

# Procedural fairness and disclosure obligations in investigations by agencies with special expertise

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## Introduction

### *Baker* factors

### Evidentiary rules under Statutory Powers Procedures Act

### *Baker* factors in investigations by agencies with special expertise

### Comment

## Introduction

In the landmark administrative law case *Baker v Canada*, **(1)** the Supreme Court of Canada established a test for procedural fairness with regard to judicial review of administrative decisions and specifically addressed the fairness and disclosure to which an applicant is entitled in a proceeding.

At a time where the investigation of Hillary Clinton's deleted emails amidst the turmoil of the US election captivated the voting public, it has never been clearer that professional conduct and ethics are at the forefront of the careers of public servants. This is equally true of individuals entrusted with the responsibility of working in highly regulated professions, such as law. Though an individual may be summarily indicted in the court of public opinion, when an investigation is of immense reputational and professional import, what degree of transparency and disclosure is required from the institutional perspective of the investigation?

This update explores the intersection between the Supreme Court's considerations of procedural fairness as imposed by *Baker* and allegations of procedural fairness and unfair investigations conducted by agencies with expertise.

## *Baker* factors

Mavis Baker, a Jamaican immigrant who lived in Toronto with her children for several years and supported herself illegally, was diagnosed as schizophrenic and applied for welfare. The government rejected her application and initiated deportation procedures. Pursuant to regulations made under Section 114(2) of the Immigration Act, **(2)** the minister of citizenship and immigration is empowered to facilitate admission to Canada or grant an exemption from the regulations on humanitarian and compassionate grounds. Baker applied to be exempt from the regulations on such grounds, but her request was summarily rejected without any reasons. After requesting disclosure of the notes relating to the rejection, Baker discovered a number of comments made that suggested or indicated bias, which prompted her to appeal the decision. Baker's application for judicial review and subsequent appeal were unsuccessful at the Federal Court and the Federal Court of Appeal.

The Supreme Court allowed Baker's appeal. The court noted that the duty of procedural fairness is "flexible and variable, and depends on an appreciation of the context of the particular statute and rights affected". **(3)** Accordingly, the court enumerated the following non-exhaustive list of factors that should be considered when determining the procedural protections that are mandated by the duty of fairness, including the degree of transparency to which an applicant is entitled to in a proceeding:

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- The nature of the decision and the process followed in making it. **(4)**
- The nature of the statutory scheme and the "terms of the statute pursuant to which the body operates". **(5)**
- The importance of the decision to the individual or individuals affected. **(6)**
- The legitimate expectations of the person challenging the decision. **(7)**
- The choice of procedure made by the agency itself:

*"particularly when 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... important weight must be given to the choice of procedures made by the agency itself and its institutional constraints". **(8)***

The fifth *Baker* factor affords considerable deference to an agency with special expertise and recognises that the agency is arguably more knowledgeable of its policies, procedures and precedents than any other body.

### **Evidentiary rules under Statutory Powers Procedures Act**

Administrative tribunals are governed by the Statutory Powers Procedures Act, which confers broad discretionary powers to accept evidence that would normally be inadmissible under the evidence rules. **(9)** Section 8 of the act stipulates that public authorities making administrative decisions are not subject to the *Stinchcombe* **(10)** disclosure principles that apply in a criminal case because the innocence of the accused is not at stake. **(11)** However, the fact that *Stinchcombe* obligations do not apply does not mean that an administrative authority has met its disclosure obligations, because "in the administrative law context, statutory obligations and procedural fairness may impose an informational burden" on the authority. **(12)**

### ***Baker* factors in investigations by agencies with special expertise**

#### ***Public servant***

In the recent case *Michael Di Biase v City of Vaughan*, **(13)** the applicant – a deputy mayor and councillor – was the subject of a complaint made to the city of Vaughan integrity commissioner alleging that he had acted contrary to the city's code of ethical conduct for members of council. The applicant demanded significant disclosure of the investigation protocol and information. The divisional court rejected the applicant's submission that he was denied natural justice and procedural fairness on the basis of an allegation that the respondent integrity commissioner relied on a non-transparent investigation process. **(14)** In its ruling, the divisional court pointed out that the integrity commissioner had:

