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Section 7 of the Charter and Administrative Procedures:
A Renewed Demand for Uniformity?

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Thesis filed to meet the requirements of a Master's Degree in Law
University of Ottawa



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Chapter 1

"The history of liberty has largely been the history of observance of procedural safeguards"¹

A. Introduction

This thesis represents an attempt to build a analytical framework for a larger study of the complicated issue of the impact of the Canadian Charter of Rights and Freedoms, notably section 7, on the workings of administrative agencies. At this preliminary stage, many of the practical considerations which will colour the final conclusions are not possible. However, it cannot be denied that without the practical assessment of the individual workings of agencies in coping with the day to day demands of their mandates, now in the context of any further imperatives imposed by the Charter, the ultimate value of this study cannot be predicted.

This in mind, this thesis will present the broader background against which the consideration of the application of the Charter to principles of administrative procedures will be made. Further, the preliminary question of whether section 7 of the Charter can be invoked in the bulk of administrative decision-making will be examined in some depth. In this context, some discussion of certain procedural norms are presented with a view to highlighting the difficulties encountered in any assessment of uniformity of

¹ McNabb vs. United States 318 U.S. 332, 347 (1943) per Frankfurter, J.

procedures. This discussion is limited to federal agencies for the most part. Finally, some preliminary conclusions are reached on the question of whether section 7 will in fact call for a second look at procedural uniformity, the details, means and practical application of which must await further study.

B. Theory

The administrative agency, although a relatively new addition² to the governmental structure, and the traditional government departmental organization have become two of the dominant tools of policy development and implementation. Canadian concepts and techniques have evolved from both the British tradition of ministerial responsibility and the American system of independent agencies. There is, however, no recognizable structure or framework employed. Many functions overlap; some departments perform administrative duties with a board acting as an appellate review³ or the reverse, where administrative bodies make the first level decisions to be reviewed or considered by either departmental personnel or by the Minister. In many cases, both department and

² The first major regulatory agency in Canada was the Board of Railway Commissioners in 1903. At last count, according to the Report on Federal Administrative Tribunals prepared by the Canadian Centre for Justice Statistics in 1983, there are a possible 133 federal agencies, depending on the definition used.

³ An example in the area of pensions where the original decision on eligibility is determined by Department of Health and Welfare personnel and these decisions are subject to review by panels of the Pension Appeals Board.

agency work closely in administrative matters with the matter passing back and forth at different levels of decision-making. There is, as Professor Ratushny pointed out, a constant blurring of traditional institutional roles and a dynamic interaction constantly at play in the formulation of policy, the establishment of criteria and the exercise of decision-making.⁴

However, agencies play an integral role in our society and mode of governing. New agencies may often be an ad hoc political response to complicated, technical or polemic crises faced by the government of the day looking for a painless way of minimizing the issue or distracting attention away from the political goals. Yet their value cannot be overlooked in a multitude of functions ranging from dispute resolution to the application of expertise in complicated policy matters to acting as a check on bureaucratic error.

There are obvious benefits⁵ in the creation of administrative agencies considering the alternative of delegating all tasks to bureaucrats or the adversarial process in the courts. Agencies are ostensibly insulated from direct government control to provide some guarantee of impartiality and freedom from political pressure.

⁴ Ratushny, E. "What are Administrative Tribunals? The Pursuit of Uniformity in Diversity" (1987), Can. Public Admin. 1, 2.

⁵ The list of benefits was drawn from Vandervort, L. Political Control of Independent Administrative Agencies, Law Reform Commission of Canada, 1979, 23-24 and Benjafield and Whitmore, Principles of Australian Administrative Law, (4th ed. 1971), 332.

Reality may not always accurately reflect this optimum goal but, for the most part, agencies jealously guard their independence. Decision makers are also arguably insulated from the behind the scenes lobbying of the regulated sector. This distance theoretically allows agencies to consider and protect the long term public interest without buckling to the pressures of political expediency, as might the government of the day. They are better able to further policies of social importance without the restrictions of the doctrine of common law precedent, contrary to a court of law.

The administrative agency vehicle is also chosen for the speed of decision making, which is directly proportional to the costs involved. Perhaps most important, having knowledgeable experts in the substantive area is logically conducive to good decision making.

Thus, the major benefits of the administrative agency concept are greater expertise, flexibility and an emphasis on social welfare or public interest.⁶

⁶ All of which may be qualified in Canada because of the penchant for political patronage appointments. However, the appointment and staffing process is beyond the scope of this discussion. For a thorough analysis of this issue, see Ratushny, E., Report of the Committee on Independence of Administrative Tribunals for the Canadian Bar Association, 1990 and the Preliminary Report of the Ratushny Task Force on Independence of Administrative Tribunals, Canadian Bar Association, 1988.

However, the picture is not perfect. The agency structure, or more properly the lack of any recognizable structure, can be a confusing and bewildering picture. The very clear advantage of tailoring agencies to meet the specific tasks at hand has the parallel effect of isolating each from the experience of the others. Most legally trained professionals, to whom many individuals and corporations turn when dealing with agencies, are not comfortable with the wide variation in roles and procedures of these bodies. There is lacking a sense of predictability and familiarity that exists with the judicial approach. However, even discounting the chauvinist attitude of the legal profession, there are legitimate complaints of arbitrariness in decision-making, exacerbated by a lack of publicity of proceedings, of decisions rendered without reasons, of the denial of oral hearings in some cases, of institutional bias on the part of the agency members and insufficient training of officials.⁷ The entire system is marked by a lack of cohesiveness. One element which can be isolated for discussion is the absence of any generalized procedures or standards for procedure.

There are two distinctly polar views on the topic of procedural uniformity for agencies. Each relies on values and norms that are unassailable: flexibility versus certainty, or practical effectiveness versus consistency. In the Canadian context, these two positions are exemplified by the writings of John Willis and A.V. Dicey and supporters.

⁷ Benjafield and Whitmore, supra n. 4.

Canadians, with certain exceptions to be discussed infra, have not seriously called into question the issue of procedural objectives in the administrative system. There is no federal legislation laying down the procedure to be followed by agencies nor any requirements that they exercise their own procedure making power to actually formulate rules. John Willis conjectured that it is because the typical federal tribunal is a big money board staffed by professionals and stands in no real need of outside procedural direction⁸. He also thought "some degree of mess is the inevitable result of the process, traditional with the common law"⁹.

He argued that Canadians don't have a general procedural statute for administrative bodies because,

Canadians have not had to live as the English do, with a mass of local citizen tribunals which do not, apparently, know how to conduct a hearing fairly and they have never shared the American legalistic passion for debasing the general precepts of decency into detailed procedural rules.¹⁰

Unlike in the United States, where their interest in administrative procedure developed as much from deeply felt objections to government interference with the market place as from the necessity

⁸ Willis, J., "Canadian Administrative Law in Retrospect" (1974), 24 U.T.L.J. 225, 233.

⁹ op. cit.

¹⁰ Willis, J., "Administrative Law in Canada", [1961] Can. Bar Rev. 251, 264.

to make that interference coherent and credible,¹¹ Canadians have basically trusted government to arrive at the appropriate response to a problem and to protect the public interest with the necessary procedural safeguards built into the individual agency's constituent legislation. There are many that would agree with this philosophy and add that procedural regularization would only serve to judicialize what ought to be a thoughtful, well researched determination of the public interest by agency members who have the necessary expertise. The courts should remain only as the ultimate arbiter of serious issues of fairness and the supervisor of jurisdictional matters while remaining carefully outside the substantive merits of the decisions of the agencies.¹²

This view counters the philosophy of A.V. Dicey and followers¹³

According to Lord Hewart:

There are no rules or principles which can be said to be rules of principles of this astonishing variety of administrative "law", nor is there any regular course of procedure for its application. It is possible, no doubt, that the public official who decides questions in pursuance of the powers given to his department does act, or persuades himself that he acts, on some general rule or principle. But, if so, they are entirely unknown to anybody outside the department, and

¹¹ Verkuil, P., "The Emerging Concept of Administrative Procedure" (1978), 78 Colum. L. Rev. 258.

¹² Of course, this presupposes a distinct and definable difference between substance and procedure. The lines are not easily drawn in all situations and the cross-over effect of a strictly procedural review cannot be denied.

¹³ A.V. Dicey,, Introduction to the Law of the Constitution, (10th ed. 1959) and Unger, R.M. Law in Modern Society: Toward a Criticism of Social Theory, 1967.

of what value is the so-called "law" of which nobody has any knowledge,¹⁴

This strictly follows the interpretation of the Rule of Law proposed by Dicey. Dicey defined the Rule of Law by reference to three principles, all founded on his belief in the soundness of the English common law and the independence of the judiciary. The first principle rejects the presence of discretion within the government structure. This echoed William Pitt's exhortation, "Where law ends, tyranny begins" and has provided the basis for generations of jurists and politicians to attempt to ensure that all statutory authorities are tightly controlled.¹⁵

The second aspect of Dicey's definition postulates that every person of whatever rank or condition is subject to the ordinary law of the realm and is amenable to the jurisdiction of the ordinary courts. The ordinary law is based on principles of openness, publicity of the law, uniformity and hearings before decisions are taken. It becomes clear that concepts such as delegated legislation, Crown immunities, privative clauses ousting supervision by the courts and any limitations on Parliament's

¹⁴ Hewart, Lord, The New Despotism, (1929), 44.

¹⁵ For example, the terms of reference of the Donoughmore Committee on Ministerial Powers in Great Britain in 1932 directed the commissioners to seek ways to keep the government structure in touch with the Rule of Law. The Franks Committee on Tribunals (Great Britain) in 1955 adopted the same approach as did the McRuer Commission on Civil Rights in 1965 (Ontario).

power, which may be necessary for efficient functioning of the modern state are inimical to the ideal of the Rule of Law.

The third facet of Dicey's definition sets out the constitutional principle that the fundamental rights of English citizens have been determined through judicial decisions made in individual cases. Thus the guarantee of rights is an inductive process, where general principles are based the results of particular decisions, as opposed to the deductive method of written constitutions.¹⁶ According to Dicey's theory, there is an inseparable connection between the means of enforcing a right and the right itself which is the strength of judicial legislation; since only the courts can determine the rights of a citizen, enforcement is a natural prerogative of the courts.¹⁷

¹⁶ Dicey, supra. n.13, p. cx

¹⁷ In a modern restatement of Dicey, H.W. Jones confines the Rule of Law to,

... a tradition of decision, embodying at least three indispensable elements: first, that every person whose interest will be affected by a judicial or administrative decision has the right to a meaningful "day in court"; second, that deciding officers shall be independent in the full sense, free from external direction by political and administrative superiors in the disposition of individual cases and inwardly free from the influence of personal gain and partisan or popular bias; and third, that day-to-day decisions shall be reasoned, rationally justified, in terms that take due account of both the demands of general principle and the demands of the particular situation.

This theory is, in effect, the source of the basic principles of natural justice or procedural fairness which have been developed by the courts to monitor and control the workings of administrative tribunals and other inferior courts. The operating presumption is that inferior courts are, by their very nature, unable to realize the important procedural protections necessary in order to ensure a fair assessment of the substantive decision. The logical extension is the creation of doctrines of control which although ostensibly limited to procedure, or how an inferior court may operate, impacts on what, not just how, decisions are made.

Diceyan theorists believed that these bodies could not be left to develop their own procedure and advocated the presumption of legislative intention that, barring express declarations to that effect, Parliament does not intend that administrative procedure should be left to an authority's arbitrary or capricious designs.¹⁸

Over the long tradition of British constitutional law, the courts have developed several principles with respect to the methods of determining issues. The basic principle directs a fair and reasonable manner of deciding based on the particular requirements of the nature of the matter. Originally, in order to avoid infringing on proper governmental behaviour such as policy

¹⁸ Law Reform Commission of Canada, Independent Administrative Agencies (Working Paper 25), 1980. Also Joplin v. Chief Constable of the City of Vancouver, 144 D.L.R. (3d) 285 (B.C.S.C.).

development, the rule was to classify the function according to an unwieldy scheme ranging from judicial and quasi-judicial to administrative acts. Those matters which crossed the threshold into quasi-judicial were held to the standards of natural justice. Those remaining below at the administrative level had limited procedural considerations or standards. The seminal case of Nicholson¹⁹ widened the scope of procedural review and proposed that the classification exercise be scrapped in favour of individual determinations of whether a duty to act fairly existed in each case. While natural justice and procedural fairness are not inherently tautological,²⁰ they are both based on the common law right to be heard. The only limits to procedural fairness are in truly political questions such as cabinet appeals or executive action²¹ although there is some argument to made that privative

¹⁹ Nicholson v. Haldimand-Norfolk Regional Board of Police Commissioners, [1979] 1 S.C.R. 311, 326 where Laskin, C.J.C. points out that, "...the classification of statutory functions as judicial, quasi-judicial or administrative is often very difficult, to say the least, and to endow some with procedural protection while denying others any at all would work injustice when the results of statutory decisions raise the same serious consequences for those adversely affected, regardless of the classification of the function in question..." The duty imposes a flexible standard, varying with the nature and circumstances.

²⁰ There are many articles devoted to the two concepts. See MacDonald, R., "A Theory of Procedural Fairness" (1981) 1 Windsor Yrbk Access Justice 3; Loughlin, M., "Procedural Fairness: A Study of the Crisis in Administrative Theory" (1978) 28 U.T.L.J. 215; Mullan D., "Natural Justice and Fairness: Substantive as well as Procedural Standards for Review of Administrative Decision-making" (1982) 27 McGill L. J. 280 and "Fairness: the New Natural Justice?" (1975) 25 U.T.L.J. 281.

²¹ Such as in Attorney-General of Canada v. Inuit-Tapirisat of Canada, [1980] S.C.R. 735. See also MacDonald, R., "The Limits of Procedural Fairness: Executive Action by the Governor-in-

clauses may immunize certain processes from procedural review by the courts.²²

The effect has been to broaden the control exercised by courts over the procedures of agencies in both the more judicialized aspects and the more routine administrative matters.

As a controlling mechanism,²³ judicial review has some drawbacks

Council" (1981-82) 48 Sask. L. Rev. 187 and Grey, J. "Can Fairness be Effective?" (1982) 27 McGill L. J. 360.

²² Grey, J., *ibid.* The situation is markedly different with respect to the application of the Canadian Charter of Rights and Freedoms to the same political actions. The case of Operation Dismantle v. the Queen, [1985] 1 S.C.R. 441 clearly states the proposition that executive acts must comply with the dictates of the Charter. Subsequent cases have confirmed this view: Century 21 Ramos Realty v. the Queen (1987), 58 O. R.(2d) 737 (C.A.) where it was determined that a decision of the Attorney-General is reviewable; Schmidt v. the Queen, [1987] 1 S.C.R. 560; Argentina v. Mellino, [1987] 1 S.C.R. 536 and U.S.A. v. Allard and Charette, [1987] 1 S.C.R. 564 where the exercise of executive discretion re surrender of a fugitive to a foreign country was reviewed. The Supreme Court of Canada in Nelles v. R. (1989), 60 D.L.R. (4th) 609, 641, affirmed that absolute immunity for prosecutors was not acceptable. However, the executive decision must be one that affects rights or freedoms protected by the Charter, such as life, liberty and the security of the person. Therefore, it is not likely that economic decisions, for example, would be subject to the wider review available under the Charter. For example, Public Service Alliance of Canada v. the Queen, [1984] 2 F.C. 889 (C.A.) appeal dismissed [1987] 1 S.C.R. 424; Le Groupe des Eleveurs de Volailles v. Canadian Chicken Marketing Agency, [1985] 1 F.C. 280 (T.D.); Smith, Kline and French Laboratories v. A.G. Canada, [1987] 2 F.C. 359 (C.A.), leave to appeal refused (S.C.C. Apr. 9/87) but see Re Mia and Medical Services Commission (1985), 17 D.L.R. (4th) 385 and Wilson v. Medical Services Commission. This issue will be discussed in more detail in Chapter 2.

²³ The issue of "controlling" at all is presumed in favour of some accountability, despite the able arguments of Harry Arthurs at the Administrative Law Conference in 1981 where he warned that we should leave the agencies alone and be wary of a general

in terms of a prospective guarantee of fair procedures. A lack of precision in the definition of the right to be heard and its proper application provide no real guidance for prospective planning by agencies. It is expected that over time, the accumulated body of law developed in the area of procedural fairness would enable agencies to predict which procedures will be required by the courts in dealing with particular types of problems. However, this presumes that agencies have the abilities and the resources to keep on top of current developments in the case law. This also assumes that agencies would correctly interpret the directions of the court, given in a context other than the agencies' own, and would be able to properly reconsider their own procedures to accord with the current judicial views. These difficulties make it less likely that agencies could adequately react to evolving jurisprudence.²⁴

Furthermore, the effectiveness of procedural review may be limited on practical level. One way is for the agency to give no reasons for the decision which then prevents a reviewing court from

fairness doctrine : "It is a Trojan horse concealing its true form. Let the administrator get on and make its law". From "Recognizing Administrative Law", U.B.C. Law Review Publications 1981, 8. Also for a more specific example of the failure to apply principles of fairness and procedure see Arnett, E., R. Reuter and E. Mendes, "FIRA and the Rule of Law" (1984) 62 Can. Bar Rev. 121.

²⁴ However, the recent creation of the Canadian Council of Administrative Tribunals will assist in reducing the isolation of agencies and provides a forum for discussing common problems and possible solutions. This form of networking, in the absence of any formal Council of Tribunals or programme of consultation may prove particularly useful in the dissemination of information on and discussion of procedural requirements.

examining the fairness of the treatment of the aggrieved person. Because courts are generally reluctant to review or appear to review the substance of agency decisions, a decision made unfairly could be shielded from effective review by the courts.

The ex post facto approach can create an element of uncertainty, delay, inconvenience and may serve to undermine the confidence of the appointed decision makers. A problem noted by David Mullan²⁵ is that some courts are willing to defer to statutory decision makers' opinions as to appropriate procedure provided there is evidence that the decision has been thought about seriously. Thus they may not be looking objectively at the decision relating to the specifics of which procedures will be employed but whether decision itself is reasonably sustainable. While this is a tacit recognition of the expertise of agency members with respect to procedure, it is a falling back from the activist supervisory stance assumed by other courts. However, it is arguable that this is balanced out by a "hard look", to use American terminology, at substantive issues in that the ultimate fairness of the decision itself is examined, and not just the process. In addition, the Charter has changed the role of the court significantly. Where fundamental rights and freedoms are at stake, deference to the agency's sense of fair procedure is not assured.

²⁵ Mullan, D., "Fairness and Natural Justice", Conference of the Study Group on Administrative Tribunals, unpublished, Ottawa, 1983. As an example see Maynard v. Osmond, [1979] Q.B. 240.

One suggested solution to these particular deficiencies of the judicial review structure could be the development of a system which required procedural rules, either promulgated by the agency itself or by the constituent legislation, which could be held to the standards accepted in the common law.

There is no serious argument against a commitment to procedural rules against which agency behaviour will be judged. The advantages to both the participant and the agency are inescapable: participatory rights are defined, direction provided, specific procedural issues such as evidence, notice and right to counsel are resolved and so on. These contribute to greater participant and public satisfaction and a concomitant reduction in the need for expensive appeals or applications for judicial review to the courts.

The real issue arises in the feasibility of uniformity of such guidelines.

On a purely logical basis it is difficult to discern the rationale for permitting agencies of a like nature to operate under widely dissimilar rules of procedure. From a rational and economic perspective, it is also difficult to see how the diversity within the system can be defended:

The waste and inefficiency resulting from this procedural maze is incalculable. It will take years of conscientious and

constant work of an independent authority to bring about the simplification and uniformity in rules of practice and procedure which common sense dictates should be the first prerequisite of a sound and workable system of administrative law.²⁶

The compelling response has always been that each agency is unique and requires absolute freedom to determine its own rules, subject only, of course, to the fundamental precepts of justice. It must be acknowledged that this is clearly supported by one of the greatest advantages of administrative agencies: flexibility.

Agencies have been created to perform a specific task and the functional approach to that task will be unique. Uniformity in any degree may not assist the particular decision-maker and may, in fact, have the opposite effect by imposing inappropriate standards or unnecessary procedural niceties. In order to adequately compensate for the individual nature of each agency, any standards set in a uniform code of procedure would have to be diluted to the most general statement of the law, which should be discernable even now by any agency member. And lastly, adherence to general standards of procedure would likely have the effect of subtly but inevitably judicializing administrative processes to the ultimate disadvantage of the participants, the agency and the general public paying the bills. Clearly, the quest for uniformity cannot be a goal in and of itself.

²⁶ Fitzgerald, J., "Uniform Rules of Administrative Practice and Procedures: History and Probabilities", Draft Report to the Administrative Law Conference, Washington D.C. 1961, p 31.

However, over the years, the agencies themselves in promulgating their procedural regulations have settled into very similar patterns and do rely on each other's experiences in revising or adding to their own rules. Co-ordination, if not outright uniformity, remains a current theme.

The issue has not been resolved in Canada. It revives periodically, suffers through another reexamination of the advantages and disadvantages, and fades when there is no political will to take on an issue with little voter appeal. The question now is whether the Charter changes the focus of the debate and ultimately directs the choice of solution.

An examination of whether the Charter will require some different action must be considered in the long term context. This question of procedural uniformity has been explored in many common law jurisdictions in the last 20 years and their responses are evidence of a consistent theme in administrative law. However, there are significant variations in the choice of solutions. The following is a brief outline of the development of the policy of uniform administrative procedure in five jurisdictions: United States, Great Britain, Australia, New Zealand and Canada.

C. History

United States

The push for administrative procedure uniformity arose from a concerted effort of the Bar as a direct result of the apparently intolerable provisions of the New Deal legislation. One of the first of many studies calling for a greater effort towards uniformity was prepared by the Attorney General in 1941, from which report the Administration Procedure Act (APA) was eventually enacted. However, no immediate action was taken on the second recommendation calling for an Office of Federal Administrative Procedure to be constituted to assist in the continuation of the standardization of procedure.²⁷

The APA and the Model State Administrative Procedure Act were enacted in 1946 and provided for the minimum standards of procedure for formal adjudications and regulatory action. The APA specifically excluded review of behaviour of Congress and the courts. Briefly, the APA set the procedure for substantive rule making, requiring notice and an opportunity for interested persons to participate in the process. Also, the procedure for formal adjudications provided for a hearing and a decision to be made on the record.

Despite the enactment of the APA significant diversity was still in evidence and the pressure was heightened for a supervisory or co-ordination body. The 1953 Conference on Administrative Procedure also suggested a test programme which would incorporate

²⁷ Ibid., 12

more detailed rules to explore the feasibility of specific guidelines. The ultimate goal was to avoid the problems of the two extremes whereby detailed rules actually impede the functioning of the agency by interfering with its mission and by over generalizing rules, thereby defeating the goal of uniformity.²⁸

The Hoover Commission on the Organization of the Executive Branch of Government in 1955 reiterated the critical need for an overseer agency to push the evolution to uniformity. The Report states,

There is no absolute uniformity in rule-making among federal agencies. Absolute uniformity of procedure is not necessary to efficient administrative action, but it is a severe burden upon private citizens...to be required to study and comply with needlessly variant rules of procedure.²⁹

Two temporary administrative conferences were constituted on a trial basis and the Administrative Law Conference was made a permanent body in 1964.³⁰

Over the next twenty years, the Conference had apparently done little to further the practical implementation of uniformity. The American Bar Association prodded for some action but was disappointed by the low priority accorded the study of the APA and the concept of increasing uniformity. The Conference was

²⁸ Ibid.

²⁹ Ibid., 29

³⁰ Although it was not functional until the appointment of the first chairman in 1968. Leadbeater, A., Council on Administration, Law Reform Commission of Canada, 1980, 38.

criticized for its highly academic approach,³¹ and its avoidance of the practical issues involved in the procedural problems faced by the agencies.

In 1981, the Model State Administrative Procedure Act was revised. The Conference moved away from the concept of one uniform code to an acknowledgement of the great diversity of agency decision making. The Model Act proposed three procedural models of adjudication. The first reflects the trial-type model represented in the APA and would be limited to serious matters, issues involving disputed issues of material facts or issues for which sanctions were a possibility. The second model, the conference hearing, is far less formal. The third is the emergency and summary adjudicative proceedings which have few procedural requirements but which would be employed in relatively few circumstances.

The new Model Act reflects a greater recognition of the need for flexibility in the legislated requirements for administrative procedure.³²

³¹ Davis, K.C., "Revising the A.P.A." (1977), 29 Admin. Law Rev. 35, 56.

³² American case law has borne out this evolutionary trend. From the early position of the Supreme Court expressed in cases such as Goldberg vs. Kelly 397 U.S. 254 (1970), the Court has moved to accept the necessity of procedural flexibility. See Matthew vs. Eldridge 424 U.S. 319 (1976). Also, in recent years more consideration has been given to expanding the mandate of the APA from formal adjudication and rule making to some of the informal decision making. Only approximately 10% of all administrative

Great Britain

The constitutional structure in Great Britain has created a greater proliferation of boards and tribunals at lower levels than is seen in the United States. Their response to the issue of procedural uniformity has been quite distinct. In 1955, the Franks Committee (Committee on Administrative Tribunals and Inquiries) was constituted as a direct response to the Crichel Down case in which involvement by the administration in land expropriation became a national *cause célèbre*. In 1957, the Committee reported,

[w]e agree that procedure is of the greatest importance and that it should be clearly laid down in a statute or statutory instrument. Because of the great variety of purposes for which tribunals are established, however, we do not think it would be appropriate to rely on either a single code nor a small number of codes. We think that there is a case for greater procedural differentiation and prefer that the detailed procedure for each type of tribunal should be designed to meet its particular circumstances.³³

However, the committee did recognize that the wide variations in procedure were much more the result of *ad hoc* decisions, political circumstances and historical accident than any application of general and consistent principles.³⁴

decisions are currently affected by the APA: the remainder are informal acts with no procedural safeguards.

³³ The Committee on Administrative Tribunals and Enquiries Report, London, 1957, 15.

³⁴ Ibid., 30.

Despite the open rejection of a procedural code, the Committee did find a certain degree of uniformity appealing. The solution to improved individual procedural rules and to a general adherence to the basic principles of fairness, openness and impartiality was thought to be a Council on Tribunals. The report resulted in the Tribunals and Inquiries Act³⁵ creating a Council to advise on the detailed application of the general principles to the organization and procedures of various tribunals. All procedural rules must first pass review by the Council before coming into force although there is no legal force behind any recommendation the Council might make with respect to these rules. It remains an advisory body only. However, annual reports of the Council have indicated that most disputes over procedure are resolved and it appears that as the Council developed a broader perspective on the tribunals' procedures a certain degree of uniformity evolved naturally.³⁶

However, there is still no shift to uniformity of procedure and critics still voice the complaint that members of the public and legal practitioners find it impossible to assimilate the variety

³⁵ 1971, 19-20 Eliz. II, c. 62 (U.K.).

³⁶ D.C.M. Yardley in Principles of Administrative Law (2d ed., Butterworths), at p 203, comments that there have been countless instances in the twenty year period since the Council started work on tribunal procedure when Ministers have agreed as a result of Council recommendations to make new or amended rules of procedure.

of individual tribunal rules all specifying detailed procedures and differing widely from one tribunal to another.³⁷

An extensive review of administrative law issues was undertaken by a Justice-All Souls Committee³⁸ and the results published in 1988. In Administrative Justice: Some Necessary Reforms³⁹, the Committee reviewed the elements of good administration and concluded that it would be advisable to endeavour to produce an updated and comprehensive set of principles on administration, both procedural and substantive. They did not consider it appropriate to set out the principles in legislative form although it would be expected that the courts would take note of them in judicial review. The development and publication of the principles would be left to the Parliamentary Ombudsman under the oversight of a Administrative Review Commission, an independent, standing body to work alongside the Council on Tribunals.

³⁷ Benjafield and Whitmore, supra. n.4, 333. This is not the case with the inquiries aspect of the jurisdiction of the Council. As a result of a special report in 1962, the procedures for most types of inquiries have been covered in a series of statutory instruments and provide for the essential ingredients of notice, appearance, discovery of documents, and the opportunity to make representations.

³⁸ A Committee established by Justice and All Souls College at Oxford in 1978.

³⁹ Report of the Committee of the Justice-All Souls Review of Administrative Law in England (Oxford Press, 1988).

Australia

In the mid-seventies, Australia took "an awesome leap to changing its whole legal structure with regard to public administration"⁴⁰. Three acts⁴¹ based on the recommendations of a federal government administrative review committee in 1971,⁴² were enacted, creating three new institutions: the Administrative Appeals Tribunal, the Administrative Review Council and the Ombudsman.

The first became the superior appeal tribunal, a general body reviewing substantive and procedural issues. This differs significantly from the British concept of specialized appellate boards which had received approval in the Franks Report.

The second was the instrument chosen for encouraging greater uniformity in procedure in the agencies. It consists of members from the tribunals, the Law Reform Commission, the Ombudsman and others to study and make recommendations for improvement in the system. It is the equivalent of the British Council on Tribunals and the American Administrative Law Conference.

⁴⁰ Law Reform Commission of Canada, Annual Report, 1977-78, 14.

⁴¹ The Administrative Appeals Tribunal Act, 1975, (since amended by the Administrative Appeals Tribunal Amendment Act, 1977), the Ombudsman Act, 1976 and the Administrative Decisions (Judicial Review) Act, 1977.

⁴² Commonwealth Administrative Review Committee chaired by Sir John Kerr.

The Ombudsman is empowered to investigate particular complaints about action taken by government departments and boards with certain important exceptions, most notably political or judicial actions.

The Review Council is studying the concept of a uniform code of procedure but it has established as its first priority the study and review of current administrative procedures to determine their adequacy. It has no power beyond researching and recommendation at this point and agencies are not obliged to vet their procedural rules with the council before promulgation.⁴³

In 1989, the Attorney General tabled a Report of the Review Council containing various recommendations after the twelve years of experience with the new system. One of the initiatives undertaken by the government in response to this Report will see the Council commencing a major review of Commonwealth decision-making and, inter alia, assess new ways of administrative decision-making and the suitability of procedures.⁴⁴

New Zealand

⁴³ However, in its first annual report, the Council expressed concern that such vetting should be instituted for all legislation creating administrative powers.

⁴⁴ Starke, J. "Extent of Development in Administrative Law in Australia" (1989), 63 Australian L.J. 655.

The Public Administrative Law Reform Committee began studying the problem of administrative procedure in the early seventies. By 1975 it had concluded that procedure was extremely critical to a fair and efficient decision-making process, but that a general code of procedure was not suitable. The recommendations settled on bringing the individual acts within a uniform set of principles⁴⁵ so as to achieve an efficient degree of uniformity without sacrificing elements of individuality. The Commission advised that these principles be followed voluntarily by the legislature and the agencies in devising procedural rules. New Zealand was also the first common law country to have a Ombudsman to deal with the citizens' complaints of unfair treatment by government agencies and departments. It has proved to be a very satisfactory method of maintaining citizen confidence in fair government.

Canada

a. Federal Level

The interest in federal administrative procedure began as a response to the American APA and the initial wave of interest crested shortly after the publication of the Franks Report in Britain.

⁴⁵ These are set out in the Commission's Sixth Report (Wellington, 1973) and include general guidelines on notice, public hearings, representation, evidence, reasons, and rehearings.

In 1956, the Canadian Bar Association had drafted an APA⁴⁶ and recommended its implementation at both the federal and provincial levels. It further advocated the creation of a standing sub-committee to oversee general improvements on procedure.

Academics and the bar associations nearly unanimously endorsed the concept of uniform procedure. The most influential opponent was John Willis who claimed not to find any abuse of the system that would warrant such controls, although acknowledging both the potential for such abuse and the confusion arising from the system as it was currently constituted.⁴⁷

In 1963, Robert Reid of the Canadian Bar Association led the attack on Willis' position. He claimed that procedural issues were the outstanding trouble-spots with both the tribunals and the courts. On the heels of the enactment of the Canadian Bill of Rights, he called for a Charter of Administrative Rights to guarantee a process that is without confusion and decisions that are without caprice.⁴⁸ He recommended the development of a code enshrining fairness for citizens, yet flexible enough to meet the real needs

⁴⁶ The Civil Liberties section of the C.B.A. actually prepared the draft. G. Rutherford, head of the Administrative Law Section, admitted in "Control of Regulation", [1961] Canadian Bar Papers 17, 21 that his section had begun a study of a uniform procedure act but came to the conclusion that it could not be done.

⁴⁷ Williams, C.D. "Notes on a Model Administrative Procedures Act", [1961] Canadian Bar Papers 31, 34.

⁴⁸ Reid, R., "Tribunal on Trial", [1963] Canadian Bar Papers 1, 10.

of the individual tribunals: basic, yet not so general as to become vapid and ineffective. In addition, a supervisory body could be formed with power to make exceptions so that the code is made sensibly to fit the needs of the tribunal while ensuring a reasonable degree of uniformity.⁴⁹ Thus, the CBA endorsed a combination of the American APA and a British Council on Tribunals.

In the same year, the Glassco Commission⁵⁰ published its report. While not directed specifically to examine individual agencies, they did comment on the lack of consistency and status, form and procedure and noted that while there had been extensive inquiries and discussions in the United States and the United Kingdom, nothing comparable had occurred in Canada.

The administrative tribunals of the federal government have never, to the knowledge of your commissioners, been the subject of systematic study...[T]here are widespread differences in the procedures followed by the tribunals. No uniformity or consistency was observed among them...[Y]our commissioners suggest the need for a comprehensive study of this important field.⁵¹

The federal government seemed to take up the challenge raised by both the CBA and the Glassco Report. In the speech from the throne the government claimed it would,

[a]ppoint a royal commission to study the status, form and procedure of adjudicatory and regulatory bodies and to

⁴⁹ Ibid., 3.

⁵⁰ The Royal Commission on Governmental Organization, (Ottawa, 1963).

⁵¹ Ibid., 72.

investigate the desirability of instituting a parliamentary commissioner or ombudsman for Canada.⁵²

Concurrently, the Minister of Justice announced that his department would be studying the powers given to administrative tribunals in order to form the basis for a general review of agencies. The initial study consisted of a two-year search through the federal statutes and regulations to discover approximately 250 instruments granting decision-making powers that affected individual rights.

By 1968, the issue was raised occasionally in the House of Commons in the course of the debate on overall justice reforms. André Fortin, Social Credit member from Lotbinière, spoke up,

[t]he Glassco Commission suggested that the government give careful defined legislation on administrative tribunals...that recommendation was made in 1963 and since then absolutely nothing has been done in that regard. I think that the implementation of clear and specific legislation concerning administrative courts could easily and happily come within the judicial reform contemplated by the Minister.⁵³

Mr. Turner, the then Minister of Justice, replied to a later call for a study,

[a] uniform procedure code for judicial bodies has received and will receive further consideration but there is no present intention to lay any report on such a matter before the House.⁵⁴

⁵² Hansard, April 5, 1965.

⁵³ Hansard, October 16, 1968, para 1229.

⁵⁴ Hansard, November 13, 1968, para 2682.

