PROCEDURAL FAIRNESS IN THE MUNICIPAL EMPLOYMENT CONTEXT

I. INTRODUCTION

In Canada, municipalities have a duty to act fairly to certain of its employees when making decisions that have a significant impact on them. This paper will set out a brief history of the development of the law regarding procedural fairness obligations in the employment context. I will also discuss what constitutes procedural fairness, which employees are owed procedural fairness and the consequences of not meeting these procedural fairness obligations.

As will be discussed below, the scope of to whom these procedural obligations apply has expanded and there are no clear limits to the types of employees who are owed procedural fairness. Given the consequences of not complying with procedural fairness obligations, the issues of determining who is owed procedural fairness and how to meet those obligations are critical to municipalities when making significant decisions about employees, such as dismissal from employment.

II. BRIEF HISTORY

The seminal Canadian case on procedural fairness in the employment context is *Knight v. Indian Head School Division No. 19*, [1990] 1. S.C.R. 653. In this case, the employer school board gave the plaintiff three months notice of dismissal after the parties were unable to reach an agreement to renew his employment contract. In its discussion of whether the plaintiff was owed procedural fairness, the Supreme Court of Canada held that to determine whether there is a general duty of fairness, one must look at the following factors:

> "(i) the nature of the decision to be made by the administrative body; (ii) the relationship existing between that body and the individual; and (iii) the effect of that decision on the individual's right". (p. 669)

In summary, the Court concluded that the duty to act fairly arose from the fact that: (1) the school board is a public body whose powers are derived from statute and must be exercised according to the rules of administrative law; (2) the board's decision was of a final and specific nature; and (3) the decision was significant to the plaintiff.

While *Knight* entrenched the modern understanding of procedural fairness, the path to get there took many years. One of the earliest cases to address procedural fairness in the employment context was the English case of *Ridge v. Baldwin*, [1963] 2 All E.R. 66. In *Ridge*, a Chief Constable was dismissed from public office after being arrested for conspiracy to obstruct justice. The Chief Constable was given neither notice of his dismissal nor an opportunity to be heard. He succeeded in appealing the dismissal because the applicable legislation permitted action only after the individual was informed of the grounds and given a proper opportunity to be heard. The decision in *Ridge* is significant because Lord Reid classified possible employer-employee relationships into three categories: (1) the master and servant; (2) the office held at pleasure; (3) and the office from which one cannot be removed except for cause. Lord Reid concluded that the duty of fairness only arises in the third category.

This paper was written by Carolyn MacEachern, with the assistance of Satprakash Harwood, Summer Articled Student, both of Lidstone Young Anderson.

Another important case in the evolution of procedural fairness is *Malloch v. Aberdeen Corporation*, [1971] 2 All E.R. 1278 (H.L.). The case is noteworthy insofar as Lord Wilberforce discussed the types of employer-employee relationships that were set out in *Ridge, supra*. His Lordship found that, although the plaintiffs were not employed in a purely master and servant relationship, the positions did have a statutory flavour so as to be characterized as an office. Lord Wilberforce concluded that even though these were offices held at pleasure, there were certain circumstances in which procedural fairness could be implied, despite the decision in *Ridge*, *supra*, where procedural fairness was found not to apply to offices held at pleasure.

The first significant Canadian case to consider procedural fairness in the employment context was *Nicholson v. Haldimand-Norfok Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311. In this case, the plaintiff was a probationary police officer who was dismissed from his position without a hearing. The Court found that although the plaintiff occupied an office held at pleasure, the regulations enacted pursuant to the *Police Act* were not meant to preserve the common law right of a Board to dismiss a constable without a hearing. The Court concluded that even though Nicholson was not entitled to the procedural protections afforded to an officer who had successfully passed the probationary period, he should be treated fairly. In the circumstances of this case, that meant he should have been informed of the reasons for his dismissal and the Board should have provided him an opportunity to respond.

With the decision in *Knight, supra*, the Court put to rest the notion that procedural fairness only attaches to the third category of employees as discussed in *Ridge, supra.* As the Court explained at p. 672:

> Administrative law has evolved in recent years, particularly in the Canadian context, so as to make procedural fairness an essential requirement of an administrative decision to terminate either of the last two classes of employment described by Lord Reid.

