

**CANADIAN BAR ASSOCIATION/ ONTARIO BAR ASSOCIATION  
NATIONAL SYMPOSIUM ON CHARITY LAW**

**Toronto - May 10, 2007**

**Natural Justice, Members and the Not-For-Profit Organization:**

**“Fair Play in Action”**

**By Jane Burke-Robertson, B.Soc.Sci., LL.B.**

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# Natural Justice, Members and the Not-For-Profit Organization: “Fair Play in Action”

Jane Burke-Robertson

*“Natural Justice is but fairness writ large and juridically.*

*It has been described as “fair play in action”.*<sup>1</sup>

## A. Introduction

In recent years, a number of cases have emerged that have considered the application of natural justice rules to the decisions of not-for-profit organizations. The emergence of these cases is not surprising considering the ever increasing number of membership-based organizations across the country, ranging from social and sporting clubs to hospitals, schools, religious organizations, professional associations and licensing bodies. At one time or another, most Canadians will become a member of one of these types of organizations.

Invariably these organizations develop admission criteria, and in some cases discipline rules and procedures in their by-laws, constitution or policies. These rules may be based on the requirements found in a statute, they may develop by convention or they may reflect an organization’s desire to create an administrative scheme to order its affairs. While some organizations have very little by way of written rules, preferring instead to include only the most minimal requirements imposed by an incorporating statute, others have comprehensive procedures and operating policies which apply.

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<sup>1</sup> *Furnell v. Whangarei High Schools Board*, [1973] A.C. 660 N.Z., adopted with approval in *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311 [*Nicholson*] and *Knight v. Indian Head School Division No. 19 (Saskatchewan Board of Education)*, [1990] 1 S.C.R. 653 [*Knight*].

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The rules which most significantly affect members are those relating to continued compliance with membership qualifications, discipline, expulsion and suspension. The application of any of these rules can result in a spectrum of impact ranging from mere embarrassment in the context of a social club, to more significant implications such as the deprivation of economic or property rights in other organizations.

This paper focuses on the application of natural justice rules to not-for-profit organizations' decisions particularly those that relate to expulsion, discipline and suspension of members. It will also examine when courts will intervene to control decisions to refuse to admit persons as members. It will conclude with some observations on by-law drafting dealing with the issues raised.

## **B. Historical Overview: Rules of Natural Justice**

The rules of natural justice apply to a wide range of decision-making bodies, both administrative and judicial in nature. In view of both the many different types of decision-makers and the implications which such decisions involve, the law has evolved to make fairness requirements variable and dependent upon individual circumstances. Therefore, when individual rights are seriously affected, the duty of fairness tends to indicate more significant procedural safeguards such as personal service of notice, an oral hearing and the right of cross-examination. In less serious cases, informal written notice and an opportunity to make written submissions may suffice. Unless fairness rules are prescribed by statute, decision-makers must make their own rules and try and balance the requirement for fairness with decision-making economy. In the not-for-profit context, these rules are generally developed in by-laws or membership rules or policies authorized by by-law.

“Natural justice” or the “duty of fairness” is most often associated with administrative tribunals. At its core, natural justice involves a set of procedures or rules designed to ensure that decisions made by a body are fair and that those affected are given an opportunity to meaningfully participate in the decision-making process. It also includes the requirement that a tribunal “maintain an open mind and [to] be free of bias, actual or perceived, [which] are part of the *audi alteram partem* principle which applies to decision-makers.”<sup>2</sup>

An alleged breach of natural justice requirements as the basis for an application for judicial review of a decision of a domestic tribunal such as a club or association has a long history dating back to the nineteenth century when courts readily reviewed the validity of the expulsion of members from clubs and other associations.<sup>3</sup> However, the first half of the twentieth century saw a significant move away from the court’s apparent willingness to intervene. In the Canadian context, this movement reached a high watermark in the Supreme Court of Canada’s decision in *Calgary Power Ltd. v. Copithorne*<sup>4</sup> which held that for the rules of natural justice to apply, the applicant had to show that the decision maker was under a duty to act “judicially”. This case significantly restricted the availability of natural justice protections. Decisions of an executive or administrative nature were immune from attack.

However, in the 1963 decision of the House of Lords in *Ridge v. Baldwin*<sup>5</sup> the pendulum began to swing in the direction of extending the reach of judicial review. In that case, the House of Lords held that a chief of police, dismissed for cause, was entitled to prior notice of the reasons for his proposed dismissal as well as an opportunity to be heard. It reasoned that judicial

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<sup>2</sup> *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170.

<sup>3</sup> See e.g. *Wood v. Wood* (1874), L.R. 9 Ex. 190.

<sup>4</sup> *Calgary Power Ltd. v. Copithorne*, [1959] S.C.R. 24.

<sup>5</sup> *Ridge v. Baldwin*, [1964] A.C. 40 (H.L.).

review was available notwithstanding the apparent administrative nature of the decision and decision-maker. In 1978, the Supreme Court of Canada followed the lead of the House of Lords when it decided *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*.<sup>6</sup> In that case, the Court held that a Police Board's decision to eliminate the services of a particular constable was invalid. The Court concluded that a decision did not have to be judicial in nature to give rise to procedural duties of fairness. *Nicholson* signalled a major departure from the classification of functions (judicial *versus* administrative) for the purposes of imposing safeguards. The Court found that the duty to act fairly required that the constable be given at least prior notice and an opportunity to reply to the allegations either orally or in writing as the board determined. The lack of a judicial nature to the decision was not the important platform for analysis. As the court said:

The classification of statutory functions as judicial or quasi-judicial or administrative is often very difficult, to say the least; and 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 the adversely affected regardless of the classification of function.<sup>7</sup>

Therefore, it was rather the seriousness of the decision and the implications that flowed from it which dictated what and how much fairness or natural justice would be required.

In *Martineau v. Masqui Institution*,<sup>8</sup> the Supreme Court of Canada recognized that the basis for intervention by way of judicial review was whether an impugned decision affected the "rights, interests, property, privileges or liberty of a person" not whether it was judicial or administrative in nature. Although the Court did recognize that some decisions are purely policy-based or legislative in nature, typically beyond the reach of judicial review, it said: "Between the

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<sup>6</sup> *Nicholson*, *supra* note 1.

<sup>7</sup> *Ibid.* at 7-9.

<sup>8</sup> *Martineau v. Masqui Institution*, [1979] S.C.J. No. 121, [1980] 1 S.C.R. 602 [*Martineau*].

judicial decisions and those which are discretionary and policy-oriented will be found a myriad decision-making processes with a flexible gradation of procedural fairness through the administrative spectrum.”<sup>9</sup>

A recent illustration of the principles in *Martineau* unfolded in *Donoghue v. Roman Catholic Episcopal Corp. of Ottawa*.<sup>10</sup> In *Donoghue*, the Diocese decided to transfer a priest from St. Brigid’s Church and to close the parish. Parishioners attempted to block the decision by way of judicial review. The Court dismissed the application, finding the decision to be an internal one of a private body which did not affect anyone’s legal rights, privileges, property or privileges. Therefore, judicial review was not available.