There is no further evidence of any action on procedural reform. However, there were great steps being made in other aspects of judicial reform which had greater priority.⁵⁵ The federal government in the early Trudeau years was committed to planning and rationalization of government.⁵⁶ It is quite likely that a more complete review of the whole administrative structure was anticipated but the loss of their majority in 1972 undoubtedly made the government more cautious about embarking on technical issues of no real timely or emotional appeal.

As part of the federal government's commitment to reform, several projects and commissions were in place in the late sixties through the late seventies that touched on procedural reforms.

The MacGuigan Committee performed empirical research on regulation-making procedures, and, in its Third Report on Statutory Instruments, advocated the widest feasible consultation with those subject to regulation as well as the public at large but stopped short of creating a uniform obligation of consultation.⁵⁷

⁵⁵ Most notably the Federal Court Act, S.C. 1970-71-72 c.1; R.S.C. 1970, and Supp., c.10.

⁵⁶ See French, R.D. How Ottawa Decides, James Lorimar and Co., Toronto, 1980.

⁵⁷ The Third Report of the Special Committee on Statutory Instruments, Queen's Printer, Ottawa, 1969.

Somewhat related was the Lambert Commission Report⁵⁸ which recommended that all regulations be subject to approval of the Governor-in-Council and that appeals to the Cabinet be abolished.

The Peterson Committee (the House of Commons Special Committee on Regulatory Reform) in 1980 set out to examine the objectives, effectiveness and economic impact of regulation and possible alternate techniques. The 29 recommendations centred on procedural reforms encouraging better methods of voluntary and informal notice and comments procedures and were very similar to those raised in the Lambert Report, the Law Reform Commission Working Paper, and the Economic Council Report.

The Economic Council of Canada produced its long awaited study entitled Reforming Regulation in 1981, two years after its Interim Report, Responsible Regulation. The Reports offered specific recommendations on regulatory issues, such as more consultation prior to the announcement of new regulations, and, further, provided for some general improvements to the system, such as abolishing Cabinet appeals and increasing Parliamentary committee scrutiny.

The Law Reform Commission of Canada commenced its ambitious study of the administrative process in the early 1970's. The first step

⁵⁸ The Commission on Financial Management and Accountability (1979).

was to catalogue the discretionary powers given by statute to various administrative bodies. Studies of ten individual agencies were then undertaken as well as some issues of general application.⁵⁹ The agency studies were basically factual reports with little analysis or correlation but they provided the raw data and the inspiration for the wide-ranging reform recommendations of Working paper 25 in 1980. The Commission's research led to the conclusion that,

...general legislation should be enacted incorporating minimum administrative procedural safeguards or providing the means for the development of common procedural guidelines.⁶⁰

The Working paper listed the basic principles to be included in such a code but leaves the detailed study of the particulars to a later date. No legislative action was taken on these recommendations. However, since the publication of this paper, agencies have carefully consulted its recommendations in promulgating their own procedural rules, thereby implementing an incremental move to adherence to common guidelines.

In 1986, the Law Reform Commission of Canada tabled its Report on Independent Administrative Agencies.⁶¹ The Commission proposed a statutory framework which would be voluntarily adopted by the

⁵⁹ Some of these were - access to information, public participation in the administrative process, political control, and independence of agencies.

⁶⁰ Independent Administrative Agencies, *supra*. n.17, 141.

⁶¹ Report 26. Independent Administrative Agencies, Law Reform Commission of Canada (1986).

agencies. To encourage agencies to work out and enact individual rules, the statutory code would apply only where the agency chose not to make its own procedure rules.⁶² Where agencies did promulgate their own, the standards expressed in the procedure Act would cease to be of any effect nor would they be considered to be the measure of the validity of the agency's rules. To foster greater accountability to Parliament, agencies would be required to submit their rules of procedure to the scrutiny of a Parliamentary Committee and be subject to a negative resolution by Parliament. Parliament, on the other hand, would discontinue the practice of inserting detailed procedural codes in agencies' enabling legislation.

The Commission continues to study the procedure issue within the broader context of a modern federal administrative law. In their 1987 Consultation Paper the theme of administrative procedure is identified as one of many that must be considered as part of long term reform.

As one part in the federal government's response to the call for modernizing the system, the Office of the Co-ordinator of Regulatory Reform was established in 1979. The mandate is to improve public administration and reduce regulatory burden. A first step in this regard was the establishment of the regulatory agenda in cooperation with several agencies. The agenda gave

⁶² Ibid, 67.

notice of draft or proposed regulations and provided an opportunity and forum for comment by interested persons. Most of the participants did so on a voluntary basis as very few have had a statutory requirement to provide notice and comment.⁶³

In 1986, the government issued a Citizen's Code of Regulatory Fairness. It states, in part:

When a government regulates, it limits the freedom of the individual. In a democratic country, it follows that the citizen should have a full opportunity to be informed about and participate in regulatory decisions. Moreover, the citizen is entitled to know the government's explicit policy and criteria for exercising regulatory power in order to have a basis for "regulating the regulators" and judging the regulatory performance of the government.

The Code promises full opportunity for consultation and participation by Canadians in the federal regulatory process and adequate early notice of possible regulatory initiatives.

The Code is a hortatory statement only: it has no force of law. Further, it was not intended for general application beyond the strict limits of the regulatory process.

b. Provincial Level

⁶³ In 1969, the MacGuigan Committee noted that only two federal statutes required consultation before promulgating regulations. By 1984, however, most new statutes giving a regulation-making power included a notice and comment provision. See Evans, Janisch, Mullan and Risk, Administrative Law (2d), 210-11.

Alberta enacted the Administrative Procedures Act⁶⁴ in 1966. The statute is not particularly detailed and refers to general standards such as "adequate notice", "reasonable opportunity" and "fair opportunity". It represents a minimal standard of fairness with considerable residual discretion left with the tribunals.⁶⁵ The Act applies only to those authorities designated by the Lieutenant Governor in regulation. Currently, the Act applies to 10 agencies.⁶⁶

Ontario had also embarked on a reform program which included a statutory codification of procedural principles.⁶⁷ In 1960, the Gordon Report⁶⁸ had recommended procedural rules be promulgated by an individual agency, vetted first by officials in the Attorney-General's Office and approved by the Lieutenant Governor-in-Council. The report urged that the agency rules should be as uniform as possible yet the feasibility of minimum guidelines was never seriously considered. At one point the comment was made,

⁶⁴ R.S.A. 1980, c. A-2.

⁶⁵ Sprague, J. "Thirty Years After the Franks Committee Report - Alberta's Report Card" (1989), 5 Admin LJ 66.

⁶⁶ Alberta Regulations 135/80 as am.

⁶⁷ The Statutory Powers Procedures Act, R.S.O. 1980, c.484.

⁶⁸ The Report of the Committee on the Organization of the Government of Ontario, Queen's Printer, Toronto, 1960.

[t]he answers do not lie in an attempt to set down rules and regulations to cover every situation. If this were possible, it would have been done.⁶⁹

The committee seemed to fail to grasp any distinction between minimum guidelines and an unworkably detailed procedural code although they repeatedly called for uniformity among the agencies' procedures.

This stance was partially reversed with McRuer Report.⁷⁰ Chief Justice McRuer was a very strong supporter of the concepts of the rule of law and parliamentary responsibility. He made the emphatic recommendation for a uniform code of procedure which was in fact later enacted as the Statutory Powers Procedure Act. Ontario also formed a Rules Committee to examine agency rules to ensure compliance with the Act; all agencies that are required to hold hearings must submit procedures to the Committee for scrutiny. However, there is no legal force behind any committee recommendations and because of its part-time status⁷¹ it has not been particularly active. The potential strength of such a committee has not been tested.

⁶⁹ Ibid., 9.

⁷⁰ Ontario Royal Commission Inquiry into Civil Rights, Queen's Printer, Toronto, 1965.

⁷¹ All six members are representatives from other departments, courts or academics. There is no full time research staff.

The former Chairman of the Ontario Energy Board was appointed in 1988 to conduct an extensive review of all regulatory agencies, boards and commissions in Ontario. The Report was submitted to Cabinet in the fall of 1989 and suggested amendments to the Statutory Powers Procedure Act in addition to the creation of an Ontario Council for Administrative Agencies. The SPPA recommendation focused on the outmoded thinking behind the Act and the need for greater agency flexibility. The Committee had considered a new Administrative Procedure Act but in the final analysis, preferred to suggest revisions to the SPPA. The main thrust of the procedural recommendations was that all agencies would be required to create rules of procedure which would then be approved by the new Ontario Council for Administrative Agencies. This would assist in the avoidance of the theme of judicialization underlying the current SPPA:

The public requires an informal, expeditious, and flexible forum that is both cost effective and "fair" in its efforts to balance the public interest with individual interests.

The primary function of the new Council would be to coordinate and support the work of all the agencies, including rules of procedure but remain in an advisory role.

In 1974, the British Columbia Law Reform Commission assessed the issue of procedural uniformity.⁷² The Commission considered both the code approach and the agency by agency approach as methods of

⁷² Report on Civil Rights- Part 3- Procedure Before Statutory Agencies, Law Reform Commission of British Columbia, 1974.

achieving procedural reform. They felt the code approach was too constraining and not appropriate in many cases, particularly where expediency is a pressing concern. Their ultimate proposal was to set up an inquiry body to study those agencies which in the discharge of adjudicative, rule-making and investigative functions have the power to affect the personal and property rights of individuals.

In 1984, the Manitoba Law Reform Commission produced its Report on Administrative Law dealing with the procedure of provincial government agencies. Their rejection of a single code of procedural approach is based on the view that this model has been overtaken by history with the emergence of the fairness doctrine.⁷³ In addition, the argument is made that uniform codes would appear to overemphasize fairness relative to the values of efficiency and accuracy⁷⁴ to the detriment of the regulated public. They recommended the enactment of separate rules for each agency by means of regulation. To achieve some degree of uniformity, the Commission devised various models of procedure relating to the particular powers exercised by most agencies. These models would act only as guidelines for each agency.

In Quebec, the Working Group on Administrative Tribunals

⁷³ Report on Administrative Law Part I: Procedures of Provincial Government Agencies, Manitoba Law Reform Commission, 1984, 50.

⁷⁴ Ibid.

(the Ouellette Commission Report) has produced a Report that has been described by Professor R. Macdonald as having:

largely avoided the ideological posturing that usually accompanies administrative law reform; by focusing on the basic "raison d'être" of tribunals, the Working Group was able to come up with practical, rather than "perfect", solutions to the problems it identified...[It] managed to avoid making recommendations grounded in an over-systematized and over-generalized caricature of administrative decision-making.⁷⁵

The Report recommends a reorganization of several quasi-judicial tribunals and the creation of an Administrative Review Tribunal to exercise general administrative review jurisdiction. With respect to procedure, the Working Group focused on the features of an effective procedural regime: the simplification of decision-making; the protection of "rights" of affected parties; and, the enhancement of the quality of administrative decision-making.⁷⁶ They recommended a generic statute spelling out basic principles of procedure to be fleshed out by individual tribunals.

D. Conclusion

The focus in the late sixties and early seventies was on the adjudicative aspects of administrative agencies and on the protection of rights. This shifted somewhat to a review of more generalized regulatory action at least at the federal level in

⁷⁵ R. Macdonald, "Reflections on the Report of the Quebec Working Group on Administrative Tribunals" (1988), 1 CJALP 337, 338.

⁷⁶ Ibid., 344.

response to an awareness of economic pressures and calls for deregulation by government.

But an additional factor is now the Canadian Charter of Rights and Freedoms. In particular section 7, with the concept of the principles of fundamental justice, and to a lesser extent, section 15, on equality before and under the law, raise the issue of procedural fairness. The question of whether uniformity or at least some standardization of procedures is appropriate or necessary for administrative agencies must be asked again in the context of the new constitutional imperatives.

Chapter 2

As a preliminary or threshold question, the application of section 7 to administrative agencies must be explored. If, in fact, the section will apply to a small percentage of administrative agencies, the argument that the Charter could demand a second look at the concept of uniform procedures would not be persuasive. On the other hand, if the risk of judicial scrutiny on the basis of the standards set in the Charter is present, many agencies may find it well worth the effort to take a closer look at the scope and application of the "principles of fundamental justice".⁷⁷

Section 7 reads:

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

The first step in any determination of an infringement of section 7 must be to answer whether there has been a deprivation or a threat⁷⁸ to life, liberty or security of the person. The Supreme Court of Canada pointed out in Reference re S. 94(2) Motor Vehicle Act⁷⁹ that the principles of fundamental justice are not a protected interest or right in themselves but are rather a qualifier of the

⁷⁷ The content of this term and any contradistinction with the more familiar expressions "natural justice" and "procedural fairness" will be discussed in chapter 3.

⁷⁸ See the comments of Madame Justice Wilson in Singh v. Minister of Employment and Immigration, [1985] 1 S.C.R. 177, 207, where she reasons that a threat to one of the rights in s. 7 is sufficient to invoke the protection of s. 7. But see Donoso v. Canada (1988), 38 Admin L.R. 219 (F.C.T.D.) where the threat was considered too remote to be protected under s. 7.

⁷⁹ [1985] 2 S.C.R. 486, 512.

right not to be deprived of one of the other three noted in the section.

Thus it is clear that the decision or administrative action must somehow impact on life, liberty or security of the person before it can be held up to the standards of the principles of fundamental justice. The definition of the standards themselves will demand a separate analysis.

For some agencies, the courts have had little difficulty in applying s. 7 to the decisions made by the agency. In the federal sphere, parole and immigration issues are obvious examples. For other, the courts are more tentative. This is particularly so where primarily economic interests are involved. However, it is in this latter area that the greatest concern for administrative agencies arise. A significant percentage of all administrative decision making involves economic interests.⁸⁰ The question of whether s. 7 applies to any economic interest becomes of prime importance when viewed in relation to what some argue are the more rigorous constitutional imperatives of s. 7, on both a procedural and substantive level.

It is necessary, therefore, to first generally review the definitional requirements of s.7 itself.

⁸⁰ In the federal jurisdiction this would range from pension decisions at various levels, unemployment insurance benefits decisions to copyright and patent appeals.

I. Everyone

Under pre-Charter law, it was clear that "everyone" implied any legal personality, including corporations.⁸¹ The issue arose in several cases under the Charter⁸² with conflicting results.

In the Reference Re S. 94(2) Motor Vehicle Act⁸³, Lamer J. commented that ss. 7 to 14 could be fused into one section and,

of course, I understand the concern of many as regards corporate offences, especially, as was mentioned by the Court of Appeal, in certain sensitive areas such as preservation of our vital environment and natural resources. This concern might well be dispelled were it to be decided, given the proper case, that s. 7 affords protection to human persons only and does not extend to corporations.

The issue was raised in R. v. Amway Corporation⁸⁴ but was not considered because of the failure of the corporation to properly raise the matter at an earlier stage.

⁸¹ Union Colliery v. the Queen (1900), 31 S.C.R. 81; R. v. Hays (1907), 14 O.L.R. 201 (C.A.); and King v. Toronto Railway Co. (1905), 10 O.L.R. 36 (C.A.).

⁸² Gershman Produce v. Motor Transport Board, [1985] 2 W.W.R. 63 (Man. Q.B.); Re Balderstone (1983), 2 C.C.C. (3d) 37 (Man. Q.B.); Smith, Kline and French Laboratories v. A.G. Canada (1986), 24 D.L.R. (4th) 321 (F.C.T.D) affd 34 D.L.R. (4th) 584 (C.A.) leave to appeal denied, S.C.C. Apr. 9/87; Home Orderly Services Ltd. v. Manitoba (1986), 32 D.L.R. (4th) 755 (Man. Q.B.) affd (1987), 49 Man R. (2d) 246 (C.A.); Re Malartic Hygrade Gold Mines and Ontario Securities Commission (1986), 54 O.R. (2d) 544 (Div. Ct). In Waste Not Wanted Inc. v. Canada (1987), 11 F.T.R. 253, a corporation formed by a group of citizens protesting the plan to dump radioactive soil at a site near their homes was ruled ineligible to challenge the decision on grounds that it infringed life or security of the person even where it was clear that the corporation did so only on behalf of its individual members.

⁸³ [1985] 2 S.C.R. 486, 502.

⁸⁴ [1989] 1 S.C.R. 21.

The "proper case" alluded to the Motor Vehicle Reference arose in A.G. Quebec v. Irwin Toy⁸⁵ and the Supreme Court has now confirmed that,

a plain, common sense reading of the phrase "Everyone has the right to life, liberty and security of the person" serves to underline the human element involved; only human beings can enjoy those rights. "Everyone" then, must be read in light of the rest of the section and defined to exclude corporations and other artificial entities incapable of enjoying life, liberty or security of the person, and include only human beings.⁸⁶

This was extended to the case of an individual's right to engage in a profession through the medium of a corporation⁸⁷.

The distinction is carefully made between this situation where there are no penal proceedings involved and a case such as R. v. Big M Drug Mart⁸⁸ where the Court made it clear that any accused, whether corporate or individual, may defend a criminal charge by arguing that the law under which the charge is brought is unconstitutional. For the purposes of defence under a criminal charge, it is irrelevant that the corporation does not or cannot

⁸⁵ [1989] 1 S.C.R. 927. See also Dwidag Systems International v. Zutphen Bros. Ltd. (S.C.C., March 29/90).

⁸⁶ Irwin Toy, 1004.

⁸⁷ Lister v. Ontario (1990), 72 O.R. (2d) 354 (H.C.J.).

⁸⁸ [1985] 3 W.W.R. 481.

enjoy the right or freedom invoked in the Charter section, such as the freedom of religion.⁸⁹

However, it remains debatable whether administrative proceedings would be covered by the Big M distinction. For the most part, offenses under regulatory regimes are not considered to be part of the criminal law and as such, may not qualify as penal legislation for the purposes of a constitutional challenge by a corporation.⁹⁰

The other pressing issue within the term "everyone" is whether the word includes the unborn. Mr. Borowski has challenged the abortion law in the Criminal Code under both the Canadian Bill of Rights⁹¹ and the Charter. The Saskatchewan Court of Queen's Bench⁹² ruled that a foetus is not covered by s. 7 of the Charter on the basis that a foetus has never been recognized as a legal person and the mere fact that rights are set out and guaranteed in the Charter does not permit the inference that Parliament intended to include

⁸⁹ See also R. v. W.H. Smith, [1983] 5 W.W.R. 235 (Alta. Prov. Ct.), R. v. Wholesale Travel Group Inc. (1989), 70 O.R. (2d) 545 (Ont. C.A.), and R. v. Quest Vitamin Supplies Ltd., [1990] 2 W.W.R. 185 (B.C.C.A.).

⁹⁰ For the purposes of s. 11 of the Charter, disciplinary charges were not considered to be an "offence": R. v. Wigglesworth, [1988] 1 W.W.R. 193. However, there remains some scope under s. 7: "...it is preferable to restrict s. 11 to the most serious offences known to our law, i.e. criminal and penal matters, and to leave other 'offences' subject to the more flexible criteria of 'fundamental justice' in s. 7.", p. 209.

⁹¹ [1981] 2 S.C.R. 575 ; [1984] 1 W.W.R. 15 (Sask C.A.) aff'd [1987] 4 W.W.R. 385 (Sask.C.A.) dism'd [1989] 3 W.W.R. 97.

⁹² [1984] 1 W.W.R. 15.

foetus in the term "everyone". There are certain exceptions in the common law⁹³ but these do not indicate a general trend toward recognition of the foetus as a legal entity with legal capabilities.

The Court of Appeal⁹⁴ came to the same conclusion after reviewing the history and a range of other areas of law which could involve fetal rights. The Court reasoned the analysis of s. 7 must be the same as under the Canadian Bill of Rights and the common law such that an interpretation of the Charter which gave independent rights to a foetus would be a major departure from legal tradition. This would not in and of itself preclude such a step, however, since it is so novel, it would suggest that clear and unambiguous wording should be used to enshrine such rights.⁹⁵

The Supreme Court of Canada did not have to deal with the substance of the s. 7 arguments because of the intervening case of R. v. Morgentaler⁹⁶ in which the impugned abortion provisions were ruled unconstitutional because of the threat to the security of the

⁹³ There is a right not to be injured negligently for the unborn (Montreal Tramway Co. v. Léveillé, [1933] S.C.R. 456); a right to participate in a gift of property to a class of children, even where children were living at the time of the testator's death were specified (Re Sloan, [1937] 3 W.W.R. 455, revd 53 B.C.R. 81 (C.A.)) and a right to protection from abuse if the foetus is capable of being born alive (Superintendent of Family and Child Services v. M., [1982] 4 W.W.R. 272 (B.C.S.C.)).

⁹⁴ (1987), 39 D.L.R. (4th) 731 (Sask. C.A.).

⁹⁵ Ibid., 748.

⁹⁶ R. v. Morgentaler, [1988] 1 S.C.R. 294.

person of pregnant women who wished to obtain abortions. The issue was clearly moot by the time the Borowski appeal reached the highest court.

The matter was most recently reconsidered in the British Columbia case of R. v. Sullivan⁹⁷ where the Court of Appeal ruled that two midwives should not have been convicted of criminal negligence in the death of a child they were helping to deliver because the child had not been born alive and was, therefore, not a person. The issue was squarely whether the foetus was a person at the time of the injury because the Criminal Code provided for penalties for causing the death of a "person" but does not define the word. After a lengthy review of the history of the common law and Criminal Code case law, the Court concluded that the line of demarcation had to be set at the point where the foetus was completely extruded from the mother's body and was born alive.⁹⁸

Also in this context, conduct of the mother that endangers the foetus can call into play the question of whether the child is in

⁹⁷ R. v. Sullivan and Lemay B.C.C.A. July 28/88 leave to appeal granted, S.C.C., Jan. 23/89.

⁹⁸ A similar distinction was drawn in an English case considering whether a foetus was another person under the Offences against the Person Act, 1861. There threats had been made against a woman and her unborn child. The House of Lords considered that it should give the words of the Act their ordinary meaning and, in that sense, felt constrained to say that the foetus was not "another person" distinct from its mother (Regina v. Tait, House of Lords, April 26/89). See also McCluskey v. H.M. Advocate, (H.L., Nov. 25/88) where criminal charges of causing the death of another person by reckless driving would apply where the foetus was born alive but subsequently died from injuries sustained before birth.

fact a person in need of protection by the court⁹⁹. In Re F¹⁰⁰ the Court of Appeal held that it could not extend its wardship jurisdiction over minors to jurisdiction over a mother for the protection of an unborn child. This was followed in Re Baby R¹⁰¹ where the Act defined "child" as a person under the age of 19 years which clearly implied that a child must be born before the jurisdiction of the Act could be invoked. In contrast, Ontario Family Courts have found that fetuses in similar circumstances were children in need of protection under the Child Welfare Act.¹⁰²

Where the child is born alive, the question of what "everyone" implies can become one of balancing the interests of the child under s. 7 with the parents' rights. In McTavish v. Director, Child Welfare Act¹⁰³ the parents refused to permit a blood transfusion to their child on religious grounds. The question raised in the challenge to the Child Welfare Act was whether the child's right to life displaced the parents' right to ordinarily make medical decisions for their child or the possible parental

⁹⁹ For a detailed analysis of the cases, see Tateishi, S. "Apprehending the Fetus en ventre sa mère: A Study in Judicial Sleight of Hand" (1989), 53 Sask. L. R. 113.

¹⁰⁰ (1988), 1 W.L.R. 1288 (CA).

¹⁰¹ (1988), 15 R.F.L. (3d) 225 (B.C.S.C.).

¹⁰² Re Children's Aid Society of City of Belleville and T. (1987), 59 O.R. (2d) 204 and Re Children's Aid Society for the District of Kenora and J.L. (1981), 134 D.L.R. (3d) 249.

¹⁰³ Alberta Q.B., Oct. 16/86. A similar result was reached in B.(R.) v. Children's Aid Society of Metropolitan Toronto (Feb. 10/89, Ont. Dist. Ct) in determining that a child's right to life overrode the parents' in regard to a blood transfusion.

right to be free of state intervention under s. 7. The court found that s. 7 would require a careful balancing of the two competing interests and in this case the child's right to life would take precedence over the parents' where it was clear that to do otherwise would endanger the child's life. Most other courts that have considered this issue have concluded that the balance would usually be tipped in favour of the right to life of the child over whatever rights the parents may have to pursue their religion or to maintain their privacy¹⁰⁴.

Another question arising in the term "everyone" is whether there are physical limitations to the application of s. 7. In Singh v. M.E.I.¹⁰⁵, Madame Justice Wilson accepted the argument that the word "everyone" encompassed a broader class of persons than citizens and permanent residents as would be indicated in ss. 3, 6(2) or 23 of the Charter. She stated further that,

¹⁰⁴ Winnipeg South Child and Family Services Agency v. Pinvidic, Feb. 1/89, Man. Q.B; Re R.K., (1987), 79 A.R. 140 (Prov. Ct), M. v. Director of Child Welfare (1986), 4 R.F.L. (3d) 363 (Alta Q.B.); and Re C.P.L. (1988) 80 Nfld & P.E.I. R. 287 (Nfld S.C.). However, in Re T. and CAS of Metropolitan Toronto the judge accepted that security of the person included the right to individual privacy and family autonomy and that one of the liberty interests to be protected is parental right to be free from state intervention. It is significant to note that this case did not deal with the life and death issue of blood transfusions but with a procedure under the Child Welfare Act. In C.A.S. v. R.W. and M.B. (1987), 80 N.S.R. (2d) 341, the court considered that the family unit as a whole has a right to liberty and security of the person under s. 7 and that the best interests of the child must be considered in this context.

¹⁰⁵ [1985] 1 S.C.R. 177.

I am prepared to accept that the term includes every human being who is physically present in Canada and by virtue of such presence amenable to Canadian law.¹⁰⁶ This has been applied to potential Convention refugee claimants.¹⁰⁷

The issue of physical presence in Canada raises at least one interesting question. Would illegal aliens, for example, have the right to challenge procedures undertaken to remove them from the country because it may affect their liberty or security of the person?¹⁰⁸ It would be difficult to deny standing to persons physically present in Canada, particularly when challenging laws that affect their status as potential immigrants or residents.

II. Life

The definition of what may perhaps be considered the most fundamental of any protected right in the Charter, that of the right to life itself, has not received a great deal of judicial attention. It is also of marginal relevance to the workings of

¹⁰⁶ Ibid., 202. Later at pp 210-211, she appeared to be suggesting that the Charter could apply to persons not yet in Canada: "...a rule which provided Charter protection to refugees who succeeded in entering the country but not to those who were seeking admission at a port of entry would be to reward those who sought to evade the operation of our immigration laws over those who presented their cases openly at the first available opportunity." However, in R. v. Canadian Council of Churches (1990), 106 N.R. 61 (F.C.A.) and Ruparel v. M.E.I., F.C.T.D., August/90, would be immigrants who were not in the country were considered to be beyond the scope of the Charter.

¹⁰⁷ Mattia v. Minister of Employment and Immigration (1987), 25 Admin. L.R. 80 (F.C.T.D.).

¹⁰⁸ This issue may be explored in the Ng case. (Ng v. Canada (1989), 97 A.R. 241 (C.A.), leave to appeal granted June 8/90.

most administrative agencies unless the definition of the right to life is considered to be broader than "the ability to draw breath"¹⁰⁹.

The troublesome questions must eventually be answered concerning when life begins, when do the rights under the Charter crystallize, and when will it be possible for the state to terminate or allow the termination of life¹¹⁰. A more expansive philosophical question arises from various comments of academics and the courts themselves: what are the limits to the right to life? In other words, will the right to life imply a right to the necessities essential for the maintenance of life, such as social welfare?¹¹¹

a. Abortion

The American courts have interpreted the right to life in rather generous terms. In Rosenblum v. Rosenblum the right to life and liberty was considered to include,

¹⁰⁹ Beare v. the Queen, [1987] 4 W.W.R. 309, 319 (Sask C.A.).

¹¹⁰ See Tolton, C. "Medico-legal Implications of Constitutional Status for the Unborn: "Ambulatory Chalice" or "Priorities and Aspirations" (1988), 47 U. of T. Fac. Law Rev. 1.

¹¹¹ This is raised in Christian, T., "Section 7 of the Charter of Rights and Freedoms: Constraints on State Action" (1984), 22 Alta. L.R. 222 and in Johnston, I. "Section 7 of the Charter and Constitutionally Protected Welfare" (1988), 46 U of T Fac L. Rev. 1, although in the context of security of the person. The suggestion is also made in the 1980 Working Paper prepared by the Law Reform Commission of Canada entitled Medical Treatment and Criminal Law at page 6,

The right to security of the person means not only protection of one's physical integrity, but the provision of necessities for its support.

...all personal rights and their enjoyment embracing the use and enjoyment of the faculties, acquiring useful knowledge, a right to marry, establish a home, and to bring up children, freedom of worship, conscience, contract, occupation, speech, assembly and press.¹¹²

In 1973, the U.S. Supreme Court decided in Roe vs Wade¹¹³ that the state interest in the unborn arose only at the end of the first trimester. Before that time, the privacy rights of the mother overrides the right to life of the foetus. However, after the first trimester, the state has the right to regulate the procedures on abortion to the extent that the regulation reasonably related to the preservation and protection of maternal health and life.¹¹⁴

However, on July 3, 1989, the U.S. Supreme Court released its ruling¹¹⁵ in a challenge to a Missouri statute that limited access to abortion facilities. In a 5-4 split decision, the Court accepted that the state has an interest in the life of the unborn at any stage of development and could place restrictions on access to abortion. This will likely devolve into a state by state examination of the right of access to services.¹¹⁶

¹¹² 42 N.Y.S. (2d) 626, 630. A similar statement of liberty was expressed in Board of Regents of State Colleges v. Roth 408 U.S. 564, 572 (1972) and in the often quoted, Meyer v. Nebraska 262 U.S. 390, 399.

¹¹³ 93 S.Ct. 705 (1973).

¹¹⁴ Christian, supra. n. 34, 228.

¹¹⁵ Webster vs Reproductive Health Services, U.S. Supreme Court decision, July 3, 1989.

¹¹⁶ Three other challenges to the ruling in Roe vs Wade were heard in the fall of 1989. The most likely to involve a general discussion of the principles in Roe is Turnock vs Ragsdale

In case law under the European Convention, it has also been held that the right to life concerns persons already born and, thus, cannot be applied to a foetus.¹¹⁷

As noted above in relation to the term "everyone", Canadian courts have been extremely reluctant to embark on a course that could lead to the establishment of the right to life for the unborn.

Most recently courts have been faced with applications for injunctions by men attempting to prevent abortions.¹¹⁸ Most of

(Illinois) involving a challenge to state regulations requiring abortion clinics to meet strict standards for staffing and equipment. The other two cases concern a requirement that in Ohio, the parents of unmarried, underage girls be notified by the doctor before any abortion and, in Minnesota, a 48 hour waiting period be imposed in addition to the requirement that notice be given to parents.

¹¹⁷ X v. U.K. Dec. Adm. Com. Ap. 8416/78, 13 May 1980; D&R 19 p. 244. The case involved a husband complaining that his wife was able to obtain an abortion without his consent. He had applied for an injunction in the High Court of Justice but the application was dismissed on the basis that an injunction could be granted only to restrain the infringement of a legal right. Because under English law, the foetus had no legal rights until it is born and has a separate existence from its mother, the father had no legal right to prevent the mother from having an abortion. He then took the matter to the European Commission of Human Rights but was equally unsuccessful.

¹¹⁸ Medhurst v. Medhurst (1984), 46 O.R. (2d) 263 (H.C.J.). See also Paton v. Trustees of BPAS, [1978] 2 All E.R. 987 (Q.B.), Mock v. Brandenburg (1988), 61 Alta.L.R. 235. There have apparently been at least six other attempts in the last five years whereby jilted lovers, estranged husbands or parents have asked Canadian judges to grant injunctions to block abortions (Ottawa Citizen, July 13, 1989). In Murphy v. Dodd (1989), 70 O.R. (2d) 681 (H.C.J.) an application was filed by the boyfriend who claimed that the couple had an agreement to have a child and that he was prepared to take and care for the infant after birth. The case was overturned on appeal on the grounds that she did not appreciate the

these cases are arguably more properly framed in terms of the conflict between the rights of the parents to determine whether a child will be carried to term by the mother as opposed to the issue of the right to life by the foetus itself. However in Tremblay v. Daigle¹¹⁹, the trial judge found that a foetus has a right to life, thereby triggering the protection of the Quebec Charter of Rights and Freedoms. The majority of the Quebec Court of Appeal upheld the decision. The Supreme Court, after an emergency hearing during the summer recess, determined that it must consider the substantive rights underlying the injunction application. Three different arguments were advanced in support of the injunction based on whether there is a right to life of a foetus based on the Quebec Charter and the Civil Code, a right to life under the Canadian Charter of Rights and Freedoms and, a right of the potential father in respect of decisions concerning his potential progeny.

significance of the proceedings and did not appear or have counsel present at the original hearing of the matter. The same issue was faced by the Manitoba Court of Queen's Bench two days after the Ontario case resulting in the ruling that the woman had absolute control over her body and the right to have an abortion (Diamond v. Hirsch July 6/89). A Quebec Superior Court responded to an application for an injunction in the same manner as the High Court in Ontario (Tremblay v. Daigle (July 17/89)). The Quebec Court of Appeal upheld the ruling in a split decision and the matter was referred to the Supreme Court of Canada on an emergency basis. The injunction was overturned by the Court although the matter had become moot by that point as Ms Daigle had obtained an abortion before the hearing of the matter had concluded ([1989] 2 S.C.R. 530). Most recently a putative father in Manitoba argued that the foetus was a "chattel" in which he had sufficient property interest to halt an abortion (Niemi v. Morris, Manitoba Court of Appeal)

¹¹⁹ [1989] 1 S.C.R. 530.

Each of these arguments were rejected. With respect to the first argument, the Court did not feel compelled to enter the philosophical and theological debates about whether or not a foetus is a person but focused on the legal issue of whether the Quebec legislature had accorded the foetus legal status. In this regard the Court commented,

Metaphysical arguments may be relevant but they are not the primary focus of inquiry. Nor are scientific arguments about the biological status of a foetus determinative in our inquiry.¹²⁰

The reasoning of the lower courts concerning the interpretation of the words "être humaine" was considered to be an insufficient legal basis for according the foetus a constitutionally protected right to life:

A linguistic analysis cannot settle the difficult and controversial question of whether a foetus was intended by the National Assembly of Quebec to be a person under s. 1.. What is required are substantive legal reasons which support a conclusion that the term "human being" has such and such a meaning...A purely linguistic argument suffers from the same flaw as a purely scientific argument: it attempts to settle a legal argument by non-legal means; in this case by resorting to the purported "dictionary" meaning of the term "human being".¹²¹

On a similar basis, the right to life for the foetus could not be found in the provisions of the Civil Code. In the view of the Supreme Court, the provisions of the Code do not create a specific or independent right to life for the unborn; they "simply provide a mechanism whereby interests described elsewhere in the Charter

¹²⁰ [1989] 2 S.C.R. 530, 552.

¹²¹ Ibid. pp 553.

can be protected".¹²² The overall conclusion, after consideration of various sections of the Code and academic articles on the issue, was that the Code does not accord the foetus a legal personality. This is consistent with the law under the common law as well.