Given that many of the dismissals have been from offices held at pleasure, numerous commentators have questioned the purpose of providing an opportunity to be heard when the decision to dismiss the employee is entirely discretionary. This was also laid to rest in *Knight, supra*, where the Court stated:

> The argument to the effect that, since the employer can dismiss his employee for unreasonable or capricious reasons, the giving of an opportunity to participate in the decision-making would be meaningless is unconvincing. In both the situation of an office held at pleasure and an office from which one can be dismissed only for cause, one of the purposes of the imposition on the administrative body of a duty to act fairly is the same, i.e., enabling the employee to try to change the employer's mind about the dismissal. The value of such an opportunity should not be dependent on the grounds triggering the dismissal. (p. 674)

The Court in *Knight, supra*, also noted that the three categories of employment are creations of common law, which can be altered by the terms of an employment contract or the governing legislation. The result of this is that an employment relationship may fall within more than one

category. Therefore, a position may have elements of a master and servant relationship and elements of a public nature. This can make it difficult to determine whether an employee is entitled to procedural fairness. In *Knight, supra*, the Court noted that the position held by the plaintiff was not of a "pure" master and servant type as it encompassed some elements of a public nature. As will be discussed below, the Court in *Knight, supra*, concluded that procedural fairness can apply to such positions depending on the "statutory flavour" of a particular position.

III. PROCEDURAL FAIRNESS FACTORS

The common law duty of fairness was described in *Knight, supra*:

> The conclusion that the respondent's employment could be legally terminated without a showing of just cause does not necessarily entail that the procedure involved can be arbitrary….It should be noted at this point that the duty to act fairly does not depend on doctrines of employment law, but stems from the fact that the employer is a public body whose powers are derived from statute, powers that must be exercised according to the rules of administrative law. It is in that context that the employee-employer relationship between the respondent and the appellant Board must be examined, with the result that the analysis must go beyond the contract of employment to encompass arguments of public policy. (p. 688)

As noted above in *Knight, supra*, one must look at three factors to determine whether a public body has a general duty to act fairly: (1) the nature of the decision; (2) the relationship between the individual and public body; and (3) the impact of the decision on the individual.

In *Knight, supra*, the Court concluded that a common law duty of procedural fairness could exist even in the absence of procedural safeguards in the legislation. The Court adopted the ruling in *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643, which found that the duty of fairness falls 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." In other words, where the decision has a serious effect on the individual, procedural fairness obligations are triggered.

It is important to note that even if the above three factors are answered in the affirmative with respect to the existence of a duty to act fairly, one must still examine the applicable legislation and the employment contract to determine whether either modifies this duty. The Court in *Knight, supra*, noted that any abrogation of a general right to procedural fairness must be clearly and explicitly expressed in the legislation or employment contract.

A. Nature of the Decision

With respect to the nature of the decision being made, the Court in *Knight, supra*, stated the following:

> There is no longer a need, except perhaps, where the statute mandates it, to distinguish between judicial, quasi-judicial and administrative decisions…
>
> On the other hand, not all administrative bodies are under a duty to act fairly. Over the years, legislatures have transferred to administrative bodies some of the duties they have traditionally performed. Decisions of a legislative and general nature can be distinguished in this respect from acts of a more administrative and specific nature, which do not entail such a duty… . (pp. 669-70)

The Court in *Knight*, *supra*, also noted that the finality of the decision is a factor to consider as to whether there is a general duty of fairness. In general, the decision of a preliminary decision will not trigger a duty to act fairly, whereas a decision of a more final nature may have such an effect. In *Knight*, *supra*, the Court determined that a decision to dismiss the plaintiff was of a final and specific nature and, therefore, this type of decision could be subject to a duty to act fairly on the part of the employer.

B. The Relationship between the Employer and Employee

One must review the three categories of employment outlined above as the starting point to determine the relationship between the employer and the employee. If a position falls within the last two categories of employment (i.e., an "office") the public employer may have a duty to act fairly depending on the nature of the decision and the impact on the individual. The issue of how to characterize the employment is discussed in more detail below.

The Court in *Knight*, *supra*, cited the following reasoning for requiring procedural fairness with respect to employees who hold an office at pleasure:

> The justification for granting to the holder of an office at pleasure the right to procedural fairness is that, whether or not just cause is necessary to terminate the employment, fairness dictates that the administrative body making the decision be cognizant of all relevant circumstances surrounding the employment and its termination (*Nicholson*, *supra*, at p. 328, per C.J.). One person capable of providing the administrative body with important insights into the situation is the office holder himself. As pointed out by Lord Reed in *Malloch v. Aberdeen Corp.*, *supra*, at p. 1282:
>
> > The right of a man to be heard in his own defence is the most elementary protection of all….
>
> To grant such a right to the holder of an office at pleasure would not import into the termination decision the necessary to show just cause but would only require the administrative body to give the

> office holder reasons for the dismissal and an opportunity to be heard. (p. 674)

The Court also noted that there is a public policy argument justifying procedural fairness in certain circumstances:

> There is also a wider public policy argument militating in favour of the imposition of a duty to act fairly on administrative bodies making decisions similar to the one in impugned in the case at bar. The powers exercised by the Appellant Board are delegated statutory powers which, as much as the statutory powers exercised directly by the government, should be put only to legitimate use. As opposed to the employment cases dealing with "pure master and servant" relationships, where no delegated statutory powers are involved, the public has an interest in the proper use of delegated power by administrative bodies. (p. 675)

Therefore, the duty of procedural fairness does not require an employer to justify a decision such as the dismissal of any employee. It simply requires that the individual be afforded the proper process before a decision is made.

