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# THE OTTAWA REGION CHURCH & CHARITY LAW™ SEMINAR

Ottawa – February 6, 2008

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## Fair Play in Action – Procedural Fairness in Membership Discipline

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By Jane Burke-Robertson, B.A., LL.B.

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**NATURAL JUSTICE RULES/DUTY OF  
FAIRNESS**

- Involves a set of procedures designed to:
  - Ensure that decisions made by a body are fair; and
  - Those affected are given an opportunity to meaningfully participate in the decision-making process
- Also includes the requirement to be free of bias, actual or perceived

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**VARIATION IN APPLICATION OF  
NATURAL JUSTICE RULES**

- Type of organization
- Specific membership rights or privileges
- Impact of termination on the member (individual circumstances)

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**IMPLICATIONS OF TERMINATION:**

- Embarrassment
- Loss of enjoyment of privilege or right and/or
- Deprivation of economic or property rights

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**EVOLUTION OF THE LAW**

- A number of cases have considered the application of the rules of natural justice or “duty of fairness” to decisions by NPO’s involving discipline and termination of members

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**COURT JURISDICTION TO INTERVENE:**

- 19<sup>th</sup> Century: English Courts readily intervened in decisions by clubs and associations to expel members
- First half of 20<sup>th</sup> Century: Courts would only intervene in the decision-making of an organization where expulsion of a member caused a corresponding deprivation of a property right

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**JURISDICTION TO INTERVENE: CANADA**

- *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police* decided by the S.C.C. in 1979 held that a decision did not have to be judicial in nature to give rise to procedural duties of fairness
- It was held that the seriousness of decision and the implications that flowed from it gave rise to natural justice requirements

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**JURISDICTION TO INTERVENE: CANADA**

- The modern approach to court intervention is based on the characterization of the relationship between a member and the organization as contractual
- Based on the English decision of *Lee v. Showmen's Guild of Great Britain* [1952] 1 All E.R. 1175 (C.A.)

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- In *Lee*, Lord Denning concluded that:
  - On an expulsion, courts will look to see if there has been “fair play”
  - A member must have had notice of the charge and a reasonable opportunity of being heard
  - The courts will ensure that the organization has followed the procedure laid down by its rules but will not otherwise interfere

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- *Lee* approach has been followed in a number of important cases:
- *Senex v. Montreal Real Estate Board* [1980] 2 S.C.R. 555 - the S.C.C. similarly found the nature of the relationship at stake was contractual
- *Lakeside Colony of Hutterian Brethren v. Hofer* [1992] 3 S.C.R. 165 - the S.C.C. affirmed that "...these rights to remain [as members] are contractual in nature, rather than property rights."

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**WHEN COURTS WILL INTERVENE:**  
*Lakeside Colony:*

- Courts will review the rules of the organization, to see if they were followed
- Courts will determine whether the expulsion decision was made in bad faith
- Where there are no express rules, courts will determine whether the organization has complied with natural justice requirements
- In doing so, courts will impute those safeguards which it considers appropriate having regard to the legal, administrative and factual context of each case

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**APPLICATION OF NATURAL JUSTICE RULES**

- Law has evolved to make fairness requirements variable and dependent on individual circumstances
- Unless the fairness rules are prescribed by statute, decision-makers must make their own set of rules
- In NPO context, these rules are generally found in by-laws and/or policies

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**COMPONENTS OF DUTY OF FAIRNESS—MEMBERSHIP CONTEXT**

- Content of notice
- Extent of participation rights
- Right to counsel
- Written reasons
- Unbiased tribunal
- Appeal rights

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**WHAT LEVEL OF FAIRNESS SAFEGUARDS WILL COURTS IMPOSE?**

- *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 [*Baker*]
  - Factors to be considered:
    - The nature of the decision being made and the process followed in making it
    - The nature of the statutory scheme and the terms of the statute pursuant to which the body operates
    - The importance of the decision to the individual or individuals affected
    - The legitimate expectation of the person challenging the decision, and
    - The choices of procedure made by the agency itself, particularly where the statute leaves the discretion to make the procedures with the agency

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**(a) Notice**

- Courts will enforce the notice requirement in by-laws or rules
- Where silent, notice and its adequacy will be determined according to the circumstances, in particular the nature of the decision and its impact upon the individual in question
- *Lakeside Colony* held that notice must be both “adequate and timely” – it must specify the nature of the charge against the member and give the member an opportunity to answer the charge