Secondly, the Court rejected the argument that the Canadian Charter of Rights and Freedoms could provide an independent basis on which to sustain the injunction. Because this was a civil action between two private parties there was no state action that is the requisite factor for the application of the Canadian Charter under section 32.¹²³ The Court declined to continue to explore legal issues not necessary to the determination of the matter at hand.

Lastly, the Court could find no jurisprudential basis for the argument based on "father's rights".

Thus, there has yet been no specific consideration at the highest level of the court on the issue of the right to life of the foetus under the provisions of section 7 of the Canadian Charter. It is, however, important to note that given the Courts' comment that,

it would be wrong to interpret the vague provisions of the Quebec Charter as conferring the legal personhood upon the foetus,

it would be extremely unlikely that any other conclusion could be possible considering the very similar vagueness problem of section 7 of the Canadian Charter of Rights and Freedoms. Nowhere is

¹²² Ibid. p. 557.

¹²³ See R.W.D.S.U. v. Dolphin Delivery, [1986] 2 S.C.R. 573.

"everyone" defined in the Charter and reference to the common law or civil law usage of the term may not provide any further guidance than was found in the review of the law in Daigle. Thus, I believe it is safe to assume that the decision on the right to life of the foetus under section 7 of the Charter has been determined.¹²⁴

b. Positive Duty on the State

There is very little jurisprudence on the expanded notion of life to include the idea that the state carries an additional burden of ensuring that the necessities of life are met. Case law under the European Convention has dealt with such issues as whether eviction could harm the right to life of a tenant suffering severe health problems¹²⁵ and whether the right to life could include the right to a personal bodyguard provided by the state¹²⁶.

There is no Canadian case directly on this point. The only Canadian case to deal remotely with this issue, Brown v. Minister of Health¹²⁷, considered the question in economic terms. The issue

¹²⁴ On this basis it is unlikely that issues involving reproductive technologies and disputes over the status of embryos not yet implanted or frozen genetic material will arise under the Charter. Even if there is some state action that would provide the trigger for the application of the Charter, it would not appear that the courts will entertain the argument that these entities should be accorded the right to life as has happened in several American cases (Davis v. Davis September/89, Tennessee Circuit Court.).

¹²⁵ X against the Federal Republic of Germany Dec Adm. Com. Ap. 5207/71, 13 December 1971. YB XIV p. 698. Coll. 39 p 99.

¹²⁶ X against Ireland Dec. Adm. Com. Ap. 6040/73, 20 July 1973. YB XVI p. 388. Coll. 44 p. 121.

¹²⁷ (1990), 66 D.L.R. (4th) 444 (B.C.S.C.).

was whether the government has the duty to provide drugs for AIDS treatment at reduced or no cost, similar to drugs for cancer and transplant treatment. The court found that the requirement in the funding policy that AIDS patients pay for their drugs caused only an economic deprivation or a reduction in their standard of living which is not covered by s. 7. The real threat to their lives came from the disease itself not the government policy. Thus, despite evidence that most patients suffering from AIDS could not afford the treatment and would die sooner as a result, the court determined there is no duty on the state to provide subsidized drugs for these patients.

Beetz J. in Morgentaler¹²⁸, considered that the Charter does not protect individuals from even the most serious misfortunes of life and s. 7 cannot be invoked simply because a person's health or life is in danger. There must be an element of state intervention which creates or furthers the danger before the s. 7 will apply.

One issue that will arise with increasing frequency is the duty of the state to provide health care. As in the Morgentaler analysis, where the government has decided on a course of action, as in the regulation of abortion, it cannot do so in a way which increases the risk to the health or security of the person. Where the state has undertaken a health programme or plan, what limitations can it impose on access to health care, whether physically, such as the availability or adequacy of facilities, or financially?

¹²⁸ Morgentaler v. the Queen, [1988] 1 S.C.R. 30, 90.

A second area of concern will be the provision of subsistence level benefits or welfare. The withdrawal of these types of benefits is more than a question of economic inconvenience or psychological security; it may be life threatening in a very real sense.

For administrative agencies, these questions will likely arise in conjunction with the concept of "security of the person" and the maintenance of life or a certain quality of life.¹²⁹ Those agencies dealing with benefits, income support programmes or economic licences may more frequently encounter arguments based on the duty of the state to provide some minimum guarantees of the protection of life.¹³⁰ Because this will inevitably involve discussion of security of the person, I propose to deal with this question in the latter section.

¹²⁹ The Supreme Court of Canada expressed the view in A.G. Quebec v. Irwin Toy, [1989] 1 S.C.R. 927 that "security of the person" may in fact include a right to social security, equal pay for equal work, adequate food, clothing and shelter and traditional property and contract rights.

¹³⁰ Many of the issues involving state support are raised in the context of section 15 of the Charter. See McInnes v. Crowell (N.S. S.C.T.D., Oct./89) where the trial judge decided that a denial of welfare benefits to a teenage mother was not discrimination under that section (the Court of Appeal overturned the decision on other grounds, N.S.C.A. Apr/90). It would be a completely different argument to allege that the state had a primary obligation to provide welfare to those who are in need of financial assistance rather than merely the obligation to deal with applications in a non-discriminatory fashion.

c. Conclusion

There is little impact on the typical administrative agency, particularly in the federal sphere, by the issue of the definition of "life". In the absence of some further indication by the courts that "life" will impose some positive duty on the state to provide for the necessities of life, this question will not likely arise often in the administrative law context. The same cannot be said, however, of the other two rights protected in section 7.

III. Liberty

Our roots in both the philosophy of Mills and the writings of Dicey have developed into a "powerful conception of individual autonomy" balanced against the interests of the state and society at large.¹³¹ The development by the Supreme Court in several cases has mirrored this philosophy, particularly in the judgments of Madame Justice Wilson.

a. Early Case Law: Liberty from Physical Restraint

Early case law focused on whether the term "liberty" was to be considered in terms of purely physical restraints as expressed in cases such as the Federal Court of Appeal decision in Operation

¹³¹ Yalden, R. "Liberalism and Canadian Constitutional Law: Tensions in an Evolving Vision of Liberty" (1988), 47 U. of T. Fac. Law Rev. 132, 134.

Dismantle v. the Queen¹³². In that case Pratte, J. predicted that an expansive definition would thwart the intention of the framers of the Charter:

The words used in the Charter and, particularly, in s. 7 should not, therefore, be given so wide an interpretation that the courts would, as a result, be invited to substitute their opinions to those of Parliament and the Executive on purely political questions. The Charter was enacted for the purpose of protecting certain fundamental rights and freedoms; it was not meant to confer legislative and executive powers on the judges.

This limitation would have left only issues such as arbitrary arrest, detention and interference with freedom of movement to be considered under section 7.

In the immigration context, the question arose as to whether a family relationship was a liberty interest to be protected by s.

7. McNair, J. for the Federal Court, Trial Division replied that

to my way of thinking, the normal connotation of the words "liberty" and "security of the person" is patently suggestive of physical well-being in the context of freedom from arbitrary arrest, detention, imprisonment and unlawful restriction and restraint of the person, including clear and present threatened apprehension thereof, subject always to the concomitant rights of others and the rights of society generally.¹³³

It is of no surprise that the bulk of the early case law on the definition of liberty concerned prison and parole issues that dealt with the question of actual physical liberty.¹³⁴

¹³² (1984), 3 D.L.R. (4th) 193, 199 (F.C.A.).

¹³³ Downes v. M.E.I. (1986), 4 F.T.R. 215 (T.D.).

¹³⁴ The debate focused on the right-privilege dichotomy and whether s. 7 would apply to decisions to grant parole, as a discretionary decision on a privilege. This mirrored the American

Other early cases brought out questions on less physical considerations. The right to drive a motor vehicle was seen as a protectable liberty interest under s. 7 in some of the earliest cases¹³⁵ but some others raised doubts as to whether "liberty" should be expanded to cover driving suspension where there is no

experience with due process claims for parole. In Greenholtz vs. Nebraska Penal Institution, 442 U.S. 1 (1979), the Court found that persons must establish more than an abstract need or desire for the liberty or a unilateral expectation of parole; they must have a existing right to the liberty. Since a conviction extinguishes full liberty rights, the expectations created by parole statutes do not reinstate the right to full due process for the decision whether to grant parole. Except, most recently the Ontario High Court of Justice indicated that a period of parole ineligibility affected the quality of an inmate's imprisonment, depriving him of a liberty interest recognized under s. 7 (Parker v. Solicitor General (1990), 73 O.R. (2d) 193). Revocation of parole on the other hand, does call for due process because it affects existing rights. There was some early disagreement in Canadian courts on this point. In Re Cadieux and Director of Mountain Institution (1984), 13 C.C.C.(3d) 330 (F.C.T.D.), Justice Reid held that the rights in s. 7 should be interpreted to include the privilege of parole but later in O'Brien v. National Parole Board (1984), 43 C.R. (3d) 10 (F.C.T.D.), Justice McNair found that liberty means only freedom from arbitrary arrest and detention, not liberty in the abstract. Justice Strayer in Staples v. National Parole Board (1985), 13 Admin. L.R. 36 (F.C.T.D.) disagreed, commenting that he was unable to see any difference between a decision to grant parole and one revoking it with respect to the application of s. 7. It was difficult for the National Parole Board to argue that the grant of parole required fewer procedural protections than revocation when the Parole Act provided the opposite in the way of hearing requirements. However, in the context of mandatory supervision, the prisoner's right to liberty was not deemed to be affected by the imposition of conditions because conditional release is an enhancement, not a deprivation, of the measure of liberty the person has a right to enjoy: Dempsey v. the Queen (1987), 80 N.R. 159 (F.C.A.).

¹³⁵ See Rowland v. R. (1984), 33 Alta. L.R. (2d) 252 (Q.B.), R. v. Robson (1985), 19 D.L.R. (4th) 112 (B.C.C.A.), and Barker v. Registrar of Motor Vehicles of Manitoba, Manitoba Queen's Bench, Dec. 7/87.

actual physical restraint on the right of the person to go where he chooses¹³⁶.

The right to choose a marriage partner or to co-habit with that partner was not considered to be part of the liberty rights protected by s. 7. In Horbis v. M.E.I.¹³⁷, an application for permanent residency by the foreign spouse of a Canadian was denied resulting in a challenge to the constitutionality of the decision on the grounds that it denied "liberty" to the married couple by preventing them from co-habiting in Canada. According to Strayer J., s. 7 must read in its context and should be limited to questions of bodily freedom:

I do not think it is a constitutional guarantee of the right of any Canadian or permanent resident of Canada to choose anyone in the world as a marriage partner and bring such person to Canada to live with them.

This reasoning was adopted in Downes v. M.E.I.¹³⁸ where the argument had been made that, in the context of deportation proceedings, the relationship between a parent and infant son was a "liberty interest" because he would be forced to either leave his son, who was a citizen, or take him with him back to Barbados. The court

¹³⁶ R. v. Gordon 2. Man. Prov Ct., Feb. 7/87; R. v. Neale (1986), 28 C.C.C. (3d) 345 (Alta. C.A.); Manitoba Public Insurance Corporation v. Paul (1985), 34 Man. R. (2d) 272 (Q.B.), Ginther v. Saskatchewan Government Insurance (1988), 66 Sask. R. 109 (C.A.) and Roenspies v. Saskatchewan Government Insurance, Sask. Q.B., June 5/90.

¹³⁷ [1985] 2 F.C. 359 (T.D.).

¹³⁸ supra, n. 56.

concluded that the normal connotation of the word liberty does not extend to the expansive liberty interest sought in this case.

Further, the right of a parent to raise his or her child would not seem to be covered under s. 7. In Re K and CAS Hamilton-Wentworth¹³⁹, the court considered whether a wardship order could infringe the right of the parent to liberty or security of the person. The judge concluded that the right of a parent to raise a child is now subordinate to the best interests of the child and because such right stems from a duty to raise a child properly it lacks the constant quality of a fundamental liberty interest. Whether the child enjoys the right to have the parent as part of a family must be determined after submissions on the child's behalf.

Similarly, where the operation of the provincial child welfare legislation precluded continued access by the birth parents after an adoption, there was no protectable interest under s. 7. In Re Catholic CAS v. S.¹⁴⁰ Tarnopolsky J.A., did not consider that barring a person from having access to a particular person would trigger s. 7:

The fact that there are places one may not go and people who may refuse to permit others to have contact and communication with themselves or their children, does not amount to a

¹³⁹ (1989), 70 O.R. (2d) 466 (U.F.C.).

¹⁴⁰ (1989), 60 D.L.R. (4th) 397 (Ont. C.A.).

deprivation of liberty or security of the person of another who might want that contact.¹⁴¹

A more expansive definition has gradually grown out of the consideration by the courts of these less physical aspects of "liberty". The debate soon focused on whether liberty was to be interpreted so broadly as to contain certain economic rights or liberties, such as the right to contract or make choices on lifestyle or profession.

While the Supreme Court has yet to make any pronouncement on the exact scope of these points¹⁴², it is possible to predict their approach to these difficult issues.

b. Supreme Court's View of Liberty

In Operation Dismantle¹⁴³, only Wilson J. explored the nature of liberty. She contended that none of the rights in s. 7 were absolute and must each accommodate the corresponding rights of

¹⁴¹ Ibid., 412.

¹⁴² Most recently the Supreme Court refused leave to hear the appeal in Wilson v. Medical Services Commission, [1989] 2 W.W.R. 1 (B.C.C.A.) in which the Court of Appeal in British Columbia had considered that liberty was to be framed broadly enough to include the right to pursue a profession. Arguments were presented in the factum in a case dealing with the issue of mandatory retirement of doctors from a hospital but no oral arguments were made before the Supreme Court (Stoffman v. Vancouver General Hospital, appeal heard May 16-19, 1989, S.C.C.).

¹⁴³ [1985] 1 S.C.R. 441.

others. She did go on to remark that the right to liberty was basically, in her view, "the right to pursue one's goals free of governmental constraint".

In Singh v. M.E.I.¹⁴⁴, she noted further that the concepts of life, liberty and security of the person are capable of a broad range of meaning, citing the American experience under the Fourteenth Amendment as evidence of the possible scope of these expressions. Subsequently, in her dissent in Jones v. the Queen¹⁴⁵, she outlined her views on liberty as protected under s. 7:

I believe that the framers of the Constitution in guaranteeing liberty as a fundamental value in a free and democratic society had in mind the freedom of the individual to develop and realize his potential to the full, to plan his own life to suit his own character, to make his own choices for good or ill, to be non-conformist, idiosyncratic and even eccentric.

The balancing between the individual and societal rights that is required in s. 7 turns on the point that no-one can be deprived of his liberty except in accordance with the principles of fundamental justice.

Her most expansive analysis of liberty is set out in Morgentaler v. the Queen¹⁴⁶. Her views seem to be based on a particular appreciation of the place of the individual in society:

An individual is not a totally independent entity disconnected from the society in which he or she lives. Neither, however, is the individual a mere cog in the impersonal machine in

¹⁴⁴ [1985] 1 S.C.R. 177, 205.

¹⁴⁵ [1986] 2 S.C.R. 284.

¹⁴⁶ [1988] 1 S.C.R. 30, 161.

which his or her values, goals and aspirations are subordinate to those of the collectivity. The individual is a bit of both. The Charter reflects this reality by leaving open a wide range of activities and decisions open to legitimate government control while at the same time placing limits on the proper scope of that control. Thus, the rights guaranteed in the Charter erect around each individual, metaphorically speaking, an invisible fence over which the state will not be allowed to trespass.¹⁴⁷

She explained that the Charter and the right to individual liberty are inextricably tied to the concept of human dignity:

The idea of human dignity finds expression in almost every right and freedom guaranteed in the Charter... All these are examples of the basic theory underlying the Charter, namely that the state will respect choices made by the individual and, to the greatest extent possible, will avoid subordinating these choices to any one conception of the good life.

In this context, liberty grants the individual a degree of autonomy in making important decisions of fundamental personal importance. Further, it does not require the state to approve the personal decisions made by individuals; it does, however, require the state to respect them.¹⁴⁸

¹⁴⁷ Ibid., 162.

¹⁴⁸ Ibid., 165. Justice Galipeau of the Quebec Superior Court reviewed the other cases and applying them to the issue of mandatory drug testing in a prison found that there is "no doubt in the mind of this court that the wide and general meaning attributed by these courts to the word "liberty" encompasses the right of citizens to consume, if only on occasion, certain intoxicants and the right not to be subject to an obligation to provide a urine sample to whomever it is that wants to detect the presence of the intoxicant in his body" and "throughout time it has been recognized that a citizen in his search for certain well-being, has the right and perhaps the pleasure to moderately intoxicate himself...To systematically refuse this to every prisoner infringes s. 7 (Re Dion and the Queen (1986), 30 C.C.C. (3d) 108, 115 and 117).

The other members of the Court have not shared the same expansive view of liberty¹⁴⁹. However, it is interesting to note that Dickson C.J., in his interpretation of the freedom under s. 2(d), edges closest to the broader view of liberty. In Reference Re Public Service Employee Relations Act¹⁵⁰, Dickson indicated that the issue at stake in the case involves "aspects of work fundamental to the dignity and personal liberty of employees" and that,

a person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being. Accordingly, the conditions in which a person works are highly significant in shaping the whole compendium of psychological, emotional and physical elements of a person's dignity and self-respect.¹⁵¹

This be somewhat inconsistent with earlier statements made in Edwards Books¹⁵² where he remarked that liberty in s. 7 was not synonymous with unconstrained freedom nor an unconstrained right to transact business whenever one wishes. It may be difficult at some point to justify any distinction between conditions of work and the opportunity to conduct business. This may be resolved under the regulation/prohibition dichotomy outlined infra, in the discussion of economic rights.

¹⁴⁹ Lamer J. commented in Reference Re Criminal Code, s.193 and 195.1(1)(c), [1990] 4 W.W.R. 481 (SCC), 521, that the Court has until now, save for certain comments of Wilson J., taken an exclusionary approach to defining liberty and security of the person.

¹⁵⁰ [1987] 1 S.C.R. 313.

¹⁵¹ Ibid., 368.

¹⁵² R. v. Edwards Books and Art, [1986] 2 S.C.R. 713, 785.

It is also of some significance that the majority in Morgentaler, chose to frame their rationale for overturning the Criminal Code provisions on abortion in terms of "security of the person" instead of "liberty", as did Wilson J. This avoided the necessity of discussing the right to privacy and the freedom of choice that may be inherent in liberty. Reliance on security of the person allowed the Court to focus on the imposition of physical or emotional stress on the woman as opposed to the right to make a personal decision on a matter that was of fundamental importance to the individual.

The subtle shift in focus from the positive (the right to make personal choices without interference from the state) to the negative (a right to be free of state imposed stress) may only indicate that the majority of the Court is not yet prepared to deal with the broad theories of liberty. This was evident in Jones¹⁵³ and E. v. Eve¹⁵⁴. In Jones, La Forest J. avoided considering the liberty argument presented to the Court because even if defined so broadly, the appellant was not deprived in a manner that violates the principles of fundamental justice. In E. v. Eve, La Forest J. again skirted the definition of liberty when faced with an argument that it included the right to bear children. At p. 436, he stated,

But assuming for the moment that liberty as used in s. 7 protects rights of this kind (a matter I refrain from entering into), counsel's contention seems to me to go beyond the kind of protection that s. 7 was intended to afford. All s.7 does is to give a remedy to protect the individual against laws and

¹⁵³ supra. n. 68, 301.

¹⁵⁴ [1985] 2 S.C.R. 398.

other state action that deprives them of liberty. It has no application here.

Inevitably, the issue of the broadest concept of liberty will have to be faced. However, it is likely to arise in conjunction with arguments on the economic rights arguments raised under this heading.

This was the case in the Reference re Criminal Code, s. 193 and 195.1(1)(c)¹⁵⁵. The question that the appellants in that case posed was whether section 7 was infringed where the state regulated a legal activity so as to effectively prohibit that activity and whether an individual had the right to exercise a chosen profession in order to provide the basic necessities of life. However, the Court was able to respond to the matter without specifically deciding the issue of whether the concept of liberty would incorporate the ability to earn a livelihood and whether regulation that amounted to a deprivation of that right would infringe section 7.

The majority in the case decided the section 7 point on the basis that the possibility of imprisonment clearly invoked the protections of section 7. Lamer J., however, went on much further to give his views on the nature of liberty in section 7 and its relationship with economic rights. It is worth examining his reasoning in this case because it provides some interesting insight

¹⁵⁵ [1990] 4 W.W.R. 481 (S.C.C.).

into the definition of "liberty" and the principles of fundamental justice.

He first reviewed the "expansive interpretation" of liberty proposed by the appellants. He cautioned that the American approach was not uncontroversial even in terms of their constitution and was, in any event, linked to their particular historical and social context.

In analysing the Canadian jurisprudence, he took issue with the reasoning in Wilson v. British Columbia Medical Services Commission¹⁵⁶, where a distinction was made between a right to pursue a profession and a mere right to work. He challenged the reliance of the British Columbia Court of Appeal on the comments of Dickson C.J. in the Reference re Public Service Employee Relations Act¹⁵⁷ with respect to work being a fundamental aspect of a person's life, sense of identity, self-worth and emotional well-being. In his view, these comments were to be limited to the context of that particular case and could not be used to define liberty under section 7. To do otherwise would be to create an "all-inclusive" section that would seriously question the independent existence of other rights and freedoms in the Charter. On this basis, he concluded that the Charter does not concern itself with economic rights. In doing so he specifically rejected

¹⁵⁶ [1989] 2 W.W.R. 1 (B.C.C.A.) leave to appeal refused S.C.C. Nov. 3/88.

¹⁵⁷ supra. n. 74.

the incorporation of a "liberty" right of contract, as in the American line of cases.

He then proceeded to give some general views on the nature of liberty under section 7, recognizing that these were not essential to the resolution of the case at hand. His theory of liberty, while arguing that his views remained compatible with the expansive view, would significantly restrict the application of section 7. He pointed to several contextual factors which provide insight into the nature of the right to liberty: the location of section 7 within the Charter itself and internally by its juxtaposition with the principles of fundamental justice.

He found it significant that section 7 was included in the Legal Rights section of the Charter and reiterated his comments from the Motor Vehicle Act Reference¹⁵⁸ on the relationship of section 7 with sections 8 to 14.

The internal context whereby the state may deprive individuals of the right to liberty if it is done in accordance with the principles of fundamental justice "can provide the key to determining the nature of the life, liberty and security of the person referred to in section 7"¹⁵⁹. He stated:

The principles of fundamental justice are principles that govern the justice system. They determine the means by which one may be brought within or before the justice system, and

¹⁵⁸ supra n. 3.

¹⁵⁹ supra n. 79, 522.

govern how one may be brought within the system and thereafter the conduct of judges and other actors once the individual is brought within it. Therefore the restrictions on liberty and security of the person that s. 7 is concerned with are those that occur as a result of an individuals' interaction with the justice system, and its administration.¹⁶⁰

This would seem to limit the application of liberty and security of the person to purely physical restraints. However, he acknowledged that, as in cases such as Mills¹⁶¹, Morgentaler¹⁶², and R. v. Videoflicks¹⁶³, liberty can incorporate some non-physical values but the common thread that runs throughout section 7 and sections 8 to 14 is the involvement of the judicial branch as guardian of the justice system. More specifically,

The interests protected by section 7 are those that are properly and have been traditionally within the domain of the judiciary. Section 7, and more specifically ss. 8 to 14, protect individuals against the state when it invokes the judiciary to restrict a person's physical liberty through the use of punishment or detention, when it restricts security of the person, or when it restricts other liberties by employing the method of sanction and punishment traditionally within judicial realm.¹⁶⁴

This will also support an extension of the concept to non-criminal matters, such as parole or civil processes restraining a mentally ill person. However, section 7 would extend only to the kinds of activities that fall within the domain of the judiciary as guardian of the justice system. Beyond this limitation, the court

¹⁶⁰ Ibid., 522.

¹⁶¹ [1986] 1 S.C.R. 863.

¹⁶² supra n. 20.

¹⁶³ (1984), 9 C.R.R. 193 (Ont. C.A.).

¹⁶⁴ supra. n. 79, 523.

encroaches on general public policy, which is properly left to the legislatures. The pressures and values of public policy may be of social significance but remain outside the scope of the principles of fundamental justice.

Despite the increasing role of administrative law in so many facets of modern society he concluded that he could not make any general determination on the extent to which section 7 would apply to administrative law generally, administrative procedures and the common law rules of natural justice or procedural fairness. He suggested that the jurisprudence be developed on a case-by-case basis but within the framework that state created agencies which assumed control over decisions affecting an individual's liberty and security of the person would remain under the traditional scrutiny of the judiciary. The realm of general public policy, dealing with broader social, political and moral issues would be better resolved in the political or legislative forum and not in the courts¹⁶⁵.

On this basis, it would be rare that Lamer J. would find that an administrative agency dealing with social or welfare matters would be caught under the Charter.

However, no other member of the Court found it necessary to deal with these issues and, in fact, specifically declined to do so.

¹⁶⁵ Ibid. 526.

There was no indication that the other justices would consider the matter in the same light and thus, the question remains alive.

c. Economic Liberty

From the earliest cases on the scope of liberty in s. 7, the theme of economic rights has been a constant.

At a fairly early stage the decisions broke into two camps differing on the interpretation of the scope of security of the person and liberty and the consideration of whether some or all aspects of economic or property rights would be covered by s. 7.

For the most part, proponents of the narrow interpretation of s. 7 accepted the political compromise that had been widely advertised as the rationale for the deliberate omission of property rights from the Charter.¹⁶⁶ Most challenges on economic grounds met with a curt response¹⁶⁷ from the courts, noting merely that s. 7 did not

¹⁶⁶ The history of the issue of property within s. 7 can be found in the Minutes of Proceedings and Evidence of the Special Joint Committee on the Constitution of Canada, Issues 44-46.

¹⁶⁷ See, for example, Noyes v. South Cariboo (1985), 64 B.C.L.R. 287 (S.C.) where the judge dealt with the argument that suspension of a teacher was contrary to s. 7 in one short paragraph: "I can find nothing in s. 7 which directly or indirectly suggests the suspension of the petitioner without pay is contrary to this section. His right to life and liberty is not threatened nor is the security of his person in jeopardy. He is out of work without pay. That is all."

protect purely proprietary interests.¹⁶⁸ Some went so far as to admit that economic rights might possibly be included in some circumstances, but it was still unlikely that the specific interest at stake in the litigation would be covered¹⁶⁹. Such matters as marketing board quotas¹⁷⁰, the right to determine individual maturity dates for RRSP plans¹⁷¹, the right to sell liquor during polling hours on election day¹⁷², patent rights¹⁷³, the right to carry on a business of one's choice¹⁷⁴, the right to strike¹⁷⁵, the

¹⁶⁸ Manicom v. Oxford (1985), 52 O.R. (2d) 137 (Div. Ct.); Re Malartic Hygrade Gold Mines and Ontario Securities Commission (1986), 54 O.R. (2d) 544 (Div. Ct.); Aluminum Co. of Canada v. Ontario (1986), 16 O.A.C. 14 (Div. Ct.); Re Homemade Winecrafts and A.G.B.C. (1986), 26 D.L.R. (4th) 468 (B.C.S.C.); Re Institute of Edible Oil Foods and the Queen (1987), 63 O.R. (2d) 436 (H.C.J.); Charalambous v. College of Physicians and Surgeons of British Columbia (1987), 27 Admin L.R. 290 (B.C.S.C.); R. v. Myrrmidon Inc., [1987] 6 W.W.R. 204 (Man. Q.B.); Manicom v. County of Oxford (1985), 52 O.R. (2d) 137 (H.C.J.); Re Energy Probe and A.G. Canada (1987), 42 D.L.R. (4th) 349 (Ont. H.J.C.), and, Swan v. the Queen (F.C.T.D., Feb. 9/90).

¹⁶⁹ Re Abbotsford Taxi and Motor Carrier Commission (1985), 23 D.L.R. (4th) 365 (B.C.S.C.) (the opportunity to make a living may be a liberty within the Charter but the making thereof is not.); Beltz v. Law Society of British Columbia (1986), 31 D.L.R. (4th) 685 (B.C.S.C.) (even if s. 7 covers economic rights it would not prevent the Law Society from setting conditions of practice because they do not present an absolute denial of the right to practice).

¹⁷⁰ Le Groupe des Eleveurs de Volailles v. Canadian Chicken Marketing Agency (1984), 14 D.L.R. (4th) 151 (F.C.T.D.).

¹⁷¹ Gerol v. A.G. Canada (1985), 53 O.R. (2d) 275 (Ont. H.C.J.).

¹⁷² Re Parkdale Hotel and A.G. Canada (1986), 27 D.L.R. (4th) 19 (F.C.T.D.).

¹⁷³ Smith, Kline and French Laboratories v. A.G. Canada (1986), 24 D.L.R. (4th) 321 (F.C.T.D.); [1987] 2 F.C. 359 (C.A.), leave to appeal refused S.C.C. Apr. 9/87.

¹⁷⁴ Société canadienne des Postes c. Postpar Inc., [1988] R.J.Q. 2740 (C.S.).

right to set up group homes for the aged or disabled¹⁷⁶ and the right to hold judicial office¹⁷⁷ have all been ruled inappropriate for review under s. 7.

Most recently the British Columbia Court of Appeal has ruled that the right to liberty does not include the freedom to contract. In Henfrey Samson Belair Ltd. v. Wedgewood Hotel and Skalbania¹⁷⁸, the court explained that while some contractual rights may be constitutionally protected, "it would be dangerous and wrong to interpret s. 7 as somehow conferring an unfettered right to contract". Further, it is "equally clear that s. 7 was not intended to prevent legislative interference with the "liberty" of one related person to purchase the assets of another undervalued on the eve of the latter becoming bankrupt". The court specifically rejected the often quoted definition of liberty in Meyer v. Nebraska¹⁷⁹ on the grounds that it is probably outdated

¹⁷⁵ International Longshoremen's and Warehousemen's Union v. the Queen, F.C.T.D., March 8, 1990.

¹⁷⁶ Canadian Mental Health Association v. Winnipeg, Manitoba C.A., Apr. 24/90.

¹⁷⁷ Allen v. Judicial Council of Manitoba, Apr. 27/90, Man Q.B.

¹⁷⁸ B.C.C.A. May/89, leave to appeal denied, S.C.C. See also Arlington Crane Service v. Minister of Labour (1988), 67 O.R. (2d) 225 (H.C.J.).

¹⁷⁹ Meyer v. Nebraska 262 U.S. 390, 415, (1923) in which the U.S. Supreme Court considered that liberty meant "not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, to establish a home and bring up children, to worship God according to the dictates of his own conscience and to generally enjoy those privileges long recognized at common law as essential to the orderly pursuit of

even in the United States and, despite the plaintiff's claim that the expansive view has been enshrined in Canadian law by Singh v. M.E.I., no Canadian court has ever accepted the American decision as anything more than possible examples of liberty interests.

Yet this same court accepted a broader view of security of the person and liberty to conclude that these terms must include some aspects of economic livelihood in other contexts. In a series of decisions from British Columbia, the extent of coverage of economic interests by s. 7 has been reviewed. However, this line of cases does not follow a straight path with some of the decisions attempting to explain previous rulings to eliminate some of the wider extrapolations from these decisions.

The basis of the inclusion of some degree of economic welfare in s. 7 seems to be the right to work or seek a profession as an integral part of liberty and security of the person. In one of the earliest cases, R. v. Robson¹⁸⁰, the interpretation of liberty to include the right to drive was predominantly based on the presumption that the earning of a livelihood could be significantly impaired thus resulting in an infringement of s. 7. It was a short step then to the conclusion that the right to practice a profession could be covered by s. 7 as well. Re Mia and Medical Services Commission¹⁸¹, D&H Holdings Ltd. v. Vancouver¹⁸², Stoffman v.

happiness by free men."

¹⁸⁰ supra, n. 58.

¹⁸¹ (1985), 17 D.L.R. (4th) 385 (B.C.S.C.).

Vancouver General Hospital¹⁸³, Branigan v. Yukon Medical Council¹⁸⁴ and Pearlman v. Law Society of Manitoba¹⁸⁵ all followed the lead in Robson to find that infringements to the right to pursue one's livelihood could be reviewed under s. 7.

In R.V.P. Enterprises v. A.G.B.C.¹⁸⁶, the Court of Appeal attempted to clarify its position in Robson and the scope of liberty in s. 7 in the following passage,

...Robson decided that the right to drive conferred by a licence is, in some respects, a 'liberty' entitled to a constitutional protection and that legislation breached that constitutional right. The case does not decide that licenses generally are protected and does not support the view that s. 7 confers protection upon property or economic rights.

The case should not therefore be regarded as authority for some of the expansive definitions of liberty which it has sometimes been suggested to support. That is not to say that 'liberty' can never relate to anything other than restrictions on physical movement; but merely that Robson does not decide that it can.

The Court concluded that in this case the right to continue to hold a liquor licence was not within the purview of s. 7.

¹⁸² (1986), 21 D.L.R. (4th) 230 (B.C.S.C.).

¹⁸³ (1986), 6 W.W.R. 23 (B.C.S.C.). The decision of the Supreme Court of Canada, Dec. 6/90 did not deal with the issue as the matter had been abandoned by the appellant at the hearing.

¹⁸⁴ (1986), 26 D.L.R. (4th) 268 (Y.T. S.C.).

¹⁸⁵ Manitoba Court of Appeal, September 8/89.

¹⁸⁶ (1988), 25 B.C.L.R. (2d) 219 (B.C.C.A.).

The analysis continued in Whitbread v. Walley¹⁸⁷, in the context of the Canada Shipping Act limitation on liability of a ship owner for damages. The test of whether an interest fell within s. 7 was framed in terms finding the right balance between two extremes: where legislation or government action directly affect life, liberty or security of the person and where the legislation or action is entirely economic. While it is clear that the former will attract the protection of the Charter, it is equally clear that the latter will not:

The difficult question, which remains to some extent unresolved, concerns the situation which falls between these two extremes- the case where the measure complained of, while it has an economic aspect, arguably is connected to or affects the life, liberty or security of the person.¹⁸⁸

The Court declared its reluctance to incorporate in s. 7 the notion that the words life, liberty or security of the person included "or such economic benefit which may enhance" these rights, such as an award of damages, but made it clear that this case should not be viewed as ruling out a case that includes an interest with an economic component.

In Wilson v. Medical Services Commission¹⁸⁹, the Court took the opportunity to extend the analysis. They were faced with the general question of whether s. 7 is broad enough to encompass the

¹⁸⁷ [1988] 5 W.W.R. 313 (B.C.C.A.) appeal to S.C.C. heard May 24, 1990. The respondents were not called upon to deal with s. 7.

¹⁸⁸ Ibid. , 324.

¹⁸⁹ supra n. 80.

opportunity of otherwise qualified and licensed doctors to practice medicine in British Columbia without restraint as to place, time and purpose even though there is an incidental economic component to the right being asserted.