For some time after the *Nicholson* and *Martineau* decisions, it was thought that there continued to be a distinction between “rules of natural justice” and the “duty of fairness”, the former applying to judicial or quasi-judicial powers and the latter applying to merely administrative decisions (which attracted fewer procedural rights). This distinction was abandoned by the Supreme Court of Canada in *Knight v. Indian Head School Division No. 19 (Saskatchewan Board of Education)*.<sup>11</sup> In the *Knight* decision, the Court signalled its favour for a more flexible approach recognizing that the degree of safeguards implied by the duty of fairness depended upon the particular administrative, legal and factual context.

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<sup>9</sup> *Ibid.* at 13.

<sup>10</sup> *Donoghue v. Roman Catholic Episcopal Corp. of Ottawa*, [2007] O.J. No. 644 [*Donoghue*].

<sup>11</sup> *Knight*, *supra* note 1.

### C. Natural Justice Rules, Domestic Tribunals and Expulsion

#### (i) *The Jurisdiction to Intervene: Property and Contract Rights*

Historically, the courts would only intervene in the decision-making of an organization where expulsion of a member caused a corresponding deprivation of a property right.<sup>12</sup> Since the courts felt that the relationships among members, or between members and an organization, were personal, intervention should not occur unless the dispute affected a property right of a member. Therefore for many years, the protection of the property rights of members was the basis for court intervention in this area.

The more modern approach to intervention by the courts was articulated in *Lee v. Showmen's Guild of Great Britain*.<sup>13</sup> While the contractual nature of by-laws had been referred to in several early cases,<sup>14</sup> it was not until the *Lee* case that the change in the law was clearly formulated by Lord Denning:

The jurisdiction of a domestic tribunal, such as the committee of the Showmen's Guild must be founded on contract, expressed or implied ... The jurisdiction of the committee of the Showmen's Guild is contained in a written set of rules to which all the members subscribe. This set of rules contains the contract between the members and is just as much subject to the jurisdiction of these courts as any other contract.<sup>15</sup>

In *Lee*, Lord Denning invoked the concept of "fair play" so far as the expulsion from social clubs is concerned:

The question in the present case is: To what extent will the courts examine the decisions of domestic tribunals on points of law? This is a new question which is not to be solved by turning to the club cases. In the case of social clubs, the rules usually empower the committee to

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<sup>12</sup> See e.g. *Hopkinson v. Marquis of Exeter* (1867), L.R. 5 Eq. 63 and *Clough v. Ratcliffe* (1847), 1 De G. & Sm. 164, 63 E.R. 1016.

<sup>13</sup> *Lee v. Showmen's Guild of Great Britain*, [1952] 1 All E.R. 1175 (C.A.) [*Lee*].

<sup>14</sup> See e.g. *Monette v. Societe St. Jean Baptiste de Valleyfield* (1886), 30 L.C.J. 150 and *Club de la Garnison de Quebec v. Lavergne* (1918), 27 K.B. 37.

<sup>15</sup> *Lee*, *supra* note 13 at 5.



expel a member who, in their opinion, has been guilty of conduct detrimental to the club, and this is a matter of opinion and nothing else. The courts have no wish to sit on appeal from their decisions on such a matter any more than from the decisions of a family conference. They have nothing to do with social rights or social duties. On any expulsion they will see that there is fair play. They will see that the man has notice of the charge and a reasonable opportunity of being heard. They will see that the committee observe the procedure laid down by the rules, but will not otherwise interfere.<sup>16</sup>

In *Senez v. Montreal Real Estate Board*,<sup>17</sup> the Supreme Court of Canada reviewed the relationship between a member and a voluntary association in a Canadian context. It similarly concluded that the nature of the relationship at stake was contractual. Mr. Justice Beetz reviewed the legislative framework of the organization, including its letters patent and by-laws. He concluded that:

[w]hen an individual decides to join a corporation like the Board, he accepts its constitution and the by-laws then in force, and he undertakes an obligation to observe them. In accepting the constitution, he also undertakes in advance to comply with the by-laws that shall subsequently be duly adopted by a majority of members entitled to vote, even if he disagrees with such changes. Additionally, he may generally resign, and by remaining he accepts the new by-laws. The corporation may claim from him arrears of the dues fixed by a by-law. Would such a claim not be of a contractual nature? What other basis could it have in these circumstances? In my view, the obligation of the corporation to provide the agreed services and to observe its own by-laws, with respect to the expulsion of a member as in other respects, is similarly of a contractual nature.<sup>18</sup>

In 1992, the Supreme Court of Canada reiterated the approach used in *Senez* when it decided *Lakeside Colony of Hutterian Brethren v. Hofer*. The Court said that “...these rights to remain [as members] are contractual in nature, rather than property rights.”<sup>19</sup>

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<sup>16</sup> *Ibid.* at 6.

<sup>17</sup> *Senez v. Montreal Real Estate Board* [1980] 2 S.C.R. 555 [*Senez*].

<sup>18</sup> *Ibid.* at 7.

<sup>19</sup> *Lakeside Colony of Hutterian Brethren v. Hofer* [1992] 3 S.C.R. 165 at para. 8 [*Lakeside Colony*].

While the courts have rationalized their intervention in expulsion cases based on property rights, or the characterization of the relationship between members and the organization as being contractual, this has not meant that there has been a broad-based willingness to intervene.

(ii) *Judicial Reluctance*

In some provinces, legislatures have prescribed procedural safeguards protecting the rights of members which can be enforced by the courts.<sup>20</sup> Others have developed membership oppression provisions which give jurisdiction to the courts to entertain applications by aggrieved members.<sup>21</sup>

However, in provinces where incorporating legislation is silent, the courts will generally follow a policy of “non-involvement” in the internal decisions of non-profit organizations, while at the same time retaining a limited “supervisory” jurisdiction. That limited supervision is exercised by the courts to ensure that the rules and procedures of an organization are properly followed, that the rules of natural justice are complied with and there is no bad faith in decision-making. In general, courts will not review the merits of a decision and they will not take on the role of an appeal body.<sup>22</sup> In *Lakeside Colony*, Mr. Justice Gonthier said:<sup>23</sup>

...[t]he courts are slow to exercise jurisdiction over the question of membership in a voluntary association, especially a religious one. However, the courts have exercised jurisdiction where a property or civil right turns on the question of membership.

<sup>20</sup> See e.g. *The Non-Profit Corporations Act, 1995*, S.S. 1995, c. N-4.2, as amended, s. 120 [NPCA].

<sup>21</sup> See e.g. *Society Act*, R.S.B.C. 1996, c.433, s. 85(1) and (2) and NPCA, s. 225.

<sup>22</sup> In *Posluns v. Toronto Stock Exchange and Gardiner* (1965), 46 D.L.R. (2d) 210 at 273 (Ont. H.C.) it was stated that “the Courts will not act as Courts of Appeal from the decisions of such [domestic] tribunals. Provided that a domestic tribunal has acted honestly and bona fide ... a Court of law will not probe the domestic tribunal’s decision to see if it would have reached a similar verdict.” See also *Vancouver Hockey Club v. 8 Hockey Ventures Inc.* (1987), 18 B.C.L.R. (2d) 372 (S.C.) where it was held that the court is not a court of appeal and it will only interfere if the order of a domestic tribunal was made without jurisdiction (or against the rules) or if it was made in bad faith or contrary to the rules of natural justice. See also *Ukrainian Greek Orthodox Church of Canada v. Trustees of the Ukrainian Greek Orthodox Cathedral of St. Mary the Protectress*, [1940] S.C.R. 586.

