MACAULAY & SPRAGUE

PRACTICE AND PROCEDURE BEFORE

Administrative Tribunals

9

Powers of an Agency to Control Its Own Procedure

9.1 MASTERY OVER THEIR OWN PROCEDURE

You cannot be either a successful administrative agency or practitioner unless you grasp the essential fact that, subject to certain limitations which will be discussed below, an administrative agency is "master of its own procedure",[1] Some statutes expressly grant the agency a general power over procedure.[2] Even in the absence of an express grant of authority to that effect, the authority is implied in the grant of the agency's mandate. The authority to develop the necessary procedure to effect a mandate is implicit in the grant of that mandate.[3] What this means is that an agency is free to develop its procedures as required in order to accomplish its particular purposes.[4] In this text I shall refer to this implied authority as the agency's common law power over procedure.

In determining its procedures an agency is not bound by the manners and traditions of the courts. And, while it may be prudent, and even fruitful, to look at judicial procedure in the formulation of agency process, to do so without understanding the strengths, weaknesses and purposes of both is to invite problems. The uncritical adoption of judicial mores leads to unsuitable, and (I would argue) unsuccessful agency operations. This applies as much to the courts when they judge agency procedures in terms of judicial process, as it does to agencies

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1 *Prassad v. Canada (Minister of Employment & Immigration)*, [1989] 1 S.C.R. 560, 36 Admin. L.R. 72, 57 D.L.R. (4th) 663; *T.A. Miller Ltd. v. Minister of Housing & Local Government*, [1968] 1 W.L.R. 992 (C.A.); *Re Cedarvale Tree Services Ltd. v. L.I.U.N.A., Local 183*, [1971] 3 O.R. 832, 22 D.L.R. (3d) 40 (C.A.); *Therrien (Re)*, 2001 CarswellQue 1013, 155 C.C.C. (3d) 1, 43 C.R. (5th) 1, 270 N.R. 1 (S.C.C.).

2 See for example s. 39(1)(d) of the *Canadian International Trade Tribunal Act*, S.C., c. C-18.3, "The Tribunal may, after consultation with the Minister and with the approval of the Governor in Council, make rules, not inconsistent with this or any other Act of Parliament . . . (d) generally, governing the proceedings, practice and procedures of the Tribunal."

3 *Re Clement* (1919), 27 B.C.R. 361, 48 D.L.R. 237 (C.A.).

4 *Nicholson v. Haldimand-Norfolk (Regional Municipality) Comm. of Police*, [1979] 1 S.C.R. 311, 78 C.L.L.C. 14,181, 88 D.L.R. (3d) 671, 23 N.R. 410; *Selvarajan v. Race Relations Board*, [1976] 1 All E.R. 12 (C.A.).

or practitioners before them. I submit that in developing or urging a particular procedure upon an agency it is simply not sufficient to copy judicial practice in the expectation that this must be the best there is.

Very simply put, this is because agencies do not serve the same function as do courts. I doubt very much that anyone would like major surgery conducted upon themselves by doctors dedicated to do so in accordance with the very best judicial process. Even when the agency's function appears very close to a court function, disciplinary hearings for example, I suggest that it is incorrect to blindly pattern the agency essentially upon judicial process. After all there must be a reason the function has been mandated to an administrative agency and not to a court.[5]

> The procedural format adopted by the administrative tribunal must adhere to the provisions of the parent statute of the Board. The process of interpreting and applying statutory policy will be the dominant influence in the workings of such an administrative tribunal. Where the Board proceeds in the discharge of its mandate to determine the rights of the contending parties before it on the traditional basis wherein the onus falls upon the contender to introduce the facts and submissions upon which he will rely, the Board technique will take on something of the appearance of a traditional Court. Where, on the other hand, the Board, by its legislative mandate or the nature of the subject-matter assigned to its administration, is more concerned with community interests at large, and with technical policy aspects of a specialized subject, one cannot expect the tribunal to function in the manner of the traditional Court. This is particularly so where Board membership is drawn partly or entirely from persons experienced or trained in the sector of activity consigned to the administrative supervision of the Board. Again where the Board in its statutory role takes on the complexion of a department of the executive branch of Government concerned with the execution of a policy laid down in broad concept by the Legislature, and where the Board has the delegated authority to issue regulations or has a broad discretionary power to license persons or activities, the trappings and habits of the traditional Courts have long ago been discarded.[6]

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5 In *Salem v. Metropolitan Toronto (Licensing Commission)* (1993), 63 O.A.C. 198 (Div. Ct.) the Ontario Divisional Court held that the Metropolitan Licensing Commission (Toronto) was not a court and was not required to follow the strict formalities of court procedure. Nonetheless, tis procedures had to at least ensure 1. that licensees are given a clear statement of the allegations against them and the basis on which liability is sought to be established; 2. that proceedings are conducted with enough order and structure to ensure that it is clear who has to prove what; 3. that respondents have a fair and orderly opportunity to call evidence and make submissions in respect of both liability and penalty; and 4. that adequate reasons are given for the decisions of the tribunal.