- set out the conduct that she had found concerning, including that she had received information about the applicant's impugned conduct from interviews that she had conducted. Though she did not identify the informant, she included actual comments attributed to the applicant that she found important and specified the job title of the informant; **(15)** and
- described her investigation by, among other things, providing specific particulars in her preliminary findings; indicating that her review encompassed public and confidential city documents, the city's past and current bylaws, emails, video surveillance, audio recordings of meetings and minutes of *in camera* board meetings; and disclosing that she had searched the applicant's city email account using keyword searches. **(16)**

The divisional court considered and applied the *Baker* factors in its analysis, finding as follows:

- The nature of the decision – the integrity commissioner investigates complaints of violations of the code of ethical conduct and reports the results to the city. The report contains factual conclusions and recommendations on penalty, but has no binding effect. **(17)**
- The role of the decision in the statutory scheme – the complaint protocol is codified in a city bylaw and part of the statutory scheme, along with the duties imposed upon the integrity commissioner by the Municipal Act. **(18)**
- The importance of the decision to the individual affected – the impact of the decision was purely reputational; the maximum penalty available was a 90-day pay suspension and the applicant could not lose his elected position or be found civilly liable. **(19)**

- The legitimate expectations of the person challenging the decision – the commissioner was very straightforward and did nothing to give rise to a legitimate expectation that she intended to behave differently from how she had actually behaved. Moreover, based on the statutory scheme and the integrity commissioner's conduct, there was no legitimate expectation that the applicant would receive disclosure to the extent that he had demanded. **(20)**
- The choice of procedure – the city is the master of its own procedures and the members of the city council are the same persons subject to investigations by the commissioner, so they were best placed to weigh in on the procedures governing such investigations. The investigation protocols were codified in a bylaw, and there was nothing in the Municipal Act or the codified complaint protocol that required the degree of disclosure that the applicant had demanded. **(21)**

Ultimately, after a consideration of the *Baker* factors, the divisional court found that the integrity commissioner had exercised her discretion appropriately and balanced the applicant's right to meaningfully respond to the allegations against him with the need to protect city staff who had cooperated in the investigation.

### **Lawyer**

The Law Society Tribunal has said that a licensee is not entitled to a perfect investigation. **(22)** Regardless, given the Law Society's considerable authority and control over the investigatory process, the tribunal has established that the Law Society must deal fairly and transparently with members. The interests of justice, as well as those of the licensee and of the public, require the Law Society to advise the licensee of all steps in the investigation and subsequent proceedings to afford the licensee the opportunity to seek appropriate counsel and to make reasonable efforts to reach a resolution. **(23)** However, before obtaining disclosure to support an allegation that an investigation constitutes an abuse of process, there must be a legally and factually tenable allegation (more than mere speculation) supported on the record. **(24)**

In 2016 the tribunal considered a case where the respondent lawyer allegedly committed professional misconduct by refusing to provide the Law Society's investigator with requested files or to answer questions in the course of an investigation. **(25)** The lawyer argued that the Law Society had acted without jurisdiction and had not acted fairly from a procedural point of view in exercising its powers under Section 49(3) of the Law Society Act, **(26)** and that the "rogue" investigations were improperly commenced and conducted. **(27)**

Section 49(3) of the Law Society Act confers powers upon the Law Society to require the production of documents during the course of an investigation. The lawyer argued that licensees should be afforded an opportunity to make submissions prior to the Law Society authorising the use of investigatory powers under Section 49(3). In determining whether the allegations of procedural unfairness in the investigation were substantiated and whether the procedures for authorising such powers were fair, the tribunal considered the issues through the lens of the *Baker* factors:

- The nature of the decision – decisions about investigatory powers serve as a screening as opposed to adjudicative function, which indicates a low level of procedural fairness. The threshold standard to trigger an investigation is a 'reasonable suspicion' and the courts consistently emphasise the importance of professional regulators being able to employ flexible, effective information-gathering powers to protect the public. **(28)**
- The role of the decision in the statutory scheme – the tribunal considered the 'plain meaning' approach to the powers established in Section 49(3), which are authorised where a licensee is "being investigated under subsection (1)", suggesting that an investigation must already be underway prior to a decision to invoke Section 49(3) powers. The tribunal pointed out that the Law Society is faced with urgent situations that may require the expeditious gathering of evidence in support of an interlocutory motion and should not be delayed in so doing. The tribunal's interpretation of the statutory language and the objective of protecting the public was that, where the Law Society has information suggestive of professional misconduct which gives rise to a reasonable suspicion, it may investigate and authorise the exercise of powers under Section 49(3). **(29)**
- The importance of the decision to the individual affected – the invocation of Section 49(3) powers affects very minor interests as compared to other matters at issue in administrative decision making because the mere use of the powers does not and cannot affect a licensee's

ability to practise his or her profession (for this to happen, there would need to be a decision made; the powers are exercised at an early stage in the process of a professional discipline case and may not lead to further action). Though the authorisation of such powers may require a licensee to take time to cooperate, a decision to practise in a regulated profession necessitates a duty to provide information to a regulator about professional activities in various ways, and cannot be characterised in the same way as a personal privacy interest or analysed as an intrusion. **(30)**