<sup>23</sup> *Lakeside Colony*, *supra* note 19 at para. 6 and paras. 8 and 10.

Mr. Justice Gonthier continued, quoting from the *Lee* case:

If a member is expelled by a committee in breach of contract, this court will grant a declaration that their action is *ultra vires*. It will also grant an injunction to prevent his expulsion if that is necessary to protect a proprietary right of his, or to protect him in his right to earn his livelihood, ... but it will not grant an injunction to give a member the right to enter a social club, unless there are proprietary rights attached to it, because it is too personal to be specifically enforced.

...

In deciding the membership or residence status of the defendants, the court must determine whether they have been validly expelled from the colony. It is not incumbent on the court to review the merits of the decision to expel. It is, however, called upon to determine whether the purported expulsion was carried out according to the applicable rules, with regard to the principles of natural justice, and without *mala fides*.

The *Street v. B.C. School Sports*<sup>24</sup> decision is a good example of judicial reluctance to intervene in the decision making processes of voluntary organizations. Although not a membership expulsion case, the same principles are equally applicable. B.C. Schools was a private organization of which Street's employer high school was a member. Street was a basketball coach. Member coaches had to follow B.C. Schools' code of conduct ("Code"). The Code created a complaint procedure including a hearing before a discipline panel. Street allegedly violated recruiting restrictions in the Code and was suspended. B.C. Schools took the position that it gave members access to a fair procedure which it had followed. It claimed that the merits of its decision were immune from review. The court agreed.

The court adopted the dicta in *Knight* that "...the aim is not to create "procedural perfection" but to achieve a certain balance between the need for fairness, efficiency and predictability of outcome."<sup>25</sup> Even though B.C. Schools had made some errors following its

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<sup>24</sup> *Street v. B.C. School Sports*, [2005] B.C.J. No. 1523 [*Street*].

<sup>25</sup> *Ibid.* at para. 89.

process and certain procedures, the Court found that the errors were not sufficient to constitute a denial of natural justice in the circumstances. The basic process had been followed. The errors were not material in the overall result.

The public policy considerations setting out the framework for when a court will intervene were summarized in *Street v. B.C. School Sports*<sup>26</sup> as follows:

...I consider that the Court is now faced with competing principles of public policy, all of which the Courts have traditionally considered important. Those principles are:

1. Non-Involvement
  - (a) Courtrooms are not the place for disputes about high school athletics to be resolved. Educational money should be spent on education, not on lawsuits. High school students should see that, in all but the rarest of cases, disputes can be resolved by meeting, by talking, by compromising, and without going to Court over every disagreement. This reasoning is not limited to school and athletic organizations; rather it is applicable to all manner of voluntary organizations.
  - (b) Courts have traditionally not permitted their calendars to become clogged with disputes of this sort, involving the internal business of voluntary organizations, and this is a policy which will continue.
2. Limited Supervisory Jurisdiction
  - (a) The Courts are loathe to give up their limited supervisory jurisdiction. There will always be those rarest of cases where an authoritative decision or guideline from a Court may be necessary or welcome. There are certain basic principles that govern relationships between people, which all people are bound by, and which cannot be contracted out of. The Courts have always retained the jurisdiction to govern those basic principles, and so long as the jurisdiction remains restricted and limited to those rarest of cases, the Courts have jealously guarded it.
  - (b) The Courts have no interest in the day-to-day activities of voluntary associations, but they have traditionally maintained a real and important interest in the processes by which those organizations govern themselves.

These principles were echoed more recently by the court in *Schaer v. Barrie Yacht Club*:<sup>27</sup>

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<sup>26</sup> *Ibid.* at para. 45.

<sup>27</sup> *Shaer v. Barrie Yacht Club*, [2006] O.J. No. 3582 [*Shaer*].

At issue is membership in a social club. It is not appropriate to review the decision made by the executive committee of the yacht club, but it is appropriate to examine the circumstances in which it was made and whether those circumstances reveal a failure to deal with the issue in accordance with the principles of natural justice. It is only in the event of such a failure that the court should interfere with the decision being made.<sup>28</sup>

(iii) *When Courts Will Intervene*

The current judicial approach to decisions made by voluntary organizations was re-iterated in *Lakeside Colony*, where the Supreme Court of Canada affirmed the statement of Stirling J. in the case of *Baird v. Wells*, decided in 1890:

The only questions which this court can entertain are: first, whether the rules of the club have been observed; secondly, whether anything has been done contrary to natural justice; and, thirdly, whether the decision complained of has been come to *bona fide*.<sup>29</sup>

Therefore, the first level of judicial inquiry in an expulsion case is reasonably simple to ascertain. It will review the rules of the organization, usually found in the by-laws or constitution, and see if they were followed. Likewise, a review of the evidence will determine whether the expulsion decision was made in bad faith. Absent express rules and applicable statutory framework, the question of whether the organization has complied with natural justice is more difficult. The court will have to impute those safeguards which it considers appropriate having regard to the legal, administrative and factual context of each case.

It should be noted that in administrative law generally, the level of procedural fairness may be affected by whether or not the decision is a final one as opposed to merely intermediate and whether the process is investigatory as opposed to determinative. In this environment, courts have frequently reasoned that less or no fairness is owed. Everything depends on the impact of

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<sup>28</sup> *Ibid.* at para. 23.

<sup>29</sup> *Baird v. Wells*, [1890] 44 Ch. D. 661, p. 670.

the process at stake. It is for this reason that suspensions from membership as opposed to expulsion may well attract a less onerous standard of fairness, depending of course on the implications that flow from a particular suspension. An analysis of these subsidiary distinctions is beyond the scope of this paper.

The Supreme Court of Canada decision in *Baker v. Canada (Minister of Citizenship and Immigration)*,<sup>30</sup> is a helpful guide in determining what level of fairness safeguards a court will impose. The case sets out a number of factors that should be considered. They are:

- (a) the nature of the decision being made and the process followed in making it;
- (b) the nature of the statutory scheme and the terms of the statute pursuant to which the body operates;
- (c) the importance of the decision to the individual or individuals affected;
- (d) the legitimate expectation of the person challenging the decision; and
- (e) the choices of procedure made by the agency itself, particularly where the statute leaves the discretion to make the procedures with the agency.<sup>31</sup>

Madam Justice L'Heureux-Dubé, writing for the majority of the Court, said that:

[t]he 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.<sup>32</sup>

While the rules of natural justice and procedural fairness in *Baker* were not reviewed specifically in relation to domestic tribunals, a number of recent cases in voluntary organization

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<sup>30</sup> *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 [*Baker*].

<sup>31</sup> *Ibid.* at paras. 23-28.