6 Mr. Justice Estey, writing for the Court in *Innisfil (Township) v. Vespra (Township)*, [1981] 2 S.C.R. 145, 123 D.L.R. (3d) 530. In *Board of Education v. Rice*, [1911] A.C. 179 (H.L.) Lord Loreburn observed: "The Board of Education will have to ascertain the law and also ascertain the facts. I need not add that in doing either they must act in good faith and fairly listen to both side, for that is a duty lying upon every one who decides anything . . .. They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy

Thus, subject to the general limitations upon its procedural authority discussed below, an agency can structure its proceedings in any way which it feels most effective for the accomplishment of its mandate. This would include, for example, determining the order and form in which evidence is filed or witnesses are called.[7]

There is something sad, if not aggravating, about an agency whose members have been chosen for their expertise in areas that often have nothing to do with judicial process (even if that expertise is simply being a touchstone of community standards) hopelessly flailing about struggling to conduct themselves as they think the courts would. Without the background, and usually without the term of appointment to learn by experience, these individuals are often incapable, however laudable their intentions (which are usually based on a desire to do "what is fair") of conducting either fair or efficient hearings. Professionals are not created by hope or desire — but through a combination of some innate ability and study and experience. Even if it were proper for agencies to operate as do courts it would not be possible to do so without substantial revision to the whole concept of the administrative agency including the appointment and term of agency members. It is sad when agencies flounder from the good, but misdirected intentions of its members to be "fair". It is maddening when this happens because of

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for correcting or contradicting any relevant statement prejudicial to their view. Provided this is done, there is no appeal form the determination of the Board." In *Local Government Board v. Arlidge*, [1915] A.C. 120 (H.L.) (municipal council condemning an individual's house) the House of Lords reaffirmed that principle. After noting that the subject council had to act judicially Viscount Haldane L.C. stated that "But it does not follow that the procedure of every such tribunal must be the same. When, therefore, Parliament entrusts it [a department] with judicial duties, Parliament must be taken . . . to have intended it to follow the procedure which is its own, and is necessary if it is to be capable of doing its work efficiently." To the same effect see *Kane v. University of British Columbia*, [1986] 1 S.C.R. 1105, 18 B.C.L.R. 124, 110 D.L.R. (3d) 311.

7 See for example, *Dilts v. University of Manitoba Faculty Association*, [1973] 5 W.W.R. 263, 41 D.L.R. (3d) 401 (Man. Q.B.), affirmed [1974] 1 W.W.R. 22, 43 D.L.R. (3d) 401 (Man. C.A.) (no rule that an agency must conduct is hearings in a prescribed sequence without exception); and *Chen v. Canada (Minister of Employment & Immigration)* (1993), [1994] 1 F.C. 630, 109 D.L.R. (4th) 560 (C.A.), reversed on other grounds [1995] 1 S.C.R. 725, 27 Imm. L.R. (2d) 1, 123 D.L.R. (4th) 536 where the Federal Court of Appeal held that natural justice did not dictate the sequence of questions at an immigration inquiry.

For a related case, see *Forrest v. Canada (Attorney General)* (2002), F.T.R. 82 (Fed. T.D.), where the Federal Court Trial Division rejected a complaint by an inmate who elected to visit family rather than attend before a prison Disciplinary Court which had been convened to hear a complaint which he had lodged.

> In considering the rules of natural justice and the duty to act fairly, the applicant had a full opportunity to be present at the hearing, the applicant had proper notice of the disciplinary charges, and the applicant had requested the adjournment of the hearing so that the Disciplinary Court could bring the witnesses requested by the applicant. *The Disciplinary Court, not the applicant, dictates the date for the hearing*, and if the applicant chooses to be absent, he cannot later complain that he did not have a fair hearing. (emphasis added)

procedures or concepts urged upon them by lawyers, who should know better, or thrust upon them by courts, which have no excuse.[8]

Thus, in summary, my advice to any agency engaged in developing its procedure is:

i. Think about what it is you are supposed to do and what you want to accomplish. (E.g. Do you need facts? Do you need those facts tested? Do you require legal argument? Do you need expert testimony? Do you need to gauge public opinion or develop policy for some social goal? Do you have to act quickly? Are you a neutral resolving disputes between others? Are you a policy maker or are you entrusted with some public policy or interest duty?)

ii. Think about the physical realities you are going to have to deal with. (E.g. Resources open to you in terms of facilities, staff, and their capabilities? Who outside of your agency are you going to be likely to work with? What are the likely types of information you are going to have to deal with and the likely sources of that information?)