Liberty was defined in generous terms. The Court adopted the definition offered by Wilson J. in Morgentaler and the comments of Dickson C.J. in Reference re Public Service Employee Relations Act;

Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being.¹⁹⁰

Thus, liberty within the meaning of s. 7,

...is not confined to mere freedom from bodily restraint. It does not, however, extend to protect property or pure economic rights. It may embrace individual freedom of movement, including the right to choose one's occupation and where to pursue it, subject to the right of the state to impose, in accordance with the principles of fundamental justice, legitimate and reasonable restrictions on the activities of individuals.¹⁹¹

The Court carefully distinguished the purely economic question of the right to work which they interpreted as asserting a right not to be regulated from the "more important aspect of liberty", the right to pursue a livelihood or profession. The latter aspect because of its connection to dignity and sense of self-worth was

¹⁹⁰ supra, n. 72, 368.

¹⁹¹ supra, n. 80, 15.

considered to take the matter beyond the bounds of the purely economic.

Because the effect of the legislation is to preclude, not merely regulate, the pursuit of a profession, the terms of the law must be in accordance with the principles of fundamental justice.¹⁹²

This decision was applied by the Nova Scotia Court of Appeal where a doctor's billing privileges under the provincial medical plan were suspended.¹⁹³ The Court specifically adopted the approach in Wilson and, in particular, the passage on participation in a billing plan:

[d]enial of the right to participate under the plan is not the denial of a purely economic right, but in reality is a denial of the right of the appellants to practice their chosen profession ...

Although leave to appeal to the Supreme Court of Canada was denied in the Wilson case, arguments of a similar nature concerning the right to liberty in pursuing a profession were raised in the appeal

¹⁹² This distinction between absolute denial of a right with incidental economic impact and its simple regulation, even with significant financial impact, seems to be the key element in most courts' evaluation of whether some "right" will fit within s. 7. See Frances, Butler and Bassett v. Winnipeg, [1986] 4 W.W.R. 193 (Man. C.A.), Beltz v. Law Society of British Columbia (1986), 31 D.L.R. (4th) 685 (B.C.S.C.), Milk Board v. Clearview Dairy Farms (1986), 69 B.C.L.R. 220 (S.C.), McPherson v. Institute of Chartered Accountants of British Columbia (1988) 33 B.C.L.R. (2d) 348 (S.C.), Archambault c. Le Comité de discipline du Barreau du Québec, [1989] R.J.Q. 688 (C.S.), Pearlman v. Law Society of Manitoba, Manitoba Court of Appeal, Sept. 8/89, and Taylor v. Institute of Chartered Accountants of Saskatchewan (1989), 59 D.L.R. (4th) 656 (C.A.).

¹⁹³ Maritime Medical Care v. Khalig-Kareemi (1989), 57 D.L.R. (4th) 505 (N.S.C.A.) leave to appeal refused, S.C.C. Nov. 16/89.

of Stoffman v. Vancouver General Hospital¹⁹⁴ Counsel did not pursue the s. 7 arguments at the hearing, thus, the Supreme Court declined to make any ruling on the issues.

The difficulty with the Wilson case is its narrow focus on the right to pursue a profession as opposed to a more generalized right to work. There is no support for the assertion that a doctor's, or any other professional's, desire to continue or establish a practice or business warrants constitutional protection in a way that an ordinary labourer's or entrepreneur's aspirations would not. There is no strong rational basis for varying the fairly consistent results in other courts where similar economic "rights" were not considered to be within the range of constitutional protection under s. 7.

If there is a liberty interest inherent only in professional careers, what are the implications for the "common worker" or entrepreneur? If there exists within s. 7 a right to pursue a profession, how much longer will the courts hold out against a general right to work, or a right to pursue any livelihood?

The Court of Appeal in Wilson agreed with the trial court that s. 7 did not cover purely economic rights yet it "then construed this 'no economic rights' doctrine so narrowly as to emasculate it

¹⁹⁴ Dec. 6/90, S.C.C.

effectively".¹⁹⁵ It remains unclear why the Court chose to ignore the comments of the Supreme Court in Edwards Books that the "legislative choices regarding alternative forms of regulation of business or industry do not generally impinge on the values and provisions of the Charter"¹⁹⁶. Taken at its widest, Wilson could mean that all business or regulatory schemes could be reviewable within the terms of s. 7.

D. Lepofsky cites three other flaws with the Wilson judgment: it amounts to a judicial insertion of property rights into s. 7; it conflicts with the overwhelming recognition by courts across the country that s. 7 does not provide protection for economic rights; and, it draws an unwarranted distinction between laws which regulate professional activity and laws which prohibit such activity.¹⁹⁷ On all of the above grounds, the Court should have rejected the claim that s. 7 protected the doctors' right to pursue their profession and bill the state for their fees. Yet, the Court accepted the liberty argument and went on to find that the legislation was fundamentally unjust.

More recently, the British Columbia Supreme Court has determined that the power to impose a penalty of termination of a right to practice one's profession through disciplinary proceedings

¹⁹⁵ D. Lepofsky, "A Problematic Judicial Foray into Legislative Policy-Making: Wilson v. B.C. Medical Services Commission" (1989), 68 C.B.R. 615, 622.

¹⁹⁶ supra n. 76.

¹⁹⁷ supra. n. 119.

transforms the action from one of regulation to one of potential deprivation, thus invoking s. 7 protection. In Howard v. the Architectural Institute of British Columbia¹⁹⁸, Huddart J. said that membership in a profession is "fundamental to ...human dignity" and extends beyond the purely pecuniary. Any potential deprivation must then be in accordance with the principles of fundamental justice. This may be contrasted with the decision in Archambault c. Le Comité de Discipline du Barreau du Québec¹⁹⁹ where a challenge to the disciplinary proceedings of the Quebec law society was rejected on the grounds that the right to practice a profession was an economic right not included in section 7 of the Charter.

It is difficult to imagine a more radical departure from the stated intent of the drafters of the Charter than the inclusion of economic or property rights in s. 7²⁰⁰. Yet the pull seems to be almost inevitably in that direction. The characterization of liberty as a broad concept integrating dignity and self-worth, whether a strong economic component is present or not, seems to be

¹⁹⁸ Oct. 26/89, B.C.S.C., per Huddart, J.

¹⁹⁹ [1989] R.J.Q. 688 (C.S.).

²⁰⁰ The compromise reached with the provinces in the negotiation of the terms of the Charter clearly indicated that property rights were not a matter within the contemplation of s. 7. Of course, courts are free to ignore vague collateral statements when they are determining the meaning of the provisions of any legislation: there is little persuasive value in imprecise statements of intent from an evidentiary point of view. Reference Re S. 94(2) Motor Vehicle Act, supra n. 3, 509, per Lamer J.: In view of the indeterminate nature of the data, it would in my view be erroneous to give these materials anything but minimal weight."

a strong pattern and is not likely to be dispelled without strong words from the Supreme Court of Canada.

Security of the Person

Early academic comment on the definition security of the person explored the possibility that it would not be limited to the "criminal law sense" of an invasion of personal or physical integrity. Several authors made the prediction that economic rights, even to the extent of including an independent right to the necessities of life, as well as rights to reputation and privacy would be incorporated into security of the person.²⁰¹

Professor Hogg in his text Constitutional Law in Canada, comments that:

Section 7 makes no reference to property, and therefore does not protect property rights. As noted in the previous paragraph, it is arguable that the phrase 'security of the person' extends to a person's capacity to satisfy his basic human needs through the receipt of income, but security of the person cannot extend to economic interests generally or property rights generally. The omission of property from s. 7 was a striking and deliberate departure from the constitutional texts that provided the models for s. 7. The due process clauses in the fifth and fourteenth amendments of the Constitution of the United States protect 'life, liberty or property'. And the due process clause in s. 1(a) of the Canadian Bill of Rights protects 'life, liberty, security of the person and enjoyment of property.

²⁰¹ See for example, Whyte, J. "Legal Rights: The Scope and Application of Section 7 of the Charter", Administration of Justice Conference on the Charter After 18 Months, Winnipeg, 1983, Manning, M. Rights, Freedoms and the Courts: A Practical Analysis of the Constitution Act 1982, Toronto: Edmond-Montgomery (1983) and Christian, T. "Section 7 of the Charter of Rights and Freedoms: Constraints on State Action" (1984), 22 Alta. L. R. 222.

The omission of property rights from s. 7 greatly reduces its scope...²⁰²

In a manner similar to liberty, the earlier days of Charter interpretation limited the application of security of the person to a purely physical dimension²⁰³. Such issues as whether compulsory helmet legislation²⁰⁴ or mandatory seatbelt legislation²⁰⁵ had infringed security of the person have been considered by courts with varying results. Blood transfusion cases where there is no conflicting interest between the rights of a parent and a child, have consistently dealt with the physical intrusion as a breach of security of the person²⁰⁶.

One of the earliest cases on the effect of state action on more than the interference with the physical integrity of the individual was Collin v. Lussier²⁰⁷. The transfer of a prisoner to a greater

²⁰² Hogg, P. Constitutional Law in Canada (2d ed.), Toronto: Carswell (1985).

²⁰³ For example, see Gerol v. the Queen (1986), 53 O.R. (2d) 275 (H.C.J.): the right to life, liberty and security of the person is the single interrelated right which guarantees the individual freedom from interference with the person. It is meant to provide protection from physical threats or punishment and from arrest or detention. Security of the person refers to physical and personal integrity of an individual.

²⁰⁴ R. v. Fisher Oct. 24, 1985, Man. Q.B.

²⁰⁵ R. v. Maier Jan. 31/89, Alta. Q.B.

²⁰⁶ C.A.S. Toronto v. L.K. and H.K. (Ont. Prov. Ct, Nov. 1/85); Re C.P.L. (1988), 70 Nfld & PEIR 287 (Nfld S.C.).

²⁰⁷ [1983] 1 F.C. 218 (T.D.) overturned [1985] 1 F.C. 124 (C.A.). In two other cases, the Ontario Supreme Court has held that s. 7 would direct a continuance of a trial where the accused is, in fact, suffering from a physical condition such that standing

security prison when the prisoner had a serious heart condition was viewed by the Trial Court as an infringement of s. 7. It was determined that security of the person not only protected one's physical integrity but the provision of necessities for its support which includes medical care. The change in detention conditions increased the applicant's anxiety as to his state of health and the deprivation of access to adequate medical care combined to infringe his security of the person.

The Supreme Court of Canada has considered the definition of security of the person in several instances. In Singh v. M.E.I²⁰⁸ Madame Justice Wilson, for the three justices ruling on the Charter position, explained that security of the person is a very broad term and could include even the threat of physical punishment and suffering as well as the freedom from the suffering itself. Thus, the refugee claimants who were being deprived of an opportunity to establish their claim under the Immigration Act by the procedures set under that Act were denied security of the person because of the threat of being returned to a country in which their lives were at risk. It was irrelevant that a foreign government presented the actual risk to the lives and safety of the applicants; it mattered only that the Canadian government, while offering the opportunity to achieve refugee status, impaired that opportunity by procedures

trial would seriously endanger his health or if the illness or disability substantially impairs effective participation in the defence: R. v. Barker Ont. S.C. July/88 and R. v. Fuger Ont. S.C. Aug/88.

²⁰⁸ supra, n. 2.

that unfairly increased the risk that the claims would be denied. While the procedures would have survived the test under the rules of natural justice, it was clear that the Charter imperatives would call for a greater scrutiny of the fairness of the procedures employed in legislative schemes.

A similar argument on the threat to personal safety was raised in Operation Dismantle²⁰⁹. In that case the plaintiffs, although not in particularly clear terms, argued that the Cruise Missile testing violated life and security of the person because of the actual deprivation of life and safety that would occur in the event of a nuclear war and as a result of the general insecurity experienced by all people as a result of living under an increased threat of war. Because the matter was so speculative and no proof of actual or threatened threat to life or safety could be established in a court, it was unnecessary to deal with the substance of the argument on security of the person. However, the Court did comment that s. 7 could not reasonably be read as imposing a statutory duty on the government to refrain from those acts which might lead to consequences which deprive or threaten to deprive individuals of life or security of the person. This was on the basis of the general principle that there is no legal duty to refrain from

²⁰⁹ supra, n. 66.

action which does not prejudice the legal rights of others²¹⁰ and s. 7 does not expand the powers of the Court in this regard.

The most extensive discussion of security of the person was in Morgentaler v. the Queen²¹¹. In his review of security of the person, the Chief Justice explained that the common law has long recognized that the human body ought to be protected from interference by others. Now, in the Charter with security of the person as a constitutional norm, it must be given content in a manner sensitive to its constitutional position.²¹² He adopted the reasoning of Justice Lamer in Mills v. the Queen²¹³ where he remarked that,

...security of the person is not restricted to physical integrity; rather it encompasses protection against "overlong subjection to the vexations and vicissitudes of a pending criminal accusation"...These include stigmatization of the accused, loss of privacy, stress and anxiety resulting from

²¹⁰ supra. n. 66. See In Re Gittens Deportation Order, [1983] 1 F.C. 152 (T.D.) and also Kretowicz v. MEI (1987), 77 N.R. 38 (F.C.A.) where arguments were made that a refusal of a landing application to a parent would infringe the security of the person of an infant child born in Canada. The issue was held to be too remote for consideration by the court in the absence of any information of danger to the child on the record. Also in Bomboir v. Harlow, [1987] 5 W.W.R. 55 (Sask. Unified Fam Ct) a challenge to the Reciprocal Enforcement of Maintenance Orders Act whereby the evidence of a single woman was not sufficient proof of paternity failed. The argument was that as a parent, the woman had a duty to provide for the necessities of life for the child and failure could result in a fine or imprisonment. This, she argued, was an infringement of her security of the person where she could not seek assistance from the father because the terms of the Act prevented her from obtaining such financial aid. Also, Donoso v. Canada, supra n. 2.

²¹¹ supra, n. 19.

²¹² Ibid., 53.

²¹³ [1986] 1 S.C.R. 863.

a multitude of factors, including possible disruption of family and social life and work, legal costs, uncertainty as to the outcome and sanctions.²¹⁴

However, he carefully points out that this form of state interference with bodily integrity and serious state imposed psychological stress may be "specific to and only triggered by the invocation of our system of criminal justice"²¹⁵ Because of his reliance on security of the person, as opposed to the question of liberty, he is able to sidestep the issue of whether privacy is incorporated into the s. 7 rights.

Yet, even if limited only to criminal law contexts, the Chief Justice goes on to explore the effects of a threat to security of the person in very generous terms. Such a threat strikes at the most basic physical and emotional level of a human being. In this manner, the removal of decision making power threatens a woman in the physical sense while the indecision of not knowing whether an abortion would be granted inflicts emotional stress. Thus, the forcing of a woman, by threat of criminal sanction, to carry a foetus to term unless she meets certain criteria unrelated to her own priorities and aspirations, is a profound interference with a woman's body.²¹⁶

²¹⁴ Ibid., 919-920.

²¹⁵ Ibid., 55.

²¹⁶ Ibid., 57.

In addition, the procedural problems with the Criminal Code provision would indicate a significant breach of security of the person. The delay inherent in the committee process can have profound consequences on the health of the woman presenting a clear risk of damage to her physical well-being and imposing emotional stress. Even if these results were not intended by the legislature, administrative inefficiencies where basic rights are infringed by procedures and structures created by the law itself are open to remedy by the courts.

In his reasons for judgment, Beetz J. adds to this formulation that, generally speaking, the constitutional right to security of the person must include both protection from state interference when a person's life or health are in danger and a right of access to medical treatment for a condition relating to life or health without fear of criminal sanction:

If an Act of Parliament forces a person whose life and health is in danger to choose between... the commission of a crime to obtain effective and timely medical treatment and...inadequate treatment or no treatment at all, the right to security of the person has been violated.²¹⁷

Thus, while there is still a question whether these conclusions will be applicable to the broader range of governmental activity in the administrative law field, the Court has made a strong commitment to an expansive definition of security of the person to protect against intrusion by the state into the physical and emotional well-being of the individual. This could have serious

²¹⁷ Ibid., 90.

implications if an economic element of security of the person is accepted, discussed infra.

Another issue that inevitably arises from an expanded version of security of the person is whether it incorporates a right to privacy and, as a corollary, whether one's reputation could be protected.

The right to privacy has been alluded to in the context of s. 8 of the Charter, dealing with the right to be secure against unreasonable search or seizure. In Hunter v. Southam Inc.²¹⁸ Dickson J. for the Court said,

Like the Supreme Court of the United States, I would be wary of foreclosing the possibility that the right to be secure against unreasonable search and seizure might protect interests beyond the right to privacy, but for purposes of the present appeal I am satisfied that its protections go at least that far. The guarantee of security from unreasonable search and seizure only protects a reasonable expectation. This limitation on the right guaranteed by s. 8, whether it is expressed negatively, as freedom from "unreasonable" search and seizure, or positively as an entitlement to a "reasonable" expectation of privacy, indicates that an assessment must be made as to whether in a particular situation the public's interest in being left alone by government must give way to the government's interest in intruding on the individual's privacy in order to advance its goals, notably those of law enforcement.

In R. v. Pohoretsky²¹⁹ and R. v. Dyment²²⁰ the Supreme Court considered that privacy in s. 8 is based on the notion of dignity

²¹⁸ [1984] 2 S.C.R. 145, 159-60.

²¹⁹ [1987] 1 S.C.R. 945.

²²⁰ [1988] 2 S.C.R. 417.

and integrity of the individual such that the use of a person's body without his consent to obtain information about him, invades an area of person privacy essential to the maintenance of his human dignity.

This was carried over into s. 7 analysis in R. v. Chatham²²¹ where compulsory blood samples were considered a violation of the person and R.L. Crain v. Couture²²² where security of the person was held to include a right against self-incrimination. In Jackson v. Joyceville Penitentiary²²³, the Federal Court Trial Division concluded that the procedure for collecting urine samples for mandatory testing for drugs or alcohol use deprived inmates of security of the person. MacKay, J. reasoned that,

While there is but limited privacy and protection of bodily integrity and expectation of those in the prison setting, what remains, including freedom from state examination of bodily wastes without consent, ought not to be taken away except in accord with principles of fundamental justice.

However, in R. v. Yelloguill²²⁴, the court claimed that security of the person did not create an independent right to privacy or confidentiality of conversations. Similarly, in Piche v. Canada (Solicitor General)²²⁵, double bunking in federal penitentiaries was not considered contrary to the right to security of the person

²²¹ (1985), 23 C.R.R. 344 (B.C.S.C.).

²²² (1983), 6 D.L.R. (4th) 478 (Sask. Q.B.).

²²³ F.C.T.D., Feb. 16/90.

²²⁴ (1984), 12 W.C.B. 9 (Man. Q.B.).

²²⁵ (1989), 36 Admin. Law R. 225 (F.C.A.).

on privacy grounds. In Charbonneau v. College of Physicians and Surgeons of Ontario²²⁶, the patient's rights to privacy in a physician's records was held not to fall within any general right to privacy that may be included in s. 7. Also, this right, if it exists, does not appear to extend to the right to have a publication ban of one's name in a criminal matter because the public interest far outweighs the risk of possible embarrassment of the individual²²⁷.

However, in some circumstances courts have been willing to accept that security of the person incorporates a right to individual privacy and a right to family autonomy whereby parents have a right to be free of state intervention.²²⁸

The issue of privacy under security of the person also leads to the question of whether reputation is a protectable interest under s. 7. It has been held that interference with a person's name, reputation or integrity are not included in the right to security of the person²²⁹. The mere fact that a human rights tribunal has been appointed to publicly hear a complaint would not seem to

²²⁶ (1985), 52 O.R. (2d) 552 (HCJ).

²²⁷ R. v. Several Unnamed Persons (1983), 44 O.R. (2d) 81 (Ont. HCJ).

²²⁸ Re T and CAS Metropolitan Toronto (1984), 46 O.R. (2d) 347 (Prov. Ct.).

²²⁹ MacBain v. Canadian Human Rights Commission [1984] 1 F.C. 696 (T.D.) rev'd on other grounds, [1985] 1 F.C. 856 (C.A.).

infringe rights to an unblemished reputation²³⁰ nor would an investigation by CSIS for employment purposes²³¹.

The most liberal interpretation of the reputation argument can be found in Kodellas v. Sask. Human Rights Comm.²³² where the court considered that as,

the concept applies to the human person, 'life, liberty and security of the person' relates not just to the physical body but to the mind and its attributes, which attributes can be subsumed under the phrase 'the dignity and worth of the human person'. Viewed as a whole, the 'right to life, liberty and security of the person and the right not to be deprived thereof' means the right not to be seriously hurt in body and mind and not to be seriously restricted in the enjoyment of the body and its attributes.

However, even accepting this expansive definition, courts have limited the application to situations where there is some real "hurt" to the mind or body. In Saskatchewan Government Insurance v. Mennie²³³, a provision of the Automobile Accident Insurance Act which deems a conviction for refusing a breath test to be "conclusive evidence" of intoxication with the result of automatically cancelling an insurance policy was not found to be in breach of s. 7. Applying the definition in Kodellas, the judge agreed that the provision effectively denied the defendant a defence but that this did not seriously "hurt his body or mind". The result would be only that a judgment would be granted against

²³⁰ Mehta v. MacKinnon (1985), 67 N.S.R. (2d) 112 (S.C.T.D.).

²³¹ Swan v. the Queen (F.C.T.D., February 9/90).

²³² [1989] 5 W.W.R. 1 (Sask. C.A.).

²³³ Nov. 17/89, Saskatchewan Court of Queen's Bench.

him with the possible suspension of his licence and insurance until he paid the amount claimed. It is difficult to justify the distinction between these cases on the grounds that one plaintiff suffered more damage to his reputation because of human rights decision than the other did from a statutory provision that deemed him to be intoxicated and denied him insurance and, further, could have resulted in his loss of employment.

Generally, however, it would seem that where administrative proceedings have criminal law implications and the subject of these proceedings will stand convicted in the eyes of the community without having had the protections of a criminal trial, there will be a stronger case for an infringement of security of the person²³⁴. On this basis, for example, the method employed in maintaining a child abuse register has been held to be an infringement of security of the person because of the consequences for reputation and loss of dignity.²³⁵

²³⁴ Ibid. The proceedings must be such, however, that legal rights are affected: a public inquiry for the purposes of recommending changes to the administration of justice will not infringe the security of person of anyone whose conduct will be examined (Robinson v. the Queen, [1987] 3 W.W.R. 362 (B.C.C.A.)). This issue was raised in Starr v. Ontario (S.C.C., April 5/90) but the majority did not deal with it. L'Heureux-Dubé J., on the other hand, considered that there was no infringement of s. 7 because the Commission was purely investigatory and any prospective threat to liberty is speculative. Further, the rights set out in s. 7 would be unduly extended if state-linked stress, anxiety or threat to reputation were found to violate the security of the person when an individual is not charged or accused.

²³⁵ S.S. v. Director of Child and Family Services (1987), 27 Admin. L.R. 303 (Man. Q.B.). The judge was careful to point out that it was not the compilation of the list itself that offended s. 7 but the virtually secret method of doing so such that persons may never know that their names are on the list.

Such emotional stress must be significantly greater than mere upset, worry or anxiety and must be related to an act of the government as opposed to interference by other parties²³⁶.

Economic Interests

One of the most important questions to be answered in the context of security of the person is whether the term encompasses economic interests and to what degree. The majority in A.G. Quebec v. Irwin Toy²³⁷ ruled out the application of s. 7 to corporations because such institutions are not capable of enjoying the right to life, liberty or security of the person except in an economic sense. They commented on the nature of s. 7 rights as follows;

What is immediately striking about [s. 7] is the inclusion of 'security of the person' as opposed to 'property'. This stands in contrast to the classic liberal formulation, adopted, for example, in the Fifth and Fourteenth Amendments in the American Bill of Rights, which provide that no person shall be deprived 'of life, liberty or property, without due process of law.' The intentional exclusion of property from s. 7, and the substitution therefor of 'security of the person' has, in our estimation, a dual effect. First, it leads to a general inference that economic rights as generally encompassed by the term 'property' are not within the perimeters of the s. 7 guarantee. This is not to declare, however, that no right with an economic component can fall within 'security of the person'. Lower courts have found that the rubric of 'economic rights' embraces a broad spectrum of interests, ranging from such rights, included in various international covenants, as rights to social security, equal pay for equal work, adequate food, clothing and shelter, to traditional property - contract rights. To exclude all of these at this early moment in the history of Charter interpretation seems to us to be precipitous.

²³⁶ R. v. X (1983), 43 O.R. (2d) 685 (H.C.J.).

²³⁷ [1989] 1 S.C.R. 927.

Professor Allan Hutchinson²³⁸ suggests that the Court leaving open the even the slightest possibility that welfare rights and even traditional property could be included in security of the person should not go unnoticed. Counsel will likely be quick to take advantage of this passage to press for a fuller explanation of the parameters of the right to security of the person.

In one of the earliest cases, in Fisherman's Wharf²³⁹, Justice Dickson of the New Brunswick Queen's Bench concluded that although the Charter is silent in specific reference to property rights, it can only be assumed that security of the person must be construed as comprising the right to enjoyment of property. However, this conclusion was reached on the judge's own initiative without any argument from counsel on the point, and on appeal²⁴⁰ the decision was overturned with LaForest J.A., as he then was, commenting that "security of property" was not expressly protected by the Charter.

While the argument is more often framed in terms of liberty, there have been several occasions where the courts have been required to deal with the question whether security of the person will include economic rights. The right to pursue an action in court,

²³⁸ Hutchinson, A. "Long-term Implications of Irwin Toy a concern" (1989), 9 Lawyers' Weekly 4 (June 30).

²³⁹ R. v. Fisherman's Wharf (1982), 135 D.L.R. (3d) 307 (N.B. Q.B.).

²⁴⁰ R. v. Estabrooks Pontiac (1982), 144 D.L.R. (3d) 21 (N.B.C.A.).

presumably because damages are considered a purely economic interest, has generally been held to be outside the range of protected interests in s. 7.²⁴¹ Similarly, challenges to contract provisions²⁴², to statutory limitations on damages receivable under a compensation scheme²⁴³, to a finding of discrimination under a human rights code²⁴⁴ and to the joint and several liability for corporate directors set by statute²⁴⁵ have been regarded as beyond the reach of s. 7.

²⁴¹ See Re Terzian and Workers' Compensation Board (1983), 148 D.L.R. (3d) 380 (Ont. Div. Ct); Ryan v. W.C.B. (1984), 6 O.A.C. 33 (Div Ct); Budge v. W.C.B., [1985] 1 W.W.R. 437 (Alta Q.B.) and Zutphen Bros. Construction Ltd. v. Dywidag Systems Inter. S.C.C., Mar 28/90). The same conclusion was reached in cases with a limitation period operating to foreclose an action, Apassin v. the Queen (1987), 14 F.T.R. 161, Wittman v. Emmott B.C.S.C. June 22/89, and Re Katnich and Workers' Compensation Board (1988), 48 D.L.R. (4th) 699 (B.C.S.C.). The one exception seems to be Budge v. the Queen, [1987] 6 W.W.R. 217 (Alta. Q.B.) where the court considered that security of the person included a fundamental right of an aggrieved person to seek redress for a tort committed against him. Whether this position will stand considering the decision of the Supreme Court of Canada in Re Workers' Compensation Act, 1983, [1989] 1 S.C.R. 922 which, although in the context of s. 15 of the Charter, briefly disposed of arguments against the workers' compensation scheme.

²⁴² Dwyer v. Canada Post Corporation (1987), 28 C.R.R. 193 (F.C.T.D.) concerning a challenge to union contract provisions dealing with seniority. Also rejected was a challenge to the Residential Tenancies Act in Bernard v. Dartmouth Housing Authority (1988) N.S.J. no. 283 whereby the landlord had served a notice to quit according to the terms of the lease.

²⁴³ Re Snell and Workers' Compensation Board of British Columbia (1987), 42 D.L.R. (4th) 160 (B.C.S.C.).

²⁴⁴ Re Pasqua Hospital and Harmatiuk (1987), 42 D.L.R. (4th) 134 (Sask. C.A.).

²⁴⁵ Byrt v. Government of Saskatchewan, [1987] 2 W.W.R. 475 (Sask. Q.B.).

Recently, the Ontario Court of Appeal ruled that the right to earn a livelihood is not protected by s. 7. In R. v. Miles of Music Ltd.²⁴⁶ a stay of prosecution had been granted under the Copyright Act on the ground that the charges were an abuse of process and a breach of security of the person under s. 7. However, the Court of Appeal rejected the lower courts' views on s. 7 explicitly noting,

the economic right to carry on a business or earn a livelihood is not a right included in the right to security of the person.²⁴⁷

On the other hand, there have been instances of economic interests being considered under the rubric of security of the person. In the Reference Re Prince Edward Island Lands Protection Act²⁴⁸, Mitchell J., in the minority, considered that security of the person does contain a right to acquire property in some circumstances:

We know that men and women by nature have certain basic physical and psychological needs, which require support if they are enjoy, in any meaningful way, the dignity due them as human beings. Support for one's physical integrity requires the utilization of property in one form or another. Therefore, if the purpose of the Charter in general and of s. 7 in particular is to advance the dignity and worth of human beings, it does not take a quantum leap to conclude that the concept of 'security of the person' must include provision for an adequate standard of living. It is in that context that s. 7 may include a limited right for everyone to acquire property.²⁴⁹

²⁴⁶ (1989), 31 O.A.C. 380.

²⁴⁷ Ibid. Also, Law Society of Manitoba v. Lawrie (1989), 61 Man. L.R.(2d) 36 (Q.B.) in respect of a right to practice law.

²⁴⁸ (1987), 40 D.L.R. (4th) 1 (P.E.I.S.C.).

²⁴⁹ Ibid. p. 16-17.

In obiter in Canada (Eve Studio) v. Winnipeg²⁵⁰, the judge reflected that,

Although private rights are not specifically protected in the Charter, it is conceivable, I think, that a person might be so deprived of his property or economic interest that his right to security of the person, if not his liberty, could be said to be violated.

This raises the arguable distinction between traditional property and "new property"²⁵¹. Courts have been generally reluctant to incorporate a right to traditional property, including most of the economic based interests, that have been presented for judicial determination to date. However, there does not appear to have been any real analysis of what property or economic interests actually are.

There is no denying that most activities have both economic and non-economic components which in many cases cannot be separated. Courts are likely to realize that constitutionally protected values of dignity and self-worth can, in some cases, be a reality only where economic conditions are favourable.

²⁵⁰ [1984] 4 W.W.R. 507, 518 (Man. Q.B.) upheld on appeal, [1985] 3 W.W.R. 40 (C.A.).

²⁵¹ See articles by Reich, C., "The New Property" (1964), 73 Yale L.J. 733 and "Individual Rights and Social Welfare: The Emerging Legal Issues" (1965), 74 Yale L.J. 1245.

In an article on the notion of constitutionally protected welfare rights, Ian Johnstone²⁵² builds a theory of economic rights protection on the grounds that security of the person includes a right to self-respect and dignity. He develops this thesis on the basis of a gradual recognition of the wider scope of security of the person beginning with the idea that the "valuation of human dignity" underlies all Charter rights, as expressed in Big M Drug Mart²⁵³.

This "dignity" theme is echoed in R.L. Crain v. Couture²⁵⁴:

The phrase security of the person includes a right to personal dignity and a right to an area of privacy or individual sovereignty into which the State must not make arbitrary or unjustified intrusion.

and in Reference Re S. 94 (2) of the Motor Vehicle Act²⁵⁵ where Lamer J. remarked that the principles of fundamental justice are founded on a belief in the dignity and worth of the human person.

It is on this basis that Johnstone claims that while dignity and self-worth are not rights in themselves, they are values that should inform the interpretation of the s. 7 rights. Welfare, he

²⁵² Johnstone, I., "Section 7 of the Charter and Constitutionally Protected Welfare" (1988) 46 U. of T. Fac. L.R. 1. See also Morrisson I., "Security of the Person and the Person in Need: Section 7 of the Charter and the Right to Welfare" (1988), 4 Journal of Law and Social Policy 1.

²⁵³ [1985] 1 S.C.R. 395. Dickson C.J. referred to the Hunter v. Southam, [1984] 2 S.C.R. 145, 155 comments on the "unremitting protection of individual rights and liberty" forming the basis for all the Charter rights and freedoms.

²⁵⁴ (1985), 6 D.L.R. (4th) 478, 502 (Sask Q.B.).

²⁵⁵ supra. n. 3.

contends, is not a purely economic interest because it relates to the physical well-being and personal integrity of its recipients. He distinguishes other types of government assistance or economic intervention such as contracts, subsidies and licences because the deprivation of these cannot be said to strike at personhood in the same manner as direct income support. He goes on to suggest that occupational licences and public employment are borderline cases where, in some instances, the activity may be protected but not necessarily its profitability or the incidents surrounding it.²⁵⁶

The focus of the courts' review should be, he claims, not on the financial loss experienced or anticipated but on the implications of this loss for personal security. Thus, even the loss of traditional property where it removes all or substantially all of one's capacity to produce an income may, in fact, constitute a threat to personal security sufficient to invoke the protection of s. 7.

Martha Jackman²⁵⁷ strongly argued that s. 7 should be interpreted to further both procedural and substantive guarantees in the welfare system. The latter, representing an absolute right to a minimum of welfare protection, is based on two premises: first,

²⁵⁶ He refers to Re Isabey and Manitoba Health Services (1985), 22 D.L.R. (4th) 503, aff'd (1986) 40 Man. R. (2d) 198 (C.A.) and Re Beltz and Law Society of British Columbia, *supra*, n. 102, where the courts ruled that even if s. 7 protected the right to pursue an occupation, there is no infringement of the right short of an absolute prohibition of the activity.

²⁵⁷ "The Protection of Welfare Rights under the Charter" (1988), 20 Ott. L.R. 257.

that in the welfare context; the difference between procedural and substantive guarantees is one of degree and not of kind; and, second, that any meaningful concept of justice must take underlying Canadian socio-political reality into account. She argued that the leap from the demand for procedural protections is not dissimilar to the call for positive obligations on the state to provide welfare. The right of a welfare beneficiary to insist on procedural protection against an unjustified termination of his or her benefits is a right to demand that the state expend whatever resources are necessary to make the requisite procedural guarantees available. The demand for the provision of welfare benefits themselves are not very different from the perspective of the state, except in total financial expenditure.

The second aspect of her argument relates to the traditional Canadian view of the relationship between government and the individual whereby we accept and demand a certain degree of government intervention to protect the elements of society unable to properly provide for themselves. Persons at the lowest end of the socio-economic scale are effectively precluded from participating in democracy merely by the lack of material prerequisites for the exercise of those capacities which are fundamental to personhood.²⁵⁸ Her thesis is that by accepting that procedural guarantees are valuable precisely because they promote interests which we deem to be fundamental, there are no grounds to limit the conception of justice in s. 7 to one which allows all

²⁵⁸ Ibid., 325.

welfare rights to be denied so long as this is done with a modicum of procedural and substantive regularity.

The argument could be made that the fact that the discussions surrounding the exclusion of property rights from the Charter centred only on the traditional forms of property that "new property" could legitimately be incorporated without offending the legislative history²⁵⁹. Others have referred to the grammatical construction of s. 7 as establishing affirmative rights to life, liberty and security of the person, not the mere protection from their deprivation²⁶⁰.