<sup>32</sup> *Ibid.* at para. 29.

settings have used the *Baker* approach to determine whether or not the domestic tribunal complied with the rules of natural justice. For example, in *Sahaydakivski v. YMCA of Greater Toronto*,<sup>33</sup> Mr. Justice Belleghem of the Ontario Superior Court of Justice noted that:

[i]n *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, the Supreme Court of Canada lays down a number of factors that are recognized as relevant to the issue of procedural fairness in the context of "statutory bodies". The case, however, is instructive on the issue of the extent to which procedures the duty of fairness requires to be taken into account. It also addresses the "choices of procedure" made by the deciding body, "particularly when the statute leaves to the decision maker the ability to choose its own procedure". Among other factors the court suggested as being important are the significance of the decision to the individual; the legitimate expectations of the individual *vis à vis* the decision; the nature of the deciding tribunal and its organization; and the particular process chosen by the agency to make its decision.<sup>34</sup>

In *Sahaydakivski*, the court applied the *Baker* criteria in determining whether the appropriate degree of procedural fairness had been applied and found that: (a) the importance of the decision to expel the applicant from the YMCA could not be quantified as "significant" since the applicant had adequate opportunities to join other health clubs; (b) the applicant could not reasonably have had any other expectation other than expulsion given his conduct and the fact that he had been warned of similar conduct on previous occasions; (c) the nature of the organization being one which provides fitness and recreation to its members and the fact that the organization has an obligation to ensure the safety and well-being of its members; and (d) finally the procedure chosen by the organization was to expel for breach of law which was clear and was one of the grounds for expulsion set out in the organization's by-laws.

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<sup>33</sup> *Sahaydakivski v. YMCA of Greater Toronto* [2006] O.J. No. 1368 [*Sahaydakivski*]. See also *Paterson v. Skate Canada* [2004] A.J. No. 1542.

<sup>34</sup> *Sahaydakivski*, *ibid.* at para. 34.

The Court in *Sahaydakivski* held that as long as an organization has rules in place and follows those rules, and as long as the rules are transparent and treat all members equally fairly, the court has no right to interfere.

(iv) *Content of Natural Justice and Procedural Fairness*

In his article “Judicial Review of the Private Decision Maker: The Domestic Tribunal,”<sup>35</sup>

Robert E. Forbes stated that:

[i]t has been long recognized that whenever a decision maker purports to exercise a given decision-making power, it must comply with the so-called rules of natural justice. The rules require no more than a procedure that is just and fair under the circumstances in which the decision is made. Since differing situations will require that different procedures be used to insure the fairness of the process, the content of the rules of natural justice will not necessarily be the same in every instance. Thus it is possible that a procedure that would satisfy the rules of natural justice for the making of a decision before a statutory tribunal may not be the same as that applicable to proceedings before a domestic decision maker. Moreover, the rules may even be of varying content within the framework of domestic tribunals alone. It may be found, for example, that a procedure which is just and fair where the decision is of a minor nature may not be satisfactory and may infringe the rules of natural justice where the matter at stake is one of importance, as where the individual’s right to pursue an occupation is at stake.<sup>36</sup> [footnotes omitted]

As the Supreme Court of Canada said in *Lakeside Colony*, the “duty of fairness” requires that those affected by a decision be given prior notice that a decision is about to be made or some action taken. It also requires that any case to be met must be disclosed and some reasonable opportunity for participation in the decision. But the question of whether a hearing, counsel, and written reasons, are required is a more difficult question since it is dependent upon the legal and factual context. That being said, some general principles concerning the content of the duty of fairness in decision-making by domestic tribunals have developed which are reviewed below. It

<sup>35</sup> [1977] 15 U.W.O. L. Rev. 123 [*Forbes*].

<sup>36</sup> *Ibid.* at 132.



should be noted that where by-laws or internal membership documents already address procedural fairness requirements, courts will generally uphold those documents except in the rarest of circumstances.

In attempting to arrive at the appropriate safeguards which fairness implies, the Court in *Lakeside Colony* stated that in addition to written documents and their requirements, courts may also consider “tradition or custom which is sufficiently well established [that] may be considered to have the status of rules of the association on the basis that they are unexpressed terms in the Articles of Association. In many cases, expert evidence will be of assistance to the Court in understanding the relevant tradition and custom.”<sup>37</sup>

a) Notice

Where a by-law provides for notice to be given in a certain manner, in general the courts will enforce the strict terms of the by-law which provide for such notice. Where a by-law is silent on the precise notice to be given in a discipline or expulsion case, the courts will still require that the rules of natural justice be followed and proper notice must be given to the member. However, the court will not necessarily require that a particular form of notice be given and will deduce from the evidence in a given case whether the member was in fact aware of the allegations against him or her so as to be given an opportunity to prepare for his or her defence. The strict requirements as to 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.

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<sup>37</sup> *Supra* note 19 at para. 65.

In *Lakeside Colony*, the Supreme Court of Canada held that it is insufficient merely to give notice that the conduct of a member is to be considered at a meeting.<sup>38</sup> Rather, the notice must specify the nature of the charge against the member and give the member an opportunity to answer the charge. As a result, the Supreme Court of Canada has held that notice must be both “adequate and timely”:

First, it gives the person who may be expelled an opportunity to consider his or her position and either see the error of his or her ways and seek reconciliation, or prepare to defend himself or herself. Second, adequate and timely notice allows the members of the group who are to make the decision an opportunity to ensure that they will be able to attend the meeting and contribute to the discussion, or perhaps to ask for an adjournment if they are unable to attend.<sup>39</sup>

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. While an oral hearing has clear advantages over written submissions (particularly where credibility is an issue), oral hearings are more expensive both in terms of cost and time. The Supreme Court of Canada has stated that: “The *audi alteram partem* rule does not require that there must always be a hearing. What is required is that the parties be given the opportunity to put forward arguments.”<sup>40</sup> Similarly in *Baker*, Madame Justice L’Heureux-Dubé stated that “...it cannot be said that an oral hearing is always necessary to ensure a fair hearing and consideration of the issues involved. The flexible nature of the duty of fairness recognizes that meaningful participation can occur in different ways in different situations.”<sup>41</sup>

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<sup>38</sup> *Ibid.* at para. 80.

<sup>39</sup> *Ibid.* at para. 82.

<sup>40</sup> *Quebec (Labour Relations Board) v. Canadian Ingersoll Rand Co.*, [1968] S.C.R. 695.

<sup>41</sup> *Baker*, *supra* note 30 at para. 33

In the context of the importance placed on participatory rights of members and satisfaction of the right to be heard, it will generally be satisfactory in an expulsion case for members to make written submissions. However, any denial of the right to make submissions will result in a breach of the duty of procedural fairness as will the blatant disregard of reasons put forward by an aggrieved person or the mere paying of “lip service” to such submissions.

c) The Right to Counsel

Similarly, while a person’s participation in the decision-making process may be enhanced by having counsel present, 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.<sup>42</sup> In the context of the domestic tribunal, the question of whether counsel is entitled to participate can generally be decided by the tribunal itself as part of its own internal rules. Again, the exceptions to the rule will be determined based on factors such as the importance of the individual interests at stake, the seriousness of an adverse decision and the nature of the issues to be decided.

d) Written Reasons for Decision

In *Baker*, the Supreme Court of Canada recognized that in certain circumstances the duty of procedural fairness will require the provision of a written explanation for a decision. Although decided in the context of an administrative tribunal, the policy reasons cited in that case can be applied to domestic tribunals where the seriousness of the impact of the decision on an individual may dictate a requirement for reasons.

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<sup>42</sup> The question of entitlement to counsel has arisen frequently in the context of immigration proceedings and prison discipline, parole revocation and refusal proceedings. See e.g. *Kelly v. Joyceville Institution* (1987), 25 Admin. L.R. 303 (FCTD). Also, a person facing professional disciplinary proceedings will normally be entitled to counsel. See e.g. *Assn. of Professional Engineers (Ontario) v. Smith* (1989), 38 Admin L.R. 212 (Ont. H.C.).