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8 The reader may wish to note the admonishing words of the Ontario Court of Appeal respecting an arbitration board in *Toronto (City) v. C.U.P.E., Local 79* (1982), 35 O.R. (2d) 545 (C.A.) (brought to my attention by Sara Blake in her text *Administrative Law in Canada* (2d ed.) (Butterworths 1997) at p. 3):

> These long and tortuous proceedings, which still continue more than four years after Risdon's dismissal, invite sad reflection on the arbitration process. They bear a sombre resemblance to *Re Township of Innisfil and Township of Vespra et al.* . . . where a novel procedural initiative in an administrative hearing resulted in long and costly proceedings before a tribunal and the courts. What has happened in this case seems to me to confound the intention of the Legislature, which wisely decided that grievances under collective agreements should not be adjudicated upon by the courts. It is obvious that the rigidities and technical rules of court procedure would interfere with the necessarily broad inquiry required.
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> The purpose of arbitration of grievances under collective agreements is to provide an expeditious and fair method of settling disputes which experience was demonstrated are much better solved in this fashion than by complex judicial proceedings. Most arbitrators are laymen who bring the benefit of their experience to the practical solution of complex human problems. Courts consistently have recognized the special role of arbitration boards and have been loathe to interfere with their decisions or proceedings.
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> It is, therefore, surprising to observe the extent to which arbitration awards purport to deal with complex questions of law. Many arbitration board decisions cited to us contain scholarly dissertations on important substantive and procedural rules applicable to judicial proceedings. They exemplify the extreme legal formalism and adherence to technical rules which overhangs the arbitration process. At best these elaborate legal studies may be irrelevant because Boards are not bound in their procedure by technical rules of law and procedure. At worst, they can cause delay and unnecessary expense and, as the argument in this appeal demonstrated, they could obscure the real issues confronting an arbitration board and confuse it in the performance of its duty. While it may be helpful for arbitration boards to seek guidance by way of analogy from established legal procedures, they risk committing jurisdictional error by rigid adherence to them.

iii. Think about the various procedures open to you in light of your powers and of the constitutional and other procedural restraints upon you (see below). (E.g. Written hearing? Oral hearing? Electronic hearing? Some mix of the two? Allow carriage of action to parties? Conduct investigations? Pre-hearing filings? After hearing filings? Expert panels? Witnesses?)

iv. Determine which of those procedures will best meet your goals in light of your physical and legal abilities

v. Think about the interests of the parties who will be appearing before you. How important are those interests likely to be? What are the parties likely to need or want to do to protect those interests?

vi. Consider how compatible the procedures your needs and goals demand are with the procedures the parties are likely to want?

vii. Ultimately balance your needs with the needs of the parties. Procedures which are compatible with both sides are likely the best. Where procedures cannot be reconciled, try to reconcile them in light of the interests and goals of your agency and the parties. For example, where the goal or interest you are attempting to accomplish may be of lesser importance you may wish to adopt a procedure which will work for your agency though not as effectively as others if that procedure is very necessary for a party to adequately protect an important interest to him or her. Parties may be asked to accept procedures which will work for their interests, though perhaps not has well as others, if that procedure is vital for the accomplishment of an important agency goal.

Where, however, there is an irreconcilable conflict between the needs of a party in order to adequately protect his or her vital interest (e.g. personal liberty) and the needs of your agency in order to adequately accomplish a goal of vital importance (e.g. national security) the goals of the state (i.e. the agency) come first. The party will have to settle for less — the best of the lesser procedures which will not imperil the agency's goal.

9.2 WHAT IS PROCEDURE?

Of course, in determining your procedure you will need to know exactly what procedure is. Frequently it is easier to say what procedure is in the abstract than to recognize it in real life.[9]

9 ". . .it is necessary to distinguish between substance and procedure, between right and remedy. They do no always admit of contrast in law. They cannot always be relegated to clear cut categories." (Walker J. in *Toronto-Dominion Bank v. Martin* (1985), 39 Sask R. 60 (Q.B.).

Procedure, which is also known as "practice", is the means by which one enforces or brings about one's substantive rights.[10] Here are two general definitions from the case law:

> 1. The word "procedure" denotes the mode by which a legal right is enforced; it is akin to the word "practice", and means the rules that are made to regulate the classes of litigation within the Court itself, and does not involve or imply anything relating to the extent or nature of the jurisdiction of the Court. . ..[11]
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> 2. It is not always easy to classify rules of law into those which are substantive and those which are procedural, but, generally speaking, it may be said that substantive rules give or define the right which it is sought to enforce and procedural rules govern the mode of proceeding or machinery by which the right is enforced.[12]

Unfortunately, the distinction between substantive law on the one hand and procedure on the other is not easy to make in practice. I suggest that the test is the effect of the rule in question. Things which operate to increase or decrease the jurisdiction of a body, or to create, terminate or extend rights are not procedural in nature.[13] Things which stream, control or shape the manner in which existing rights are pursued are procedural.[14]

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10 *Angus v. Hart*, [1988] 2 S.C.R. 256, 30 O.A.C. 210, 52 D.L.R. (4th) 193; *Re Royal Canadian Mounted Police Act (Canada)* (1990), [1991] 1 F.C. 529, 123 N.R. 120 (C.A.), leave to appeal to S.C.C. refused (1991), 135 N.R. 319 (note) (S.C.C.).