C. Importance of the Decision

The importance of the decision to the individual affected is critical when examining the dismissal of employees from public sector employment. Courts have held that procedural protections are called for when the decision is important and has a significant impact on the person in question.

In *Knight*, *supra*, the Court concluded that decisions to dismiss employees clearly have an important impact on individuals and that such decisions trigger a duty to act fairly.

IV. CONTENT OF PROCEDURAL FAIRNESS

The content of procedural fairness is highly variable and dependent on the particular facts, employment contract and legislation. The general content of the duty to act fairly was set out in *Baker v. Canada (Minister of Citizenship and Immigration),* [1997] 2 S.C.R. 817:

> Although the duty of fairness is flexible and variable, and depends on an appreciation of the context of the particular statute and the rights affected, it is helpful to review the criteria that should be used in determining what procedural rights the duty of fairness requires in a given set of circumstances. I emphasize that underlying all these factors is the notion that the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their

> views and evidence fully and have them considered by the decision-maker. (p. 837)

The content of procedural fairness in employment situations was summarized in *Knight, supra*:

> Since the respondent could be dismissed at pleasure, the content of the duty of fairness would be minimal and I would tend to agree that notice of the reasons for the appellant board's dissatisfaction with the respondent's employment and affording him an opportunity to be heard would be sufficient to meet the requirement of fairness.
>
> …
>
> It must not be forgotten that every administrative body is the master of its own procedure and need not assume the trappings of a court. The object is not to import into administrative proceedings the rigidity of all the requirements of natural justice that must be observed by a court, but rather to allow administrative bodies to work out a system that is flexible, adapted to their needs and fair. As pointed out by de Smith (Judicial Review of Administrative Action, 4th ed. (1980), at p. 240), the aim is not to create "procedural perfection" but to achieve a certain balance between the need for fairness, efficiency and predictability of outcome. Hence, in the case at bar, if it can be found that the respondent indeed had knowledge of the reasons for his dismissal and had an opportunity to be heard by the board, the requirements of procedural fairness will be satisfied even if there was no structured "hearing" in the judicial meaning of the word. I would agree with Wade when he writes (Administrative Law (5^{th} ed.), at pp. 482-83):
>
> > A "hearing" will normally be an oral hearing. But it has been held that a statutory board, acting in an administrative capacity, may decide for itself whether to deal with applications by oral hearing or merely on written evidence and argument, provided that it does in substance "hear" them.
>
> (pp. 683 and 685)

Therefore, the basic requirements of procedural fairness, in the context of dismissal of public sector employees, are the provision of reasons and an opportunity to be heard. However, the rules concerning the giving of reasons and an opportunity to be heard are not fixed in stone. The

rules will depend on the context of each particular dismissal, having regard to such factors as the position occupied, contractual clauses, and applicable legislation or bylaws.

Providing reasons is an essential component of procedural fairness in its own right and assists the individual to make his or her views known. In *Rochon v. Board of School Trustees Spirit River School Division No. 47* (1994), 111 D.L.R. (4th) 452 (Alta C.A.), the Court stated:

> As the reason for notice is to allow him an opportunity to convince the Board that he should continue in employment, a notice must be given in circumstances which are reasonable and which would allow him an opportunity to present his side fairly. (p. 457)

Similarly, in *Hill v University College of Cape Breton, Board of Governors of the University of Cape Breton* (1991), 1 Admin. L.R. (2d) 103 (N.S.S.C.T.D.), the Court stated:

> It is fundamental to the principles of natural justice that a person whose interests are being decided by a tribunal must be appraised of the case against him and must be given the opportunity to respond to that case. A person cannot respond unless he knows the extent of the case of which is being made against him. (pp. 118-119)

In *Knight, supra*, the Court ruled that the duty of fairness was met since the plaintiff had been notified of the Board's reasons for dissatisfaction and was given an opportunity to be heard, although no formal hearing was held. The requirements of procedural fairness were satisfied, even absent a structured hearing. Everything that had to be said had been said. Accordingly, the Court concluded that the requirement of the formal giving of reasons and the holding of a hearing would have achieved no more than to impose upon the Board a purely procedural requirement at odds with the principles of flexibility of administrative procedure.

