*,[21] the Supreme Court held that the common law doctrine of solicitor-client privilege barred a complainant before the Ontario Human Rights Commission from obtaining disclosure of a legal opinion drafted by the Commission's in-house counsel.[22] In addition, s. 5.4(2) of the SPPA prohibits the disclosure of privileged materials.

[21] [2004] 1 S.C.R. 809.
[22] Evan Fox-Decent, "The Charter and Administrative Law: Cross-Fertilization in Public Law," *Administrative Law in Context*, Colleen M. Flood, Lorne Sossin, Eds. (Toronto: Emond Montgomery, 2008) at 175.

In some circumstances, fairness may also require non-disclosure. Administrative agencies have to deal with competing obligations towards parties and non-parties. At some proceedings, for example involving the College of Physicians and Surgeons and the Human Rights Tribunal of Ontario, there may be confidentiality interests of complainants, such as concerning their medical or personal histories, which compete with the high disclosure obligations generally established. In such situations, an *O'Connor*-like third party record application may be required.[23] Similarly, public security concerns may militate against full disclosure in certain immigration and refugee hearings,[24] or prison and parole matters.[25]

Where privilege or confidentiality issues arise, fairness may require that the affected party be provided with a redacted record.[26] If there is a dispute regarding disclosure of privileged or confidential materials, a party may bring a motion in advance of the hearing pursuant to s. 5.4(1) of the *SPPA*, requesting that the tribunal make a finding respecting disclosure of a disputed document. The interim decision may then be subject to administrative appeal processes or judicial review. Although it is beyond the scope of this paper to discuss the *Freedom of Information and Protection of Privacy Act*, provisions of the *FOIPPA* will also affect the disclosure process when personal information and privacy issues are at play.[27]

Practical Suggestions for Obtaining Disclosure

Baker reminds us that simply because a tribunal's own disclosure rules have been followed does not mean that adequate disclosure has been provided in accordance with common law fairness requirements. If you seek greater disclosure, do not take what you have been provided with at

[23] *R. v. O'Connor*, [1995] 4 S.C.R. 411.
[24] See for e.g.: *Charkaoui v. Canada (Citizenship and Immigration)*, [2008] 2 S.C.R. 326, and *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 72.
[25] *Demaria v. Canada (Regional Classification Board)* (1986), 21 Admin. L.R. 227 (Fed. C.A.).
[26] See for e.g.: *Miraglia v. University of Waterloo*, 2009 HRTO 1810 at para. 28, in which certain disputed confidential materials were provided to the applicant in a redacted form with the identifying information withheld.
[27] R.S.O. 1990, c. F.31 [*FOIPPA*].

face value and do not assume that a party or tribunal has complied with its procedural fairness disclosure obligations.[28] As a general rule, always ask for additional disclosure if you require it, and seek written confirmation that you have been provided with all relevant materials and/or all material that will be put before the administrative tribunal. If a party fails to disclose relevant documents, witness statements, notes or any other relevant materials, consider bringing a written motion to the tribunal adjudicator. Keep in mind, as well, that your request for fulsome disclosure may trigger a corresponding disclosure request from the other side so fully consider the implications of a disclosure dispute, including the potential for further delay and cost, and the tribunal forming the opinion, rightly or wrongly, that you are merely engaging in a fishing expedition.

Even if a particular tribunal does not have express rules regarding the form and manner of disclosure, the tribunal may nevertheless be willing to oversee the disclosure process. This occurred in the Human Rights Tribunal of Ontario decision *Cormie v. Laurentian University*.[29] In this decision, the respondents, including Laurentian University, brought a motion requesting that the Ontario Human Rights Commission, a party to the application before the Tribunal, be ordered to provide its documentary disclosure in a "coherent and rational manner, which would include the preparation of an index of documents to be organized in a chronological manner ensuring that all documents are dated, legible and identifiable."[30]

The HRTO rules required the Commission and the parties to exchange documents in advance of the hearing. The respondents complained that the Commission's disclosure consisted of 2000 loose leaf pages in no apparent order. The respondents pointed out that "Many of the documents are undated. Many documents are illegible. Several documents appear in more than one place. Finally, it is often difficult to determine where the documents come from and who has authored

[28] Palbinder Shergill, "Disclosure – How to Tell When You've Had Enough," presented at the Annual CBA Administrative and Labour Law CLE Update, November 1999.
[29] 2008 HRTO 44 [*Cormie*].
[30] *Ibid*. at para. 1.

the documents."[31] In response to the motion, the Commission argued that there was no basis in the HRTO's Rules for the order sought by the respondent.

