

# Natural justice and procedural fairness at OBSI

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## What are natural justice, procedural fairness and administrative fairness?

The principles of natural justice and procedural or administrative fairness are at the foundation of ombudsman decision making, at OBSI and at independent financial ombudsman services around the world.

The expressions “natural justice,” “procedural fairness” and “administrative fairness” are sometimes used interchangeably, however, natural justice is the historical foundational concept that has been expanded to include the more modern principles of procedural fairness and administrative fairness.

Essentially, natural justice requires that a person receive a fair and unbiased hearing before a decision is made that will negatively affect them. The three main requirements of natural justice that must be met in every case are: adequate notice, fair hearing and no bias. Sometimes, all three of these concepts are grouped together as “the right to a fair hearing.”

- **The notice requirement** means that the people affected by the decision must be told about the important issues and be given enough information to be able to participate meaningfully in the decision-making process.
- **The fair hearing requirement** means that the people affected are given a reasonable opportunity to present their point of view and to respond to facts presented by others, and that the decision-maker will genuinely consider what each person has told them when making the decision.
- **The no bias requirement** means that the person making the decision must act impartially when considering the matter, and must not have any relationships with anyone that could lead someone to reasonably doubt their impartiality.

Historically, obligations of natural justice were owed only in court and other very formal legal proceedings, and today the specific procedures to be followed to ensure the principles of natural justice are upheld in courts are set out in detailed written laws. However, it is now recognized that the broader concepts of procedural and administrative fairness can give rise to less extensive procedural rights in other, less formalized types of decision-making.

The expressions “procedural fairness” and “administrative fairness” usually refer to the set of rules and conventions that are used to ensure that the principles of natural justice are upheld, in a somewhat less formal manner, in the field of administrative law or in other contexts where the power of the government or other authority may be brought to bear against an individual or group.

## The procedural requirements of natural justice depend on context

What exactly constitutes adequate notice and a fair and unbiased hearing varies depending on the circumstances and the forum for the decision. The specific requirements are quite different, for example, in a criminal court where someone's liberty may be at stake, than in a court hearing a lawsuit about property, or a small claims court proceeding, or an administrative tribunal or an arbitration process. These differences reflect what is justifiable, efficient and practical given the nature of the parties, the issues in question, and the public purposes that the decision-making process is fulfilling in each context.

The leading Canadian case relating to fairness in administrative proceedings is the *Baker* case,<sup>1</sup> in which the Supreme Court of Canada expressed this fundamental principle in the following way:

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

The Supreme Court in *Baker* made it clear that this context-based approach to fairness means that practices that do not meet the standard of administrative fairness in one decision-making context may be adequate in another. In order to assist with this determination, the court set out five factors to be considered:

- the nature of the decision,
- the nature of the statutory scheme,
- the importance of the decision to the individual affected,
- the legitimate expectations of the parties, and
- the choice of procedure made by the decision-maker.

Since the decision in *Baker*, these five factors have been applied in many cases where the fairness of an administrative decision has been challenged in the courts.

## Natural justice and administrative fairness in ombudsman decision-making

In the context of ombudsman services, the decision-making processes in place reflect the fact that the cases typically involve disputes of limited monetary value and parties with quite different levels of sophistication, knowledge and access to resources. Additionally, for many cases, other mechanisms of recourse are not practically available to dissatisfied consumers.

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<sup>1</sup> *Baker v. Canada (Minister of Citizenship & Immigration)* 2 S.C.R. 817 [1999] at para 21 [emphasis added].

Although OBSI is not created by statute, it operates under the authority of federal banking regulation and provincial securities regulation. These regulations require almost all securities firms in Canada to be members of OBSI as a condition of their license and all Canadian banks to belong to a federally licensed external complaints body, and OBSI is one of the two licensed external complaints bodies. OBSI's services are overseen by banking and securities regulators.

The essential public policy rationales for such regulatory support of independent financial ombudsman services such as OBSI include consumer protection, consumer confidence and access to justice. To be effective in fulfilling these public purposes, financial ombudsman services must be:

- **Accessible** – particularly to those without legal representation and those who are disadvantaged in their ability to understand and exercise their own rights and obligations.
- **Timely** – decisions must be rendered within a reasonable amount of time.
- **Cost-effective** – the cost of the services, which are borne by the industry, must be proportionate to the nature of the disputes.

The consequences of financial ombudsman decisions, while not binding on the firms and consumers involved, can be serious. For the firms involved, such consequences can include the time and cost of responding to the OBSI investigation, the financial cost of paying recommended compensation to consumers, and, in cases where a firm has refused to comply with a recommendation, can involve reputational impacts associated with the publication of a refusal. For consumers involved, who in many cases do not have any other viable avenues of redress should OBSI decide not to recommend compensation in their case, the recovery of lost financial resources can be of vital importance and can directly impact their quality of life in retirement.

The magnitude of these consequences is mitigated by the limit that is imposed on the amounts that can be recommended by OBSI (currently \$350,000), and the actual amounts typically recommended (average compensation amounts received through the OBSI process over the past five years have been approximately \$4,000 for banking cases, and \$21,000 for investment cases).

