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Re Kachkar: Is the public interest entitled to procedural fairness?

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1. INTRODUCTION

Procedural fairness is "a cornerstone of modern Canadian administrative law".[1] It is well-established that administrative decision-makers have a common law duty to accord procedural fairness to individuals or entities whose private rights, privileges or interests may be affected by their decisions. Can a similar duty be owed to parties, like the Crown, who represent the public interest, rather than a private interest? *Re Kachkar*,[2] a decision of the Court of Appeal for Ontario, seems to answer that question in the negative.

The Court's opinion on this point is arguably *obiter*, but nevertheless warrants discussion. There are a variety of administrative contexts, such as professional discipline, licensing and securities regulation, in which a party seeking relief from the decision-maker can be said to be acting on behalf of the public interest. It seems reasonable to ask whether the common law duty of procedural fairness should not extend to such parties, particularly where the statutory regime in question specifically contemplates that the public interest will be represented in an adversarial setting.

2. BACKGROUND

Re Kachkar involved a hearing before the Ontario Review Board (the "Board"). Richard Kachkar had been charged with first degree murder, for intentionally killing a police officer on duty. At trial, he was found not criminally responsible on account of mental disorder ("NCR"). Consequently, he was the subject of a disposition hearing before the Board, pursuant to Part XX.1 of the *Criminal Code*.

The Board's mandate in these circumstances is to determine whether the accused should be detained in custody in a hospital, or discharged, and what, if any, conditions should apply to the detention or discharge. The Board is required to make the disposition that is the least onerous and least restrictive to the accused, taking into consideration the need to protect the public from dangerous persons, the mental condition of the accused, the reintegration of the accused into society and the other needs of the accused.[3] The Attorney General of the

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[1] *New Brunswick (Board of Management) v. Dunsmuir*, [2008] 1 S.C.R. 190, 2008 SCC 9, 2008 CarswellNB 124, 2008 CarswellNB 125 (S.C.C.) at para. 79.

[2] 2014 ONCA 250, 2014 CarswellOnt 3935 (Ont. C.A.).

[3] *Criminal Code*, s. 672.54.

province where the disposition is to be made is not required to participate, but is entitled to be a designated as a party to the disposition hearing.[4]

Disposition hearings are intended to be conducted in as informal a manner as is appropriate in the circumstances.[5] The *Criminal Code* nevertheless ascribes certain minimum procedural rights to the parties: for example, pursuant to s. 672.5(11), any party may adduce evidence, make oral or written submissions, call witnesses and cross-examine any witness called by any other party and, on application, cross-examine any person who made an assessment report that was submitted to the Board in writing.

At Mr. Kachkar's disposition hearing, the Attorney General of Ontario (the "Crown") was a party. At the commencement of the hearing, counsel for the Crown and for Mr. Kachkar made a joint submission as to the appropriate disposition. Specifically, they proposed that the respondent be detained in a medium security unit at the Ontario Shores Centre for Mental Health Sciences (the "Hospital"), and in the discretion of the Hospital, be given privileges to access the hospital grounds escorted by hospital staff.

The evidence before the Board included a portion of the trial judge's charge to the jury, including a detailed review of the evidence at trial, as well as a number of victim impact statements that were, in the words of the Court of Appeal, "emotionally powerful, poignant and heart-rending". The Board also heard opinion evidence from an expert, who testified that although the risk of similar future conduct was low, Mr. Kachkar was vulnerable to psychotic behaviour, and remained a significant threat to the public.

Having conveyed their joint submission to the Board at the outset, counsel for the Crown and for Mr. Kachkar chose not to make closing submissions. After reserving its decision, the Board made a disposition that was different from the joint submission. Specifically, the Board added a condition giving the respondent privileges, in the discretion of the Hospital, to enter the community of Whitby, Ontario, escorted or accompanied by staff. In its reasons, it explained why it had departed from the joint submission:

> While the joint recommendation from the parties was for escorted hospital and grounds passes only, the Board felt this was not compatible with its obligation to balance public safety and the least onerous and the least restrictive disposition for the individual. While we are mindful that public safety is paramount in the twin aims of Part XX.1, we do not believe that a pass into the community, accompanied or escorted by staff, if determined to be appropriate by the person in charge at Ontario Shores, can put the public at risk.

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4 *Criminal Code*, s. 672.5(3). In cases where an accused is transferred from another province, the same right is extended to the Attorney General of that province.

5 *Criminal Code*, s. 672.5(2).