Madame Justice L’Heureux-Dubé pointed out numerous policy reasons for providing reasons including: fair and transparent decision making, a reduction in arbitrary decisions, affording litigants the ability to assess whether they should appeal, confirming to all parties that all applicable issues have been addressed and finally, ensuring that those affected feel it is more likely that they have been fairly treated. In short, as Madame Justice L’Heureux-Dubé stated, giving reasons generally makes for a better decision. However, the policy reasons in favour of providing reasons do not go so far as to require formal reasons and in *Baker*, the notes of the immigration officer were considered to satisfy the reasons requirement. In this regard, Madame Justice L’Heureux-Dubé stated: “In my view, however, these concerns can be accommodated by ensuring that any reasons requirement under the duty of fairness leaves sufficient flexibility to decision-makers by accepting various types of written explanations for the decision as sufficient.”<sup>43</sup>

While there is no general requirement encompassed in the duty of fairness to include reasons in the case of domestic tribunals, there may indeed be situations where procedural fairness may dictate that reasons be given. In *Rankin v. Alberta Curling Federation Appeals Committee*, the Court stated:<sup>44</sup> “Although a failure to give reasons by consensual domestic tribunals should be more tolerated by the courts, the policy objectives to require reasons remain as valid for consensual tribunals as they do for statutory tribunals.” In *Rankin*, the Court applied the four factors set out in *Baker* in determining that the Alberta Curling Federation should be required to give reasons for the suspension of four curlers, in particular:

1. significant consequences for the individual;

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<sup>43</sup> *Baker*, *supra* note 30 at, para. 40.

<sup>44</sup> *Rankin v. Alberta Curling Federation Appeals Committee*, [2005] A.J. No. 1758 at para. 68 [*Rankin*].

2. the decision making process gives no assurance that the decision maker considered the submissions of the applicants;
3. there is unclear reasoning leading to the finding;
4. there is an inability of a reviewing court on judicial review to determine whether the decision makers applied consistent and lawful criteria.

The Court held that at a minimum, brief reasons should have indicated: "...in a transparent way the information that was relied upon, what weight was given to the various pieces of information, the reasoning behind the decision, the conclusion, and the reason that alternate approaches were not taken."<sup>45</sup>

e) An Unbiased Tribunal

It is generally accepted that natural justice requires that the decision-maker be impartial and unbiased. However, the application of this rule in the context of expulsion from membership organizations is difficult. Given the character of a not-for-profit organization and in particular the often close relationship of members, particularly in the context of a social club, it is almost impossible to find an unbiased decision maker. As Forbes observes:<sup>46</sup>

There is no doubt that an unbiased tribunal is one of the central requirements of natural justice. However, given the close relationship amongst members of voluntary associations, it seems rather likely that members of the relevant tribunal will have had some previous contact with the issue in question, and given the structure of a voluntary association, it is almost inevitable that the decision makers will have at least an indirect interest in the question. Furthermore, the procedures set out in the rules of the association may often require that certain persons make certain kinds of decisions without allowing for an alternate procedure in the case of bias.

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<sup>45</sup> *Ibid.* at para. 79.

<sup>46</sup> *Forbes, supra* note 35 at 139-141.

The current state of the law with respect to bias in decision making on expulsion or disciplinary cases was well stated in *Barrie v. Royal Colwood Golf Club*<sup>47</sup> where the court acknowledged that by the very nature of a domestic tribunal, there can be no unbiased decision makers:

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.<sup>48</sup>

Accordingly, in relation to bias, as long as there is no bad faith on the part of those making the decision, a court will not interfere in the decisions of a domestic tribunal even where it could otherwise be said that the decision maker was biased.

f) Appeal Rights

Do the rules of natural justice require that an organization provide a right of appeal from an internal decision on expulsion? It seems reasonably clear that there is no obligation on a not-for-profit organization to provide a right of appeal to any other adjudicative body. Where they do provide a right of appeal, it is similarly not required to constitute the appeals panel with unbiased decision makers provided that the subsequent decision is made in good faith.

(v) *Other Considerations*

a) Statutory Rules

The cases suggest that court intervention in expulsion and suspension cases will depend upon the discipline rules of the organization (if any) and the organization's compliance with those rules, the type of organization (whether it is a social or sporting club or another type of organization) and the impact upon the member who is the subject of the expulsion.

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<sup>47</sup>*Barrie v. Royal Colwood Golf Club* (2001), 18 B.L.R. (3d) 21, 2001 BCSC 1181 [*Barrie*].

<sup>48</sup>*Ibid.* at para. 70.

In some cases, natural justice requirements will also be dictated by statute. As a result, in determining the standard to be applied, it is important to first inquire into the relevant statutory regime to determine whether it imposes natural justice requirements on the organization in question. For example, *The Non-Profit Corporations Act, 1995* (Saskatchewan) includes a clear statement that natural justice rules will apply. Saskatchewan's legislation also includes oppression remedies which may be invoked by members.<sup>49</sup> However, federally, in Ontario and in most other provinces, the legislation is silent on the question of natural justice on termination of membership.<sup>50</sup> Other provinces such as British Columbia codify a specific right to apply to the court where a member is of the view that the organization has failed to comply with its by-laws.<sup>51</sup>

Similarly, legislation may provide for a complaints and discipline process as a means of protecting the public. This arises, for example, in legislation providing for the governing bodies of self-regulating professions which also generally set standards of fitness for admission. The decisions of these bodies in the context of refusing admission into membership or in discipline, expulsion or suspension are usually subject to natural justice requirements.<sup>52</sup> These types of bodies are also considered by the courts to have a "public" character sufficient to be reviewable by the prerogative remedies which are available only when the decision in question comes within the scope of public, as opposed to private law.

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<sup>49</sup> *The Non-Profit Corporations Act, 1995*, S.S. 1995, c.N-4.2, as amended to S.S. 2006, c.27, s.3, Section 120 provides that: "A member of a corporation is entitled to a fair hearing before he or she is disciplined or before his or her membership interest in the corporation is terminated pursuant to section 119." Under Section 121, members who claim to be aggrieved because of a disciplinary procedure or because of a termination of membership may apply to the court under Section 225 which provides for an oppression remedy and gives the court broad jurisdiction in making an order.

<sup>50</sup> *Corporations Act*, R.S.O. 1990, c. C.38, as amended to 2005, c.5, s. 16, *Canada Corporations Act*, R.S.C. 1970, c. C-32, as amended.

<sup>51</sup> *Society Act*, R.S.B.C. 1996, c.433, s. 85(1) and (2).

<sup>52</sup> See e.g. *Rubin v. College of Pharmacy (Ontario)* [1961] O.R. 398 (Ont. C.A.). See also *Saskatchewan Veterinary Medical Assn. v. Murray* (2002), 261 Sask.R. 22 (Sask. Q.B.). See also *Thomson v. College of Physicians and Surgeons (British Columbia)* (1998), 10 Admin L.R. (3d) 201 (BCSC).

b) By-laws and Membership Rules

It now appears to be settled that where an organization turns its mind to the procedural rules to be followed on discipline, expulsion or suspension in the by-laws or other membership documents, those rules must be followed by the organization and will be considered to form part of the contract between the members and the organization. However, where the by-laws and internal documents are silent, the courts will imply rules of natural justice into the “contract” between the members and the organization and will determine what those rules should be under the circumstances. As such, several cases have found that where the by-laws and membership documents are silent, the rules of natural justice implicitly form part of the contract between the organization and the member.<sup>53</sup> In *Senez v. Montreal Real Estate Board*,<sup>54</sup> the Supreme Court of Canada held that when the by-laws of voluntary associations are silent, the organization must observe the rules of natural justice which represent supplementary law.