11 *McKee v. Lavary* (1923), 17 Sask. L.R. 429 (C.A.). See also *Canada (Attorney General) v. Newfield Seed Ltd.* (1989), 63 D.L.R. (4th) 644, 80 Sask. R. 134 (C.A.) where the Court, at p. 666, quotes the following from *Materna v. Materna* (1983), 145 D.L.R. (3d) 624, [1983] 3 W.W.R. 725, 25 Sask. R. 175 (Q.B.):

> As a general proposition the distinction between procedure and substance depends on whether the rule of law being considered operates to create or define a right which, when invoked, will entitle that party to whom the right is vested to relief; or whether the rule of law merely serves as a vehicle for the enforcement of some other right which the parties are ultimately concerned to vindicate or deny. . . . The distinction therefore between substance and procedure is a functional one. If the function of the rule is to provide the vehicle or method for the vindication of some right, then it is a matter of procedure only; but where the rule provides for the assertion of a substantive right or encroaches on or revives a substantive right, it goes beyond procedural and is substantive.

Similarly see *Aylmer Meat Packers Inc. v. Ontario*, 2010 CarswellOnt 585, 2010 ONSC 649 (Ont. S.C.J.). In that case the Ontario Superior Court of Justice stated that:

> 13 Procedural legislation goes to the "conduct of actions. It indicates how actions will be prosecuted, how proof will be made and how rights will be enforced in the context of a legal proceeding".

12 *Sigurdson v. Farrow* (1981), 15 Alta. L.R. (2d) 180 (Q.B.) quoting Halsbury's.

13 *Ostrowski v. Saskatchewan (Beef Stabilization Board Appeals Committee)* (1993), 9 Admin. L.R. (2d) 227, 101 D.L.R. (4th) 511, 109 Sask. R. 40 (C.A.).

14 *Angus v. Hart*, [1988] 2 S.C.R. 256, 30 O.A.C. 210, 52 D.L.R. (4th) 193. "Normally rules of procedure do not affect the content or existence of an action or defence (or right, obligation, or whatever else is the subject of the legislation), but only the manner of its enforcement or use. . .."

See also the decision of the Nova Scotia Court of Appeal in *Nova Scotia (Attorney General)*

Thus, in *Aylmer Meat Packers Inc. v. Ontario*, 2010 CarswellOnt 585, 2010 ONSC 649 (Ont. S.C.J.), in finding that a rule which restricted access to summary judgment was procedural in nature, the Ontario Superior Court of Justice made the following comments:

> 15 In determining whether a provision is purely procedural, the courts look to the substance of the provision and its practical impact on the parties. The important thing is not the label, but the effect. If the effect of a provision is to alter the legal significance of the facts of a case and the legal position of the parties, it is not purely procedural.
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> . . .
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> 18 By contrast, cases involving changes of evidentiary rules have been found to be purely procedural, except where they interfere with substantive rights such as solicitor-client privilege or legal presumptions arising out of certain facts.
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> 19 In my view, summary judgment is a procedural provision and any changes to it are procedural enactments. (footnotes excluded)

Most of the rules of evidence are procedural in nature; however, privilege, although an aspect of evidence, is a matter of substantive law, as are rules of evidence respecting presumptions arising from certain facts. Still, to illustrate how complex this can all get, the compellability of a spouse was found to be procedural not substantive.[15] Also a rule establishing the *weight* of evidence has been said to be a substantive rule.[16]

The following matters have been found to come under an agency's power over procedure:

i. a provision directing the mode of hearing (oral or written);[17]

ii. the granting of adjournments;[18]

iii. decisions to hold electronic hearings;[19]

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v. Bishop 2006 CarswellNS 460, 2006 NSCA 114 (Nova Scotia Court of Appeal) which approved of the discussion found above and applied it to the specifics of the authority of the Nova Scotia Utility and Review Board to order discovery outside of a hearing.

15 For both propositions see *Wildman v. R.*, [1984] 2 S.C.R. 311, 12 D.L.R. (4th) 641, 5 O.A.C. 241.

16 *Andrews v. Andrews*, [1945] 1 D.L.R. 595 (Sask. C.A.). See also *R. v. S. (C.J.)* (1994), 116 Nfld. & P.E.I.R.1, 363 A.P.R. 1 (P.E.I. T.D.), reversed (1996), 137 Nfld. & P.E.I.R. 181, 428 A.P.R. 181 (P.E.I. C.A.), leave to appeal to S.C.C. refused (1996), 148 Nfld. & P.E.I.R. 270 (note), 464 A.P.R. 270 (note) (S.C.C.) (rule removing requirement for corroboration of evidence for conviction was substantive, not procedural, in nature).

17 *Local Government Board v. Arlidge*, [1915] A.C. 120 (H. of L.).