- The legitimate expectations of the person challenging the decision – the tribunal held that the doctrine of legitimate expectations, which applies when there are promises or established practices by the decision maker, had no application in this context. **(31)**
- The choice of procedure – the tribunal found that the procedural changes requested by the lawyer would constitute a significant change to current protocols authorising investigations, the effect of which could not be predicted by the tribunal. Important weight should be given to the regulator's choice of procedure (which in this context meant that a licensee would not be consulted prior to a decision to invoke Section 49(3) powers, contrary to what the lawyer argued the protocol should be). **(32)**

Ultimately, the tribunal concluded that neither the statute nor procedural fairness required that the licensee be allowed to make submissions before authorising the Section 49(3) powers. The *Baker* factors suggested that a minimal level of procedural fairness was required and, in analogous circumstances, the divisional court had held that no notice was required before commencing an investigation, given that there are many stages in an investigation for a licensee to make submissions before a licence to practise could be revoked. **(33)**

## Comment

The previously discussed interpretations of the *Baker* factors and what passes as procedurally fair suggest that, in the context of investigations conducted by an agency with specialised expertise or a professional regulatory body, the threshold level of procedural fairness may easily be met without undue disclosure on the part of the investigating body. These decisions indicate that, where the subject of an investigation raises allegations of procedural unfairness, administrative governing bodies will continue to be afforded significant deference in their choice and execution of procedure, absent clear and compelling evidence that the impugned investigatory actions could not be justified under a *Baker* analysis.

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## Endnotes

(1) [1999] 2 SCR 817.

(2) RSC, 1985, c I-2 (now replaced with the Immigration and Refugee Protection Act, SC 2001, c 27 s 25(1)).

(3) *Baker, supra*, at para 22.

(4) *Baker, supra*, at para 23.

(5) *Baker, supra*, at para 24, citing *Old St Boniface Residents Assn Inc v Winnipeg (City)*, [1990] 3 SCR 1170 at p 1191.

(6) *Baker, supra*, at para 25.

(7) *Baker, supra*, at para 26.

(8) *Baker, supra*, at para 27.

(9) RSO 1990, c S 22, Section 15 [SPPA].

(10) See *R v Stinchcombe*, [1991] 3 SCR 326, [1991] SCJ No 83, where the Supreme Court of Canada imposed a duty upon the crown in indictable offences to disclose to the defence all material evidence, whether favourable to the accused or not, noting that failure to disclose impedes the ability of the accused to make full answer and defence.

(11) *May v Ferndale Institution*, 2005 SCC 82 at para 92.

(12) *May*, *supra* at para 93.

(13) 2016 ONSC 5620.

(14) *DiBiase*, *supra* at para 99.

(15) *DiBiase*, *supra* at paras 101-107.

(16) *DiBiase*, *supra* at paras 108-111.

(17) *DiBiase*, *supra* at paras 115-116.

(18) *DiBiase*, *supra* at paras 118-120.

(19) *DiBiase*, *supra* at paras 123-124.

(20) *DiBiase*, *supra* at paras 125-130.

(21) *DiBiase*, *supra* at paras 131-136.

(22) *Law Society of Upper Canada v Brooks*, 2015 ONLSTH 87 at para 103.

(23) *Law Society of Upper Canada v Deanna Lynn Natale*, 2012 ONLSHP 201 at para 60.

(24) *Law Society of Upper Canada v Cusack*, 2016 ONLSTH 7 at para 40, citing *Natale*, *supra*, at paras 7-10.

(25) *Cusack*, *supra*.

(26) RSO 1990, c L8.

(27) *Cusack*, *supra*, at para 1.

(28) *Cusack*, *supra*, at para 53.

(29) *Cusack*, *supra* at paras 55-60.

(30) *Cusack*, *supra* at para 61-63.

(31) *Cusack*, *supra* at para 64.

(32) *Cusack*, *supra* at para 65.

(33) *Cusack*, *supra* at para 66.