



National Energy
Board

Office national
de l'énergie

WHAT IS PROCEDURAL FAIRNESS?

ISSUE: WHAT IS PROCEDURAL FAIRNESS?



Administrative tribunals like the National Energy Board (NEB or Board) must comply with procedural fairness requirements when they make a regulatory decision on an application. If they do not, a court can strike down the Board's decision.

Procedural fairness, also known as natural justice in some cases, generally has two components.

First, a person must have an adequate opportunity to be heard before a decision is made affecting that person's interest, providing there is a sufficiently direct impact on their interest. This means when a

decision is going to be made that impacts a person, they have a right to participate, to know what information the NEB is relying on for its decision and to be given a chance to respond to that information. The specific procedural rights they are entitled to will vary with the nature of the issue and the potential impact of the decision. The more serious the impact, the greater the procedural rights.

Second, the decision must be made by an independent and impartial decision-maker.

These procedural fairness requirements were created by the courts over time (common law). They are assumed to apply; in other words, courts assume, absent of clear wording in the *National Energy Board Act* to the contrary, that Parliament intended the NEB to act fairly, independently and without bias when making decisions that impact others. This assumption can be displaced by clear wording in the *National Energy Board Act*. For example, the Act has a provision that prohibits public hearings for certain types of applications, and those clear provisions overrule the common law procedural fairness requirements.

Not everything the NEB does attracts the same level of procedural fairness, and in fact, some of the functions the Board carries out do not have these requirements at all. For example, the Board studies and issues reports on energy supply and demand. This function does not require

QUICK FACTS:

The NEB must not be, or be perceived to:

- Be influenced by others (e.g., government, media, non-parties)
- Be financially interested in the outcome
- Be systemically (institutionally) biased (e.g., be both prosecution and judge)
- To have made up its mind before hearing all the evidence on the record before it

regulatory decisions, nor does it engage procedural fairness requirements. However, the Board is always aware of procedural fairness requirements, and does its best to make sure that its conduct of other functions does not raise procedural fairness issues for its regulatory function. If there is an inadvertent impact, the Board acts to remedy those impacts as soon as possible.

The application of procedural fairness requirements may vary from case to case. Essentially, what is “fair” requires a balance between what is necessary for the effective and efficient performance of the NEB’s public duties, as set out under the *National Energy Board Act*, and what is necessary for the protection of the interests of the people affected.