18 *Prassad v. Canada (Minister of Employment & Immigration)*, [1980] 1 S.C.R. 560, 36 Admin. L.R. 72, 57 D.L.R. (4th) 663.

19 See the discussion later in this text respecting electronic hearings at c. 21A.5(c).

iv. a direction to file in advance of a hearing any evidence on which the party intended to rely coupled with a decision not to hear any evidence not so filed;[20]

v. decisions to hear separate applications in a common hearing;[21]

vi. decisions to hold a hearing in private;[22]

vii. the authority to prevent abuse of its processes by refusing to proceed with an application;[23]

viii. decisions as to whether a lawyer may be the only professional authorized to assist a party, or whether a non-lawyer agency may appear; or whether a person must appear personally or be represented by agent;[24]

ix. the power to determine the composition of a student disciplinary committee.[24.1]

x. the power to order discovery (examination of an individual) of a provincial appraiser outside of the formal expropriation compensation hearing.[24.2]

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20 *Morista Developments Ltd. v. Ontario Municipal Board* (1990), 2 Admin. L.R. (2d) 113 (Ont. Div. Ct.); *U.F.C.W., Local 401 v. Westfair Foods Ltd.*, 2010 CarswellAlta 639, 2010 ABCA 120 (Alta. C.A.) (power to require advance disclosure falls within an agency's power over its procedure).

21 *Ontario (Minister of Transportation & Communication) v. Eat'n Putt Ltd.* (1985), 50 O.R. (2d) 503 (Div. Ct.), leave to appeal to Ont. C.A. refused (1985), 12 Admin. L.R. xxxvii (note) (Ont. C.A.).

22 *Millward v. Canada (Public Service Commission)*, [1974] 2 F.C. 530, 49 D.L.R. (3d) 295 (T.D.).

23 *S. (N.) v. Norris* (1992), 6 Admin. L.R. (2d) 228, 93 D.L.R. (4th) 238, 10 O.R. (3d) 67 (Gen. Div.).

24 *R. v. Lemonides* (September 4, 1997), Doc. 354/95 (Ont. Gen. Div.).

24.1 *D.(C.) (Litigation Guardian of) v. Ridley College)* (1996), 45 Admin. L.R. (2d) 77 (Ont. Gen. Div.).

24.2 *Nova Scotia (Attorney General) v. Bishop* 2006 CarswellNS 460, 2006 NSCA 114 (Nova Scotia Court of Appeal). Regulation 26 of the Expropriation Procedures Regulations gave the Nova Scotia Utility and Review Board the authority to "give such direction as to practice and procedure to be followed in any proceeding before it". The issue in this case was whether this authorized the Board to make orders requiring discovery (examination of witnesses outside of hearing). The Nova Scotia Court of Appeal held that it did. A claimant had brought a proceeding before the Board for compensation respecting an expropriation by the province of the claimant's land. After a preliminary hearing the Board issued an order directing the discovery of the province's appraiser. The province contested the order arguing that the Board did not have the authority to order discovery. The Court of Appeal ruled that the issue of substance in the proceeding was the calculation of the expropriation compensation award and that the order for discovery did not determine any aspect of that award. Rather:

> "The discovery direction is a "mode of proceeding or machinery by which the right is enforced" and is one of the "things which stream, control or shape the manner in which existing rights are pursued" . . ."

The Court also held that the particular grant of authority in Regulation 26 for the Board to give directions as to practice and procedure "to be followed in any proceeding before it" extended to

The Ontario Superior Court of Justice also found that a rule restricting access to summary judgment was procedural, not substantive, in nature (*Aylmer Meat Packers Inc. v. Ontario*, 2010 CarswellOnt 585, 2010 ONSC 649 (Ont. S.C.J.)). The Federal Court of Appeal also found the concept of quorum to be a matter of procedure in *Faghihi v. Canada (Minister of Citizenship & Immigration)* 2001 CarswellNat 1077, 2001 FCA 163, 274 N.R. 358 (Fed. C.A.).[24.2A]

In addition, although the power to award costs appears to be substantive (see discussion respecting substantive matters), in *obiter*, in *Inforica Inc. v. CGI Information Systems & Management Consultants Inc.*, 2009 CarswellOnt 5276, 2009 ONCA 642 (Ont. C.A.) the Ontario Court of Appeal stated that the ability of an arbitrator to make an order requiring the posting of *security* for costs was more akin to a matter of procedure than substance.[24.3]

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discoveries to take place outside of the actual hearing before the Board. The broader authority respecting any proceeding before the Board distinguished the case from the earlier decision of the Supreme Court of Canada in *Canadian Pacific Air Lines Ltd. v. Canadian Air Lines Pilots Association*, [1993] 3 S.C.R. 724 where the statutory authority was worded in such a way that it was evident that it referred only to matters in a formal hearing itself. The enabling authority of Regulation 26 was to be read in the context of the co-existing Regulation 23 which authorized the Board to direct the procedure "at a hearing". In order to avoid tautology Regulation 26 had to be interpreted to refer to more than just procedure "at the hearing". In addition the ordinary meaning of Regulation 26 supported the legislative objective to promote an effective hearing process before the Board. As described in the Board's decision: "Discovery of expert appraisers should assist the hearing process by facilitating disclosure, avoiding surprise, and ultimately, perhaps, enabling the Board to reach a more informed decision."