The Vice-Chair found that while there was no express requirement in the Tribunal's Rules governing the format of the disclosure, it was implicit in the Rules that documents be legible, and that the nature of the documents be indentified if they were unclear on their face. The Vice-Chair ordered each party to provide its disclosure in chronological order with an accompanying index identify each document by its nature and date. *Cormie* therefore highlights the power and occasional willingness of an administrative tribunal to control and direct its own disclosure procedures.

If a party's direct request for disclosure is rejected, and a pre-hearing motion is unavailable or is denied, a party may then consider taking the further step of requesting that the adjudicator issue a *subpoena duces tecum*. In *Canada Labour Code*[32] unjust dismissal adjudications, for example, there is mixed case law regarding an adjudicator's power to order pre-hearing disclosure.[33] Some adjudicators have adopted the view that the *CLC* does not authorize adjudicators to order pre-hearing disclosure. Rather than make orders in advance of the hearing, adjudicators have instead opted to issue a *subpoena duces tecum* once they have assumed carriage of the matter at the outset of the *CLC* hearing. Note, however, that other *CLC* adjudicators have taken a different view, and have ordered pre-hearing disclosure in advance of the hearing in response to a motion.[34] Accordingly, where disclosure is resisted, it is advisable to bring a pre-hearing motion prior to taking the next step of a *subpoena duces tecum.*

[31] *Ibid*. at para. 1.
[32] R.S.C. 1985, c. L-2 [*CLC*].
[33] See *Bisceglia v. Greater Toronto Airports Authority*, [2001] C.L.A.D. No. 235, and *Ladowski v. Canadian Broadcasting Corp.*, [1006] C.L.A.D. No. 538.
[34] See *Walker v. Bell Canada Inc.*, [2010] C.L.A.D. No. 109, and *Tehrani v. Royal Bank of Canada*, [2007] C.L.A.D. No. 137.

Where a party requests the adjudicator to issue a *subpoena duces tecum,* it should put the opposing party on notice and request that the relevant materials be brought to the hearing, so that the materials can be exchanged at the beginning of the hearing if the subpoena is issued. The drawback to this approach is that it opens the process to delay if disclosure is made only at the outset of the hearing and an adjournment is required to allow the parties to assess the evidence. On occasion, however, a short adjournment may be all that is needed. As well, if the hearing is scheduled to occur over a number of days, this existing delay between hearing days may cure any issues related to the timeliness of disclosure since the materials can be reviewed in the interim.

A significant tool for obtaining administrative disclosure is contained in s. 6(2) of the *Judicial Review Procedure Act*,[35] which provides as follows:

> **Application to judge of Superior Court of Justice**
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> 6. (2) An application for judicial review may be made to the Superior Court of Justice with leave of a judge thereof, which may be granted at the hearing of the application, where it is made to appear to the judge that the case is one of urgency and that the delay required for an application to the Divisional Court is likely to involve a failure of justice.

As a last resort, where a party believes that non-disclosure is likely to result in a failure of justice, a party may bring a motion on leave before a single Justice of the Superior Court of Justice on an urgent basis. If the Justice denies leave under s. 6(2), the Justice may order that the matter be referred to a three member panel of the Divisional Court for a hearing.[36]

The Superior Court decision *Waxman v. Ontario Racing Commission* involved an application under s. 6(2) of the *JRPA*.[37] The applicants, Daniel Waxman and Vandalay Racing, were

[35] R.S.O. 1990, c. J.1 [*JRPA*].
[36] *Ibid.* at s. 6(3).
[37] 2006 CanLII 35617 (ON S.C.D.C.).

subject to a proceeding before the Ontario Racing Commission that proposed to suspend their licenses, redistribute $450,000 in racing purses, and fine them $100,000. The applicants and the Commission had been engaged in an ongoing dispute related to the adequacy of the disclosure provided by the Commission. Among other materials, the applicants had requested complete witness statements from the Commission's proposed witnesses, as well as the reports of the principal investigator, both of which Commission counsel had refused to provide. The applicants' counsel had also requested that Commission counsel identify the documents on which it intended to rely in the hearing, which was also refused.