The argument against this interpretation rests primarily in the distinction between what could be called classic rights and social rights²⁶¹. Social rights call for affirmative action by the state often with significant financial expenditure from the public purse. For the judiciary, the difficulty is in the assessment of the validity of these rights in terms of the balance between the individual and the state, and, in more practical terms, in the balance between the roles of the court and the elected government.

²⁵⁹ Jean McBean, "The Implications of Entrenching Property Rights in S. 7 of the Charter of Rights" 26 Alta L.R. 548, 582.

²⁶⁰ Bender, P. "The Canadian Charter of Rights and Freedoms and the United States Bill of Rights: A Comparison" (1983), 28 McGill L.J. 811, 825-6 and McBean, *ibid.*, 582.

²⁶¹ supra. n. 183, 330-1.

Thus there may be convincing arguments that there is an independent duty on the state to provide income security programmes to ensure that everyone has at least the necessities of life at a standard of living that provides some degree of dignity. There have been few challenges on this ground²⁶² but it is inevitable that this aspect will be raised until it is conclusively dealt with by the Supreme Court of Canada.

²⁶² The issue arose in Ontario Nursing Home Assn. v. Ontario Ont. H.C.J., July 13/90, in the context of the provision of specialized nursing home care for Alzheimer sufferers. On an earlier (Dec 12/88) motion to quash an application for a declaration that extended care residents have the right to receive adequate funding partly on the basis of s. 7 of the Charter, the court found that it might be possible for applicants to establish that the policies of the Ministry have resulted in a situation where their physical and psychological integrity is not adequately protected and that this has not been done in accordance with the principles of fundamental justice. However, at the hearing of the substantive issue, on the basis of the absence of evidence establishing that the plaintiff was not adequately cared for, the court summarily concluded that s. 7 does not deal with property rights and as such does not deal with additional benefits which might enhance life, liberty and security of the person. In Tanguay v. Québec, Que. S.C., May 31/90, the court rejected the argument that s. 7 would override an order to reimburse the social assistance programme for an overpayment relating to a personal injury award received by the plaintiff. The court cited Whitbread and Walley in refusing to apply s. 7 to economic rights. Jean McBean, supra n. 183, suggested that laws which may prove exceptionally susceptible to challenge should properly be accepted as protected right in s. 7 would be landlord and tenant legislation, environmental laws, labour law, nationalization action by government, taxation, and matrimonial property law.

Cases such as Minister of Finance v. Finlay²⁶³, where individuals have standing to challenge the programmes of various levels of government and the inter-governmental funding agreements for social assistance programmes will lead to further judicial consideration of the rights of individuals to constitutionally protected welfare.

In this regard, administrative agencies are the most vulnerable, particularly those involved in income support, pensions, income tax review and, possibly, public employment. There is a vast range of activities that could be challenged on these grounds with serious financial implications for every level of government. Items such as subsidized housing, welfare assistance, unemployment insurance benefits, pension supplements, spouses' allowances, survivors' benefits, and the rest of the myriad of governmental assistance programmes could be at risk. Combined with the gradually expanding nature of "liberty" as discussed above, it could appear that a significant proportion of administrative activity could be scrutinized by the courts under s. 7 of the Charter.

The only saving factor is that an infringement of either life, liberty or security of the person must be in accordance with the

²⁶³ F.C.A. July 6/90. Although this case did not refer to the Charter, MacGuigan J.A. concluded that the limitations in the Canada Assistance Plan would not permit overpayments of welfare benefits to be deducted from future payments where basic necessities of life are just being met. It is possible for this argument to extend to a Charter right to receive the necessities of life, at least in relation to overpayments.

principles of fundamental justice in order to be salvageable under s. 7, not to mention the possibility of justification under s. 1.²⁶⁴

Thus, it may become imperative for most agencies to assure themselves that their procedures²⁶⁵, policies and activities accord with the principles of fundamental justice.

²⁶⁴ Although in this latter context, Wilson J., has commented that she does not see how an infringement of the principles of fundamental justice could ever be saved under s. 1 of the Charter: Motor Vehicle Reference, *supra*, n. 3, 523. But see Hufsky v. the Queen, [1988] 1 S.C.R. 621.

²⁶⁵ Most agencies, at least at the federal level, have a significant degree of autonomy in developing their own procedures. It would appear that the substantive portion of the s. 7 guarantees would be beyond the scope of the agencies to remedy but would remain an issue for the legislatures alone. The substantive aspect will not be considered, for the most part, in this study.

Chapter 3

"I am not here to dispense justice! I am here to dispose of the case according to the law. Whether or not this is justice is a position for the legislature to determine."
(Sir Thomas Taylor, Chief Justice of Manitoba, 1889-1899)

The word "justice" has no legal content: it is a purely subjective term implying that one is satisfied with a particular action or result. Add the qualifier "fundamental" and the perceptual difficulties multiply. The choice of the term "principles of fundamental justice" has guaranteed that litigants under s. 7 of the Charter will be endlessly seeking to persuade the courts to take action where some government programme or legislation affects them unjustly, according to the plaintiffs' own personal definitions of justice. It also portends the expansion of section 7 beyond the purely legal into the realm of "fairness" in a general sense, possibly including some of the principles of equality now reserved for section 15 of the Charter.

For administrative agencies which are or may be, if the definitions of life, liberty and security of the person are expanded as noted above, subject judicial scrutiny under s. 7 of the Charter, the issue of the definition of principles of fundamental justice can be particularly puzzling. The history of procedural protections in the administrative context can be traced through the rules of natural justice and the concept of procedural fairness but the question remains whether the Charter will now call for something extra. Will administrative agencies be now required to act more

like courts, judicializing most procedures in order to comply with the principles of fundamental justice? The uncertainty is compounded by the addition of a substantive element of the principles of fundamental justice as a result of the ruling in Reference Re S. 94(2) Motor Vehicle Act²⁶⁶

In that case, the predominant issue facing the Court in coming to a workable definition of the principles of fundamental justice was whether courts were limited to a review of the law or government action on the basis of procedural content alone or was there an aspect that would permit a review of the substance of legislation or executive action.

The analysis of this question was not developed in a vacuum; the courts have always recognized that the principles of fundamental justice must evolve from existing constitutional principles of law and a long abiding tradition of protection of individual rights. As a further aid, the courts have looked to the political birth of s. 7 and its continued development to explore the evolving content of the principles of fundamental justice.

Canadian constitutional law is founded on the same principles expressed by A.V. Dicey²⁶⁷: the rule of law and supremacy of Parliament. Although these two prongs of British constitutional

²⁶⁶ Reference Re s. 94(2) Motor Vehicle Act, [1985] 2 S.C.R. 486.

²⁶⁷ Introduction to the Law of the Constitution (10th ed., 1959).

theory are arguably contradictory²⁶⁸, they have basically come to mean that the law will be certain, prospective, applied to all evenly and that Parliament's word is supreme. Any act of legislature may expressly override a common law principle, such as natural justice, and the courts will be obliged to uphold it. Of course, the judiciary have traditionally been able to temper what they view as unreasonable legislation by various means without expressly overruling the provisions of a statute²⁶⁹.

However, the courts have been careful not to appear to be re-writing statutes. The principles of Parliamentary supremacy and the constitutional imperatives are inconsistent with judicial legislation and this has defined the scope of judicial review on procedural issues. This in turn informed the nature of the rules of natural justice as in Bell Canada v. Communications Wkrs of Canada²⁷⁰

It is not unimportant to keep in mind in a case such as this that the so-called rules of natural justice are a means devised by the courts to interpret and apply statutory law in such a way as to avoid unjust results in particular cases.

²⁶⁸ Dicey himself dilutes the power of the rule of law by his explanation of Parliamentary supremacy. The power of Parliament to expressly and unequivocally override any particular common law principle and the requirement that the courts apply all Parliamentary acts tends to undermine the original premise that the rule of law is based on the strength of the common law and its application by the courts.

²⁶⁹ The history of the privative clause is one example. Courts have swung from a strict, narrow interpretation of such clauses to a more deferential attitude. See Mullan D., "Judicial Deference to Administrative Decision-Making in the Age of the Charter", Nov. 5, 1985 Heald Lecture at University of Saskatchewan.

²⁷⁰ [1976] 1 F.C. 459, 477 (C.A.) per Jackett C.J.F.C.

They are not rigid but flexible. They must be applied according to the exigencies of the particular case and they are not to be used as an instrument to defeat the achievement of the objectives of the particular statute.

The rules of procedural fairness were considered in the same vein in Inuit Tapirisat of Can. v. Léger²⁷¹:

Procedural fairness, like natural justice, is a common law requirement that is applied as a matter of statutory interpretation. In the absence of express procedural provisions it must be found to be impliedly required by the statute. It is necessary to consider the legislative context of the power as a whole. What is really in issue is what it is appropriate to require of a particular authority in the way of procedure, given the nature of the authority, the nature of the power exercised by it, and the consequences of the power for the individuals affected. The requirements of fairness must be balanced by the needs of the administrative process in question.

Into this formulation, the Canadian Bill of Rights²⁷² was introduced in 1960. It was greeted with high expectations but ultimately did not become a particularly useful tool in championing human rights on a procedural or substantive basis.²⁷³ Its limited value seemed to rest in the fact that it was an ordinary statute of Parliament, without the force and effect of a constitutional document.

The relevant sections of the Bill of Rights for the discussion of the principles of fundamental justice are:

s. 1 (a).

²⁷¹ [1979] 1 F.C. 710, 717 (C.A.) per LeDain J.A.

²⁷² Canadian Bill of Rights, R.S.C. 1985, App. III.

²⁷³ Until perhaps the Singh decision in 1985 in which Beetz J. resurrected the Bill and declared the offending procedural provisions invalid. Infra n. 16.

...the right of the individual to life, liberty, security of the person and the enjoyment of property and the right not to be deprived thereof except by due process of law; and,

s. 2(e)

...no law of Canada shall deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations.

Section 1(a) refers to due process of law in conjunction with the rights now enshrined in s. 7 of the Charter, with the notable exception of the right to enjoyment of property. There are very few reported cases under this section and those few demonstrated an unwillingness on the part of the court to expand due process beyond "according to the legal process recognized by Parliament and the courts in Canada"²⁷⁴. This was implicitly tied to the procedural standards set out in s. 2(e).

The reasons for judgement of Laskin, C.J. in the Curr case have often been cited as the basis for the limitation of due process to the procedural protections available elsewhere in the Bill of Rights. He expressed very grave reservations about the duty of or the opportunity for the courts to control substantive aspects of federal legislation:

The very large words of s. 1(a), tempered by a phrase ("except by due process of law") whose original English meaning has been overlaid by American constitutional imperatives, signal extreme caution to me when asked to apply them in negation of substantive legislation validly enacted by a Parliament in

²⁷⁴ Curr v. the Queen, [1972] S.C.R. 889.

which the major role is played by elected representatives of the people...²⁷⁵
and:

Compelling reasons ought to be advanced to justify the court in this case to employ a statutory (as contrasted with constitutional) jurisdiction to any operative effect and a substantive measure duly enacted by a Parliament constitutionally competent to do so, and exercising its powers in accordance with the tenets of responsible government...those reasons must relate to objective and manageable standards by which a court should be guided if scope is to be found in s. 1(a) due process and silence otherwise competent federal legislation. Neither reason nor underlying standard were offered here.²⁷⁶

The fear was that without "objective and manageable standards" to guide them, the courts could not resist,

making the wisdom of impugned legislation the test of its constitutionality [particularly] so where it is measuring legislation by a statutory standard, the result of which may make federal enactments inoperative.²⁷⁷

This limitation of due process is clearly based on one underlying presumption: that the Bill of Rights is not a constitutional document with the power to authorize the court to override otherwise valid legislation. However, in the Morgentaler²⁷⁸ case, Laskin C.J. hinted that he was prepared to consider that s. 1 (a) need not be confined to procedural matters:

There is often an interaction of means and ends, and it may be that there can be a proper invocation of due process of law in respect of federal legislation as improperly abridging

²⁷⁵ Ibid., 902.

²⁷⁶ Ibid.

²⁷⁷ Ibid., 903.

²⁷⁸ Morgentaler v. the Queen (1975), 30 C.N.R.S. 209 (S.C.C.).

a person's right to life, liberty, security of person and enjoyment of property.²⁷⁹

Thus, it might appear that the line was not so firmly drawn that a substantive review of federal legislation could never be envisioned.

Section 2(e) of the Bill of Rights is the source of the term "principles of fundamental justice" for which the statement by Fauteux C.J. has become the standard definition:

Without attempting to formulate any final definition of those words, I would take them to mean, generally, that the tribunal which adjudicates upon rights must act fairly, in good faith, without bias and in a judicial temper and must give to him the opportunity adequately to state his case.²⁸⁰

This expression of the principles of fundamental justice mirrors the administrative law requirements of natural justice which are in turn founded on two principles: the audi alteram partem rule and the nemo iudex in sua causa rule.

Until recently, the Bill of Rights did little to influence the prevailing deference to express legislative provisions overriding the rules of natural justice. In a surprising decision, the Supreme Court of Canada in Singh v. Minister of Employment and Immigration²⁸¹, resurrected s. 2(e) of the Bill of Rights and gave it new vigour. Three of the six justices ruled that the procedures

²⁷⁹ Ibid., 227.

²⁸⁰ Duke v. the Queen, [1972] S.C.R. 917.

²⁸¹ [1985] 1 S.C.R. 177.

of the Immigration Appeal Board were in conflict with the guarantee of a fair hearing in accordance with the principles of fundamental justice. Refugee claimant status was determined without an oral hearing at any stage of the administrative process. Claimants were then faced with the burden of having to demonstrate an ultimate probability of success before the Immigration Appeal Board would hear their appeal. The Court concluded that the Board must give a full oral hearing in each case in order to meet the demands of s. 2(e) of the Bill of Rights.

However, in the context of s. 2(e), it is clear that the "principles of fundamental justice" refer solely to issues of procedure because of the inclusion of the phrase "fair hearing" in the same clause. It would be difficult to find support in the wording of s. 2(e) for judicial review of the substance or policy of impugned legislation. It has been argued that the same intention was present when the drafters of the Charter borrowed the expression "principles of fundamental justice", although without the "fair hearing" reference. It is, in fact, the absence of any procedural context in s. 7 that eventually permitted the Supreme Court's conclusion that it included a substantive element²⁸²

²⁸² Reference re Motor Vehicle Act, supra. n. 1, 511 per Lamer J.: "In s. 7, the words "principles of fundamental justice" are placed in the context of, and qualify much more fundamental rights, the "right to life, liberty and security of the person". The distinction is important."

The expression "principles of fundamental justice" was central to most of drafting discussions on s. 7 prior to the enactment of the Charter. The original section referred to "due process"²⁸³ but at the First Ministers' Conference in 1980 a fear of a repeat of the American experience with substantive due process in the early part of the twentieth century prompted the substitution of the "principles of fundamental justice".²⁸⁴ Before the Senate-House Committee on the Constitution, B. Strayer, then as A.D.M. of Public Law from the Department of Justice, stated:

...it was our belief that the words "fundamental justice" would cover the same thing as what is called procedural due process, that is the meaning of due process in relation to requiring fair procedures...it does not cover the concept of what is called substantive due process, which would impose substantive requirements on the policy of the law in question.²⁸⁵

²⁸³ White, John, Legal Rights: the Scope and Application of S. 7 of the Charter, Administration of Justice Conference: The Charter after Eighteen Months, Winnipeg, 1983 and Romanow, R. and White, J., Canada Notwithstanding (1984).

²⁸⁴ Substantive due process, as it became known, was a phenomenon of the early twentieth century guaranteeing individuals the right to certain standards in "substantive" government acts which interfered with fundamental protected rights. This permitted judicial review of the policy behind legislation, questioning the appropriateness and reasonableness of legislation. The most celebrated case was Lochner v. New York 198 U.S. 45 (1905) dealing with the regulation of the working hours of bakery employees. This began three decades of the Supreme Court striking down social and economic legislation in the defence of the freedom to contract and liberty to enjoy property. By 1937 this approach was largely abandoned leaving the Court with "an attitude of deference based on the Court's minimal requirement that burdens on an interest be rationally related to the legislative programme" (Whyte, J., Legal Rights: the Scope and Application of Section 7 of the Charter, n. 18, 5. See Tremblay, L. "Section 7 of the Charter: Substantive Due Process?" (1984), 18 U.B.C. Law Rev. 201.

²⁸⁵ Quoted in the Reference case, supra n. 1, 504. This view was confirmed in the government's The Charter of Rights and Freedoms: A Guide for Canadians (1982) at page 10 where, in

Nevertheless, the Supreme Court of Canada rejected the limitation to procedural review and determined that s. 7 must encompass more than considerations of natural justice or procedural fairness.²⁸⁶ Lamer J. for the majority, made several conclusions on the nature of the term "principles of fundamental justice". First, it is not to be considered an independent right, but a qualifier of the right not to be deprived of life, liberty and security of the person; its function is to set the parameters of that right.²⁸⁷ The definition of the term can be discerned by reference to ss. 8-14, which are illustrative of the meaning of the phrase, at least in criminal or penal law, and are representative of principles recognized by the common law and international conventions as essential elements of "a system for the administration of justice which is founded upon a belief in the dignity and worth of the human person and the rule

relation to the rights under s. 7, it stated: "the rights outlined [in s. 7- 14] spell out the basic legal protection that will safeguard us in our dealings with the state and the machinery of justice. They are designed to protect the individual and ensure simple fairness should he or she be subjected to legal proceedings, particularly criminal cases." Morris Manning in his text, Rights,

Freedoms and the Charter (1982) suggested that the words "due process" were eliminated not to preclude the American concept of substantive due process but to foster it by avoiding the narrow definition of due process adopted by the Supreme Court under the Bill of Rights.

²⁸⁶ Reference, per Lamer J. at p. 509, "In view of the indeterminate nature of the data, it would in my view be erroneous to give these materials anything but minimal weight".

²⁸⁷ Ibid., p. 501.

of law".²⁸⁸ It is clear that Lamer J. anticipated that many of the principles will be procedural in nature although they are clearly not limited to such guarantees. Finally,

whether any given principle may be said to be a principle of fundamental justice within the meaning of s. 7 will rest upon an analysis of the nature, sources, rationale and essential role of that principle within the judicial process and in our legal system, as it evolves.²⁸⁹

Some of the sources of the principles of fundamental justice will arguably be found in sections other than 8 to 14 of the Charter. In R. v. Cornell²⁹⁰, LeDain J. for the Court considered that there may be some overlap between section 7 and the equality rights in the Charter²⁹¹. Wilson J. also briefly considered whether freedom of conscience would be included in the principles of fundamental

²⁸⁸ Ibid., p. 502. Wilson J. disagreed on this point and considered that ss. 8-14 were not necessarily relevant to the definition of the principles of fundamental justice. LaForest J. in Thomson Newspapers v. Director of Investigation, S.C.C. Mar. 29/90 said that section 7 may, in certain contexts, provide residual protection to the interests protected by other specific provisions in the Charter, in this case, s. 11(c).

²⁸⁹ Ibid. p. 511.

²⁹⁰ [1988] 1 S.C.R. 461, 477.

²⁹¹ However, the clear legislative intent that section 15 not come into force until April, 1985, prevented the court from giving "effect to such protection as s. 7 might otherwise afford to the right of equality before the law". This limitation did not stop the B.C.C.A. in Wilson v. B.C. Medical Services Commission, [1989] 2 W.W.R. 1 (B.C.C.A.) from considering that the impugned law discriminated unfairly between new doctors and established physicians and, therefore, contravened section 7. The grandfathering provisions were similarly flawed. See Lepofsky, D., "Section 7 - a Problematic Foray into Legislative Policy-Making: Wilson v. B.C. Medical Services Commission" (1989), 68 C.B.R. 615 and Schwartz, H. "Section 7 and Structural Due Process - In Defence of Wilson" (1990), 69 C.B.R. 162.

justice in the Morgentaler²⁹² decision. This approach reflects the understanding that the substantive application of the principles of fundamental justice will be far reaching and a potentially comprehensive source of protection of the rights to life, liberty and security of the person.

Other sources will also inform the content of the principles of fundamental justice. In R. v. Lyons²⁹³, the Court held that to properly assess whether a legislative scheme for indeterminate detention of dangerous offenders violated the principles of fundamental justice, it was necessary to examine that scheme in light of the basic principles of penal policy that had animated legislative and judicial practice in Canada and other common law jurisdictions. This approach was also adopted in R. v. Beare²⁹⁴ in the consideration of fingerprinting requirements under the Identification of Criminals Act.

While the inclusion of a substantive element in s. 7 has had a direct and obvious impact in the criminal law context²⁹⁵, there are some implications for the administrative agency as well. John Whyte suggested that a substantive review authority would control

²⁹² Morgentaler v. the Queen, [1987] 1 S.C.R. 30.

²⁹³ [1987] 2 S.C.R. 309, 327.

²⁹⁴ [1988] 2 S.C.R. 387.

²⁹⁵ See Vaillancourt v. the Queen, [1987] 2 S.C.R. 636; Lavolette v. the Queen, [1987] 2 S.C.R. 667; Logan v. the Queen (1988), 67 O.R. (2d) 87 (C.A.); Morgentaler v. the Queen, *supra* n. 27; Gray v. the Queen (1989), 66 C.R. (3d) 378 (Man. C.A.).

the abuse of discretion in administrative agencies by imposing a new duty of consistency in decision-making.²⁹⁶ Luc Tremblay argued that certain common law presumptions are included in the principles of fundamental justice such as rules against total discretion²⁹⁷, the presumptions against retrospectivity, unreasonable law²⁹⁸, substantial alteration of the law, interference with vested rights, and impairing obligations²⁹⁹. Allan Manson suggested that in the parole and prison context³⁰⁰, substantive review will permit external scrutiny of the administration of prisons, the parole boards and parole services.

These types of considerations could lead to a more intensive review of administrative action and constituent legislation with some far

²⁹⁶ Whyte, supra. n 18, 28. For a view of the issue from the common law perspective, see Mullan, D. "Natural Justice and Fairness - Substantive as Well as Procedural Standards for the Review of Administrative Decision-Making" (1982), 27 McGill L.J. 250 and MacLaughlin, W., "Some Problems with Judicial Review of Administrative Inconsistency" (1984), 8 Dalhousie L.R. 435.

²⁹⁷ Cf. the comments on the criminal law context in R. v. Beare, supra n. 29 confirming the importance of discretion as an essential feature of the criminal justice system. Also in R. v. Lyons, supra n. 28, the Supreme Court recognized that the existence of prosecutorial discretion does not offend the principles of fundamental justice.

²⁹⁸ For a discussion of reasonableness in administrative law see Grey, J. and Casgrain, L-M., "Jurisdiction, Fairness and Reasonableness" (1988), 4 Admin. L.J. 43. See R. v. Bowen and Kay (1988), 91 A.R. 264 (Q.B.) and Bryntwick v. N.P.B., [1987] 2 F.C. 184 (T.D.).

²⁹⁹ L. Tremblay, "Section 7 of the Charter: Substantive Due Process?" (1984) 18 U.B.C. Law Rev. 201, 248-249.

³⁰⁰ Manson, A., "Administrative Law Developments in the Prison and Parole Contexts" (1984), 5 Admin. L.R. 151, 158.

reaching implications³⁰¹. However, although it must be recognized that it is no longer appropriate to define fairness only in the procedural sense³⁰², the focus of this paper is on the procedural aspects of s. 7 and the fundamental requirements of fair play in administrative action.

Procedural Protections

The specific elements of the procedural protections available under s. 7 of the Charter will necessarily be closely related to the rules and principles developed under the common law doctrines of natural justice and procedural fairness³⁰³. The primary issue will continue to be whether there is an adequate opportunity to be heard, with all its component values and attendant rights.³⁰⁴

³⁰¹ See for example Hay v. National Parole Board (1985), 13 Admin. L. R. 17 where the Federal Court, Trial Division found a change in policy for incarceration of certain types of prisoners to be arbitrary and unfair where it would now affect individually guaranteed legal rights.

³⁰² I. Johnstone suggests that in Canada's political culture and philosophy it is no longer appropriate to refer to justice merely as a procedural value. There should be substantive limits on what the state can do in designing and administering programmes. See Johnstone, "Section 7 of the Charter and Constitutionally Protected Welfare" (1988), 46 U. of T. Fac Law Rev. 1, 42-43.

³⁰³ According to Pratte J.A. in Gallant v. Canada (1989), 68 C.R. (3d) 173, 181: "But it can be said, without any risk of error, that the basic procedural rules that are part of the principles of fundamental justice do not differ, in substance, from the rule of natural justice and of procedural fairness".

³⁰⁴ The second aspect of natural justice, namely the rule against bias, will, of course, be another primary element under the principles of fundamental justice.

Where the courts have the choice of deciding on ground of the common law or the Charter, it appears that the selection of remedies may often be determinative of the ultimate ratio for the decision³⁰⁵. Judicial review has a limited spectrum of remedies for courts to consider but the Charter, by means of section 24(1) opens up the field for any number of creative remedies. The inclination for a sympathetic court may be to find a basis for decision on Charter grounds and avoid or eliminate recourse to the common law, even where the same substantive result would be achieved. Wayne MacKay predicted in any early article on the Charter and fairness that s. 7 would overwhelm administrative standards³⁰⁶ and to some degree it is true.

It is on this basis that I propose to consider the relationship of the Charter and the common law rules of natural justice and procedural fairness in terms of several specific procedural norms:

- the requirement of an oral hearing and the participatory rights that fall within a hearing:
 - the right to full disclosure of information
 - the right to counsel
 - the right to cross-examination
 - the duty to give reasons

³⁰⁵ R v. Smith (1988), 34 Admin. L.R. 148 (H.C.J.) at p. 151: "I, therefore, base my decision on the Charter, and not the common law of judicial review. This is important, as it is agreed by counsel that s. 24 of the Charter gives me broad discretion in a remedy in this matter."

³⁰⁶ MacKay W., "Fairness after the Charter: A Rose by any other Name" (1985), 10 Queen's L.J. 263.

These were chosen because they represent some of the more judicialized procedures, long revered by the courts as the best and possibly only means of attaining the truth or justice in an adversarial process. The question remains whether the "principles of fundamental justice", in a non-criminal law setting, will somehow draw on these procedural standards to ultimately judicialize the administrative process.

Oral Hearings

In the criminal law context the right to a public, oral hearing has long been held to be the safeguard of individual liberty. The theory that a person must be entitled to face his accuser has over the years fostered a strong structure of procedures in the rules of the court. This concept is well adapted to criminal law and procedure but has never been held to be a critical part of the administrative process. The values served by the two types of process have never been particularly comparable, except in the instance of disciplinary tribunals and the like. This, however, does not prevent the constant and unrelenting pressure from those adversely affected by administrative decisions to advocate a right to an in personam appearance before administrative decision-makers.

The rules of natural justice and the principles of procedural fairness are, in part, a gradual judicial erosion of the protective wall around administrative decision-making. Some internal limits were maintained by the adoption of a threshold test, the hallmark of the quasi-judicial/administrative dichotomy. The development of this test prevented full-scale imposition of the judicial model on those matters considered to be administrative and reserved for the courts the role of supervising the more important issues dealing with true legal rights. The courts have come to recognize the inappropriate and ineffective nature of the threshold test and have broken down some of the barriers, if only those marking distinctions within the upper range of the scale. The Supreme Court of Canada in Consolidated-Bathurst v. International Woodworkers³⁰⁷ and in Syndicat des employés du Québec et de l'Acadie v. CHRC³⁰⁸ confirmed that the content of the rules of natural justice is no longer dictated by classification as judicial, quasi-judicial or executive, but by reference to the circumstances of the case, the governing statutory provisions and the nature of the matters to be determined.

³⁰⁷ SCC Apr 26/89 per Lamer J. and Sopinka J. in dissent on other grounds.

³⁰⁸ (1989), 62 D.L.R. (4th) 385, 425 (S.C.C.): "the context of the rules to be followed by a tribunal is now not determined by trying to classify them as judicial, quasi-judicial, administrative or executive. Instead the court decides the content of the rules by reference to all the circumstances under which the tribunal operates".

Natural justice very often demanded oral hearings in the determination of rights on the quasi-judicial side of the threshold. It was quite infrequent that a court would demand an oral hearing for administrative matters: these matters were considered unreviewable. It was this rigid all or nothing limitation that was softened somewhat by the development of the principles of procedural fairness. Some form of hearing, whether in person or by written submissions, could now be required even in matters characterized as administrative.

Early fears were that section 7 would similarly adopt a threshold approach, along the lines of the quasi-judicial/administrative schism. Fortunately, the courts have not transferred the common law limitations inherent in a threshold test and have stated the view that where the right to life, liberty or security of the person are adversely affected, there should not be any distinction on procedural grounds because the matter is quasi-judicial or administrative. Differences in procedure standards will arise but only because there will remain a range of procedural requirements suited to each type of decision.

Thus, for example, in the parole and prison law context, decisions would have been classified as administrative under the common law rules and thus exempt from the more rigorous procedures of natural justice. Charter decisions differ not only due to the fact that judges could now override statutory restrictions on procedures but in the focus of the review itself. These cases demonstrate a call

for a more broadly based review of procedural standards although maintaining a spectrum approach³⁰⁹.

There remain no absolutes in constitutional principles of fair procedure just as there are none in the common law doctrines. In R. v. Potma³¹⁰, the Ontario Court of Appeal recognized that

[the court could not suggest that] the principles of fundamental justice in the Charter are immutable. "Fundamental justice" like "natural justice" or "fair play" is a compendious expression intended to guarantee the basic right of citizens in a free society to a fair procedure. The principles or standards of fairness essential to the attainment of fundamental justice are in no sense static and will continue as they have in the past to evolve and develop in response to society's changing perception of what is arbitrary, unfair or unjust.³¹¹

The Supreme Court of Canada affirmed at an early stage that there was not a single view of the principles of fundamental justice. Procedures would remain tied to function with some tribunals required to hold oral hearings and others relying on other forms of participation.³¹² Thus, for matters at the "administrative end

³⁰⁹ See R. v. Smith (1988), 34 Admin. L. R. 148 (Ont. H.C.J.) dealing with the duty to have a hearing and allow representation by counsel. Also, D & H Holdings v. Vancouver (1985), 23 D.L.R. (4th) 365 (B.C.S.C.) where a duty to give reasons was seen as a principle of fundamental justice where a municipality revoked a business licence.

³¹⁰ (1983), 18 M.V.R. 133.

³¹¹ Ibid., 143.

³¹² Singh v. M.E.I. (1985), 58 N.R. 1, 63 per Wilson J. where she stated "I am prepared to accept that procedural fairness demands different things in different contexts...and an oral hearing may not be required in every case".

of the spectrum of statutory decision-making", there will be no firm right to an oral hearing³¹³.

Therefore, while the threshold question of whether a process is administrative or quasi-judicial will be irrelevant to the initial application of s. 7, factors that would indicate a need for a higher standard of fairness will come into play in the assessment of what specific types of procedures will be required under the principles of fundamental justice. In Re Latham and Solicitor General of Canada³¹⁴, procedures for revocation of parole were considered in this perspective:

In my view, fundamental justice requires procedural fairness commensurate with the interest affected. For the same reason that the common law would not require here a more judicialized process normally associated with natural justice, s. 7 would not either.

There is little in the case law to indicate with any precision when an oral or in-person hearing will actually be demanded by s. 7. In Singh v. MEI³¹⁵, Wilson J. suggests that particularly in matters of fundamental importance such as where a person's life, liberty and security of the person are at risk, that procedural fairness would invariably require an oral hearing. She went on to state that where serious issues of credibility are raised there must be an opportunity for the party affected to respond in person. In

³¹³ See for example, McDonald v. Kindler, [1989] 2 F.C. 492 (F.C.A.), on appeal to the S.C.C.

³¹⁴ (1984), 9 D.L.R. (4th) 393.

³¹⁵ supra. n. 16.

Singh, the lack of an oral hearing was clearly symptomatic of a larger problem with the entire refugee process³¹⁶ because the legislative provisions accorded no opportunity to the applicant at any stage to state his case or to know the case that had to be met in what could only be classified as an adversarial process. However, in view of the Court's focus on the issue of credibility, it is doubtful that a hearing at a lower level would assuage the Court's concern that credibility would be assessed without the person appearing before the Board making that decision.

It is interesting to note that in relation to the Canadian Bill of Rights, Beetz J. for the other three justices, considered that s. 2(e) would also demand an oral hearing because of the nature of the legal rights at stake and the severity of the consequences to the individuals. The Bill of Rights would require at least one hearing before the matter could be finally adjudicated, leaving it open, if administrative cost and inconvenience were such that the Board could not hold hearings in every case, for the government to restructure the process so that a hearing could be held at some lower level of decision-making, such as the Refugee Status Advisory Committee.³¹⁷

³¹⁶ Wydrzynski, C. "Immigration Law- Determination of Refugee Status- Charter of Rights and Freedoms, Section 7" (1986), 64 C.B.R. 172, 179.

³¹⁷ Three years later the government responded by amending the legislation to accord an oral hearing to all refugee claimants: R.S.C. 1985, c. 28 (4th Supp.).

In R. v. Wigglesworth³¹⁸, dealing with an issue under section 11(h) of the Charter, Wilson J. expressed the view that where

an individual is to be subject to penal consequences such as imprisonment - the most severe deprivation of liberty known to our law - then he or she, in my opinion, should be entitled to the highest procedural protection known to our law.

The "highest procedural protection" would entail in person hearings with all the attendant rights of participation in the process. However, she doubted that there were any administrative bodies that would have the power to imprison; this punishment is reserved for public wrongs or transgressions against society. Thus, there will be no likely application of section 11(h) to administrative agencies but Wilson J. emphasized that this limitation will not restrict the application of section 7 to proceedings where section 11 is not available.

In this line, the case of Duncan v. Minister of Defence³¹⁹ provides a good example. The procedures devised pursuant to the National Defence Act allowed the accused to convey his submissions on an appeal relating to severity of sentence to a member of the staff of the decision-maker who would then synthesize the submissions and assess them. The decision-maker would consider only this abridged submission and does not hear the applicant personally or read any of the material directly submitted on his behalf. Justice Muldoon was frankly scornful of the process:

³¹⁸ [1988] 1 W.W.R. 193 (S.C.C.).

³¹⁹ F.C.T.D., Mar. 16/90.

There is no fundamental justice inherent in that process...It violates fundamental justice to require the [applicant] to transmit his representations for mitigation of sentence through the perceptions of the [subordinate officer of the decision-maker] who,... simply must be bearing an institutional bias.

However, despite the overwhelming deficiencies of the process as instituted and the threat of imprisonment for the applicant, Muldoon J. reluctantly refused to declare that written submissions were unconstitutional in this case:

For the purposes of this litigation only, it seems that an oral hearing was not strictly necessary, if the applicant's submissions could have been laid directly before the [decision-maker] after his counsel had had the opportunity to review finally what [was] submitted. Such a procedure would be akin to reply in oral argument.

It is doubtful whether he would have hesitated to overrule the procedures had this system been instituted to determine the original finding of guilt. Because it was implemented only for reviews of the severity of a sentence the principles of fundamental justice would allow a somewhat lesser standard of procedures³²⁰ but only by a narrow margin.