24.2A In my opinion, treating quorum, which goes to the question of who can exercise authority – not how that authority is exercised, as a matter of procedure – is highly problematic. This is discussed in more detail later under heading 12.19 "Quorum" in chapter 12.

24.3 *Inforica Inc. v. CGI Information Systems & Management Consultants Inc.*, 2009 CarswellOnt 5276, 2009 ONCA 642 (Ont. C.A.):

> I would add, however, that even if it can be said that orders for security for costs do fall into a special category, that category is much closer to procedure than to substance. Such orders are made to protect the integrity of the dispute resolution process by preventing parties from structuring their affairs in a manner that immunizes them from the discipline of costs. They do not decide rights, but rather serve to ensure that parties are governed by the rules of the game.
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> By way of analogy, for appeal purposes in ordinary civil proceedings, an order for security for costs is regarded as a procedural order from which there is no right of appeal. Such an order is interlocutory in nature, incidental to the resolution of the subject matter of the dispute, and, accordingly, an appeal only lies to the Divisional Court with leave: see *Susin v. Chapman*, 1998 CanLII 3224 (ON C.A.); *Shuter v. Toronto, Dominion Bank*, 2007 CanLII 37475 (ON S.C.).
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> I recognize that failure to satisfy an order for security for costs may lead to a dismissal of the claim, but the sanction for non-compliance with an order cannot alter the nature of the order itself. Many procedural or interlocutory orders - for particulars, for production of documents, for the payment of costs ordered in interlocutory proceedings - may carry the ultimate sanction of dismissal of the non-complying party's claim. But if the claim is dismissed, the dismissal flows from the party's failure to comply with the interlocutory or procedural order, not from

In a somewhat problematic decision the Ontario Divisional Court held that a statutory time limit to appeal a property assessment was a matter of procedure which could be extended under a superior court's inherent power over process (*PPF Investments Inc. v. Municipal Property Assessment Corp., Region No. 15*, 2010 CarswellOnt 221, 2010 ONSC 491 (Ont. Div. Ct.)). Insofar as a right of appeal exists only to the extent created by a legislature, it appears problematic to classify the time period during which the right to appeal exists as being procedural rather than substantive. Furthermore, the case appears to be in conflict with other decisions (noted below) where the imposition of a time limit for the brining of an action, or the imposition of a requirement for leave before an action may be brought were found to be substantive matters.

Equally problematic are the decisions in the Federal Courts that the determination of what constitutes quorum is a matter of procedure (*Faghihi v. Canada (Minister of Citizenship & Immigration)*, 2001 CarswellNat 1077, 2001 FCA 163 (Fed. C.A.); *Stumf v. Canada (Minister of Citizenship & Immigration)*, 2002 CarswellNat 877, 2002 FCA 148 (Fed. C.A.). See the more detailed discussion later under the subheading "Quorum: A Substantive or Procedural Matter" which is located under heading 12.19 "Quorum".

On the other hand, the following matters have been found to be substantive and not to be mere matters of procedure:

i. the creation of a means for public scrutiny of decisions of the R.C.M.P.;[25]

ii. a provision which extended the monetary jurisdiction of a court;[26]

(*Continued on page 9–9*)

the order itself, and does not alter the interlocutory or procedural nature of the order that led to dismissal: see *Laurentian Plaza Corp. v. Martin* (1992), 7 O.R. (3d) 111 (C.A.).

25 *Re Royal Canadian Mounted Police Act (Canada)* (1990), [1991] 1 F.C. 529, 123 N.R. 120 (C.A.), leave to appeal to S.C.C. refused (1991), 135 N.R. 319 (note) (S.C.C.). "What is legislated is clearly not just a manner of scrutiny but the very existence of public scrutiny for the first time."

26 *McKee v. Lavary* (1923), 17 Sask. L.R. 429 (C.A.).

iii. a rule requiring a plaintiff to post costs (because it had the effect of terminating the right of action in the event of failure to do so);[27]

iv. a requirement that a contract for payment of a real estate commission could not be sued upon unless the contract was in writing and separate from the sale agreement;[28]

v. the giving or taking away of a right of appeal;[29]

vi. the imposition of a time limit beyond which an action could not be brought;[30]