The applicants brought a motion before the Commission seeking disclosure of the disputed materials. The Commission dismissed the balance of the motion, but directed its counsel to review the investigative reports and, if necessary, make further disclosure by October 18, 2006, in advance of the hearing scheduled for October 23, 2006.

On October 18, 2006, Commission counsel produced 12 previously undisclosed investigative reports. When the applicants' counsel requested an adjournment in light of the voluminous last minute disclosure, this request was refused by Commission counsel. Accordingly, the applicants brought an urgent motion to a single Justice of the Superior Court, requesting that the Commission be ordered to adjourn the hearing and disclose the remaining disputed materials, including the witness statements. The Commission resisted the motion, submitting that the applicant's motion was premature and the adjournment request should be brought at the outset of the Commission's hearing.

The Court agreed with the applicants that the witness statements were a necessary part of the minimum acceptable disclosure, particularly as the applicants' livelihood was at stake. Justice Lane found that the Commission's decision on disclosure "understates the degree of disclosure appropriate for the case and creates a fundamental unfairness to the applicants in the

proceeding."[38] Lane J. held that "a summary of the anticipated evidence of each witness is an essential part of disclosure in a case such as this one," and commented that "trial by ambush is incompatible with a fair hearing."[39] Further, the Court ordered that the Commission hearing be adjourned, as the hearing would be irretrievably tainted with unfairness at the outset if it were to proceed without fulsome and timely disclosure. In the result, the Commission was required to provide the witness summaries and was further prohibited from proceeding with the hearing for twenty days after the production of the witness statements.

In addition to an application under s. 6(2) of the *JRPA*, judicial review can be brought in the normal course to a three member panel of the Divisional Court. A party can apply for an administrative decision to be set aside on the grounds that it was denied procedural fairness by reason of insufficient disclosure. Importantly, issues of disclosure, which are an aspect of procedural fairness, are not subject to the *Dunsmuir* standard of review analysis. The question for the reviewing Court is simply "was the procedure fair or not"? An administrative body must be correct in its grant of procedural fairness, and whether the duty of fairness or the requirements of natural justice have been met is a question of law that is always reviewed on a correctness basis. In *Cardinal v. Director of Kent Institution*, the Supreme Court held that "the denial of a right to a fair hearing must always render a decision invalid, whether or not it may appear to a reviewing court that the hearing would likely have resulted in a different decision." Simply put, the right to a fair hearing "must be regarded as an independent, unqualified right which finds its essential justification in the sense of procedural justice which any person affected by an administrative decision is entitled to have. It is not for a court to deny that right and sense of justice on the basis of speculation as to what the result might have been had there been a hearing."[40]

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[38] *Ibid*. at para. 9.
[39] *Ibid*. at para. 10.
[40] [1985] 2 S.C.R. 643 at para. 23. See also *Clifford v. Ontario Municipal Employees Retirement System*, 2009 ONCA 670 at paras. 22-24, and *Edmonton Police Association v. Edmonton (City of)*, 2007 ABCA 184 at para. 3.

Conclusion

As outlined above, disclosure requirements in the administrative context are flexible. The adequacy of disclosure in a particular case will depend on the interests at stake, the tribunal's own rules and procedures, the legitimate expectations of the parties and other factors. In many contexts, the disclosure obligations in a particular administrative proceeding may be ambiguous or subject to interpretation. Accordingly, as a matter of advocacy, do not assume that an administrative agency or a party has fulfilled its legal obligation to provide sufficient disclosure. When in doubt, ask for additional disclosure and seek confirmation that you have been provided with everything that is relevant. If you don't ask, you will almost certainly not receive. While the *audi alteram partem* principle does not necessarily translate into the right to receive and know all relevant information, affected parties are nevertheless entitled to be provided with adequate information in order to ensure a fair process.