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**(b) Right to a Hearing**

- Unless required by statute, the duty of fairness does not usually mandate a right to an oral hearing to satisfy the requirement that an individual be given the opportunity to participate in the decision-making process - (though this may be implied in certain circumstances)
- Generally, a right to make written submissions will satisfy the participatory rights of members in discipline cases (as long as another procedure is not prescribed by the rules)

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**(c) The Right to Counsel**

- The duty of fairness does not include an absolute right to be represented by counsel, though in certain circumstances a right to counsel will be implied to satisfy the procedural fairness requirement

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**(d) Written Reasons for Decision**

*Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817*

- The S.C.C. recognized that in certain circumstances the duty of procedural fairness will require the provision of a written explanation for a decision
- *Baker* highlighted the importance of reasons and policy reasons behind provision of reasons, including:
  - Reducing arbitrariness in decision-making
  - Affording litigants ability to assess appeal
  - Confirming that all applicable issues considered

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**(e) An Unbiased Tribunal**

- Generally, natural justice rules require that the decision-maker be impartial and unbiased
- Several cases have recognized the inherent difficulty of such a requirement in a membership organization where it will be difficult (or impossible) to find unbiased decision-makers
- As long as there is no bad faith, courts will not intervene even if it could otherwise be said that the decision maker was biased
- “The standard of procedural fairness in respect of potential bias or the apprehension of bias can therefore be no higher than the requirement that the decision makers approach the proceedings in good faith with open minds.” *Barrie v. Royal Colwood Golf Club* [(2001), 18 B.L.R. (3d) 21, 2001 BCSC 1181

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**(f) Appeal Rights**

- The cases suggest that there is no obligation on a membership organization to provide a right of appeal to any other adjudicative body from a decision to expel a member

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**OTHER CONSIDERATIONS**

- **Statutory Rules**
  - Most non-profit corporate statutes are silent on natural justice requirements
  - *The Non-Profit Corporations Act, 1995* (Saskatchewan) provides a clear statement that natural justice rules will apply
  - Saskatchewan’s legislation also includes oppression remedies which may be invoked by members

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- **Type of Organization**
  - Social Clubs
  - Sporting organizations
  - Trade organizations
  - Religious Organizations
  - Professional Associations
  - Licensing bodies

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**RULES OR NO RULES**

- Where rules exist, the organization must follow them. Courts will generally look no further, provided no bad faith
- Where by-laws are silent, the organization must observe the rules of natural justice which the Supreme Court of Canada in *Senez*, stated represents “supplementary law”

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**SPECIFIC EXCLUSION OF NATURAL JUSTICE RULES**

- If by-laws drafted with an exclusionary clause, *Lee* case suggests that such a clause would be unenforceable as being contrary to public policy
- *Posluns v. Toronto Stock Exchange et. al.* [1968] S.C.C. left the door open to a contrary conclusion in suggesting that by-laws could expressly exclude the rules of natural justice

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**COMMENTARY ON BY-LAW DRAFTING - EXPULSION:**

- Most by-laws refer only generally to the ability to terminate or suspend without detailing the notice and other requirements
- Before drafting: Important to identify and consider the rights enjoyed by members in the particular organization and the impact of termination
- Better to have clear rules in place than to leave it to the courts to decide

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- Procedures selected by organizations should be set out explicitly and in unambiguous terms and the by -laws or policies should provide that the procedure is an exhaustive one
- “Automatic disqualification” v. expulsion in drafting
- Use of membership terms requiring a member to re -apply

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**MEMBERSHIP RIGHTS ON APPLICATION**

- A person applying for membership generally has no legal right to compel the organization to admit him/her as a member
- Exceptions:
  - By-laws are drafted so as to “require” admission
  - Statutory scheme applies

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**COMMENTARY ON BY-LAW DRAFTING:  
ADMISSION**

- The process and any criteria for the admission of members should be detailed in the by-laws
- When drafting admission provisions, it is usually important to:
  - State clearly how members are admitted and provide discretion (i.e. no automatic right)
  - Provide clear criteria for membership (broken down by membership category, if applicable)
  - Use of terms of membership

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