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27 *Brown v. Keele*, [1934] 4 D.L.R. 508, 42 Man. R. 329 (C.A.). See also *Xiao v. Canada (Minister of Citizenship & Immigration)* (1998), 149 F.T.R. 146 (Fed. T.D.) where the Federal Court Trial Division held that the Minister of Citizenship and Immigration could not use his power over procedure to require that an application be accompanied by the legislated fee or be rejected. The Minister of Citizenship and Immigration adopted as a policy the requirement that immigration applications must be accompanied by the full "right-of-landing" fee. There was no legislative requirement respecting the timing of the payment of this fee which the Federal Court Trial Division stated only had to be paid sometime before the issuance of the requested visa. The Minister refused to accept an application where the "right-of-landing" fee submitted with it fell short by $100. On judicial review the Federal Court Trial Division held that the Minister did not have the authority to demand payment of the fee at the time of the application. The Court stated:

> [A]lthough the Minister may issue guidelines and other non-binding instruments as a matter of administrative practice, even if such a policy existed in 1997, it acted as much more than a mere guideline in this instance; it was clearly mandatory in nature and the application had a legal effect. The Minister's authority to make such requirements is derived exclusively from the relevant legislation .... I cannot find any authority in the Immigration Act, the Immigration Act Regulations, 1978, or the Immigration Act Fees Regulations for such a requirement. It is no answer for the Minister to state that nothing in the Act or Regulations prohibit him from making it. His authority must be found in explicit and positive language in a relevant statute or regulation. Here, the Immigration Act Fees Regulations are not even ambiguous on the issue; they are entirely silent on whether applications may be returned for overpayments.

28 *Smith v. Upper Canada College* (1921), 61 S.C.R. 413, 57 D.L.R. 648.

29 *Smith v. Upper Canada College* (1921), 61 S.C.R. 413, 57 D.L.R. 648; *Colonial Sugar Refining Co. v. Irving*, [1905] A.C. 369 (P.C.); *Doran v. Jewell* (1914), 16 D.L.R. 490, 49 S.C.R. 88; *R. v. Gartshore* (1919), 49 D.L.R. 276 (B.C.S.C.).

30 *Stephenson v. Parkdale Motors*, [1924] 3 D.L.R. 663, 55 O.L.R. 680 (H.C.), aff'd [1924] 4 D.L.R. 1201, 56 O.L.R. (C.A.); *Hackett v. Ginther*, 26 D.L.R. (4th) 106, [1986] 3 W.W.R. 385, 46 Sask. R. 34 (C.A.); *Bassett v. Canada* (1987), 35 D.L.R. (4th) 537, 53 Sask. R. 81 (C.A.). See also *Johnston v. Law Society (Prince Edward Island)* (1991), 80 D.L.R. (4th) 725, 1 Admin. L.R. (2d) 265, 91 Nfld. & P.E.I.R. 126 (P.E.I. C.A.), leave to appeal to S.C.C. refused (1991), 93 Nfld. & P.E.I.R. 270 (note), 292 A.P.R. 270 (note) (S.C.C.) (time limit set out in statute is substantive law and statutory authority to make rules regulating pleading, practice and procedure does not include the power to alter the substantive law).

For a somewhat usual decision respecting the setting of time limits for the brining of judicial review see *Central Halifax Community Assn. v. Halifax (Regional Municipality)*, 2007 CarswellNS 146, 2007 NSCA 39 (N.S.C.A.). This case dealt with a challenge to the Nova Scotia Civil Procedure Rules which set a time limit respecting the bringing of judicial review. It was argued before the Court that as the Judicature Act only authorized Rules regulating the pleading, practice and procedure before the Court the Rule setting the time limit was *ultra vires* as time limits barring a right of action were matters of substantive law – not procedure. The Court held that the publication and Parliamentary tabling process required for the Court's rules operated to

vii. a requirement for leave before an action may be commenced;[31]

viii. a provision stating that no action should be brought for a commission unless the person rendering the service was licensed as an agent or not required to be licensed;[32]

ix. the creation of a defence to an action;[32.1]

x. a rule of court having the effect of altering or expanding the common law definition of "the record" for the purposes of judicial review (because it had the effect of expanding the common law judicial review authority of the court);[32.2]

xi. a rule of court imposing a six-month time limit for the bringing of *certiorari* after which time leave of the court had to be granted;[32.3]

xii. agency regulation purporting to set time limit upon right to seek review granted by statute;[32.4] and

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maintain the validity of the Rules. The Judicature Act required that the Court's rules had to be published in the *Gazette* and thereafter had "the force of law". In addition, the Court felt that its Rules were not subordinate legislation (presumably in the sense that they were not restricted to the strict subject matter of their enabling legislation). Rather, the Court felt that a tabling exercise in the Legislature at which time they were subject to cancellation at the direction of the Legislature resulted in a sort of legislative acceptance and validation of the subject matter of the Rules.

> Furthermore, these rules do not represent subordinate legislation as the appellant seems to suggest. While they may not be passed by the Legislature in the conventional sense, they are laid before the House of Assembly where they are subject to cancellation, should the Assembly so direct. A failure to do so implies their acceptance. Thus, by these provisions, the *Civil Procedure Rules* generally, and rule 56.6 specifically, embody the force of law.