At the other end of the scale, are the routine administrative matters that will rarely require oral hearings. A representative

³²⁰ However, because of the "incurable and basic constitutional deficiencies", he exercised his power under section 24(1) to grant a prohibition against imprisoning the applicant.

case is Hundal v. Superintendant of Motor Vehicles³²¹, where the Chief Justice of the British Columbia Court of Appeal reasoned:

The content of the principles of fundamental justice required in a given case will depend upon the circumstances of that case. Thousands of administrative decisions are made daily impinging upon the rights of the individual. It would be folly to suppose that the principles of fundamental justice demand a full oral hearing in every case.

The court came to this conclusion on the basis of several factors all indicating that the plaintiff had been given ample opportunity to know the case he had to meet and to have the decision reviewed according to the statute. Further, there was no issue of credibility, as in Singh, and there was a statutory right of appeal available to correct any error.

Similarly, in Idziak v. Canada³²² where the issue was whether the principles of fundamental justice were infringed by the determination by the Minister of Justice that there were no circumstances on which to overturn an order to extradite the applicant, the judge was of the view that the applicant had suffered no lack of procedural protection even though no in person hearing had been held. The applicant was given a full opportunity to advance his arguments sufficient to meet the duty spelled out in Kindler v. Canada³²³:

The basic objective of the duty to act fairly is to ensure that an individual is provided with a sufficient degree of

³²¹ (1985), 20 C.C.C.(3d) 466.

³²² (1989), 70 O.R. (2d) 498 (H.C.J.) confirmed on appeal (1990), 72 O.R.(2d) 480 (C.A.).

³²³ [1989] 2 F.C. 492 (C.A.), on appeal to S.C.C..

participation necessary to bring to the attention of the decision-maker any fact or argument of which a fair-minded decision-maker would need to be informed in order to reach a rational conclusion.

In determining whether the Charter would require a hearing, the judge considered several factors including the nature of the decision, the nature of the material relevant to that decision, the capacity or function of the decision-maker, plus any relevant statutory provisions. There were no legislative requirements for a hearing and, in addition:

[t]he decision made by the Minister is in essence a policy-driven one; there were no facts in dispute and, hence, no determination of credibility to be made. I see nothing in the nature of the decision to be made which necessitated an oral hearing in order that the Minister give fair consideration to relevant representations. I had difficulty in imagining how a hearing could have assisted the applicant in this case.³²⁴

Between the two extremes of the potential for imprisonment and the routine administrative or policy matters, the courts are slowly working out the appropriate degrees of procedural requirements along the spectrum of decision-making. At the end of the scale entailing serious intrusions into individual's rights to life, liberty and security of the person, there will naturally be more oral hearings required. At the policy or "routine or administrative" end of the spectrum will be the minimum standards of the audi alteram partem rule with written submissions as the standard procedure.

³²⁴ supra. n. 57, p. 503.

This range is demonstrated quite clearly in the area of parole and prison law. There is a wide spectrum of decision-making in many contexts that will call for specifically tailored procedures to balance the interests of the institutions or society and the rights of the individual. It is also the area that best exemplifies the impact of the Charter on the administrative process and the effect the court can have on the development of legislative revisions to administrative procedure.

Parole and Inmate Cases

The most prolific area of procedural debate in the earliest stages of Charter development was in parole and inmate law. There the concept of when an oral hearing would be required, despite the lack of any hearing provision in the statutes, was explored in detail.

The grant of parole has always been considered an administrative activity, exempt from the provisions of natural justice. However, after Martineau v. Matsqui Institution Disciplinary Board (no. 2)³²⁵, the spectrum approach was adopted to allow a review of the decisions affecting liberty of individuals but that the extent of the procedural requirements would depend on a range of factors, including the gravity of the consequences and the administrative

³²⁵ [1980] 1 S.C.R. 602. Dickson J. stated that it is wrong "to regard natural justice and fairness as distinct and separate standards, and to seek to define the procedural content of each".

constraints of the tribunal³²⁶. Thus, at a minimum, fairness would apply to parole decisions.

However, the courts were restricted in the remedy they could provide in the judicial review of these matters. In R. v. Smith³²⁷, Gray J., rejected the argument that he could decide the issue of whether the applicant had a fair hearing under the common law. He said:

I do not believe the common law duty extends far enough to be of assistance, however, At common law, the Parole Board was not even required to hold a hearing prior to the revocation of parole, and the rules of natural justice did not apply...These restrictions do not apply under the Charter.³²⁸

With the advent of the Charter, courts felt obliged to reconsider whether the principles of fundamental justice would require full, oral hearings for parole matters. In one of the earliest cases, R. v. Cadeddu; R. v. Nunery³²⁹, Justice Potts started from the presumption that at common law,

[w]hen Parliament either has made explicit provision as to rights to a hearing or has delegated the determination of that question and the delegate has exercised its delegated legislative authority in that respect, I do not think the court properly can or should imply a right to hearing not provided for in the positive law.

³²⁶ O'Connor, F. "The Impact of the Canadian Charter of Rights and Freedoms on Parole in Canada" (1985), 10 Queen's Law J. 33C, 347. See also Morgan v. National Parole Board (1982), 65 C.C.C.(2d) 216 (F.C.A.).

³²⁷ (1988), 34 Admin L.R. 148 (H.C.J.).

³²⁸ Ibid., p. 150-1.

³²⁹ (1982), 40 O.R. (2d) 128 (H.C.J.).

But now with the addition of the Charter,

Considering that the rights protected by s. 7 are the most important of all those enumerated in the Charter, that deprivation of those rights has the most severe consequences upon an individual and that the Charter establishes a constitutionally mandated enclave for protection of rights, into which the government intrudes at its peril, I am of the view that the applicant could not be lawfully deprived of his liberty without being given the opportunity for an in-person hearing before his parole was revoked....Although nothing in the common law or in federal or provincial legislation required the Board to grant a hearing - or for that matter, forbade the Board to do so - I am of the opinion that the Charter dictates that such an opportunity be given.³³⁰

Later cases confirmed that, at least where the parolee had enjoyed some degree of liberty, albeit limited or constrained, s. 7 would impute a need for an oral hearing before the Board could revoke that liberty.³³¹

Parolees have traditionally fared better under the Charter than have inmates remaining in custody³³². The rationale seems to be that parolees have had some taste of liberty, conditional though it may be, while inmates have no reasonable expectation of imminent liberty. This rationale is carried over into the debate on the

³³⁰ Ibid., 139.

³³¹ R. v. Nunery (1983), 5 C.R.R. 69 (Ont. H.C.J.) where Smith J. points out that it would seem incongruous to provide a hearing under the legislation for the decision to grant parole at a time when only an inchoate right to liberty is involved but deny one after liberty has been achieved and a deprivation of it is being considered. Also, Re Dumoulin and the Queen (1983) 6 C.C.C. (3d) 190 (Ont. H.C.J.); Swan v. A.G. B.C. (1983), 35 C.R. (3d) 135 (B.C.S.C.); Re Martens and the Queen (1983), 8 C.C.C. (3d) 336 (B.C.S.C.); Re Latham and the Solicitor General (1984), 12 C.C.C. (3d) 10 (F.C.T.D.); Hewitt v. N. P. B., [1984] 2 F.C. 357 (T.D.); and, Re Lowe and the Queen (1983), 35 C.R. (3d) 135 (B.C.S.C.).

³³² MacKay, A.W. "Inmates' Rights: Lost in the Maze of Prison Bureaucracy?" (1988), 11 Dalhousie L. J. 698, 702.

procedures necessary for the grant of parole in contrast to its revocation.

The reaction of the court has been to specifically reject the threshold test by which decisions relating to the initial grant of parole would remain unreviewable or limited some minimum standard of procedure. In Staples v. National Parole Board³³³, Strayer J. commented that he was unable to see any difference between a decision to grant parole and one revoking it with respect to the application of s. 7. If distinctions must be made, they should appear only as differences in the requirements of fundamental justice and not in the initial application of the section. To hold otherwise would be to invoke the threshold test employed in the common law which proved to be relatively unsatisfactory for the determination of rights.

The courts have also rejected the American experience on the application of the due process clause in the Fourteenth Amendment to parole questions. In Greenholtz v. Nebraska³³⁴, the Supreme Court ruled that it would take more than an abstract need or desire for liberty or a unilateral expectation of parole to trigger the full range of due process protection: there must be a legitimate claim or entitlement. Conviction for a crime extinguishes full liberty rights and the expectation created by parole statutes does

³³³ (1985), 13 Admin. L.R. 36 (F.C.T.D.).

³³⁴ 442 U.S. 1 (1979).

not reinstate the right to full due process for the decision to grant or refuse parole. Revocation, on the other hand, does call for due process because it affects an existing right.³³⁵

The Canadian response has been broader: the distinction between "rights" and "privileges" is not a relevant consideration and the inherent flexibility of the term "principles of fundamental justice" will accommodate the variations in procedures called for by the range of decision-making activity carried out in the parole context. Marceau J. in Gallant v. Canada³³⁶, commented:

It seems to me that to appreciate the practical requirements of the audi alteram partem principle, it is wrong to put on the same level all administrative decisions involving inmates in penitentiaries, be they decisions of the National Parole Board respecting the revocation of parole, or decisions of various types of punishments; up to administrative segregation, can be imposed, or decisions, such as the one here involved, of prison authorities approving the transfer of inmates from one institution to another for administrative and good order reasons. Not only do these various decisions differ as to the individual's rights, privileges and interests they may affect, which may lead to different standards of procedural safeguards; they also differ, and even more significantly, as to their purposes and justifications...

Thus, the inchoate interests involved at the stage of the grant of parole, or one of the other temporary release programmes available, will remain at the lower end of the procedural spectrum. This will

³³⁵ A dissenting justice argued that the parole statutes do not create a "mere hope" of parole but that the whole criminal justice system from judges on sentencing to parole boards recognize that parole will be granted in the majority of cases. Inmates are aware of this and it is unrealistic to classify parole as a discretionary privilege decision that does not call for due process.

³³⁶ Supra., n. 38.

likely involve considerations of adequate notice and an opportunity to respond as the essential ingredients of fair play³³⁷.

Although it cannot be doubted that a transfer from one prison to another where freedom may be more severely restricted is a form of deprivation of liberty³³⁸, the cases dealing with inmates generally demonstrate a less generous attitude toward procedural rights. Although an administrative decision, the principles of fundamental justice will apply to allow the individual affected "the opportunity to bring forth information that can help the decision-maker to reach a fair and prudent decision"³³⁹. The specific procedural opportunities available to each individual will depend on the particular case and the nature of the decision to be made.

³³⁷ For example in MacDonald v. N.P.B. (1986), 2 F.T.R. 272 and Grey v. N.P.B. (1986), 2 F.T.R. 232, the court referred to the difference in the degree of liberty at stake in an application for day parole. In MacDonald at p. 282, Muldoon J. stated: "Conceptually and actually the deprivation by revocation of even a conditional liberty which has already been accorded is different from, and more serious than, the discretionary withholding of such a conditional liberty in the first place" and at p.282-3,

As with revocation, the appropriateness of an oral hearing for deciding on full parole is not in question here. Day parole is of a more limited probationary nature; and the kind of decision-making process appropriate for the principles of fundamental justice, for the inmate, and for society in which the inmate seeks to be conditionally liberated, must be viewed through the optic of the statutory scheme.

³³⁸ The "prison within a prison" concept was raised in Martineau v. Matsqui Inst. Disciplinary Bd., [1980] 1 S.C.R. 602.

³³⁹ supra. n. 38, 184.

In some circumstances, transfers from one institution to another or to more secure incarceration could be viewed as vital to the inmate's life and security of the person. In Collin v. Lussier³⁴⁰, the transfer of an inmate to a maximum security institution was held to be an infringement of his security of the person because of the implications for his medical condition and the unavailability of treatment facilities at the new institution. Thus, the inadequate notice and the lack of an opportunity to state his case constituted a breach of the principles of fundamental justice because of the reasonably held fear that his serious medical problems would lead to a risk of death in the more secure facility.

However, according to Professor MacKay, a review of the majority of inmate cases leads to the conclusion that the courts have little sympathy for inmate dissatisfaction with transfers, particularly if there is some misconduct of the inmate involved³⁴¹. In general, prisoners have no right to be confined in a lower security institution³⁴² nor is there an overriding right to an in person hearing for a transfer to a maximum security unit³⁴³. For inmates,

³⁴⁰ (1983), 6 C.R.R. 89 (F.C.T.D.) rev'd in part [1985] 1 F.C. 124 (C.A.).

³⁴¹ Supra n. 41.

³⁴² Bovair v. Regional Transfer Board (1986), 2 F.T.R. 185.

³⁴³ Re Chester and the Queen (1984), 5 Admin L. R. 111 (Ont. H.C.J.) and Mitchell v. Crozier (1986), 1 F.T.R. 138.

the statement by McNair J. in Mitchell v. Crozier sums up the application of the Charter:

The decision to transfer is essentially an administrative matter that should only be interfered with by the courts on the rare occasion when it is readily apparent that the prisoner so transferred has not been dealt with fairly, taking all factors into account. The advent of the Charter may have widened the scope of the factors but it had not changed the administrative nature of the decision to transfer and reclassify an inmate, which more often falls to be determined by the common law precepts of the duty to act fairly.³⁴⁴

The cases in the parole and inmate context supports the spectrum approach adopted under both the common law rules and the section 7 analysis³⁴⁵. The courts remain respectful of the practical limits necessary in the face of unceasing demands for expanded procedural rights in all areas. The range or spectrum approach provides the greatest flexibility while maintaining the courts' inherent power to provide a remedy.

Conclusion

Thus, it is clear that the principles of fundamental justice have not incorporated the notion of a standard right to an oral hearing, even when dealing with imprisonment³⁴⁶. The courts have deliberately adopted the spectrum approach to procedural requirements and relied on the inherent flexibility of the common law approach. The main distinction is, however, the view that

³⁴⁴ Mitchell, ibid., 145.

³⁴⁵ Strayer J. in Camphaug v. Canada (F.C.T.D., Apr. 10/90) concluded that the fairness requirement was the same, whether it arose under the common law or under the principles of fundamental justice in section 7 of the Charter.

³⁴⁶ Duncan, supra n. 54.

there is a wider focus than under the common law and a more generous interpretation of the procedural norms. Yet, overall the courts remain pragmatic and realistic in the consideration of whether oral hearings will be demanded under the principles of fundamental justice. It may be that this is an indication by the courts that an oral hearing in itself is not necessarily the guarantor of the fairness of the ultimate decision or a perhaps a tacit acknowledgment of the need for efficient, economic government, even in decisions affecting the life, liberty and security of the person.

Once an oral hearing is commenced, whether pursuant to the statutory or voluntarily undertaken, certain procedural issues will arise. One issue closely related to the criminal law area is whether the right to counsel in oral hearings is contained in the principles of fundamental justice.

Right to Counsel

This is one of the areas in which courts have taken a more protectionist stance on individual rights than under the common law. Whereas under the natural justice or procedural fairness, there is no general right to counsel³⁴⁷ in any administrative proceeding, courts have been more likely to find that such a right exists pursuant to the principles of fundamental justice.

³⁴⁷ R. v. Smith (1988), 34 Admin L.R. 148 (Ont. H.C.J.).

Natural justice or procedural fairness would call for a right to independent representation in few circumstances. In Fraser v. Mudge³⁴⁸, the House of Lords considered that,

One looks to see what are the broad principles underlying [prison rules]. They are to maintain discipline in prison by proper, swift and speedy decisions whether by the governor or the visitor; and it seems to me that the requirements of natural justice do not make it necessary that a person against whom disciplinary proceedings are pending should as of right be entitled to be represented by solicitors or counsel or both.

Later, in Ex p. Tarrant³⁴⁹, it was conceded that the right to representation was dependent on the circumstances of each individual case.

This pattern has been followed in Canadian law³⁵⁰, particularly evident in the parole or prison disciplinary areas³⁵¹. For parole matters the right to counsel or assistance has been recognized in regulation. In disciplinary matters, the courts prior to the Charter, had been somewhat reluctant to find in the common law a

³⁴⁸ [1975] 1 W.L.R. 1132, 1134 (H.L.).

³⁴⁹ [1985] QB 251 (Div Ct).

³⁵⁰ See Re Men's Clothing Manufacturers Assoc. and Toronto Joint Board (1979), 104 D.L.R. (3d) 441 (Ont. Div.Ct.) and Clark v. United Association of Plumbing and Pipefitters (1988), 87 N.B.R. (2d) 91 (Q.B.) where the right of union members to counsel of their choice was considered to be part of the requirement of procedural fairness.

³⁵¹ For an extensive review of the case law see Weatherston, R. "Penitentiary Disciplinary Hearings and the Right to Counsel" (1988), 4 Admin. L. J. 8.

right to counsel even where the consequences to the individual were quite severe. In Davidson v. Disciplinary Board of Prison for Women³⁵², Cattanach J. held that the common law did not oblige the board to allow legal representation. On the other hand, a Commissioner's Directive prohibiting the assistance of lawyers at disciplinary hearings was held to be ultra vires because it precluded the exercise of discretion by the chairman of the panel with respect to a request for legal assistance. However, he went to comment that assistance would be available in relatively few cases since most disciplinary matters involved only questions of fact.³⁵³

In the context of the Charter, however, a similar request for representation would not be left to an exercise of discretion by the presiding officer but would be a matter of right provided the circumstances indicated a legitimate need for assistance. In a fundamental revision of the common law, the Federal Court of Appeal in Howard v. Stony Mountain Institution³⁵⁴, determined that s. 7 will create a right to counsel not subject to the discretion of the chairperson where the circumstances are such that the opportunity

³⁵² (1981), 61 C.C.C. (2d) 520 (F.C.T.D.).

³⁵³ This reasoning was applied in several other cases including Minott v. Presiding Officer of Stony Mountain Penitentiary, [1982] 1 F.C. 322 (T.D.), Dubeau v. N.P.B., [1981] 2 F.C. 37 (T.D.), Re Blanchard and Disciplinary Board of Millhaven (1982), 69 C.C.C. (2d) 171 (F.C.T.D.) and LaSalle v. Disciplinary Tribunal of Leclerc Inst. (1983), 5 Admin. L.R. 23 (F.C.T.D.)

³⁵⁴ [1985] 2 F.C. 642 (C.A.) appeal quashed [1987] 2 S.C.R. 687.

to present one's case calls for such a right. In this particular case, the risk of losing 267 days of earned remission and the particularly vague charges demanded that the inmate have legal assistance if requested. According to MacGuigan J.A., the Charter introduces a new perspective; while not creating new rights in this area, it does enhance existing ones. After an extensive review of Canadian and American case law he concluded that there is a sliding scale of adequacy which can be defined only in reference to the particular degree of liberty at stake and the particular procedural safeguard in question³⁵⁵. The resolution may involve a balancing of competing interests, here necessity and immediacy versus an individual's liberty. He specifically adopted six criteria outlined in Ex p. Tarrant³⁵⁶ as indicators of the need for representation:

- (1) the seriousness of the charge and the potential penalty;
- (2) whether any points of law are likely to arise;
- (3) the capacity of a particular prisoner to present his own case
- (4) procedural difficulties;
- (5) the need for reasonable speed in adjudication;
- (6) the need for fairness as between prisoners and as between prisoners and prison officers.

He proceeded to explore the right to counsel as a fundamental part of the right to be heard and the consequences for the disciplinary process for these institutions:

It may be that a recognition of the right to counsel would lead inevitably to the introduction of a prosecuting officer, the complete disappearance of any inquisitorial aspect to the process and the full acceptance of an adversarial system. I

³⁵⁵ Ibid., 681.

³⁵⁶ supra. n. 84.

accept this as an accurate estimate of the likely consequences, but not as an argument in terrorem. If it is what fundamental justice requires, it is a step forward rather than a limitation.³⁵⁷

Yet, he refrained from making a right to counsel an absolute one. The existence of the right remains dependent on the facts indicating that an inmate's right to fundamental justice would be infringed by a denial of legal assistance.

The application of Howard in subsequent cases has demonstrated this "fact-bound" approach. In Savard v. Morrison³⁵⁸, Reed J. considered that a disciplinary hearing for a minor offence would not call for the same conclusions in Howard. She was prepared to accept the assessment of the presiding officer of the circumstances involved. In Walker v. Kingston Penitentiary Disciplinary Board³⁵⁹, Strayer J. reviewed the guidelines in Howard and concluded that, although there was a liberty interest at stake in the case because of the potential penalty of dissociation, there was no need to have counsel present. The case was relatively simple, the applicant had access to legal advice in the interim and there was no risk of loss of earned remission as in Howard.

In Mitchell v. Crozier³⁶⁰, McNair J. reaffirmed the principle that forfeiture of earned remission equalled a denial of the right to

³⁵⁷ Ibid., 684.

³⁵⁸ (1986), 3 F.T.R. 1.

³⁵⁹ (1986), 3 F.T.R. 109.

³⁶⁰ supra. n 79.

liberty under s. 7 but that an inmate's wilful misinterpretation of the seriousness of the charges and his subsequent failure to request representation did not constitute grounds for the quashing of a disciplinary decision on the basis of a breach of the principles of fundamental justice.

The concept of adverse consequences was expanded somewhat to allow representation in cases where inmates would be subject to loss of future earned remission³⁶¹, punitive dissociation³⁶² but not necessarily where the inmate was extremely familiar with the disciplinary process and would not require any assistance³⁶³. This latter criteria contrasts with MacGuigan J.A.'s disapproval in Howard of the requirement that the chairperson determine the capacity of the inmate because it involves what amounts to a summary judgment of the inmate before he has been heard.

In his article³⁶⁴, Professor Jackson suggests that inmates should always have the right to counsel and that the cost of legal

³⁶¹ Bailey v. Dinsley (1986), 6 F.T.R. 69 and Tremblay v. Etablissement Laval, [1987] 3 F.C. 73 (T.D.).

³⁶² Therriault v. Comite de Discipline de l'institution du Centre Federal de Formation F.C.T.D., Feb. 18/87.

³⁶³ Kelly v. Joyceville Institution F.C.T.D., May 8/87 and Engen v. Kingston Penitentiary F.C.T.D., July 24/87 where despite serious consequences, it was held that the inmates were competent to handle their own defence.

³⁶⁴ Jackson, M. "The Right to Counsel in Prison Disciplinary Hearings" (1986), 20 U.B.C.L.R. 221, 274-78.

representation should be born by the government³⁶⁵. Following up on the suggestion by MacGuigan J.A. that Crown counsel should present the case for the institution, he posits that the presence of opposing counsel would improve the quality of the hearings and would comply more fully with the imperatives of the Charter. Presumably this would meet with fierce resistance from the officials charged with the maintenance of security in the institutions. However, if the demands of the Charter are to be met on a consistent basis, it may come to the point where counsel or some form of assistance for inmates will be required in nearly every case.

Howard has been considered in contexts other than prison cases. In disciplinary matters or internal investigations with penal sanctions, a right to counsel will be implied where the proceedings:

notwithstanding any characterization of the matter as administrative and internal, [were] serious, the format ... formal and the consequences... significant.³⁶⁶

Fairness to an "accused" even in respect of administrative charges which may affect reputation, livelihood and opportunities for career advancement as well as punitive consequences may call for

³⁶⁵ It has been held that provincial legal aid plans are not required to fund counsel before disciplinary hearings in Landry v. Legal Services Society, B.C.S.C., July 6/85. This has been followed in criminal cases where the accused has raised the right to counsel as including a right to funded counsel (Deutsch v. Law Society Legal Aid Plan (1985), 11 O.A.C. 30 (Div Ct.) and to funded counsel of one's choice (R. v. Rockwood (1989), 49 C.C.C. (3d) 129 (N.S.C.A.)).

³⁶⁶ Cramm v. R.C.M.P. (1987), 80 N.R. 63 (F.C.A.).

a right to counsel³⁶⁷. Further, this may call for the right to have counsel of one's choice³⁶⁸ or a right to "competant counsel"³⁶⁹.

Whether this will extend to the provision of funded counsel is not as likely. In several decisions, courts have concluded that the right to retain counsel and the right to have counsel provided at the state's expense is not the same thing.³⁷⁰ However, in cases not falling within provincial legal aid plans, s. 7 will require funded counsel if the accused cannot pay for a lawyer and representation of the accused by counsel is essential to a fair trial. These will be exceptional cases³⁷¹ and will most likely arise only in matters concerning imprisonment as a penalty.³⁷² Nor, would it appear that a cap on legal aid funding for any particular case infringes the

³⁶⁷ Cramm, ibid., 72; In re Husted, [1981] 2 F.C. 791 (T.D.); Bachinsky v. Sawyer, 43 D.L.R. (3d) 96 (Alta. S.C.); and Joplin v. Chief Constable of Vancouver Police Department (1985), 10 Admin. L.R. 204 (B.C.C.A.).

³⁶⁸ Clark v. Plumbers and Pipefitters Union (1988), 87 N.B.R. (2d) 91 (Q.B.).

³⁶⁹ Mathon v. Canada (1988), 38 Admin.L.R. 193 (F.C.T.D.).

³⁷⁰ Rowbotham v. R. (1988), 25 O.A.C. 321; R. v. McGibbon (1988), 31 O.A.C. 10; R. v. Rockwood *supra* n. 100; R. v. Robinson (1989), 63 D.L.R. (4th) 289 (Alta. C.A.).

³⁷¹ Rowbotham, McGibbon, and Rockwood, ibid.

³⁷² In R. v. James June 6/90, Alta. Q.B., Cavanagh J. considered seven factors in assessing whether the state should be required to pay for legal counsel, including the complexity of the case, the abilities and education level of the accused, the need for assistance of counsel, and the ultimate threat of imprisonment. He concluded that the presence of counsel did not guarantee a fair trial. It is the duty of the judge to hold a fair hearing and to determine whether the absence of counsel jeopardized the accused's right to be fairly tried.

Charter right to counsel under ss. 7 and 11³⁷³, even in the criminal law context. It is not entirely clear what the impact will be in administrative law although it is fairly safe to predict that there will not be a greater right to counsel in these matters where none exist in the criminal law area.

Conclusion

It would appear that where the decision is made to have an oral hearing, the implication is that counsel are necessary to assist the individuals in the proceedings. There is little questioning of this basic proposition in any of the decisions and the assumption remains that counsel are a necessary adjunct to the hearing. This presumes a general right to assistance in most administrative matters and would extend to a right to choose who is to act in that role.

Right to Cross-Examination

Although the right to an oral hearing is often proclaimed to be the strongest protection of individual rights, it is perhaps the right to cross-examine that, as one of the foundations of the adversarial process, provides the greatest assurance of fairness and truth, at least in the unshakable view of the legal profession. As stated by Estey J. in Innisfil v. Vespra³⁷⁴,

³⁷³ R. v. Munroe, N.S.S.C. May 10/90.

³⁷⁴ (1981), 37 N.R. 43, 63 (S.C.C.).

...it must be noted that cross-examination is a vital element of the adversarial system applied and followed in our legal system, including, in many instances, before administrative tribunals since the earliest times. Indeed, the adversarial system, founded on cross-examination and the right to meet the case being made against the litigant, civil or criminal, is the procedural sub-structure upon which the common law itself has been built. That is not to say that because our court system is founded upon these institutions and procedures that administrative tribunals must apply the same techniques. Indeed, there are many tribunals in the modern community which do not follow the traditional adversarial road. On the other hand, where the rights of the citizen are involved and the statute affords him the right to a full hearing, including a hearing of his demonstration of his rights, one would expect to find the clearest statutory curtailment of the citizen's right to meet the case made against him by cross-examination.

Yet, how much value is this "right" in administrative proceedings where the members of the hearing panel are entitled to question witnesses, employ their own expertise in assessing evidence or call upon staff research to aid in the search for the "truth"? Because the values being served by the processes are not identical, there is not necessarily the same immediate connection between the right to cross-examination and the interests involved in administrative proceedings. Administrative matters often embody the concern to incorporate public policy views as well as the interests of any individuals concerned. The adversarial approach may not always be compatible even where oral hearings are the norm.

In attempt to balance the interests of expediency and the rights of the individuals involved, legislatures have incorporated specific provisions on the right to cross-examination. The

Statutory Powers Procedure Act³⁷⁵ of Ontario and the Administrative Procedures Act³⁷⁶ of Alberta each have specific requirements for cross-examination during a hearing held under the terms of those Acts.

Under the common law, there is little doubt that an unassailable right to cross-examination is not available in the absence of statutory authorization. In Yue v. U.S.A.³⁷⁷, White J. refused applications for habeus corpus after extradition hearings. The sole ground of argument was that the affidavit procedure employed deprived the applicant of his right to cross-examine the deponents. It was clear from a review of the case law prior to the Charter that there was no independent right to cross-examination under the

³⁷⁵ R.S.O. 1980, c. 484, s. 10(c):
A party to proceedings may at a hearing ,
(a) be represented by counsel or an agent;
(b) call and examine witnesses and present his arguments and submissions;
(c) conduct cross-examination of witnesses at a hearing reasonably required for a full and fair disclosure of the facts in relation to which they have given evidence.

³⁷⁶ R.S.A. 1980, c. A-2, s. 5:
When an authority has informed a party of facts or allegations and that party
(a) is entitled under section 4 to contradict or explain them, but
(b) will not have a fair opportunity of doing so without cross-examination of the person making the statements that constituted the facts or allegations,
the authority shall afford the party an opportunity of cross-examination in the presence of the authority or of a person authorized to hear or take evidence for the authority.

³⁷⁷ (1983), 7 Admin L. R. 109 (Ont. H.C.J.).

Extradition Act³⁷⁸ or s. 2 (e) of the Canadian Bill of Rights³⁷⁹. This historical survey enabled the court to conclude that there is no inherent right to cross-examine deponents in a procedure that is not a final adjudication, is not a binding decision determining culpability, title in property, or any other final determination of remedy.³⁸⁰

This conclusion is apposite in other investigatory or non-final proceedings. In Brouillette v. Canadian Human Rights Commission³⁸¹, an investigation under the Canadian Human Rights Act was not considered so exceptional as to make procedural measures other than the basics necessary to achieve justice³⁸². Thus, an open investigation with formal cross-examination was deemed to be unnecessary considering the nature of the powers of the Commission and the investigator appointed under the Act, and the fact that the applicant had been afforded an opportunity to make comments on the investigator's report prior to the decision of the Commission to reject his complaint.

³⁷⁸ Re Insull, [1934] O.W.N. 194 (C.A.).

³⁷⁹ Re Wisconsin and Armstrong (1973), 10 C.C.C. (2d) 271 (F.C.A.) leave to appeal refused 32 D.L.R. (3d) 265n (S.C.C.).

³⁸⁰ Ibid., 117.

³⁸¹ (1986), 86 N.R. 393 (F.C.A.).

³⁸² Ibid., 394.

The same court later affirmed its position in Labelle v. the Queen³⁸³ where the applicant argued that she should have been given the opportunity to cross-examine the investigator appointed under the CHRA and the persons interviewed by the investigator before the Commission dismissed her complaint. Because there were no issues of credibility and no dispute over the facts, cross-examination was deemed to be unnecessary under the rules of natural justice.

The Supreme Court of Canada upheld the notion that an oral hearing, and thus, presumably cross-examination, is not necessary in these circumstances as long as the substance of the case is disclosed and the parties have had an opportunity to make submissions before the decision is made.³⁸⁴

As a general proposition, cross-examination in investigatory procedures would be required by natural justice only where the it was necessary to enable the person to meet the case against him³⁸⁵.

Where the accuracy of the facts and credibility are in issue, particularly in penal situations, it will be clearer that a right to cross-examine exists although consistent with the tenor of the hearing or investigation; a right to cross-examine will not

³⁸³ (1987), 25 Admin L. R. 10 (F.C.A.).

³⁸⁴ Radulesco v. CHRC, [1984] 2 S.C.R. 407.

³⁸⁵ Kuntz v. College of Physicians and Surgeons of British Columbia (1987), 24 Admin L.R. 187 (B.C.S.C.) and Semchuk v. Board of Education, Regina (1986), 26 Admin L. R. 88 (Sask. Q.B.).

displace the informal nature of the process. Thus, a prisoner will be permitted to question the persons making allegations against him where he would otherwise be unable to answer the case against him.³⁸⁶

The Supreme Court of Canada reaffirmed this principle in Re Irvine and Restrictive Trade Practices Commission³⁸⁷ where one of the issues was what procedural rights attended the right to be represented by counsel. The applicants demanded, inter alia, the right to cross-examine other witnesses. Estey J. extensively reviewed the history of the right to counsel and the participatory rights attached thereto. Before the doctrine of procedural fairness, it was clear that the threshold test of the administrative/quasi-judicial nature of the proceedings would be determinative of the right to cross-examine other witnesses. He referred to St. John v. Fraser³⁸⁸ and the following remarks on the right to cross-examine in an investigatory process:

Unless by virtue of other provisions of the statute it can properly be held that the investigation was a judicial or quasi-judicial proceeding and that the opportunity of cross-examining any witness examined by the investigator on matters affecting the appellants' status or reputation was such an essential requirement in the conduct of the investigation as went to the investigator's jurisdiction to proceed with it, section 29 clearly constitutes an insuperable barrier to the appellants' claim.

³⁸⁶ R. v. Desroches (1983), 5 Admin. L.R. 1 (Ont. Div. Ct).

³⁸⁷ [1987] 1 SCR 181, 210.

³⁸⁸ [1935] S.C.R. 441.

The development of the doctrine of procedural fairness would lead the courts to review the procedure "in its setting and ask the question whether it operates unfairly to ...the point where the courts must supply the legislative omission".³⁸⁹ The same proposition appears in English and American law, even in the latter where the right to be represented by counsel is included in the Administrative Procedure Act³⁹⁰.

There is no definition of the right to be represented by counsel and the common law does not presuppose that in every circumstance such a right will incorporate a right to cross-examine every other witness heard by the tribunal. Estey J. concluded,

Fairness is a flexible concept and its content varies depending on the nature of the inquiry and the consequences for the individuals involved. The characteristics of the proceeding, the nature of the resulting report and its circulation to the public, and the penalties which will result when events succeeding the report are put in train will determine the right to counsel and, where counsel is authorized by statute without further directive, the role of such counsel.³⁹¹

Because all the rulings of the Hearing Officer being challenged in this case were made before the Charter came into force, oral arguments under s. 7 were not presented to the Court.

³⁸⁹ Wiseman v. Borneman, [1971] A.C. 297, 317.

³⁹⁰ 5 U.S.C. s. 555.

³⁹¹ Irvine, supra n. 122, p. 231.