3. DECISION OF THE COURT OF APPEAL FOR ONTARIO

The Crown appealed the disposition of the Board, and in particular, the Board's decision to grant the respondent access to the community, at the discretion of the Hospital. One of the grounds of appeal was that the Crown had been denied procedural fairness, because the Board added the community access condition without first providing the Crown with the opportunity to make submissions on the condition.[6]

The Court rejected this argument. First, the Court observed that it was important to be mindful of the nature of the Board process, which is inquisitorial and non-adversarial, and places the burden on the Board, rather than on the parties, to gather and consider the relevant evidence.[7]

Noting that the Crown did not assert a violation of any of its statutory procedural rights, the Court then considered whether the Board owed a common law duty of procedural fairness to the Crown as a party before it. The Court began by referring to the following oft-cited passage from the Supreme Court of Canada's decision in *Cardinal v. Kent Institution*[8] as a definition of the circumstances in which the duty of fairness arises:

> This Court has affirmed that there is, as a general common law principle, a duty of procedural fairness lying on every public authority making an administrative decision which is not of a legislative nature and which affects the rights, privileges or interests of an individual.[9]

The Court of Appeal acknowledged that the Board was a public authority making an administrative decision. However, the Court held that the Crown could not be described as an individual, nor did it have a right, privilege or interest that was affected by the Board's disposition. On this basis, the Court found that no common law duty of procedural fairness was triggered in the circumstances.

The Court elaborated as follows:

> In my view, the duty of fairness extends to those impacted by the administrative decision-making process in the sense that they have a right, privilege or interest that they can claim as their own that is affected, usually adversely, by the decision. While the jurisprudence has increasingly extended this notion to include, for example, corporations either private or public, see D. Brown and J.M. Evans, *Judicial Review of Administrative Action in Canada*, vol. 2, looseleaf at p. 7-54, the Attorney General representing the Crown sits uncomfortably in this

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6 The Crown also argued, unsuccessfully, that the disposition was unreasonable, because it was made without supporting evidence.

7 The Court referred in this regard to the Supreme Court of Canada's analysis of the NCR regime in *Winko v. Forensic Psychiatric Institute*, [1999] 2 S.C.R. 625, 1999 CarswellBC 1267, 1999 CarswellBC 1266 (S.C.C.).

8 [1985] 2 S.C.R. 643, 1985 CarswellBC 817, 1985 CarswellBC 402 (S.C.C.).

9 *Ibid*., at 653.

> company. Even with an expanded definition, the Crown cannot be described as an individual.
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> Nor do I think that the Attorney General can be said to be advancing a right, privilege or interest that the Crown can claim as its own. Indeed, the Attorney General does not purport to rely on a Crown right or privilege to trigger the duty of procedural fairness. Rather, the Attorney General argues that the Crown is owed procedural fairness because of its interest in ensuring as far as possible a Board disposition that is least onerous and least restrictive to the respondent consistent with public safety. In other words, the Crown's interest is in ensuring compliance with s. 672.54 of the Criminal *Code*. That is the interest that is said to trigger its entitlement to procedural fairness.
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> In my view, the Attorney General does not advance an interest that the Crown can claim as its own. What is being asserted is the public interest, not a private interest. This is to be contrasted with the respondent's liberty interest, which is clearly his own and equally clearly affected by the Board's disposition.[10]

After concluding this analysis, the Court went on to hold that even if it were wrong on this point, and the Board owed the Crown a duty of procedural fairness in the circumstances of the case, the duty had been met in this case, because the Crown had been accorded the opportunity to urge upon the Board the disposition that in its view would best meet the statutory objective.

4. DISCUSSION

The Court's conclusion that the Crown had, in any event, received procedural fairness on the facts of the case arguably renders the rest of its observations on this issue *obiter*. Nevertheless, its opinion on the preliminary question, namely that a common law duty of procedural fairness was not owed to the Crown in the circumstances, has potentially wide-ranging implications. The Court might have chosen, in coming to that opinion, to rely exclusively on the special nature of the Board and of disposition hearings to distinguish such proceedings from other circumstances. In deciding the question as it did, however, the Court seems to have expressed the rather broad view that a common law duty of procedural fairness simply cannot arise vis-à-vis a party that represents the public interest, as opposed to a private interest.

This view is potentially relevant to a variety of tribunal settings. There are many administrative regimes in which a party seeking relief from the decision-maker can be said to be acting on behalf of the public interest. In a professional discipline hearing, for example, one of the parties before the tribunal is the regulatory body of which the professional is a member, which is invariably

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[10] *Supra*, note 2, at paras. 42-44.

mandated by statute to serve and protect the public interest.[11] Similarly, licensing regimes typically contemplate hearings whose purpose is to determine whether a licence should be denied or revoked, at which the relevant Director or Registrar, who is a party, can be seen as an advocate on behalf of the public interest.[12] The same might also be said of the role played by staff of a securities regulator, in enforcement proceedings under securities legislation, or by a school board defending a decision to expel a student, at an expulsion appeal hearing pursuant to an education statute.