Therefore, providing an opportunity to be heard does not necessarily entail a formal hearing. For example, in *Reglin v. Creston (Town)*, 2004 BCSC 790, the Court concluded a formal hearing is not always necessary so long as the decision-making body provided the employee reasons for its decision and an opportunity to be heard. Similarly, in *Collins v. Whistler (Resort Municipality)* (1993), 10 Admin L.R. (2d) 79 (B.C.S.C.), the Court held:

> Thus, although specific formalities of the hearing are not prescribed, the duty of fairness requires that, whatever the form of the hearing, the decision-making body has all the relevant evidence before it and that the individual who is to be impacted by the decision knows the case he or she has to meet by the time he or she is granted the opportunity to be heard. (p. 90)

Despite the fact that the courts have given administrative bodies a fairly broad discretion in determining how to provide an opportunity to be heard, there are still some uncertainties. For example, in *Knight, supra*, the Court stated:

> In my view, the appellant board has made itself sufficiently available for discussion through meetings with the respondent and his lawyer so that each party's concerns were made fully known to the other. This can only lead to the conclusion that the respondent knew the reasons for his dismissal and was provided with every opportunity to be heard. The requirements of the duty to act fairly in the scope of the employer-employee relationship in the case at bar have been met. I therefore conclude that the respondent was properly dismissed and that his action must fail. (p. 686-687)

While administrative bodies are required to ensure that an individual is provided with sufficient information about the reasons for his or her dismissal, there is no specific manner required to convey the information. In *Knight*, *supra*, the Court found no breach of procedural fairness because the plaintiff was aware or should have known about the problems that resulted in his termination and had an opportunity to respond to those concerns. In contrast, in *Reglin*, *supra*, the plaintiff had meetings with Council concerning his position, but in the context of an investigation into general personnel problems at the Town. The Court found that since those meetings had occurred early in the investigation process and that Council had not conveyed that the plaintiff's position was in jeopardy, he had not been sufficiently informed.

These meetings were held by Council to investigate personnel issues including complaints about the Town's Administrator, who was the plaintiff's supervisor. As part of this investigation, the plaintiff submitted a report criticizing the Administrator. Council provided the Administrator with a copy of the plaintiff's report and provided the Administrator an opportunity to respond in writing and attend a hearing before Council. As a result of this hearing, in which Council had originally intended to dismiss the Administrator on the basis of the report prepared by the plaintiff, Council passed a motion to dismiss the plaintiff instead. The plaintiff was not provided with the Administrator's report, nor was he provided an opportunity to be heard by Council prior to Council's decision to terminate his employment.

Not surprisingly, the Court ruled that these meetings were not sufficient to make it clear to the plaintiff that Council was considering dismissing him. The Court reasoned:

> Creston argues that it effectively gave Mr. Reglin a hearing in two ways: first, by facilitating various interviews that took place between Mr. Reglin, Mr. Leben [the Town's Administrator] and other council members prior to Mr. Reglin providing council with his report, and second, and more significantly, by receiving and considering the report itself.
>
> I cannot accept Creston's arguments in this regard. The interviews occurred early in the process when there was no indication that Mr. Reglin's position was in jeopardy. As for the report, it undoubtedly, was a means by which Mr. Reglin expressed his considerable unhappiness with Mr. Hutchinson's administration. However, he was not provided with a copy of Mr. Hutchinson's written reply to

> his report nor was he given the opportunity to appear before Creston's council and respond to Mr. Hutchinson's allegations. The best example of the potential value of providing such an opportunity is the fact that Mr. Hutchinson successfully used his hearing before council to defend himself and keep his job. Given that it was plain that the two men couldn't work together, one of them had to go and it may have been Mr. Reglin even if he had been afforded a hearing. But the fact remains that Creston owed Mr. Reglin an opportunity equal to that it afforded Mr. Hutchinson. Thus, Creston did not comply with its duty of procedural fairness in dismissing Mr. Reglin from his employment. (paras. 49-50)

The difference in the conclusions reached by the Courts in *Knight, supra* and *Creston, supra*, are as a result of the different circumstances leading up to the decision to dismiss. In *Knight, supra*, the plaintiff was well aware of the Board's concerns and his lawyer was in communication with the Board. This was not the case in *Reglin, supra*, as the plaintiff did not know Council was considering dismissing him. The Court noted that Council ultimately may have decided to dismiss the plaintiff, but it was required to follow the proper process before doing so.

V. TO WHOM DO THESE RIGHTS APPLY?

One of the more difficult aspects of procedural fairness is determining which employees of a municipality are entitled to procedural fairness. This is because procedural fairness applies to those employees who hold an "office" and not to all employees of a municipality.