In a subsequent case on virtually the same facts, the Federal Court, Trial Division applied the reasoning of the Irvine case to the Charter arguments. Quite simply, Jerome J. determined that,

the proceedings here determine no rights, impose no liabilities, are conducted in private and at most lead to a statement of evidence to the Commission, puts the s. 7 issue to rest. Fundamental justice does not require the right to counsel appropriate to a judicial proceeding.³⁹²

The Court of Appeal in its review of the case³⁹³ indicated that while it might not agree with this characterization of the proceedings, it would also hold that the procedure prescribed by the legislation did not offend the principles of fundamental justice in the Charter.³⁹⁴

Section 7 of the Charter does not appear to have changed the state of the law in any significant fashion with respect to the right to cross-examination. In this area, the principles of fundamental justice remain consistent with the common law development of the rules of natural justice, procedural fairness and the jurisprudence under the Canadian Bill of Rights. The underlying rationale may be that cross-examination is not an essential feature to most of the proceedings in administrative law because of the multiple interests involved in most processes and the fact that administrative decision-makers are often appointed because of their

³⁹² Stelco v. A.G. Canada, [1988] 1 F.C. 510, 520 (T.D.)

³⁹³ F.C.A. Oct. 27/87.

³⁹⁴ See also, Samuel, Son & Co. v. Restrictive Trade Practices Commission (1987), 48 D.L.R. (4th) 77, 87 (F.C.T.D.).

expertise in an area while judges are expected to rely only on the material on the record to come to a decision. This is rather simplistic explanation of the distinction but it serves to emphasize one fundamental difference that is at least tacitly recognized by courts in determining procedural rights in administrative law cases.

Right to Disclosure

There is very little value in any procedure, whether an oral hearing or written submission, where the individual is unaware of the information that is required, the submissions made by others in opposition, or the information brought to the decision-makers attention by any other means that will form the grounds for the decision. An essential ingredient of the audi alteram partem rule is the need to know the case to be met.

This has been a long standing issue in administrative law under natural justice and procedural fairness. In Re Pergamon Press³⁹⁵, Lord Denning commented

...I am clearly of the opinion that the inspectors must act fairly...before they condemn or criticize a man, they must give him a fair opportunity for correcting or contradicting what is said against him. They need not quote chapter and verse. An outline of the charge will usually suffice.

³⁹⁵ [1971] 1 Ch. 388.

Later in Selvarajan v. Race Relations Board³⁹⁶, Lord Denning outlined the often quoted definition of disclosure,

The fundamental rule is that, if a person may be subjected to pains or penalties, or be exposed to prosecution or proceedings, or deprived of remedies or redress, or in some such way adversely affected by the investigation and report, then he should be told the case made against him and be afforded an fair opportunity of answering it.

Under the Charter, this issue has arisen in a variety of circumstances. Predictably, the courts have relied on the spectrum approach to determine the degree of disclosure necessary for any particular administrative process. Basically, the extent of disclosure required by natural justice will be weighed against the prejudice to the scheme of the legislation concerned³⁹⁷ and the impact on the individual³⁹⁸. A similar approach has been adopted under s. 7.

This issue is particularly problematic in the parole and inmate context and there has developed a long line of cases dealing with the delicate balance between the applicant's right to know the case

³⁹⁶ [1976] 1 All E.R. 12.

³⁹⁷ Wade, E. Administrative Law (5th ed.), 481-2. See also Re Toronto Independent Dance Enterprise and Canada Council (1989), 60 D.L.R. (4th) 503 (F.C.T.D.) and Syntex Pharmaceuticals International v. Medichem Inc. (1990), 105 N.R. 49 (F.C.A.).

³⁹⁸ Johnstone v. Minister of Veterans Affairs, F.C.A. Apr. 9/90 where the court expressed amazement that a decision could be made without giving the individual any notice of the case existing against her. Marceau J.A. considered this to be a textbook example of how, in practice, an administrative process may go awry and why procedural safeguards were developed by the courts to protect citizens from conscious or unconscious abuse by public authorities.

to be met and the right of the state to protect informants and information.

In Re Cadieux and Director of Mountain Institution³⁹⁹, Reed J. deemed it a cardinal principle that the person whose liberty is being decided should have the right to know the case made against him and an opportunity to respond. The common law rules of fairness do not always require the full disclosure of all information held by the decision-making body and the question facing the court was whether s. 7 would engage a more extensive right to full disclosure. She responded to the arguments on the relationship between the common law and s. 7:

I would not pretend to answer the general question of whether s. 7 demands a higher standard of conduct with respect to administrative decision-making bodies to which it applies than do the rules of fairness. In some instances it may do so....In reading the jurisprudence in this area one is struck time and time again by the fact that nothing more seems to be meant by the distinction between fairness and natural justice than an indication that the rules of natural justice differ in different circumstances.

In applying s. 7 protections to inmates, she considered that the court has to be conscious of the fact that these are not citizens entitled to absolute liberty but only to a conditional liberty granted as a matter of discretion by the parole boards. Thus, it should not be surprising that the rules of fairness will not necessarily be those applied to a person entitled to absolute liberty who is charged with a criminal offence⁴⁰⁰

³⁹⁹ (1984), 13 C.C.C. (3d) 330 (F.C.T.D.).

⁴⁰⁰ Ibid., 345.

She concluded, however, that it would be rare that an inmate could not be told at least the "gist" of the reasons against him so as to enable him to meet the essentials of the case against him. In the prison context, however, it will be necessary to protect sources of information for the protection of the safety of the informant and the information collection methods. The balance cannot be drawn to the total exclusion of the interests and rights of the inmates but neither can they expect to be treated to the same procedural privileges that will be accorded to citizens not subject to incarceration.

Following Cadieux, Re Latham and Solicitor General of Canada⁴⁰¹, Strayer J., maintained that fundamental justice would require procedures commensurate with the interests affected. In the revocation of day parole, it would not be necessary to employ full natural justice or a judicialized process although fairness would indicate that the inmate receive at least an outline of the allegations made against him. Later in Staples⁴⁰², he ruled that the applicant must be made aware of the substance of the adverse material in order to be in a position to respond to the charges.

The deep division over the degree of disclosure necessary to protect the rights of the individual is demonstrated in the case

⁴⁰¹ (1984), 12 C.C.C.(3d) 10 (F.C.T.D.).

⁴⁰² Supra. n. 68.

of Ross v. Kent Institution⁴⁰³. The Trial Court found that the process was deficient and that the inmate did not have the information necessary to permit him a rational and full defence.

The court said:

Fundamental justice demands that the inmate be sure that he is privy to all information available to the Board. Denial of information is denial of the right to be heard. Without the information the hearing ostensibly accorded the accused under the amendments to the Parole Act is illusory.⁴⁰⁴

The Court of Appeal modified this approach and determined that while fundamental justice requires the inmate know the case against him, it is not essential that he know the sources of all the information before the board provided he is informed of the substance of that information.⁴⁰⁵

Nitikman J. in Wilson v. N.P.B.⁴⁰⁶ proposed that the only exceptions to the right to full disclosure of information are the need to protect an informant's identity and in respect of information originally obtained on a promise of confidentiality where the informant's identity would automatically become known. This would impose a positive duty on the part of the decision maker to exercise discretion to ensure that all claims for confidentiality were carefully assessed and only those legitimately necessary for the protection of the safety of informants were allowed. Where the

⁴⁰³ (1987), 25 Admin L.R. 67 (B.C.C.A.).

⁴⁰⁴ [1987] B.C.W.L.D. 467.

⁴⁰⁵ (1987), 12 B.C.L.R. (2d) 145 (C.A.).

⁴⁰⁶ [1985] 3 W.W.R. 333 (F.C.T.D.).

evidence shows that the board took all precautions and seriously considered the issue, the court will likely defer to the boards' interpretation of public interest⁴⁰⁷.

Even without specific evidence of serious review by the hearing panel, the court may defer to the board's assessment of the interests of security. In Bull v. Prison for Women⁴⁰⁸, Rouleau J. took judicial notice of the fact that,

Often information contained within an inmate's file is of a confidential nature, the disclosure of which would endanger the security of the institution as well as the source of the information. Correctional officers who make negative comments or disclose adverse information concerning the inmate could endanger themselves or others were such comments to be made in the presence of inmates who had a history of violence for which they were serving lengthy sentences.⁴⁰⁹

However, inmates must be advised of the substance of information disclosed in their absence and be afforded the opportunity to respond to or rebut any of the information which may influence the panel.

The court in Gallant⁴¹⁰, considered the differing requirements under s. 7 and the common law. Pratte J.A. found that the decision to provide only very general information to the inmate which did not give him any real notice of the allegations against him was

⁴⁰⁷ Rice v. N.P.B., F.C.T.D. July 2/85.

⁴⁰⁸ (1986), 25 Admin. L.R. 229 (F.C.T.D.).

⁴⁰⁹ Ibid., 233.

⁴¹⁰ supra. n 38. Applied in Camphaug v. Canada, F.C.T.D. Apr. 10/90.

defensible on the grounds that there was a serious risk that informants would be endangered by the disclosure of more specific information. He formed this opinion on the basis that the rules of procedural fairness which would otherwise require full disclosure were not binding where "the application of those rules would endanger the lives of other inmates." He then went on to determine that the principles of fundamental justice in s. 7 would not be satisfied by the limited disclosure but that the exercise of such discretionary authority would be saved under s. 1. He considered that the "rules of substantial justice" required by s. 7 were not as flexible as the procedural rules and were infringed by the fact that the inmate was not given a real opportunity to answer the allegations against him.

A more logical approach was put forward by Marceau J.A. who concurred in the result. He saw the issue more in terms of whether the rule of confidentiality could affect the content of the principles of procedural fairness rather than whether the rule could outright exempt the application of the principles. He expressed difficulty with the notion that the audi alteram partem principle could ever be completely disregarded except in cases of extreme urgency and for a short period of time⁴¹¹.

In this line, he proposed that the result would be the same under the principles of fundamental justice:

⁴¹¹ As in the case of Cardinal v. Kent Institution, [1985] 2 S.C.R. 643.

The rationale behind the audi alteram partem principle, which simply requires the participation, in the making of a decision, of the individual whose rights or interests may be affected, is of course that the individual may always be in a position to bring forth information, in the form of facts or arguments, that could help the decision-maker reach a fair and prudent conclusion. It has long been recognized to be only rational as well as practical that the extent and character of such a participation should depend on the circumstances of the case and the nature of the decision to be made. This view of the manner in which the principle must be given effect in practice ought to be the same whether it comes into play through the jurisprudential duty to act fairly or the common law requirements of natural justice, or as one of the prime constituents of the concept of fundamental justice, referred to in s. 7 of the Canadian Charter of Rights and Freedoms. The principle is obviously the same everywhere it applies.

On this basis, because the situation here dealt with the question of whether there was a valid concern to warrant a transfer, the degree of procedural protection was less than if there was an offence for which a determination of guilt must be made. Thus, the limited disclosure was upheld⁴¹².

The internal logic of Marceau J.'s approach is much more appealing than that of Pratte J. The latter analysis rigidly differentiates between the principles of fundamental justice and the common law principles of fairness. The former would accord with other commonly held views on the principles of fundamental justice and other decisions on disclosure. One such decision is from the Ontario High Court of Justice in Ontario v. Grady⁴¹³. There the

⁴¹² Desjardins J. dissented on the grounds that there was not sufficient disclosure.

⁴¹³ (1988), 34 C.R.R. 289 (Ont. H.C.J.).

court confirmed three basic principles that set out the parameters for the analysis of adequate disclosure:

- there is no point distinguishing between the duty of fairness at common law and any such duty arising under s. 7 of the Charter. It is sufficient to say that "fundamental justice" includes the duty to be fair;
- the content of the duty to be fair varies with the context in which the duty arises; and,
- at a bare minimum, fairness requires that the individual, in order to adequately state his case, know the case which must be met.⁴¹⁴

It is contextual factors that contributes the most to the range of limits deemed appropriate in each case. Courts remain aware of the practical problems facing administrators and, except in egregious errors, do not generally take the attitude that disclosure of information cannot be without some limitation.

This deference may not be extended to cases where the decision maker in question withholds information on the grounds that it may be, in fact, harmful to the applicant. In situations involving Lieutenant-Governor's warrants or transfers made thereunder, the court recognizes that the duty to disclose may be subject to an overriding discretion to limit access where disclosure may cause harm to the patient or others⁴¹⁵. Despite this exception, where the

⁴¹⁴ Ibid., pp. 314-15.

⁴¹⁵ Re Egglestone and Mousseau and Advisory Review Board (1983), 6 C.C.C. (3d) 1, 11 (Ont. Div. Ct.).

"main focus" of the Board's concern is not disclosed, there may be an infringement of fairness⁴¹⁶

Disclosure also encompasses the question of whether an individual has the right to attendance throughout a hearing. The general rule is that persons affected by the decision must be in attendance throughout the hearing and that no evidence or testimony be admitted in his or her absence, subject to the legitimate demands of confidentiality, security and public interest.

This has arisen frequently in the prison/parole context. It has been held that the Parole Board cannot conduct some aspect of the hearing ex parte or discuss the decision with other parties, such as parole or Corrections officials, in the absence of the applicant.⁴¹⁷

Similarly, where not all the members of the decision-making body are present throughout the hearing, there may be a breach of the principles of fundamental justice. In several parole cases where the legislation permitted file hearings by some members of a panel and oral hearings by others in relation to the same matter, the

⁴¹⁶ A.G. Ontario v. Grady *supra* n. 148.

⁴¹⁷ Hewitt v. N.P.B. (1984), 5 Admin L.R. 100 (F.C.T.D.); Re Martens and the Queen (1983), 8 C.C.C.(3d) 336 (B.C.S.C.); and Re Lowe and the Queen (1983), 149 D.L.R. (3d) 732 (B.C.S.C.). However, in the immigration context, where counsel appeared on behalf of the applicants they cannot be heard to say that their right to be present was infringed where they chose not to appear (A.G. Canada v. Sorkun (1988), 34 Admin L.R. 131 (F.C.T.D.)).

courts have not been sympathetic to the administrative convenience of this form of division of labour. Even where hearings are held in the absence of a statutory requirement, boards will be held to the procedural standards requiring all deciding members to be present to hear the case.⁴¹⁸

The absence of a panel member for a few minutes during the hearing while counsel for the applicant continued with cross-examination was not considered a sufficiently serious breach of the rules of natural justice to warrant overturning a decision of the Environmental Appeal Board in Islands Protection Society and British Columbia⁴¹⁹. Similarly, procedures of a disciplinary committee which permitted a lawyer under investigation to meet with only one member of the three person committee were held to not infringe the lawyer's constitutional rights when a formal complaint was later issued. The court considered that this procedure was sufficient to meet the obligation of permitting the lawyer to be informed of the charge against him and to address the committee. This was based mainly on the conclusion that the committee's only function was to recommend rather than decide and therefore, the principles of fundamental justice or the duty to act fairly were limited.⁴²⁰ However, in CTV v. C.R.T.C.⁴²¹, the Federal Court of

⁴¹⁸ See O'Brien v. N.P.B. (1984), 12 Admin L.R. 24 (F.C.T.D.); Browning v. N.P.B. (1984), 43 C.R. (3d) 31 (F.C.T.D.); R.v. Mason (1983), 5 Admin. L.R. 16 (Ont. H.C.J.); and Ford v. N.P.B. (1984), 43 C.R. (3d) 26 (F.C.T.D.).

⁴¹⁹ (1988), 34 Admin L.R. 51 (B.C.S.C.).

⁴²⁰ As in Hawrish v. Cundall, Sask. Q.B., May 31/89.

Appeal found it extraordinary, although irrelevant to the ultimate determination of the appeal, that some panel members should not have been present throughout the entire hearing.

The issues of disclosure of information and the right to attendance throughout the proceedings were raised in the recent case of Chiarelli v. Canada.⁴²² The Supreme Court of Canada will hear an appeal on the issue of the constitutionality of in camera proceedings held pursuant to s. 48(2) of the Canadian Security Intelligence Service Act⁴²³ (CSIS Act) and the Immigration Act⁴²⁴. The issue before the Federal Court of Appeal was whether the procedures of the Security Intelligence Review Committee (SIRC) which permitted an in camera hearing as part of the investigation during deportation proceedings. The impugned procedures were outlined in the CSIS Act and specified that no-one is entitled as of right to be present during, to have access to or to comment on representations made to the committee by any other person⁴²⁵. The Committee prepares a summary of the evidence received in camera and releases this to the interested parties who may then make submissions on the summary.

⁴²¹ (1980), 34 N.R. 50, 70 (F.C.A.).

⁴²² F.C.A., Feb. 23/90.

⁴²³ R.S.C. 1985, c. C-23.

⁴²⁴ R.S.C. 1985, c. I-2, ss. 81 and 82.

⁴²⁵ s. 48(2).

The Court of Appeal was unanimous in concluding that the effect of the closed hearing was to deny the appellant his right to a decision made in accordance with the principles of fundamental justice:

In my opinion, it is a requirement of fundamental justice that no decision be made determining the rights of a person without giving that person a meaningful opportunity to be heard. In this case, the Review Committee had to determine whether the information in its possession disclosed reasonable grounds to believe that the appellant was a person described in subparagraph 19(1)(d)(ii) of the Immigration Act, 1976. In order to get a meaningful opportunity to be heard, the appellant had to know not only what was the information before the Committee (in order to be able to contradict it), but also what were the sources of the information (in order to be able to challenge their reliability). This, the appellant was not given an opportunity to know and, for that reason, I am of the opinion that the procedure followed in this case did not meet the requirements of fundamental justice.⁴²⁶

The impact of this decision will be felt across government.⁴²⁷ The SIRC review is employed in at least three separate statutory schemes⁴²⁸ and is similar to many other statutory restrictions on

⁴²⁶ supra n. 157, 17, per Pratte J.A.

⁴²⁷ Perhaps more so after the decision in Thomson v. Canada, F.C.A. May 17/90 where the Court of Appeal upheld its earlier view [(1988) 3 F.C. 108] that the "recommendations" of the SIRC were binding on the government.

⁴²⁸ See Immigration Act, supra; the Citizenship Act, R.S.C. 1985, c. C-29, s. 19 (where the Secretary of State forms the opinion that there are reasonable grounds to believe an individual would be a threat to Canada or engage in organized crime, the Minister's decision is reviewable by the Committee); and CSIS Act, s. 52(2) (reviews of denials of security clearances in respect of public service employment). For a more detailed explanation of the procedures see Rankin, "The SIRC: Reconciling National Security with Procedural Fairness", 3 CJALP 173.

disclosure of information⁴²⁹. The case raises the serious question of what degree of protection of the public interest can be accorded without infringing an individual's s. 7 interests.

Clearly, disclosure of relevant information plays an integral part in the overall fairness of any process, whether by oral hearing or written submission. Certain limitations may be tolerated under the Charter provided there is evidence that a careful consideration was given to the decision to withhold facts or evidence from the person whose life, liberty or security of the person is at risk. However, until the Supreme Court of Canada rules on Chiarelli, the exact nature of the balancing between the public interest and the rights of the individual that will be required is unknown.⁴³⁰

Right to Reasons

⁴²⁹ Examples include the Privacy Act, R.S.C. 1985, c. P-21; Access to Information Act, R.S.C. 1985, c. A-1; and, Canada Evidence Act, R.S.C. 1985, c. C-5.

⁴³⁰ This Court has recently affirmed that the balance of interests involved is an important factor to take into account in determining the principles of fundamental justice. If a similar approach is adopted in this context, there may be some greater scope for defending the provisions although the rationale may be considered weak. It is submitted that national security may be an overriding interest that will allow a court to accept certain limitations on disclosure as would be serious threats to the safety of other individuals. However, this case was concerned with the issue of criminal behaviour, not a threat to national security, and the restrictions may be considered overbroad.

The rules of natural justice have not incorporated an obligation to give reasons for decisions⁴³¹ except in a few circumstances where reasons would be necessary to permit a right to appeal⁴³², a statutory right to make representations on a fixed record⁴³³ or after the exercise of discretion in the matter of a penalty⁴³⁴. The traditional considerations of quasi-judicial and administrative functions does not play a major role here because even at the judicial level, natural justice does not ordinarily compel the disclosure of the reasons for a decision⁴³⁵.

Yet on a theoretical level, a requirement for reasons is a compelling notion for the optimum functioning of the procedural

⁴³¹ Pure Spring Co. Ltd. v. Minister of National Revenue, [1947] 1 D.L.R. 501 (Exch. Ct.) and Canadian Arsenals Ltd. v. CLRB, [1979] 2 FC 393 (C.A.).

⁴³² Re R.D.R. Construction and Rent Review Commission (1982), 139 D.L.R. (3d) 168 (N.S.C.A.); Dome Petroleum Ltd. v. Public Utilities Board, [1979] 1 S.C.R. 684; 567687 Saskatchewan Ltd. v. Prince Albert (1987), 60 Sask. R. 42 (Q.B.), and Re Yarmouth Housing Ltd. and Rent Review Commission (1982), 139 D.L.R. (3d) 544 (N.S.C.A.).

⁴³³ Singh v. MEI, [1985] 1 S.C.R. 177.

⁴³⁴ Sask. Teachers' Federation v. DeMoissac (1973), 38 D.L.R. (3d) 296 (Sask. C.A.).

⁴³⁵ DeSmith, Judicial Review of Administrative Action (4th) at 148-9: There is no general rule of English law that reasons must be given for administrative (or indeed judicial) decisions. See also, McDonald v. the Queen, [1977] 2 S.C.R. 665 and Taggart, M. "Should Canadian Judges be Legally Required to Give Reasoned Decisions in Civil Cases?" (1983), 33 U. of T.L.J. 1.

fairness model. In 1932, the Donoughmore Committee Report⁴³⁶ considered that:

It may well be argued that there is a third principle of natural justice, namely that a party is entitled to know the reason for the decision, be it judicial or quasi-judicial.

This concept may lend itself more easily to the adjudicative end of the administrative law spectrum but there remains significant arguments for the duty to extend to policy decisions and other non-adjudicative matters. K.C. Davis suggested that:

Courts should take into account that findings and reasons are usually two of the four elements in a bundle of protections against arbitrariness - open standards, open findings, open reasons, and open precedents.

All four would be apt for any type of bureaucratic decision, if only to serve the value of openness in governmental decision making.

Most statutory codes of procedure include at least an obligation to provide reasons on request by parties if not a mandatory duty to do so in all cases.⁴³⁷ Many agencies' enabling acts also contain

⁴³⁶ the Committee on Ministers' Powers, supra Chapter 1, n. 13, p. 80.

⁴³⁷ Statutory Powers Procedures Act, R.S.O. 1980, c. 484, s. 17:
A tribunal shall give its final decision and order, if any, in any proceedings in writing and shall give reasons in writing therefor if requested by a party;
the Administrative Procedures Act R.S.A. 1980, c. A-2, s. 7:
When an authority exercises a statutory power so as to adversely affect the rights of a party, the authority shall furnish to each party a written statement of its decision setting out
(a) the findings of fact on which it based its decision, and,

provisions for the duty of giving reasons for decisions⁴³⁸. This is necessary in view of the absence of any common law duty: where the common law has no basic requirement for reasons, the statute must supply the obligation⁴³⁹

Generally, courts will not interfere where there is no statutory obligation to provide reasons and will not imply a right to explanation of a tribunal's preference of certain evidence⁴⁴⁰ or the interpretation of evidence⁴⁴¹.

In some cases, however, courts have employed various techniques to imply a right to reasons where none would otherwise exist under the

(b) the reasons for the decision;
and also Australia's Administrative Decisions (Judicial Review) Act, 1977, c. 59, s. 13(1); Victoria's Administrative Law Act, 1978, c. 8; Great Britain's Tribunals and Inquiries Act (1971), U.K. c. 62, s. 12(1); and, the American Administrative Procedures Act, 5 U.S.C., s. 555(e).

⁴³⁸ For example, the Canadian Human Rights Commission is required to give reasons for decisions in s. 42(1) of the Canadian Human Rights Act, R.S.C. 1985, c. H-6.

⁴³⁹ Northwestern Utilities Ltd. v. Edmonton, [1979] 1 S.C.R. 684.

⁴⁴⁰ Larivière v. Milhaven Institution (1986), 7 F.T.R. 289.

⁴⁴¹ Anand v. Provincial Medical Board of Nova Scotia (1981), 49 N.S.R. (2d) 490 (S.C.T.D.); Bidulka v. Canada (1987), 76 N.R. 375 (F.C.A.). Also Regina v. Secretary of State for Trade and Industry, ex p. Lonrho, [1989] 1 W.L.R. 525 (H.L.) concluding that the absence of reasons for a decision where there is no duty to give them cannot provide any support for the suggested irrationality of the decision. The only other significance of the absence of reasons is that if all other known facts and circumstances appear to point overwhelmingly in favour of a different decision, the decision-maker, who has given no reasons, cannot complain if the court draws the inference that he had no rational reason for his decision.

common law principles. The most effective is to view the failure to provide reasons as part of an overall failure to adequately disclose adverse information to the party such that it infringed the rules of audi alteram partem⁴⁴². This would permit the court to review cases where there was no right to appeal but where:

the procedure followed by the decision-making body includes an absence of notice to the applicant of the allegations of fact, policy concerns or other circumstances that the body may propose to consider, and an absence of an opportunity to meet such allegations or comment on those concerns or circumstances, whether at a hearing or meeting otherwise, the refusal to give reasons for the decision adverse to the applicant denudes the procedure of the minimum of fairness which the body should be expected to display.⁴⁴³

The Supreme Court relied on this approach in Cardinal and Oswald v. Kent Institution⁴⁴⁴ to find that the duty of fairness included the duty to give reasons for a decision where the individuals affected were not, in effect, accorded an opportunity to be heard. The decision in this case concerned a Penitentiary Director deciding to continue administrative segregation of prisoners despite the recommendation to the contrary from a Segregation Review Board. While the Court held that the original decision to segregate the inmates could not be impugned because of the emergency nature of the decision, the statutorily mandated review

⁴⁴² See Nicholson v. Haldimand-Norfolk (1978), 23 N.R. 410. Also, Demaria v. Regional Classification Board (1986), 69 N.R. 135 (F.C.A.).

⁴⁴³ Hutfield v. Fort Saskatchewan General Hospital (1986), 24 Admin. L.R. 250, 270-1 (Alta. Q.B.) affd (1988) 89 A.R. 274 (C.A.). See also Floris v. Director of Livestock Services (1986), 76 N.S.R. (2d) 320 (N.S.S.C.T.D.).

⁴⁴⁴ (1985), 63 N.R. 353, 359.

of the matter should include a reference to the reasons for the decision and the ability of the inmates to address the Director's concerns⁴⁴⁵. The prisoners had no other means of establishing the case to be met in the review of the segregation order: all information had to come from the Director.

On the other hand, where it is clear that the board disclosed all relevant information and the complainant had every opportunity to be heard, an obligation to provide formal reasons would not be a requirement under the doctrine of procedural fairness⁴⁴⁶.

Thus it would appear that the right to reasons may not be an independent value. There is clear relationship with the concept of adequate disclosure and the right to be heard where defects in these can be proven by the failure to provide adequate or rationale reasons for the decision.

Where reasons are offered, it would appear that they should comply with certain standards of adequacy⁴⁴⁷. However, there is very little judicial consensus on this point. For some courts little

⁴⁴⁵ Ibid., 359. Also, Pruneau v. Goulem (1988), 23 F.T.R. 19 where the Pinard J. explained that the duty to act fairly simply required that prior to taking the decision it be ensured that the applicant was clearly informed of the reasons for the recommendation and that he have an opportunity to express his reasons in opposition.

⁴⁴⁶ Knight v. Bd of Education of Indian Head School Div. No. 19 (1990), 106 N.R. 17 (SCC).

⁴⁴⁷ Blanchard v. Control Data Canada (1985), 14 D.L.R. (4th) 289 (S.C.C.) per Lamer J.

more than an assurance that all relevant considerations were addressed⁴⁴⁸ will be necessary. Where needed for a decision to undertake an appeal, the reasons must be "proper, adequate and intelligible in order to permit the person concerned to assess whether there are grounds of appeal"⁴⁴⁹. It may not be enough to recite the fact that evidence and arguments led by the parties have been considered⁴⁵⁰ but it may also not be necessary to divulge a "full and complete disclosure of all its reasons"⁴⁵¹. There should be some indication of the reasoning process, indicating that the decision maker is responding to the arguments raised in the proceedings⁴⁵² but perhaps not to the point of "making a explicit

⁴⁴⁸ Manlangit v. M.E.I. (1987), 78 N.R. 1, 5 (F.C.A.) referring to Boulis v. Minister of Manpower and Immigration, [1974] S.C.R. 875, 885 stating that "reasons of this kind are not to be read microscopically; it is enough if they show a grasp of the issues that are raised...and of the evidence addressed to them, without detailed references.". Also, in Kindler v. AG Canada, [1987] 2 F.C. 145 (C.A.) where a court will not necessarily infer from the failure to refer to some issues that they were not considered.

⁴⁴⁹ Northwestern Utilities v. Edmonton, supra n. 174, 45.

⁴⁵⁰ Penzoil Petroleums v. Jorsvick (1986), 78 A.R. 155, 156 (Alta. Q.B.). Also, Re Pacific Western Airlines Ltd. (1984), 9 Admin. L.R. 109 where the Review Committee of the Canadian Transport Commission explained in thirty pages that, while the Air Transport Committee was not obliged by statute or the common law to provide reasons for its decisions, the failure to do so would be a ground for review because the statutory right to appeal to the Review Committee would otherwise be impaired.

⁴⁵¹ Knight, supra n. 181, 50.

⁴⁵² Hannley v. Edmonton (1978), 7 Alta. L.R. (2d) 394 and C. Lellamo construction Inc. v. Quebec, [1988] R.J.Q. 2580 (C.S.S.): "Even if insufficient reasons are given by the Board for its decision, unless such insufficiency of reasons is so great that it amounts to an infringement of the rules of natural justice this Court should not interfere."

written finding on each constituent element, however subordinate, leading to its final conclusion"⁴⁵³.

On a theoretical level, the assessment of adequacy must reflect the purposes served by the requirement to give reasons⁴⁵⁴ and the function of the agency itself. Tribunals established to give a interested individuals an opportunity to be heard in policy matters may be required to address the submissions by the parties in formulating its reasons. On the other hand, tribunals exercising discretion in decisions should articulate the relevant considerations relied on⁴⁵⁵. Matters resolving conflicts between parties will require reasons that deal with the opposing arguments and an assessment of the evidence. Where issues of credibility are integral to the process, an assessment of the supporting facts

⁴⁵³ Services Employees' International Union v. Nipawin District Staff Nurses Assoc., [1975] 1 S.C.R. 383, 391.

⁴⁵⁴ This part on the purposes relationship is derived from Evans, Janisch, Mullan, Risk, Administrative Law: Cases, Text and Materials (3d edition, 1989) Montgomery Publications, Toronto, p. 328.

⁴⁵⁵ For example in Tsai v. Canadian Human Rights Commission (1988), 91 N.R. 374 (F.C.A.) the Commission gave very sparse reasons in its statutorily required notice of reasons. Despite the lengthy extrapolation the court was required to go through to support the decision, they were accepted as a formal compliance with the Act. However, the court expressed the hope that in the future where the exercise of the Commission's discretion is engaged, that it more fully articulate its reasons for the decision. Desjardins J. dissented on the grounds that the reasons did not, in fact, disclose the basis on which the discretion was exercised.

should be given⁴⁵⁶. Thus, it is clear that, even if a general duty to provide reasons could be considered, there is no objective standard of adequacy that may be applied to the wide range of administrative agencies and their functions.

The application of the Charter to this issue will not likely result in any great variation from the common law, despite the overwhelming view to the contrary expressed in the legal literature⁴⁵⁷. However, there are very few decisions dealing with the duty to provide reasons after a decision as a part of the principles of fundamental justice on which to base any realistic assessment of the issue.

One of the only cases was D & H Holdings v. Vancouver⁴⁵⁸ dealing with the issue of whether a city council, in its statutorily authorized discretion, could revoke a business licence without providing any reasons. The City Charter specifically allowed the Council to revoke a licence without providing any reason. In one short paragraph, the court considered that it was not the exercise

⁴⁵⁶ Abadio v. MEI (1988), 90 N.R. 28 (F.C.A.) where the question of whether the Immigration Appeal Board believed the applicant's story required sufficient reasons to support the dismissal of his claim.

⁴⁵⁷ Kushner H., "Right to Reasons in Administrative Law" (1986), 24 Alta L.R. 305, Evans, supra n. 189, Comtois, S. "Reflexions sur le contenu procédural des principes de justice fondamentale garantis à l'article 7 de la Charte canadienne" in Développements récents en droit administratif Vol II, (Yvon Blais, 1989), 35, at 52-53.

⁴⁵⁸ (1985), 64 B.C.L.R. 102 (S.C.).

of a wide grant of discretion that was offensive but the failure to give reasons for that exercise. This seemed to be grounded on the presumption that there would be no adequate way of challenging the decision without knowing on what basis the decision was made.

In the absence of any other case law on the issue, it is difficult to build a well grounded argument for the inclusions of a general duty to provide reasons in the principles of fundamental justice. There is little to indicate that principles devised in the s. 7 search for perfect procedures⁴⁵⁹ will lead to the conclusion that a general requirement for reasons will be imposed.

The likely development under s. 7 will be a refinement of the duty to provide reasons on the basis of specific reference to process related criteria. This would allow some general principles to be developed on where it would appropriate to consider reasons a part of fairness and also on what would be the required content.

Conclusion

It is trite to repeat that s. 7, at least in its procedural sense, will generally follow the lines of the common law principles developed over the past decades. However, it is also clear that the Charter will be read progressively and liberally, with the

⁴⁵⁹ or the "Ultimate Rational Process" found in Rabin, R. "Legitimacy, Discretion and the Concept of Rights" (1983), 92 Yale L.J. 117.

implication that courts are free to reject the restriction of narrow interpretations of fairness or natural justice. While s. 7 has effectively become the dominant partner in the fairness debate, there will continue to be a significant degree of cross-referencing between the principles of fundamental justice and fairness. Neither will evolve without consideration of the other's progress.

In Board of Education, Indian Head School Division No. 19 v. Knight⁴⁶⁰, the Supreme Court of Canada reiterated that, like the principles of fundamental justice:

...the concept of fairness is entrenched in the principles governing our legal system and the closeness of the administrative process to the judicial process should indicate how much of those governing principles should be imported into the realm of administrative decision-making.

The content of the duty to act fairly is flexible and reactive to the specific dimensions of the mandates of the administrative bodies. S. 7 is equally flexible and, on the same basis, has not called for inappropriate or generalized features of procedure to be applied across the administrative law spectrum.

The point of distinction between the common law and the constitutional principles appears to be in the focus of the review.⁴⁶¹ S. 7 has not created any new rights but it has provided

⁴⁶⁰ supra. n. 181.

⁴⁶¹ Also, to some extent, the remedy drives the review; courts are apt to use the constitutional route in order to rely on the wider powers under s. 24(1) of the Charter.

a means of enhancing the rights found in the common law now in the form of constitutionally protected procedural values.

Chapter 4

On the basis of the necessarily selective review of procedural norms in chapter 3, which are also basically reflective of some of the traditional judicialized concepts, it is possible to make some assessment of the effect of the "principles of fundamental justice" on the impact of the common law principles determining administrative procedures.