The courts have gone even further in some instances and declared that specific procedural safeguards adopted by an organization are not enough. In *Paterson v. Skate Canada*,<sup>55</sup> the Court took the extraordinary step of reviewing the explicit process established by Skate Canada for discipline proceedings and found the process to be inadequate. The Court “read in” a requirement to permit cross-examination where Skate Canada was investigating allegations of dishonesty and fraud about one of its members. The gravity of the allegation and the potential economic implications of a decision militated in favour of the highest level of protection notwithstanding the more limited, but certainly explicit procedures adopted by Skate Canada.

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<sup>53</sup> See e.g. *A.A.A. Khan Transport Inc. v. Bureau d'éthique commerciale de Montreal inc.* [1998] Q.J. No. 226.

<sup>54</sup> *Senez*, *supra* note 17.

<sup>55</sup> *Paterson v. Skate Canada*, [2004] A.J. No. 1542.



Similarly, in the *Lee* case, Lord Denning went so far as to say that an organization cannot contract out of the duties of fairness.<sup>56</sup>

Although the jurisdiction of a domestic tribunal is founded on contract, express or implied, nevertheless the parties are not free to make any contract they like. There are important limitations imposed by public policy. The tribunal must, for instance, observe the principles of natural justice. They must give the man notice of the charge and a reasonable opportunity of meeting it. Any stipulation to the contrary would be invalid. They cannot stipulate for a power to condemn a man unheard.

The *Lee* case has been often cited for the proposition that if the by-laws or constitution are drafted with an exclusionary clause, the clause would be unenforceable as being contrary to public policy.<sup>57</sup> According to Lord Denning, any stipulation in a constitution which would result in the tribunal not being required to observe natural justice rules would be invalid.<sup>58</sup>

However, in *Posluns v. Toronto Stock Exchange and Gardiner*,<sup>59</sup> the Supreme Court seemed to leave the door open to a contrary conclusion when it said:

In the absence of an express prohibition the Courts will not construe the rules of an association of a body having disciplinary authority over its members as impliedly excluding the rules of natural justice when they would otherwise be applicable. [emphasis added]

Given the courts' willingness to exercise continued supervisory jurisdiction over decision-making of domestic tribunals, it seems likely that the courts will continue to uphold the duty of fairness even where the by-laws or constitution include a clause which attempts to exclude fairness procedures. However, the Supreme Court of Canada has recognized that by-laws form a contract between the member and organization. It has also said that when an individual joins a corporation, he accepts its constitution and by-laws and undertakes an

<sup>56</sup> *Lee*, *supra* note 13 at 5.

<sup>57</sup> See e.g. *Kennedy v. Gillis et al.* 30 D.L.R. (2d) 82, [1961] O.J. No. 601.

<sup>58</sup> *Lee*, *supra* note 13 at 5.

<sup>59</sup> *Posluns v. The Toronto Stock Exchange et al.* 46 D.L.R. (2d) 210 aff'd by [1966] 1 O.R. 285-306 (C.A.); aff'd [1968] S.C.R. 330.

obligation to observe them. It therefore remains an arguable point as to whether by-law provisions which develop a set of procedural protections can be declared to be inadequate when an organization has specifically turned its mind to what kind of process it wishes to adopt and follows it in making decisions. If the organization's by-laws indicate that the only protections to be offered to an aggrieved member are those which it specifically sets out and no more, it might be argued more forcefully that following its own process is all that needs to be done to remain immune from judicial interference.

c) Type of Organization

In the context of determining the level of fairness to be applied, the courts invariably consider the type of organization as bearing on the nature of the interest involved.

The courts have found that while social clubs are not excluded from the duty to be fair on expulsion of members, the need for fairness is less rigorously enforced unless a property or economic right is also at stake. As was noted in *Conacher v. Rosedale Golf Club Assn.*, the court stated that “as a matter of policy, the law refuses to recognize a duty of care regarding the social expectations of others or to interfere in purely voluntary social relationships.”<sup>60</sup>

However, regardless of the type of organization, where a club specifically sets out an internal disciplinary process which it does not follow, the court will enforce the contractual rights of the member to ensure that the organization follows the process which it has itself declared to represent fairness.

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<sup>60</sup> *Conacher v. Rosedale Golf Assn. Ltd.* [2002] O.J. No. 575 at para. 24.

*Lakeside Colony* affirms the courts' particular reluctance to intervene in the affairs of a religious organization. The Court quotes from *Ukrainian Greek Orthodox Church of Canada v. Trustees of the Ukrainian Greek Orthodox Cathedral of St. Mary the Protectress*<sup>61</sup> in saying:

...it is well settled that, unless some property or civil right is affected thereby, the civil courts of this country will not allow their process to be used for the enforcement of a purely ecclesiastical decree or order.<sup>62</sup>

The *Donoghue* case stated that the decision to close St. Brigid's church was one that was authorized pursuant to the private canon law of the church and should not be interfered with by a court unless the decision affected the parishioners' property or civil right by reason of their membership.<sup>63</sup>

However, *Lakeside Colony* stands for the proposition that the courts will intervene in ecclesiastical procedure to uphold rules of natural justice where there are property rights at stake or where the contractual rights are of such a serious nature as to be susceptible to enforcement by the courts. The Supreme Court of Canada found that the defendants had not received adequate notice in breach of the requirement of procedural fairness and therefore were entitled to remain on the Colony lands.

Finally, where expulsion from an organization is of such a serious nature so as to affect economic rights or interests, such as an individual's right to continued employment, the duty of fairness will be strictly applied by the courts.

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<sup>61</sup> *Ukrainian Greek Orthodox Church of Canada v. Trustees of the Ukrainian Greek Orthodox Cathedral of St. Mary the Protectress*, [1940] S.C.R. 586.

<sup>62</sup> *Lakeside Colony*, *supra* note 19 at para. 6.

<sup>63</sup> *Donoghue*, *supra* note 10 at 2.

d) Remedies

The potential success of a judicial review depends in part on there being no adequate alternate remedy available to a complainant. Therefore, where an action in damages will properly compensate a complainant, judicial review typically will not succeed. Judicial review then is designed to protect rights and interests, the deprivation of which cannot necessarily be quantified. Of course, courts have and will continue to rationalize awards of damages in the context of lawsuits where organizations deviate from the contractual obligations expressed in their constating documents with resultant damage to members.<sup>64</sup>

**D. Membership Rights on Application**

Both the *Canada Corporations Act*<sup>65</sup> and the *Corporations Act (Ontario)*,<sup>66</sup> as well as most provincial incorporating legislation, are silent regarding the requirements for admission of members into not-for-profit corporations.