Should parties that represent the public interest in this way be entitled to procedural fairness from administrative decision-makers, as a matter of common law? The doctrine of procedural fairness in Canada has traditionally focused on the perspective of individuals or entities whose private interests are affected by administrative action. In the leading cases in which the doctrine was forged and developed, from *Nicholson v. Haldimand-Norfolk (Regional Municipality) Commissioners of Police*[13] onwards, courts have been asked to view fairness through the lens of the effect that the exercise of public powers by decision-makers has on a person's private interests, such as their livelihood, or right to remain in Canada.

There would seem, however, to be no reason why, in principle, such a duty could not extend to a party representing the public interest, particularly where the statutory regime in question specifically contemplates that that interest will be represented in an adversarial setting. In such cases, the public arguably has the same claim as any other party to a fair opportunity to be heard by an impartial tribunal. At a professional discipline hearing, for example, the public, as represented by the prosecuting regulatory body, can reasonably expect a fair opportunity to put forward evidence of the alleged misconduct, and to make submissions in support of appropriate protective or remedial orders, where findings of misconduct are made. In licensing hearings, it seems logical that the public be fairly able to present relevant evidence and submissions in support of the denial or revocation, through the vessel of the Director or Registrar.

It is possible to conceive of a variety of scenarios where the fairness of an administrative proceeding could be adversely affected, from the perspective of a party representing the public interest. A licensing tribunal might deny the Director's request for an adjournment to call reply evidence, without affording her the opportunity to make submissions in support of the request. A securities commissioner might refuse to hear enforcement staff's motion that he recuse himself. A professional discipline tribunal might communicate with the

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[11] See for example: *Health Professions Procedural Code*, being Schedule 2 to the *Regulated Health Professions Act, 1991*, S.O. 1991, c. 18, s. 3(2); *Law Society Act*, R.S.O. 1990, c. L.8, s. 4.2; *Veterinarians Act*, R.S.O 1990, c. V.3, s. 3.

[12] See for example: *Liquor Licence Act*, R.S.O. 1990, C. L. 19; *Racing Commission Act, 2000*, S.O. 2000, c. 20; *Long-Term Care Homes Act, 2007*, S.O. 2007, c. 8.

[13] [1979] 1 S.C.R. 311, 1978 CarswellOnt 609, 1978 CarswellOnt 609F (S.C.C.).

professional's counsel in an attempt to clarify a fact in issue, in the absence of the prosecutor.

Apart from any effect such instances of potential unfairness may have on public confidence in the administrative process, they could also serve to inhibit the furtherance of the legitimate state interest behind the relevant regulatory regime. It is therefore reasonable to suggest that, as a matter of common law, a decision-maker has a duty to avoid such scenarios by according procedural fairness to "public interest" parties, and not just to parties advancing a private interest.

5. CONCLUSION

The Court of Appeal may have been correct to conclude in *Re Kachkar* that the traditional common law requirements to trigger a duty of procedural fairness are not met in the case of a party representing the public interest. However, the notion that such a party can be entitled to fairness is not entirely foreign to the law. In the criminal context, courts have recognized that the concept of trial fairness can extend to protect the interests of the prosecution. In the words of one judge, "[t]rial fairness takes account of not only the fair trial interests of the respondents but also the public interest in fairness to the prosecution and its witnesses".[14] Similarly, as articulated by LaForest J. in *R. v. Corbett* (dissenting on other grounds):

> It is true that s. 11 of the *Charter* constitutionalizes the right of an accused and not that of the state to a fair trial before an impartial tribunal. But 'fairness' implies, and in my view demands, consideration also of the interests of the state as representing the public. Likewise the principles of fundamental justice operate to protect the integrity of the system itself, recognizing the legitimate interests not only of the accused but also of the accuser.[15]

There would seem to be no reason in principle why a similar approach should not apply in the administrative context, where a party represents the public interest, at least in adversarial proceedings. The fundamental maxim *audi alterem partem* means, after all, that there is a duty to hear the "other" side, no matter what kind of interest that side represents.

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[14] *R. v. Rutigliano*, 2013 ONSC 2514, 2013 CarswellOnt 14991 (Ont. S.C.J.) at para. 13.

[15] [1988] 1 S.C.R. 670, 1988 CarswellBC 756, 1988 CarswellBC 252 (S.C.C.) at para. 165.