I. Application of Section 7

There are three possibilities to consider in this regard: that s. 7 does not change the scope or application of the common law rules; that s. 7 represents an enhancement of the terms of natural justice or procedural fairness; or, that the principles of fundamental justice, while reflecting the same or similar standards as the common law, will apply in a substantially different fields of decision-making.

i) No Change

In some areas of administrative decision making, there is no question that the principles of fundamental justice have had little or no impact whatsoever. This is a factor of the natural limitation presented in the opening words of s. 7, directing its application only to matters affecting life, liberty and security of the person. More importantly, however, it represents a certain judicial attitude that the principles of fundamental justice are

essentially a constitutional expression of the common law rules of natural justice or procedural fairness. This may derive from the testimony of the drafters, previously referred to, that the term used in s. 7 was a deliberate attempt to incorporate the common law provisions without specifically adopting the same terminology.

It may also be a factor of the courts' attitude that there is a fairly well known universe of principles of fair procedure or a finite number of fundamental elements of fairness, represented by certain judicial or adversarial concepts that are the mainstay of court processes. In the role of judicial review as the superior courts supervising the inferior tribunals' activities, courts are naturally apt to apply what is viewed as the best of the judicial world to the decision-making processes of the administrative law sphere. This results in the interpretation that the principles of fundamental justice are another derivation of these basic concepts of fairness and are not necessarily an addition or amendment to the long standing traditions of the common law.

iii) Enhancement

One theory is that Canada has now explicitly constitutionalized the right to fundamental justice with respect to threatened deprivations of "life, liberty and security of the person" and that

procedural claims will now be recognized more readily when those particular interests are at stake⁴⁶².

For certain administrative activities it would appear that the courts have adopted the view that the principles of fundamental justice are in fact an enhancement of the common law rules represented in natural justice and procedural fairness.⁴⁶³ The prime example is the parole and prison context. In this area, the courts have responded quickly to arguments that the procedures followed by the state in assessing even the limited degree of liberty enjoyed by parolees and inmates within an institution deserve a serious second look by the courts. The results have fairly consistently been the widening of procedural requirements for the bodies that deal with these issues and a trend to the formalization of the procedures along the lines of the more judicial types of hearings. The legislatures have responded by adopting a right to a hearing in many statutes dealing with parole as a response to the Charter considerations and the earliest rulings of the courts.

⁴⁶² Mullan, D., "Natural Justice - The Challenges of Nicholson, Deference Theory and the Charter" in Finklestein, N. and MacLeod-Rogers, B., Recent Developments in Administrative Law (Carswell Co., Toronto, 1987), 43.

⁴⁶³ See Howard v. Stony Mountain Institution, [1984] 2 F.C. 642 (C.A.) leave to appeal granted S.C.C. (1985), 45 C.R. (3d) 242n where McGuigan J.A. was of the view that s. 7 enhanced the existing common law procedural entitlements in the situations to which it applied.

The major changes in the parole field may be anomalous but it is likely a factor of the large number of cases that quickly arose in response to the Charter. Inventive lawyers responded to the opportunity to provide some additional recourse for their incarcerated clients and the courts were receptive to the notions of constitutionally protected concepts of liberty, albeit an inchoate interest or limited form of liberty. It may also be argued that it is easier for the courts to focus on the issues raised in the parole/inmate situations because of the nature of the issues: a specific, procedural remedy in a quasi-criminal domain without the difficult complications of policy, social or economic issues present in so many of the decisions of other administrative law entities. These questions concerned an individual versus the state in terms of the most stringent form of state power: the power to incarcerate.

According to an early article by Professor MacKay⁴⁶⁴, s. 7 has been used to require hearings upon parole requirements but also to shape the content of those hearings. However, in other contexts, the courts have not been as pro-active, such as extradition, deportation and discipline cases.

It would not appear that as a general principle, the courts have accepted the principles of fundamental justice as a third category

⁴⁶⁴ "Fairness After the Charter: A Rose by any Other Name" (1985) 10 Queen's L.J. 263, 316.

of procedural rights⁴⁶⁵ superior in content to natural justice or fairness. Parole cases have proven to be the exception to the rule.

One author suggested that the Charter, by elevating fundamental justice to constitutional heights and by attaching it to a circumscribed set of interests, may have sent a signal to the courts that they ought to take an especially close look at certain legislative and administrative acts. However, he argues, the Charter has not swallowed up administrative law completely and traditional administrative doctrines will continue to be required to deal with issues of a less fundamental nature.⁴⁶⁶

iii) Exclusive Area of Jurisdiction

There will clearly be some overlap in the application or potential application of the common law rules and the principles of fundamental justice. However, it is equally clear that there are certain areas in which they will be mutually exclusive.

The courts have accepted that certain decision making fora not otherwise accessible to judicial review under natural justice/procedural fairness will be open to judicial scrutiny under

⁴⁶⁵ Ibid, 326.

⁴⁶⁶ Johnstone, I. "Section 7 of the Charter and Constitutionally Protected Welfare" (1988), 46 U. T. Fac L.R. 1, 44.

the Charter. Early cases such as Operation Dismantle and others subsequent have demonstrated that many types of state decisions or actions will be held to the standards of the Charter, including s. 7 and its procedural protections. Thus, exercise of the royal prerogative, prosecutorial discretion of the Attorney General, etc. will fall within scope of the Charter.

It is also clear that the substantive application of s. 7 of the Charter opens up a new horizon for judicial review. While the courts carefully phrase their new role as one avoiding commenting on the wisdom of legislative choices, it is inevitable that in the constitutional assessment of the statute or government action there will be some increased opportunity for expressing judicial approval or disapproval.

On the other hand, natural justice/procedural fairness and the relevant sections of the Canadian Bill of Rights will continue to play the dominant role in issues concerning economic or property rights. Traditionally, only matters concerned with "rights" were amenable to judicial review under natural justice. However, the expansion of the scope of the common law application, notably by procedural fairness but also by the addition of other features such as "legitimate expectations"⁴⁶⁷, wide fields of decision-making will

⁴⁶⁷ The article "'Legitimate Expectations': Judicial Review of Administrative Policy Action", by R. Young explores the development of the doctrine of legitimate expectation. It has recently been recognized in Canadian courts in In the Matter of the Canada Assistance Plan, June 15/90, B.C.C.A. on appeal to S.C.C. and in Sunshine Coast Parents for French v. Board of School

be covered. Also the virtual elimination of the threshold approach has opened up the field of reviewable decisions, although with a corresponding relaxation of some the procedural requirements for those at the lower end of the spectrum⁴⁶⁸.

For economic or property questions, the courts still have recourse only to the common law provisions for judicial review of the procedural requirements of the decision-making process.

However, the argument may also be made that at some point when the courts recognize the fundamental nature of the right to some of the "new property", as represented in the welfare state, these will come to be included in the protections available under s. 7 under the rubric of "security of the person". As discussed earlier in Chapter 2, there are several proponents of the view that security of the person must include property rights of some type and perhaps extending to a positive duty on the part of the state to provide a minimum degree of protection for life itself, including the

Trustees of School District No. 46, July 5/90, B.C.S.C. The doctrine comes into play only in procedural matters and does not imply any restriction on the decision-maker in matter of substance.

⁴⁶⁸ In Cardinal v. Director of Kent Institution, [1985] 2 S.C.R. 643, Le Dain J. remarked: "This Court had affirmed that there is, as a general common law principle, a duty of procedural fairness lying in 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". See also, Re Collins and Pension Commission of Ontario (1986), 31 D.L.R. (4th) 86, per Reid J.: "The old learning was that if rights were affected the function of the tribunal was quasi-judicial and therefore subject to the rules of natural justice. It is sufficient now if interests only are affected."

necessities of life and a minimum standard of living. The courts have accepted that to a certain extent, security of the person will incorporate a concept of dignity and self-worth upon which the state will not be permitted to tread in an untrammelled fashion. However, the next step, that of imposing on the state a positive duty to provide for the essentials of life and that dignity and self-worth, has not yet been taken by any court.

In conclusion on this point, it would appear that the principles of fundamental justice are in fact an enhancement of the common law rules of natural justice and procedural fairness. They are a recognition by the courts that a constitutional entrenchment of these principles is something more than a repetition of the common law rules traditionally expounded by the courts. However, it must be recognized that the scope of application will differ: section 7 does not constitutionalize an elevated procedural standard for all administrative decision-making. Also, this enhancement may not, as in the view of David Mullan⁴⁶⁹, lead to the court ignoring the need to balance efficiency and the specific needs of the particular tribunal with individual rights. Thus, it may not completely change the dynamics of judicial review on procedural grounds.

⁴⁶⁹ "Natural Justice" in Finklestein and MacLeod-Rogers, supra. n. 1, 51.

II. Are Standards of Procedure Necessary?

This question is divided into two parts: first, whether standards are necessary generally and, second, whether they are required by s. 7 of the Charter.

I. Uniform Standards of Procedure

As noted in Chapter 1, the debate over whether administrative procedures should be standardized is one on which administrative law experts have very differing views.

The idealized version of administrative procedure is expressed by Professor Verkuil:

Administrative procedure should be concerned with the overall fairness and accuracy of decisions with their efficient and low cost resolution, and in a democratic society, with participant satisfaction in the process.⁴⁷⁰

This expresses what has been considered the optimum exercise of governmental powers operating efficiently within acceptable boundaries.⁴⁷¹ The normative values usually quoted in the search for minimum procedures are fairness (or accuracy), efficiency (or flexibility) and satisfaction of the participants (and the general public satisfaction with the administrative process). Yet these

⁴⁷⁰ Verkuil, P., "The Emerging Concept of Administrative Procedure" (1978), 78 Colum. L.Rev. 258, 279,

⁴⁷¹ Doern, Hunter, Swartz and Wilson, "Canadian Regulatory Boards and Commissions" (1975), 18 Can. Public Admin. 189.

three can be conflicting and are not readily balanced in an absolute sense. Much depends on the priorities set and the relative strengths of the interests involved. A closer look at the tensions between the different values reveals the dilemma.

Fairness and efficiency are sobriquets for private interests or rights versus public interest. There is no doubt that increasing governmental involvement in many facets of Canadians everyday life is a settled fact. To the individual, the primary issue is that he or she be dealt with equitably. To the government agency, the primary issue is that the public interest be advanced efficiently and expeditiously. These may not be "antithetical but they are often contending".⁴⁷²

Administrators are charged with a specific duty: the application of policies enunciated by Parliament. Expedience, discretion and flexibility of operation are seen as key implements in the furtherance of this duty while overly stringent procedural rules imply restraint, expense and delay.

A rational reconciliation can be achieved in the optimum procedural package. The goal of rules is not the "maximum degree of confining, structuring and checking"⁴⁷³ of discretion but to find the best direction for use of each specific power.

⁴⁷² Doern et al., ibid., 196.

⁴⁷³ Davis, K.C., Discretionary Justice: A Preliminary Inquiry, Louisiana University Press, Baton Rouge, 1969.

It is incontrovertible that the presence of rules can do much to improve the efficient achievement of agency goals. Procedures can promote deliberate consideration of issues and ensure that all decisions are taken on an adequate factual basis. Arbitrariness is eliminated as is hasty approximation. The agency finds itself in an improved vantage point in determining public interest generally.⁴⁷⁴

A simple extension of this reasoning can support validation of the quest for uniform procedures. Uniformity can be an advantage from the individual's point of view: the requirements from agency to agency are comparable, no variation on critical participatory rights exists for similar matters and basic procedural information is readily available from one source. From the agency point of view, uniform rules could streamline operations, sharing from other agencies' experiences in similar matters. Doubt is removed concerning the legitimacy or sufficiency of procedures, perhaps minimizing the demand for judicial review. Costs and time spent on experimentation with basic rules by each agency could be reduced. More or consistent participation by the public affords better decisions based on more accurate information and results in less after the fact criticism. Lastly, by removing the secrecy still permeating the administrative process, new respect could be

⁴⁷⁴ Issalys, P., The Pension Appeals Board, Law Reform Commission of Canada, Ottawa, 1979.

fostered which guarantees increased satisfaction by the public and greater acceptability of agency decisions politically.

A further particular problem is encountered in Canada as a result of our constitutional structure of federalism. With the increased growth of government at all levels, the prospect for conflict grows proportionally. The independence of all forms of government holds less appeal in the practical governing of the country:

The nature of policy problems confronting governments today has eroded the significance of constitutionally water-tight compartments with the result that governments must face what has been called the 'seamless web' of policy.⁴⁷⁵

Former Prime Minister Trudeau claimed that:

Decision-makers in government can no longer stand apart; they must work together and know each others' problems and intentions in order to make the practical decisions and choices required within their own jurisdiction.⁴⁷⁶

In a narrower sense, the same could be said of federal administrative agencies. Their collective wide-ranging mandates in all facets of life make it inevitable that some conflict between the various bodies will continue. Agencies are assuming a greater role in all levels of government and have significant impact on the lives of Canadians and on the policy direction for the country. Added to this is the restraint of the courts in dealing with the issues of procedures of agencies:

Courts now recognize the legitimacy of tribunals as an essential part of the structure of government and the legal

⁴⁷⁵ Schultz, R.J., Federalism and the Regulatory Process Institute for Research in Public Policy, Montreal, 1979, p. 22.

⁴⁷⁶ Rt Hon. P.E. Trudeau, Notes for an Address to First Ministers Conference, May 23, 1973.

system. They respect both the status conferred on the tribunals by the Legislature and their expertise in the performance of the task assigned to them. It is a natural consequence of this new attitude that courts now respect the intention of Legislatures to limit judicial review...⁴⁷⁷

Thus, as independence of agencies increases, the need for uniformity in procedures may also increase. Direct accountability may no longer be desired but a standard of settled participatory values may bridge the gap and provide some further guarantee of the essential values of fairness and efficiency.

The Ouellette Commission Report⁴⁷⁸ relatively briefly considered issues of procedure. It recognized:

...the proper place of procedure as a subsidiary complement to institutional structure, and correctly observes that good administrators are a precondition to good procedure...It identifies three features of an effective procedural regime: the simplification of decision-making; the protection of the 'rights' of affected parties; and the enhancement of the quality of administrative decision-making.⁴⁷⁹

The Report concluded that a generic statute setting out the basic principles of administrative procedure be devised which would be

⁴⁷⁷ Re Public Service Employees Union and Forer (1985), 23 D.L.R. (4th) 97, 112. Also in Crane, B., "Procedural Developments in Administrative Law" (1988) 9 Adv. L.Q. 22, the author admonished the legal community to realize that there is a general tendency for the courts to interfere less and less in the internal affairs of tribunals, meaning that the courts will exercise their discretion in favour of boards whenever possible.

⁴⁷⁸ Report of the Quebec Working Group on Administrative Tribunals (1988).

⁴⁷⁹ Macdonald, R., "Reflections on the Report of the Quebec Working Group on Administrative Tribunals (Ouellette Commission Report)" (1988) 1 CJALP 337, 344.

adopted and expanded on by the detailed rules promulgated by each tribunal to meet the particular need of its specific role.

While the proposed legislation may unduly emphasize the adversarial model⁴⁸⁰, the idea is not without merit. It is conceded generally that the concept of the procedural statute, such as the Statutory Powers Procedure Act may not be valid as a current response to the problems of administrative procedure. Such statutes codify the law at the moment of enactment and as a result stultify the development of the law. The answer may more properly arise in the idea of guidelines that may be devised by collective effort, perhaps coordinated by some central agency, and adopted voluntarily by each agency in accordance with its specific needs.⁴⁸¹ Whether this must or should be in the form of a statute continues to be debatable.

The Law Reform Commission of Canada supports the notion of legislated standards but with a unique twist. The legislated standards would not be used by the courts in determining the vires of the procedures devised by the agencies, although presumably made in conformity with the standards, but would be the benchmark for the proceedings not covered by agency rules. This would serve as

⁴⁸⁰ Professor Macdonald comments, ibid. p. 345, that the Working Group states that it wants to depart from a strictly judicial procedural framework but, unfortunately, when it came to specifics, it cannot escape the reflex tendency to parrot the Code of Civil Procedure, presumably for a lack of an overall theoretical model of non-adjudicative due process.

⁴⁸¹ See Comtois S., "On the Opportunity of Codifying Administrative Procedure" (1987-88), 1 CJALP 119 and Roman A., "A Uniform Procedural Code: Pros and Cons" (1987-88), 1 CJALP 127.

encouragement for the agency first, to devise rules for all its activities, and second, to consider carefully the standards set in the legislation to incorporate the relevant principles into their own rules. There would also be an advisory body to work with agencies in the development of their rules of procedure.⁴⁸²

However, there are some important criticisms of uniformity that must be considered. Clearly, uniformity cannot be a goal in itself. In the context of a preliminary review of the issue of independence of tribunals, Professor Ratushny claimed,

It also can be counterproductive to place too high a premium on uniformity from tribunal to tribunal. Each tribunal is meant to be different. The very existence of separate administrative bodies is a recognition that there are unique areas of decision-making which cannot be conducted as effectively either by the ordinary departmental structure or by the courts. Moreover, there is a complex inter-play which occurs in some administrative decision-making. Policies develop incrementally, with many participants in the process, as facts become established and issues crystallize. There is a need to keep squarely in view the specific tribunal functions which are under consideration.⁴⁸³

He proposed to continue a study of the general issue of independence of tribunals in a functional framework. He suggested that conceptionally, administrative bodies can be characterized as

⁴⁸² There would appear to be nearly unanimous approval of an advisory body to assist agencies in the development of procedures. Ouellette Report, supra n. 17; Law Reform Commission of Canada, Report 26 of the Law Reform Commission of Canada, Independent Administrative Agencies: A Framework for Decision Making (1985), Review of Ontario's Regulatory Agencies (Macauley Report), Report to Management Board of Cabinet (1989).

⁴⁸³ Ratushny, E., Independence of Administrative Tribunals, Report of the Ratushny Task Force on Appointments to Federal Administrative Tribunals, Canadian Bar Association, August 25, 1988.

falling into three general categories: adjudicative, economic-regulatory, and inquire and report. The rules of natural justice and fairness will be applied in different ways and it may be useful to consider whether there are any principles to govern the exercise of these functions. Although administrative procedures were not the primary focus of the Report, the issue of uniform standards of procedure for each of the functions noted was raised as a possible item of future consideration.

The concept could be carried to its next logical step. The Law Reform Commission of Manitoba⁴⁸⁴ proposed a similar framework for administrative procedures of various types of powers exercised by tribunals: impose a sanction, arbitrate, assess compensation, issue licences, determine rates, and award benefits. These were considered sufficiently uniform in function such that broad guidelines on procedure could be suggested. They also represent a gradation in the concept of hearing requirements according to the substantive rights involved. The Commission set out six specific models of procedure based on these powers which would be implemented as models for individual agencies to incorporate into their own procedures with the assistance of a monitoring body.

The question is then one of how specific the standards should be in relation to the activities carried out by agencies. It may be

⁴⁸⁴ Report on Administrative Law, Part I: Procedures of Provincial Government Agencies, Manitoba Law Reform Commission, 1984.

that if there is an advisory body to assist in drafting models of procedure based on the standards, a single general statement of administrative procedure principles would suffice.

It would appear that the quest for improvement in administrative procedure has not faded in importance over the last years. The subject continues to be of prime importance. However, it is important to note that procedural reform, and concomitantly the demands for uniformity, has taken its rightful place as one part of a more systemic approach to reform rather than the lead role.

It may also be of note that the Charter guarantees under s. 7 will call for a more specific examination of whether standards of procedure are necessary.

II. Uniform Standards Demanded by S. 7?

The second aspect of the analysis in this chapter is the question of the specific effect of the principles of fundamental justice on the procedures of administrative agencies and whether there is an apparent demand for uniform standards of procedure.

John Evans⁴⁸⁵ suggests that any expansion of areas of review open to the courts would not appropriately lead to the courts regarding the Charter as giving them carte blanche to:

recast the relationship between specialist administrative agencies and the courts that has been evolving in Canadian public law over the last decade. A virtually important and distinctive aspect of contemporary administrative law in this country has been the emergence of a recognition by the courts of the institutional characteristics of administrative tribunals, the reasons for their creation, and the ambiguities and open-texture of language. From these, judges hearing applications for judicial review have inferred that they should normally resist the temptation to substitute their view of the "correct" interpretations of the agency's enabling legislation or the fairness of particular aspects of its procedure.

In this vein, courts have often refrained from interfering with an agencies' interpretation of its procedural requirements even where the result may, in fact, deviate significantly from the traditional adversarial model of adjudication⁴⁸⁶ on the grounds that the agencies' choice was not fundamentally unfair.

Most recently the Supreme Court of Canada reiterated:

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...the aim is not to create "procedural perfection" but to achieve a certain balance between the need for fairness, efficiency and predictability of outcome.

⁴⁸⁵ "Administrative Tribunals and Charter Challenges" (1988), 2 C.J.A.L.P. 13, 16.

⁴⁸⁶ Ibid., 17.

This balancing on several levels will undoubtedly continue and courts will explore the realm of what procedural lapses by agencies will truly infringe the principles of fundamental justice. The enhancement of the common law imperatives will likely continue to appear in areas of dispute that deal with the most serious issues of individual liberty or security of the person.

Generally, within the context of the procedural rights discussed in Chapter 3, the courts remain visibly conscious of the need to balance the rights of the individual with the right of the state to pursue and achieve its own ends on behalf of collective goals.

The threshold test of the common law is clearly rejected as well as the companion restrictions on judicial review. These shifts in both the common law and constitutional arenas have not had the effect of declaring open season on administrative agencies. The courts have instead reacted with continued caution and restraint. As pointed out by Professor Hudson Janisch⁴⁸⁷,

...as the all-or-nothing threshold and entitlement questions fade in importance, they will be replaced with subtle and difficult questions of nuance and degree. I am confident that we are now asking better questions, that is questions about what sort of procedures are appropriate in particular situation rather than mechanically transposing trial type procedures in the name of "natural justice" when an activity is deemed "judicial" and nothing when deemed "administrative". The rub, of course, is that better questions demand better answers.

⁴⁸⁷ "Administrative Tribunals and the Law" (1989), 2 C.J.A.L.P. 263, 271.

Even in the issues of procedure most identifiable with the protection of individual rights, such as the right to counsel, the courts recognize the constraints on the state in the provision of such services in, for example, inmate disciplinary situations.

However, the argument can be made that, in consideration of the particularly fundamental nature of the rights protected in s. 7, the otherwise permissible discretion of administrative tribunals in relation to procedure could be more limited. Ian Johnstone claimed that "structured discretion" may be required in the context of Charter adjudication:

The essential point is that, since the interests protected as security of the person relate to personal integrity and self-respect, then the application of fundamental justice ought to give effect to that. A constitutionally protected right to personal security does little for self respect and dignity, if a person can be deprived of that right by wholly arbitrary, unreasonable and oppressive laws.⁴⁸⁸

He made no argument for the rationalization of procedures along the lines of standards or a code but the implication for agencies if the expanded definition of security of the person may be a recognition that the Charter will demand intensive review of procedures. The practical result could well be the consideration of standard procedures to avoid conflict with the Charter guarantees and the elimination of uncertainty concerning the validity of individual mechanisms of decision-making.

⁴⁸⁸ Johnstone, supra n. 5, 45.

This would prove particularly useful for tribunals not previously considered to be dealing with substantive "life, liberty and security of the person" issues, such as welfare or benefit agencies. They would benefit the most from a considered review of procedural standards and the development of appropriate models.

Thus, it may not be a direct call for standards that develops under s. 7: the principles of fundamental justice may not require agencies to follow uniform standards of procedure. The pull to uniformity may continue as a defence to the real or imagined threat to administrative independence in procedures. Despite apparent judicial restraint in procedural matters, there is still a perceived risk that courts will interfere with an agency's performance of its statutory mandate and impose increased procedural burdens. One means of minimizing the risk may be to adopt a standard statement of procedural principles, and possibly more detailed models under the direction of an advisory body. Thus, the ultimate effect, the creation of minimum uniform procedure standards, may be the same as if the Charter had required it in the first place.

III. Specific Procedural Issues

Oral Hearings

There are several possible approaches to formulating standards for hearings, ranging from a universal requirement for oral hearings in all decisions to simple criteria indicating the most effective

use of hearing resources. The former is clearly overbroad; not even the American APA requires hearings in all cases. The latter has possibilities although it is doubtful whether there would be any way to enforce the adoption or police the practical application of such criteria.

In 1985, the Law Reform Commission of Canada suggested procedural standards as part of a new procedural framework for agencies, prompted partly by the demands of s. 7. These would be "the foundation" upon which individual agency rules would be based rather than an expression of a general set of rules in themselves.⁴⁸⁹ In considering hearings under the heading "Allowing for the Communication of Information and Views", the Commission recommended that the standard be set as:

Those who are sufficiently interested to be entitled to receive notice of agency proceedings must be accorded standing as 'participants' in administrative proceedings, if they so choose. Such participants should have a reasonable opportunity to communicate information and views to the agency, and to comment on submissions of other participants.⁴⁹⁰

They hastened to add that this would not imply that all agencies must hold formal hearings nor that there would always be an opportunity to present one's case orally. The requirement for oral hearings arises in the context of the decision itself, the subject matter and the impact of the decision on the individuals concerned.

⁴⁸⁹ supra n. 21, 51.

⁴⁹⁰ Ibid., 54.

There is little more that a general or minimum standard on hearings could offer. Any greater detail erases the general nature of the guideline and would lead to a statutory list of either classifying powers or tribunals that must follow certain models of procedure.

The solution is to refer the specifics of when oral hearings are necessary to a collective or co-operative analysis supervised by the advisory body set up to assist in procedural matters. The experiences of the agencies themselves would be far more valuable an indicator than theoretical or academic assumptions on the need for oral hearings. There is also a body of law under the Charter on which to rely in determining the appropriateness of written or oral hearings in specific circumstances. Models of procedure can be devised by the advisory body for general reference by agencies as needed.

This will foster uniformity but not at the expense of the other interests of fairness and expediency. It will also help provide the public and the legal community with some guidance on the nature and existence of oral hearings before tribunals and, presumably, eliminate some of the uncertainty under the Charter.

Disclosure

The Law Reform Commission of Canada in Report 26 summed up the merits of an open system and disclosure of information:

Disclosure of information leads to a more open administrative process, which yields more accurate and acceptable decisions on the strength of a more informed presentation and analysis... An open process contributes to fairness, efficiency and accountability in administrative decision-making.⁴⁹¹

It remains a cardinal principle that persons involved in any proceeding must be fully informed of the case to be met, particularly in reference to the matters raised under s. 7 of the Charter. There is little value in a rule permitting individuals to participate in the decision-making process when their submissions will by necessity be made without full information on the issues facing the decision-maker.

However, there must be some recognition that there will be matters which cannot be disclosed, whether for reasons of national security, economic protection or individual safety.

As a minimum standard, it should be clear that limitations on disclosure will be the exception to the general principle of openness in decision-making. In the absence of a decision from the Supreme Court of Canada on the permissible limits to disclosure under s. 7 in the Chiarelli case, it is difficult to define these limitations with any certainty.

⁴⁹¹ Ibid., 57.

An advisory body working with other agencies would be the ideal instrument for the comparison and standardization of disclosure issues.

Right to Counsel

For the most part, this right follows the decision whether to have an oral hearing. There is little restriction on the participation of counsel or other types of assistance in the preparation of written submissions. The real issue arises in the participation of legal counsel before tribunals with all the attendant delays, conflicts and demands that result from such participation.

However, there is a real need for assistance for many individuals and it would appear that the Charter is generally defensive of a right to counsel. An open administrative system, particularly when dealing with complicated or fundamental issues, calls for an open right to the assistant of one's choice, whether legally trained or not.

Restrictions could be considered in the context of the individual rules of the agency and would be related to the specific nature of the context.

Reasons

A more general feature of the effect of the principles of fundamental justice on the common law rules is the issue of whether an administrative body will be required to supply reasons for its decision. Clearly, this is not a prerequisite for natural justice or procedural fairness but the question is open for debate under s. 7. It may be strongly argued in the constitutional context that administrative agencies, and courts for that matter, will be held to an enhanced standard of procedure for the matter of providing reasons for a decision. The case law is decidedly sparse on this issue⁴⁹², yet it would seem to be an appropriate moment in the development of our acceptance of fundamental procedural protections to finally accept that reasons must be an integral part of any decision, particularly where it impacts on the life, liberty and security of the person.

It has been argued that the value of a general requirement to provide reasons would make the ultimate decisions more acceptable to the parties involved, promote better decision making by forcing the decision-maker to focus on the issues and presentations made, check the exercise of discretion, build up a useful body of precedent for both the agency and the public, eliminate discrimination in that all like decisions will be treated alike,

⁴⁹² D & H Holdings Ltd. v. Vancouver (1985), 64 B.C.L.R. 102 (S.C.) is the only case on this point.

and improve arguments made to the tribunal because parties will be well informed of what is needed.⁴⁹³

Yet, would uniform procedural requirements further this goal? Authors Evans, Janisch, Mullan and Risk⁴⁹⁴ suggest that a universal requirement of reasons may strengthen an unwelcome trend toward the excessive legalization of much of the administrative process. They also question whether mandatory reasons would serve the values most highly prized in the administrative process: speed, efficiency and fairness. The preparation of reasons adds time and expense and does not guarantee the elimination of arbitrariness in decision-making or the influence of any illegitimate consideration.⁴⁹⁵ It has also been argued that reasons would be onerous for most decision-makers, particularly those lacking any legal training.⁴⁹⁶

There is also no guarantee of adequate reasons. Two authors suggested that

...too often unnecessary written judgments are churned out by harried administrators in response to a host of 'standard form' policy reasons (even where these are inapplicable to the case at hand) and are cobbled together by reference to a host of 'standard form' criteria of justification (even where

⁴⁹³ Kushner, H.L., "Right to Reasons in Administrative Law" (1986), 24 Alberta L.R. 305.

⁴⁹⁴ Administrative Law Cases and Materials (1989, 3d ed.), 311.

⁴⁹⁵ Ibid.

⁴⁹⁶ Kushner, supra n. 32, 306-7.

these played little or no part in the actual decision-making process).⁴⁹⁷

They argue further that there is a difference between archival reasons and justification for a decision. The former is a fixed statement of narrowly drawn proofs and arguments typically found in law reports and the latter is a rational explanation based on proofs and arguments. The former, the argument follows, is not necessarily the optimum means to meet the rationales of better decision making, satisfying the parties and allowing internal review/judicial review where necessary. In fact, archival reasons may serve to undermine the overall achievement of the values of fairness, objectivity, and "the integration of individual decisions into the wider framework of policies and purpose in administrative law" by stressing one of these at the expense of the others.⁴⁹⁸

A uniform requirement for reasons may not be worth pursuing:

Written archival reasons for decision can contribute to a better system of administrative justice. But they do not do so on a blanket, across the board and uniform basis grounded in these traditional justifications. They so only in particular settings and only when crafted in a fashion which responds to the logic of those settings. In other words, fidelity to the institutional context - policy, bureaucratic rationality, language, process integrity - of individual administrative agencies must be the criterion against which the need to give archival reasons is judged.⁴⁹⁹

⁴⁹⁷ Macdonald R. and D. Lametti, "Reasons for Decisions in Administrative Law" (1989), 3 CJALP 123, 127.

⁴⁹⁸ Ibid., 158.

⁴⁹⁹ Ibid., 158.

The question is thus whether the goal of openness of the process and possibly, participant satisfaction, would be sufficient to overcome serious objections to a uniform requirement for reasons. These objections have a financial element in that any additional burden on the tribunal will add cost both in terms of time and resources.⁵⁰⁰ However, there is the more fundamental objection to the incremental formalization of the process for all decision-making.

It is difficult to escape from the logic of a general requirement that there be some known justification for any decision, be it judicial or regulatory. It just does not seem to be met in a general requirement for archival reasons in all cases. There will be many types of decisions for which a checklist approach⁵⁰¹ will be appropriate in terms of all the goals of administrative practice, including participant satisfaction. While this may be acceptable for some decisions⁵⁰², there will be others which will require detailed reviews of the submissions of parties and the evidence or

⁵⁰⁰ Some costs incurred will likely relate to training of tribunal members, extra staff to maintain the precedents library, staff to assist with the decision writing/editing/research, funds for reproducing decisions and distribution to parties and other interested persons. Costs to the parties themselves would likely be determined by the time lag necessary to produce reasons.

⁵⁰¹ These would include a form letter setting out various reasons for a decision with the appropriate box checked off and any additional comments made where necessary. This will be available in many cases where there is strict legislative requirements to be met, such as in some benefit programmes where eligibility is determined on certain criteria being present.

⁵⁰² "Front line" processing of benefit eligibility comes to mind most easily.

material on which the tribunal proposes to rely⁵⁰³. Whether this approach can be said to be support for a general requirement for reasons is debatable. It does appear to be an acknowledgment of the uniqueness of each agency and its role in government.

The pull towards a universal requirement for reasons, at least under s. 7 and the principles of fundamental justice, may be irresistible. Most recent analytical studies of procedure have supported the general idea of reasons⁵⁰⁴. However, the implementation of this requirement, I believe, will continue to focus on the individual features of each agency.

The uniform guidelines could contain provision for a general presumption to provide reasons in all cases except where the agency can rationalize a departure from the standard procedure. This would also require the participation of the co-ordinating body in the assessment of whether reasons are truly warranted in the type of decision-making being carried out by the agency and in the implementation of alternative procedures.

⁵⁰³ Most likely all decisions relating to an appeal from a prior decision, decisions on adversarial matters and those which impact on more serious matters, such as those falling under s. 7 of the Charter.

⁵⁰⁴ See the Ouellette Commission Report, the Macauley Report in Ontario, the Report of the Law Reform Commission of Manitoba Procedures of Provincial Government Agencies and the Law Reform Commission of Canada, Report 26. In Great Britain, the Justice-All Souls Committee Report, Administrative Justice, (Oxford Press, 1988), recommended reasons on demand although approved of the general trend toward the provision of reasons in most cases.

IV. Conclusion

The simplest approach to reform in administrative law was suggested by Professor Harry Arthurs:

[F]ind good people; train them well; pay them well; hire them in adequate numbers; tell them what you want done; give them adequate responsibility and hold them accountable to their peers and superiors; and, reward them for superior performances⁵⁰⁵,

and presumably, get out of their way. Notwithstanding the fundamental appeal of this recommendation, it may be necessary to consider structuring the procedural powers given to administrative agencies to ensure that all the normative values are adequately assured.

It is inevitable in an unstructured, discretion-based system that stresses and tensions would develop between participants, politicians and the regulators. However, the political and pragmatic choices have been difficult and little practical advance has been made in the last twenty years of examining administrative reform.

Now the Charter adds a new dimension to the traditional issues in the administrative procedure debate and calls for a re-examination of the issues and the potential responses. On the basis of the above analysis, I suggest it is time to consider seriously the

⁵⁰⁵ Arthurs H., "Recognizing Administrative Law" paper presented to the Administrative Law Conference in Vancouver, (1981) U.B.C. Law Publications.

concept of minimum standards of procedure in conjunction with an advisory body instituted to assist agencies in devising specific rules of procedure. While the principles of fundamental justice may not contain a direct reference to a minimum standard of procedure for administrative agencies and will likely never require such, the interests of justice, in terms of fairness to the individuals concerned and the efficiency of the system, call for at least a serious study of the feasibility of this approach. In this regard, the work of the Law Reform Commission will be critical and it is hoped that further guidance can be expected in the short term from that source.

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