*Conacher*<sup>67</sup> stands for the proposition that a person applying for membership in a not-for-profit organization generally has no legal right to compel the organization to admit him/her as a member. Lionel and Judi Conacher's son was denied membership in the club. The Conachers, long-standing members, sued on their son's behalf claiming that the Club "breached their duty to deal with their son's membership application fairly, honestly and in the best interests of all of Rosedale's members and in accordance with the club's established procedures, rules or by-laws."<sup>68</sup> The Court held that while "[t]he by-laws of not-for-profit or "voluntary associations" such as social clubs, philanthropic, sports or professional bodies constitute contractual

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<sup>64</sup> See e.g. *Sol Sante Club v. Grenier*, [2006] B.C.J. No. 3141.

<sup>65</sup> R.S.C. 1970, c. C-32.

<sup>66</sup> R.S.O. 1990, c. C.38.

<sup>67</sup> *Conacher*, *supra* note 60.

<sup>68</sup> *Ibid.* at para. 2.

obligations as between the members and the corporation”,<sup>69</sup> “[a]t common law ... no person has a right to become a member of an association and nothing in the club’s by-laws or rules confers upon members, any legally enforceable contractual rights with respect to the applications of relatives.”<sup>70</sup>

Since the courts consider the relationship between members and not-for-profit organizations to be contractual, it generally follows that an applicant for membership will not have any legal right to require an organization to admit him or her into membership. However, such a right may exist depending upon the precise language in the by-laws or constitution and on whether any statutory scheme applies so as to require admission. The following cases illustrate this point.

In *PCL Industrial Constructors Inc. v. CLR Construction Labour Relations Association of Saskatchewan Inc.*,<sup>71</sup> CLR had been designated by the Minister of Labour pursuant to the *Construction Industry Labour Relations Act* (“CILRA”) to act as the sole representative of all unionized employers in the construction industry in the trade division. It exclusively conducted collective bargaining on a province-wide basis on their behalf as mandated by the CILRA.<sup>72</sup> PCL was denied membership into CLR on the basis that it did not qualify. PCL brought an action for, *inter alia*, an order to compel CLR to admit it as a member, for a declaration that CLR’s actions were oppressive or unfairly prejudicial towards PCL, and that CLR breached the rules of natural justice.

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<sup>69</sup> *Ibid.* at para. 21.

<sup>70</sup> *Ibid.* at para. 27.

<sup>71</sup> *PCL Industrial Constructors Inc. v. CLR Construction Labour Relations Association of Saskatchewan Inc* [1999] S.J. No. 151, aff’d. [2000] S.J. No. 60, aff’d. Application for leave to appeal dismissed with costs (without reasons) [2000] S.C.C.A. No. 156 [*PCL*].

<sup>72</sup> *PCL, ibid.* [1999] S.J. No. 151 at para. 2.

The Court ruled in PCL's favour holding that CLR's actions were oppressive and unfairly prejudicial to the interests of PCL since the governing legislation did not provide CLR with any discretion concerning who it could admit as a member. If a unionized employer qualified for membership pursuant to the provisions of the Act, CLR had no choice but to admit the applicant as a member. Because the CILRA was specific legislation while the *Non-Profit Corporation's Act*<sup>73</sup> (Saskatchewan) ("NPCA") was general legislation, the CILRA had precedence.<sup>74</sup> The court held that based on the arbitrariness of CLR's decision to deny membership to PCL, "such a denial violates the principles of fairness and constitutes a denial of natural justice."<sup>75</sup> The court ordered that the Articles, by-laws and application forms of CLR be amended to include the right of every applicant who qualifies under the CILRA the right to membership in the organization and it admitted PCL as a member of CLR.

In *Peel (Regional Municipality) v. Greater Toronto Airports Authority*,<sup>76</sup> the discretion of the board to admit members was also limited, this time by the wording of the by-laws. The by-laws provided for nominations to membership to be made by the municipalities being represented by the Greater Toronto Airport Authority (the "GTAA"). If the nominee met the qualifications in the by-law, the nominee was required to be admitted as a member and elected to the board. An additional provision in the by-laws required all directors to comply with its conflict of interest provisions. Mr. Parsons was interviewed and was qualified based on article 4.6(a), which provided, in part:

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<sup>73</sup> S.S. 1995, c. N-4.2.

<sup>74</sup> *PCL*, *supra* note 72 at paras. 60-62.

<sup>75</sup> *Ibid.* at para. 87.

<sup>76</sup> *Peel (Regional Municipality) v. Greater Toronto Airports Authority* [1999] O.J. No. 3597 [*Peel*].

The Board shall appoint each Nominee so named by the Nominator who (i) meets the qualifications of a Member set forth in section 4.2 ... and (ii) meets the conflict of interest requirements set forth in section 6.12 ...<sup>77</sup>

However, Mr. Parsons' application for membership was rejected as the board concluded that, based on the conflict of interest requirements, Mr. Parsons may not always act in the best interests of the GTAA and therefore did not meet the conflict of interest requirements. The court held that the conclusion made by the board about a possible future conflict of interest was too remote to disqualify Mr. Parsons from membership presently and that the wording of the by-laws precluded the board from using its discretion to refuse to admit members.

There have also been a number of cases dealing with situations where a former member claimed unfair treatment on suspension or termination, but the court characterized the situation as an application for membership because the former member's membership had lapsed or expired prior to the dispute. Two Saskatchewan cases illustrate the court's thinking in this regard.

In *Trumbley v. Saskatchewan Amateur Hockey Association*,<sup>78</sup> ("Trumbley") the appellant was a hockey coach who participated in a tournament not sanctioned by the Hockey Association, of which he was a member even though the Association had stated that any member who participated in the tournament would face suspension from the Association. Despite this warning, the appellant participated in the unsanctioned tournament. The appellant later learned that his name had been struck from the membership list and appealed the decision of his "suspension". The court held that while the case had been argued on the basis of a suspended or terminated

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<sup>77</sup> *Ibid.* at para. 10.

<sup>78</sup> *Trumbley v. Saskatchewan Amateur Hockey Association* (1986), 49 Sask. R. 296 (C.A.) [*Trumbley*].

existing membership, in fact it was actually a case about the refusal to admit an applicant for membership. The court regarded this distinction as important because

... the first process is subject to rules in the bylaws of the appellant association and to rules in the Act, the second process is not. Accordingly, if the second process is the relevant one, whether the appellant complied or not with the termination and suspension rules is entirely immaterial. In that case, the appellant's efforts to comply with the rules were merely gratuitous [*sic*] and any failure to comply with them, if failure there was, can carry no consequences.<sup>79</sup>

The court also found that a central issue was whether or not the appellant's membership was for a fixed term:

The bylaws of the appellant imply a fixed term: an annual membership is payable and no member shall be entitled to enter competition or be represented at the annual general meeting unless its financial commitments are fully paid. In the case of the respondent no precise dates can be fixed for the date his 1984-1985 membership ceases. The bylaws are very loosely worded -- it can be said that his membership ceased by the effluxion of time before October 1, 1985.<sup>80</sup>

In *Tkachuk (Litigation guardian of) v. Bridge City Cosmo Aqualene Synchronized Swimming Club Inc.*,<sup>81</sup> the board of the Club chose not to renew Laura Tkachuk's membership because of serious problems various members and coaches of the Club had with both Laura and her parents. In the 1996-1997 swimming year, the board gave Laura a probationary membership on the condition that both she and her parents change their disruptive behaviour. In 1997, after numerous meetings and discussions, and without any improvement in the behaviour of the Tkachuks, the board decided not to renew Laura's membership and refunded her membership fee. The board was also concerned about the viability of the Club because numerous other

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<sup>79</sup> *Ibid.* at 3-4.