The issue then becomes whether an employee occupies a position that could be considered an "office," such that the position falls within the last two categories of employment noted above. The Court, in *Hannis v. Teevan* et al. (1998), 162 D.L.R. (4th) 414 (Ont. C.A.), referred to the following definitions of "office" in its discussion of whether an employee of a university was entitled to procedural fairness:

> "The appropriate definition of "office" in The New Shorter Oxford Dictionary (1993) is:
>
> A position or place to which certain duties are attached, especially one of a more or less public character; a position of trust, authority or service.
>
> The appropriate definition of "office" in Webster's New World Dictionary of American Language, Second College Edition (1976) is:
>
> A position of authority or trust. In a government, business, institution, etc. (p. 421)

In Canada, many executive positions within municipalities are required by statute. As a result, it is fairly easy to determine whether these types of positions are offices. The determination is more

difficult for senior or mid-level managers who are not designated as officers by statute or whose positions are not created by statute. The responsibilities of these positions can resemble employees, office holders or both. In other words, these positions have elements of a master and servant relationship and of an office held at pleasure.

A. Statutory Employees

In British Columbia, the *Community Charter,* S.B.C. 2003, c. 26 (the "*Community Charter*") requires the creation of several offices and empowers local governments to create other office positions. For example, sections 146 and 147 provide that:

> 146 A council
>
> (a) must, by bylaw, establish officer positions in relation to the powers, duties and functions under sections 148 *[corporate officer]* and 149 *[financial officer]*,
>
> (b) may, by bylaw, establish other officer positions, and
>
> (c) may assign powers, duties and functions to its officer positions.
>
> 147 A bylaw under section 146 may establish the position of chief administrative officer of the municipality, whose powers, duties and functions include the following:
>
> (a) overall management of the operations of the municipality;
>
> (b) ensuring that the policies, programs and other directions of the council are implemented;
>
> (c) advising and informing the council on the operation and affairs of the municipality.

Employees who are appointed to positions that are established pursuant to these sections of the *Community Charter* are entitled to procedural fairness.

Beyond the creation of offices, the legislation also provides specific rules when an office holder is dismissed. Section 152 provides that:

> 152 (1) Subject to a contract of employment and subject to providing the officer with an opportunity to be heard, the appointment of a municipal officer may be terminated by the council as follows:
>
> a) in the case of termination for cause, by immediate termination without any period of notice
>
> b) in any other case, by termination on reasonable notice.

> 152(2) A termination under subsection (1) (b) may only be made by the affirmative vote of at least 2/3 of all council members.

Therefore, the requirement to hear from the officer prior to making any decision regarding his or her dismissal is built into section 152 of the *Community Charter*.

In Alberta, the *Municipal Government Act*, R.S.A. 2000, c. M-26 requires, with some flexibility, the creation of the position of Chief Administrative Officer. This Act also allows for the creation of other officer positions. The relevant sections are 205, 210 and 211 which provide, in part:

> 205 (1) Every council must establish by bylaw a position of chief administrative officer.
>
> (2) Every council must appoint one or more persons to carry out the powers, duties and functions of the position of chief administrative officer.
>
> (3) If more than one person is appointed, the council must by bylaw determine how the powers, duties and functions of the position of chief administrative officer are to be carried out.
>
> 210 (1) A council may by bylaw establish one or more positions to carry out the powers, duties and functions of a designated officer under this or any other enactment or bylaw.
>
> (2) Council may give a position established under subsection (1) any title the council considers appropriate.
>
> (3) The bylaw must include which of the powers, duties and functions referred to in subsection (1) are to be exercised by each position.
>
> 211 (1) A municipality may revoke with or without cause the appointment of a person to the position of a designated officer.
>
> (2) A designated officer whose appointment is revoked without cause is, subject to any written agreement between the municipality and the officer, entitled to reasonable notice or to compensation instead of reasonable notice.
>
> (3) A designated officer whose appointment is revoked with cause is, subject to any written agreement between the municipality and the officer, not entitled to reasonable notice or to compensation instead of reasonable notice.

The legislation in Ontario is fairly similar to Alberta and British Columbia. The *Municipal Act*, S.O. 2001, c. 25 requires the appointment of a Clerk and allows for the creation of various other offices. The applicable sections include 228 and 229:

> 228(1) A municipality shall appoint a clerk…
>
> 228(2) A municipality may appoint deputy clerks who have all the powers and duties of the clerk under this and any other Act.
>
> 229 A municipality may appoint a chief administrative officer.

While Ontario legislation pertaining to the creation of offices is similar to that of Alberta and British Columbia, the legislation on dismissal of office holders is different. In particular, the Ontario *Municipal Act* does not address termination of office holders. Instead, that power is contained within the *Interpretation Act*, R.S.O. 1990, c. I.11. Section 28 provides that:

> 28. In every Act, unless the contrary intention appears,
>
> > (l) words authorizing the appointment of a public officer or functionary, or a deputy, include the power of removing or reappointing the person or appointing another in or to act in his or her stead, from time to time in the discretion of the authority in whom the power of appointment is vested;

In general, procedural fairness will apply to positions designated as officers by statute and to those positions which are created pursuant to provisions of a statute, depending on the nature of the decision and the impact on the individual.