The specific procedures of an independent financial ombudsman that ensure that the principles of natural justice are upheld are therefore designed to do so while respecting the needs for accessible, timely and cost-efficient services that are fundamental to the public purposes of the ombudsman service and proportionate to the consequences for the parties.

The procedures of independent financial services ombudsmen also reflect the fact that the parties have engaged in an exchange of information and firms have had the opportunity to conduct an internal investigation prior to ombudsman involvement. Before OBSI will investigate a case, regulations require that consumers first bring their complaint to the participating firm or bank, which has 90 days to resolve the issue to the satisfaction of the consumer. During this 90-day period, firms and banks are required to investigate the substance of the consumer's complaint and try to resolve the dispute. This means that firms and consumers have had the opportunity to hear one another's position directly and firms have had the chance to assess and respond to the issues raised and evidence presented by the consumer before OBSI is involved in the matter.

## Non-adversarial fact-finding processes are consistent with administrative fairness

OBSI's dispute resolution procedures generally involve an investigation of a complaint, followed by an attempt at settlement and ultimately, a decision or recommendation in each case.

The method by which information is gathered in the investigation process is an inquisitorial (or non-adversarial) one, involving an expert investigator who analyses the materials presented by the parties, usually including an initial interview with each party, and then brings their own expertise to bear in determining what additional information they believe they need to properly assess what the fair outcome of the dispute should be.

The investigator will initiate the collection of the additional information they deem necessary by directly asking the parties to provide it or by conducting independent research, such as determining the regulatory requirements applicable at the time in question, assessing the risk profile of a security, or calculating financial losses. The investigator will present each party with the evidence they have that could turn the decision against them, and will analyze the parties' response and any contrary evidence that they present. The investigator may raise the arguments of one party against the other, and may independently challenge the parties on the evidence they have provided.

This differs from the adversarial fact-finding procedures typical of a common law court, administrative tribunal or arbitration proceeding that are familiar to most lawyers in Canada, which has led some to express concern about the fairness of the inquisitorial process used by ombudsman services such as OBSI.

However, inquisitorial systems of decision-making, which exist in many contexts and are especially common in the courts and other tribunals in civil law jurisdictions, can be and are entirely consistent with the principles of natural justice.

In common law jurisdictions, inquisitorial systems are used most commonly in "mass justice" settings, such as administrative tribunals, where they are used primarily because they are consistent with the public interest need for accessible tribunals, and because the system could not afford the inefficiencies associated with adversarial trials.<sup>2</sup>

Similarly, in the context of independent Canadian financial services ombudsmanship, the public purpose drivers that led to the establishment of the ombudsman system and that require its continued existence are those that also necessitate a fair and efficient non-adversarial fact-finding system.

## OBSI's fairness service commitments

At OBSI, our fairness service commitments have been developed to ensure that the principles of natural justice are upheld in our process, while respecting our stakeholders' needs for accessible, timely and

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<sup>2</sup> For a full discussion see: Inquisitorial Adjudication and Mass Justice in American Administrative Law in *The Nature of Inquisitorial Processes in Administrative Regimes – Global Perspectives*, Laverne Jacobs & Sasha Baglay (eds.) (Surrey, England: Ashgate Publishing Company) 2013. pp.93-112

cost-efficient services that are essential to our organization's public purposes. Our fairness service commitments are:

1. **We will only consider matters that are within our mandate** – We will only consider issues that we are authorized to consider pursuant to our Terms of Reference.
2. **We will listen to both parties and give them the opportunity to respond to any allegations against them** – We will fully disclose to each party any evidence or allegations that could turn a recommendation against them, and we will ensure that both parties have a full and fair opportunity to present their side of the dispute.
3. **We will be independent and impartial** – Everyone involved in the decision-making process will be impartial and independent of the parties and will not have any relationships that could cause a reasonable concern about bias. We will not act as an advocate for consumers, nor for financial services firms.
4. **We will follow our procedures and do what promise to do** – We will honour the parties' legitimate expectations based on the commitments we make and our stated procedures.
5. **We will make all decisions in good faith** – We will never base our decisions on bad faith, act with an improper purpose or make decisions based on irrelevant considerations.
6. **Our decisions will be reasonable** – We will consider and assess the arguments and evidence, and consider each party's specific circumstance. We will only reach conclusions that are rationally connected to the evidence in the case.
7. **We will provide adequate reasons for our decisions** – Our decision and our reasons will be identified and communicated clearly to both parties. We will provide the parties with information about how we considered and assessed the arguments and evidence, including how each party's specific circumstance was considered.
8. **We will have transparent review and complaint procedures** – When we communicate our decisions, both parties will be informed of our escalation or reconsideration procedures. Our procedures for making service and compliance complaints will be clearly defined and accessible.
9. **We will continuously improve** – We will evaluate our processes and methodologies on an ongoing basis and make improvements and correct mistakes whenever they are identified.