<sup>80</sup> *Ibid.* at 4.

<sup>81</sup> *Tkachuk (Litigation guardian of) v. Bridge City Cosmo Aqualene Synchronized Swimming Club Inc.* [1998] S.J. No. 196 [Tkachuk].



members and staff stated that they would leave the Club if the Tkachuk's stayed. Tkachuk sued on the grounds of oppressive or unfairly prejudicial conduct and lack of procedural fairness.

The Court followed *Trumbley* and held that because Laura's membership had expired before the board decided not to renew her membership, she was not entitled to the same procedural safeguards given to a person whose membership was terminated by the board.<sup>82</sup> Further, the court held that on a review of the by-laws of the Club it was clear that admission to membership was left to the discretion of the board. The court held that:

[j]ust as Mr. Trumbley who was not accepted for membership once his annual membership had expired could not look to the provisions of s. 120 of the Act, neither can Tkachuk. The Aqualenes, a voluntary organization, decided to leave it in the discretion of its board of directors to determine who may be a member, and whose membership could be renewed. If the membership of the Aqualenes preferred some other arrangement, it could have amended the bylaws at its annual general meeting.

...

I find no basis upon which the Tkachuks can bring an application to require the board of the Aqualenes to provide them with a fair hearing. It is neither required by the legislation nor the rules of this organization.<sup>83</sup>

Accordingly, in the context of admission of members, the drafting of by-laws and membership rules should consider the existence of any applicable legislation which may require admission of certain types of members. Careful attention should be paid to the question of whether certain members should have rights to membership which are automatic (as opposed to discretionary). As a general rule, from an organization's perspective it will be preferable to draft admission provisions as discretionary.

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<sup>82</sup> *Ibid.* at para. 17.

<sup>83</sup> *Ibid.* at paras. 18-19.

### **E. Summary of Principles**

A number of principles can be derived from the case law in this area. They can be summarized as follows:

- Decisions which affect the legal rights, interests, privileges or property of members will be amenable to judicial review;
- Judicial supervision of the decisions of voluntary organizations is typically rationalized on the basis that the by-laws of these organizations represent a binding contractual commitment to members;
- Respecting the private nature of voluntary organizations, there is a very real and clearly expressed judicial unwillingness to intervene in the decisions of these organizations;
- However, the courts will take jurisdiction to ensure that organizations follow their expressed procedures designed to ensure fairness, absent which such procedures will be imputed by the courts;
- What kind of procedures will be implied will depend on a number of factors, such as the importance of the decision, its impact on the member and the expectations of both the organization and its members;
- Courts may even intervene when they consider already expressed procedures to be inadequate although the judicial authority for such an approach is not well-settled;
- Courts will also intervene to control bad faith in decision making;

- Courts are more reluctant to get involved when an organization refuses to confer membership on a person. An applicant for membership does not have the same vested interests as a member. Judicial reluctance in this context is no different than in other contexts, and courts are even more unwilling to get involved for an aggrieved person who has no pre-existing interest, as opposed to someone whose interests are being terminated.

#### **F. Commentary on By-law Drafting**

By-laws vary considerably in their membership admission and expulsion provisions. These differences are driven in large part by the type of organization and whether its membership is restricted or broadly-based. By-laws may delegate the creation of expulsion provisions to a subsidiary document, such as membership rules or policies, provided that the subsidiary document is clearly referenced in the by-laws as having authority and the members are provided with the subsidiary document at the time of becoming members.

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: (1) state clearly how members are admitted; (2) provide clear criteria for membership (broken down by membership category, if applicable); (3) provide that admission is in the discretion of the admitting body (the board, membership committee or a particular officer) and be careful of any wording which might imply an automatic right (unless dictated by statute); and (4) as discussed below, consider the use of terms of membership.

Expulsion provisions will vary according to the nature and type of membership organization. Organizations with restricted voting memberships, such as those which provide

that membership is restricted to the board of directors will invariably provide for automatic disqualification as a member, *i.e.*, upon ceasing to be a director. The by-laws of these types of organizations do not typically need to be drafted with a sophisticated process for expulsion unless the deprivation of membership would have a serious impact on the member.

Organizations with more broadly based memberships, such as clubs, sporting organizations, professional associations and churches usually provide members with specific membership rights. The by-laws of these organizations should be carefully drafted and should set out detailed criteria for membership as well as expulsion provisions which provide members with appropriate fairness, having regard to the particular membership rights that would be affected by an expulsion. In other words, it is essential for drafters of membership provisions in most organizations like this to identify and consider the rights enjoyed by members in the particular organization in advance of drafting the expulsion provisions. Where there is a property or economic right or privilege tied to membership, the removal of which will seriously impact on the member, the fairness provisions should necessarily reflect higher procedural safeguards.

In some cases, it is useful for by-laws to distinguish between expulsion and automatic disqualification of members. For example, a member may automatically cease to qualify for membership when he/she ceases to meet certain membership criteria (required in order to be a member – such as a requirement that members hold a particular license), failing to pay annual dues or any number of more readily ascertainable criteria. The distinction which may be drawn, depending upon the circumstances, is that automatic disqualification would not attract the same level of procedural safeguards (or in some cases, any procedural safeguards) as an expulsion, in some organizations.

It is generally recommended that by-laws include “terms” of membership which may also tie into an obligation on the part of the member to pay annual membership dues. An annual term, for example, can be a useful means of controlling membership numbers since by-laws can provide that membership ceases or expires on the anniversary date of being admitted into membership (or some other specified date). An annual term may require members to re-apply for membership and can also be a useful way, assuming careful drafting, of “weeding out” members. It may also give an organization more leeway, since those who are not members typically do not enjoy the same rights to more extensive procedural fairness. Therefore, in drafting membership term provisions, it is important to consider whether: (1) there should be an automatic right on the part of members to renew membership upon payment of an annual membership fee; or (2) whether the organization should have a continuing right to evaluate its members and their suitability, in which case the by-laws should require either that members provide evidence of conformity with membership criteria or that once a membership term has expired, the member must re-apply for membership.

In the context of expulsion from not-for-profit organizations, by-laws may provide for any decision-making body (to determine the expulsion) from a review panel to a single officer, such as the president, who may make the decision in his or her discretion having followed the process for expulsion outlined in the by-laws. As noted above, there is no requirement for by-laws to provide for an appeal of this decision and the by-laws may, and should in most cases, provide that the decision is final and binding with no further appeal. By-laws may be drafted so as to give the decision-maker full discretion to remove a member or they may require the decision-maker to consider certain criteria in coming to a decision. Where criteria are expressed in the by-laws, the decision-maker must be careful to have regard to the criteria in coming to its

decision, failing which the decision may be reviewed on the basis that the procedures set out in the by-laws were not followed.

Procedures selected by organizations should be set out explicitly and in unambiguous terms and the by-laws should provide that the procedure is an exhaustive one. Consideration of the precise fairness requirement which applies in each case is essential. Failure to provide a fair expulsion process in the by-laws may result in the court imposing a fairness procedure on the organization that is difficult to carry out or that is inconsistent with its objectives, particularly in the case of a religious organization. Ultimately, those involved in drafting by-laws should ensure that the by-laws provide for a procedure which represents “fair play in action” in the event that an expulsion or other disciplinary decision is challenged by a member of the organization.

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