B. Common Law Offices

Canadian courts ascribe to the view that a duty of procedural fairness applies when terminating the employment of a public sector employee whose position contains even some aspects of an office holder. As noted above, certain employees of a municipality may be entitled to common law procedural fairness rights even though the position has not been created by statute. In *Knight*, *supra*, the Supreme Court of Canada found that employees who hold an office at pleasure (the second employment relationship set out above) are entitled to procedural fairness.

The Court noted that this change in approach was reflected in *Malloch, supra*, which held that a pure master servant relationship is one where there is no element of public employment or service such as no support by statute. The Court in *Malloch*, *supra*, concluded that procedural fairness does not apply to master and servant relationships and that where any elements of a public nature exist, the relationship begins to move away from master and servant and it begins to take on a statutory flavour such that procedural fairness may need to be observed.

In *Knight*, *supra*, the plaintiff held the position of Director of Education, which was established by legislation and the duties of the position were partly set out in legislation. Therefore, the Court held that the office held by the plaintiff was not of a "pure" master and servant type since it encompassed some elements of a public nature. While the Supreme Court of Canada noted that there was a clear contractual element to the employment of the plaintiff, the Court found that

the position had a strong "statutory flavour", so as to be characterized as an office. Accordingly, the Court found that the plaintiff was entitled to procedural fairness.

In *Collins, supra*, the Court had to determine whether the position of Firefighter/Inspector attracted a duty of procedural fairness. In its discussion of whether the employee in this case was entitled to procedural fairness, the Court noted that the language used in *Knight, supra*, did not clearly set out just how strong the "statutory flavour" must be to categorize an employment relationship as an "office" rather than a master and servant relationship. While the Court in *Collins, supra*, noted that the Court in *Knight, supra*, found a strong "statutory flavour" to the position at issue in that case, the Court in *Collins, supra*, interpreted the term "strong" as related to the facts in *Knight, supra*, and as not as imposing a more stringent criterion. Rather, the Court in *Collins, supra*, read the judgment in *Knight, supra*, as adopting the test expressed above in *Malloch, supra*, rather than qualifying it by requiring a "strong" statutory flavour.

In *Collins, supra*, the Fire Code, adopted under the regulations of the *Fire Services Act*, applied to bylaws of the municipality. The Firefighter/Inspector was empowered to administer the bylaw. However, the inspection-related services that flowed from this authority were fairly limited. Collins claimed these occupied 30% of his time, while the Fire Chief deposed that the fire warden duties formed a limited part of the plaintiff's responsibility. Despite this, the Court concluded that the position contained a statutory flavour and thus it attracted a duty of procedural fairness.

In *Anderson v. Twin Rivers School Division No.* 65 (1994), Alta. L.R. (3d) 408**,** the Alberta Court of Queen's Bench concluded that, since the positions of Deputy Superintendent and Assistant Secretary-Treasurer contained elements of management and were endowed with statutory flavour, the plaintiffs were entitled to procedural fairness. The plaintiffs' employment contracts referred to the positions as executives of the School Board, and they were responsible and accountable to the Superintendent of the Board. Interestingly, while the power to employ came from the *School Act*, it did not require the Board to create such positions. Rather, it permitted them to employ other non-teaching professionals that the Board considered necessary for its operation.

The Court's ruling was consistent with the view that even if a Council or Board, as opposed to an act of the legislature, has created a particular position, this should not be a bar to finding the position is an "office". The Court also noted that these two plaintiffs were treated in the same manner by the Board in the dismissal process as the Superintendent and Secretary Treasurer who were considered office holders by the Board. This reinforced the Court's view that the Board considered all of these employees to be holders of an office with the requisite statutory flavour , which dictated that a hearing be provided.

Two other cases in which non-statutory employees were found to be entitled to procedural fairness are *Hanis v. Teevan* (1998), 162 D.L.R. (4th) 414 (Ont. C.A.) and *Gerrard v. Sackville (Town)* (1992), 89 D.L.R. (4th) 145 (N.B.C.A.). In *Hanis, supra*, the plaintiff held the position of Director of Social Sciences Computing Laboratory and was an adjunct professor without tenure. The plaintiff was not governed by any detailed instructions from anyone in a position of authority and had played a leading role in the lab's development and management. Like *Collins,*

supra, the Ontario Court of Appeal concluded that this position had a statutory flavour. As the Court noted:

> There is no doubt that the Plaintiff was in a position of authority and trust. He used his own ideas and skills in setting up the SSCL. [the lab] The way in which he did so was not governed by detailed instructions received from a person in authority over him. His responsibility was to achieve a goal for the University and he discharged that responsibility with considerable success. (p. 421)

The Court also noted that the University was a statutory body continued by way of legislation and was financed, in part, by public funds.

It is also interesting to note that, in this case, the University had also failed to follow its own policies regarding dismissal of an employee. The University was required to give a warning to the plaintiff and interview him. The University did neither before terminating the employment of the plaintiff because of his alleged use of the University's computer for his own purposes without the consent or knowledge of the University.

In *Gerrard*, *supra*, the Court found that the position of Manager of Industrial and Commercial Development attracted a duty of procedural fairness. The Court relied on the fact that the plaintiff supervised staff and his termination was an exercise of statutory duty. In this case, the Court applied *Hughes v. Moncton (City)* (1990), 111 N.B.R. (2d) 184 (N.B.Q.B.) to find that, even though the Plaintiff was a middle manager, this was not a bar to determining he was an office holder. As the Court noted:

> The Town of Sackville is a public body, deriving its powers from statute. It exercises its public powers on behalf of the citizens it serves. The exercise of these public powers apply in the creation of the position, in filling it and in firing Gerrard. Other factors that lead to the conclusion that procedural fairness rules must be observed in this case are that the Town gave the holder of the office an official title and it placed him in a managerial position. As well, the office was one capable of some protection and he had staff subordinate to him. (p. 154)

In *Hughes*, *supra*, the Court found that a staff solicitor held an office and was entitled to procedural fairness even though his position was not created by statute. The Court noted that while this position was not a statutory one, it was specifically created by Council in that Council appointed the plaintiff to the position by resolution. As well, Council adopted a job description before it advertised the position.

Going against this current of judicial opinion is the case of *Gismondi v. Toronto* (2002), 16 C.C.E.L (3d) 97. In this case, the plaintiff was the Director of Roads and Sidewalk Operations. He was classified as a middle manager, had a large budget and managed a significant number of employees. Despite this, the Court found the plaintiff was a middle manager as opposed to a

senior manager or member of the executive. The Court went on to find that holding a position of trust, by itself, is not sufficient to make one an office holder:

> I do, however, agree with the City's counsel that under the circumstances of the instance case, it would be a stretch to say that even if one's office or employment with a government body contained certain elements of a position of trust such a fact would not necessarily elevate one to a "office holder" to which the doctrine of procedural fairness applied. In other words, not all municipal government employees can be said to be something other than a "servant", as in a classical master-servant relationship, notwithstanding the fact that the employees in a position of trust or great responsibility. (p. 105)

The Court also noted that the plaintiff's position was not created by statute and that he was a middle management employee who could be hired, fired, and promoted by the City's Chief Administrative Officer. This decision was upheld by the Ontario Court of Appeal:

> In *Knight,* the Plaintiff held the office of Director of Education, a position created by statute. By contract, the Respondent's position did not have this strong statutory flavour. He was a middle manager in a large municipality. He managed a large number of people and a large budget but he was simply one of many employees and managers delivering municipal services to the public. The municipal resolution appointing the respondent to his position in the City of North York cannot be equated to a statutory position as considered in *Knight.* ((2003) 226 D.L.R. (4th) 334, at p. 350)

In British Columbia, the reasoning in *Collins*, *supra*, seems to be similar to cases such as *Gerrard, supra*, and *Hughes*, *supra*. In the more recent decision of *Reglin, supra*, the Court had no trouble finding that a Director of Financial Services was entitled to procedural fairness. This was because this position was created in accordance with the then *Local Government Act*, R.S.B.C. 1996, c.323. This position was created by statute and was clearly an officer position. The Court, however, did thoroughly review the law regarding procedural fairness and cited *Hughes*, *supra*, and *Gerrard*, *supra*, in its discussions. The Court noted that, from a review of these cases along with *Collins*, *supra,* and *Anderson, supra*, it had no doubt that the Director of Financial Services was an "officer" such that the City owed him a duty of fairness.

It will be interesting to see how the law develops in Canada regarding the types of positions to which procedural fairness will apply. While the courts in New Brunswick and British Columbia seem to be casting the net of procedural fairness quite wide, the recent decision of the Ontario Court of Appeal in *Gismondi*, *supra*, seems to be narrowing the scope of the types of positions that have the requisite statutory flavour such that procedural fairness applies.

VI. IMPACT OF DECISION

Procedural fairness only applies to decisions about employment that are significant to the individual. As noted above, it is well settled in Canadian law that the decision to terminate the employment of an office holder is subject to procedural fairness obligations. As noted in *Knight, supra*:

> There is a right to procedural fairness only if the decision is a significant one and has an important impact on the individual. Various courts have recognized that the loss of employment against the office holder's will is a significant decision that could justify imposing a duty to act fairly on the administrative decision – making body. (p. 677)

In all of the cases cited above, the Courts found that employers owed a duty of fairness to office holders when making decisions about whether to terminate their employment.

An issue that does not appear to be settled in Canadian law is whether the decision to suspend an office holder triggers the duty to act fairly. In *Anderson, supra*, the employees were suspended without pay pending a formal hearing to decide whether their employment would be terminated. The Court noted that the decision to suspend the employees without pay was significant and had an important impact upon them and that the suspension without pay was in breach of the employment contract. However, the employees proceeded with putting their case forward at the hearing before the Board rather than taking the position that the suspension amounted to constructive dismissal.

The Court expressly stated that it would not deal with the issue of whether the suspension without pay, in and of itself, was a decision to which procedural fairness obligations apply. Given the reasoning of the courts as noted above regarding the expansion of procedural fairness obligations, it would not be a stretch for a court to find that a suspension with or without pay attracts a duty of procedural fairness because of its impact on an employee.

VII. CONSEQUENCES OF BREACHING PROCEDURAL FAIRNESS

The general remedy when a public employer is found to have breached procedural fairness is to quash the resolution or by-law terminating the employment. This has the effect of reinstating the employee. This can be an expensive proposition for public employers as the damages awarded are generally back pay from the date of the resolution or by-law to the decision by the court. Depending on the time lapse between these two dates, these amounts can be substantial.

As well, the employer is then in the unenviable position of having to return the employee to the workplace or proceeding with a second process to consider whether to terminate the employee in a manner consistent with the public employer's procedural fairness obligations. This was the situation facing a municipality in the case of *McColl v. Gravenhurst* (Town), (1998) 48 M.P.L.R. (2d) 217 (Ont. C.A.).

In that case, the Town breached its procedural fairness obligations when it dismissed the its Chief Administrative Officer and Clerk. The plaintiff successfully applied for judicial review, quashing the bylaw dismissing him on the basis that he was not given adequate notice of the reasons for his dismissal. The Town had already hired another person to replace the plaintiff and chose not to return him to his previous position. Instead, the Town immediately held a new hearing before Council and provided the plaintiff with full notice of the reasons for the proposed dismissal.

This hearing took place before seven members, three of who had participated in the first decision to dismiss the employee. After hearing from the plaintiff, Council unanimously passed another by-law to dismiss the plaintiff. He appealed this second decision by Council. The Court ultimately held that the Town had met its procedural obligations to the plaintiff. The Court noted that the decision not to return the employee to his previous position was simply administrative common sense and that the hiring of a replacement did not indicate bias on the part of the Council. Furthermore, the Court confirmed that the participation of three Councillors who had previously decided to dismiss the employee did not indicate that the hearing was conducted with closed minds. The Court found that there was no procedural defect in the conduct of the hearing with respect to the second decision to dismiss the plaintiff.

Depending on the circumstances, a court may not quash a resolution or bylaw even where there has been a procedural defect. Instead, courts can award increased damages to the employee. In *Reglin, supra*, the plaintiff did not make an application under the applicable judicial review legislation within the limitation period to request that Council grant him a hearing and reconsider its decision. Rather, the plaintiff commenced a wrongful dismissal action. Furthermore, the plaintiff had been hired under a five-year contract in another municipality. The Court felt that this was at odds with the plaintiff's stated position that he would like to resume his employment with the Town of Creston.

However, the Court, in this case awarded increased damages in addition to pay in lieu of reasonable notice. In awarding these damages, the Court noted the obligations of employers in Canada to act in good faith and fair dealing in the manner of dismissal. In the case of *Wallace v. United Grain Growers Ltd*., [1997] 3 S.C.R. 701, the Supreme Court of Canada implied such an obligation on employers in the employment contract and concluded that where an employer breaches its implied obligations of good faith, a court can award increased pay in lieu of reasonable notice. Given the decision in *Reglin, supra*, a public employer's breach of its procedural fairness obligations can also constitute a breach of its obligation of good faith in the manner of dismissal.

VIII. CONCLUSION

The Supreme Court of Canada in *Knight, supra*, expanded the scope of employees who are entitled to procedural fairness. However, the Court did not set out clear limits as to who is entitled to procedural fairness, as many positions within a municipality have elements of both a master and servant relationship and are of a public nature. This places municipalities in the difficult position of having to determine on a case-by-case basis which employees are owed procedural fairness. While it is clear that statutorily created positions are owed procedural

fairness, it is less clear with middle and senior management positions and those positions that exercise some statutory functions but are not created by statute, such as a building inspector. Given the consequences of not meeting procedural fairness obligations, the most practical advice for municipalities is to be conservative and err on the side of caution in the assessment of those positions that have some public elements to them.

As to the content of procedural fairness, it is well settled that a municipality will meet its procedural fairness requirements if it provides the reasons to the employee and provides an opportunity to respond before making a decision that has a significant impact on the employee. While the courts have been clear that an oral hearing is not always required, municipalities take more of a risk that a court will find a procedural defect if it does not provide such a hearing. Again, municipalities may want to err on the side of caution and provide a hearing for decisions that have a significant impact on employees.