The Court distinguished other, contrary, judicial decisions from the Supreme Court of Canada, the Saskatchewan Court of Appeal, and the Newfoundland Supreme Court (Trial Division) on various grounds (one case involved a conflict of laws issues, the other jurisdictions did not have the same legislative tabling rules, the case involved a conflict with a statutory time limit).

> Some caution should be exercised in relying on this decision. Its view respecting the effect of legislative tabling may be inconsistent with Parliamentary law – which holds that Parliament can make rules only through legislation – not by resolution and likely not by forbearing to disallow regulation. It is questionable either that Parliament can amend legislation through resolution or forebearance or legislate in that way. And as all valid subordinate legislation has the force of law the Court's reliance on that concept also appears somewhat problematic.

31 *Toronto-Dominion Bank v. Martin* (1985), 39 Sask. R. 60 (Q.B.).

32 *Bateman & Litman Real Estate Ltd. v. Big T. Motel Ltd.* (1964), 44 D.L.R. (2d) 474 (Sask. Q.B.), affirmed (1964), 49 D.L.R. (2d) 480 (Sask. C.A.).

32.1 *Angus v. Hart*, [1988] 2 S.C.R. 256, 30 O.A.C. 210, 52 D.L.R. (4th) 193.

32.2 *Saskatchewan Insurance Office & Professional Employee's Union, Local 397 v. Saskatchewan Government Insurance*, [1984] 4 W.W.R. 668 (Sask. Q.B.).

32.3 *Ostrowski v. Saskatchewan (Beef Stabilization Board)*, [1993] 4 W.W.R. 441, 9 Admin. L.R. (2d) 227, 12 C.P.C. (3d) 156, 109 Sask. R. 40, (*sub nom. Ostrowski v. Saskatchewan (Beef Stabilization Board Appeals Committee)* 101 D.L.R. (4th) 511 (C.A.).

32.4 *Canada (Attorney General) v. Canada (Public Service Staff Relations Board)*, 74 D.L.R. (3d) 307, [1977] 2 F.C. 663 (C.A.) (Rule found not to be a rule of procedure. Also found to operate as a fetter upon the discretion of the Board to hear such reviews.) See also *Cardona v. Canada*

xiii. the authority to re-hear a matter.[32.4A]

xiv. a change in the standard of review.[32.4B]

xv. the power to order the payment of costs.[32.4C]

In *C.S.W.U., Local 1611 v. Seli Canada Inc.*, 2010 CarswellBC 440, 2010 BCSC 243 (B.C.S.C.), the B.C. Supreme Court held that an agency's power over its procedure did not extend to defining what constituted "the record" for the purposes of judicial review. B.C. Judicial Review Procedure Act declares that the transcript of a proceeding before an agency constitutes part of the record for the purposes of judicial review. The B.C. Supreme Court held that the B.C. Human Rights Code provision that the B.C. Human Rights Tribunal to make rules respecting practice and procedure did not authorize rules which direct that a transcript of its proceedings do not constitute part of the record. The rule in question provided that any transcript made of a proceeding did not constitute part of the agency's record. Unfortunately, the Court did not explain whether this limitation flowed from the fact that the definition of the record was a matter of substance or whether the definition of the record to be used on judicial review was not a matter that could be considered a matter of the Tribunal's own practice and procedure. Rather the Court simply stated its conclusion.

> 73 The Tribunal, pursuant to s. 27.3 of the *Code* is given the power to make rules respecting practice and procedure to facilitate just and timely resolution of complaints. That rule does not give the Tribunal power to determine its record for the purpose of judicial review.

9.3 IMPORTANCE OF PROCEDURE

Procedure plays an important role. I have noted the importance of procedure earlier in a paper which I co-authored with Martin Freeman.[32.5]

> It is not only the means by which the decisions of agencies are made, but the yardstick against which the "fairness" of those decisions are measured. Procedure

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(Minister of Manpower & Immigration) (1978), 89 D.L.R. (3d) 77 (Fed. C.A.) (inability to use procedural regulation power to impose time limit on statutory right to ask for reasons).

32.4A *Baudisch v. Canada (Civil Aviation Tribunal)* (1997), 47 Admin. L.R. (2d) 12 (Fed. T.D.).

32.4B *British Columbia v. Bolster*, 2005 CarswellBC 2575 (B.C.S.C.).

32.4C *Ontario (Attorney General) v. Ontario Review Board*, 2009 CarswellOnt 1356, 95 O.R. (3d) 698, 93 Admin. L.R. (4th) 301 (Ont. S.C.J.). ("The ORB is a creature of statute is not authorized to order a party to pay the costs incurred by the ORB without express statutory authority. Costs are a substantive matter for which express statutory authority is required. I find that it is not a mere matter of procedure.")

32.5 Martin Freeman and James L.H. Sprague, "The Case for a Federal Administrative Hearings Powers and Procedures Act", in Anisman and Reid (eds.) *Administrative Law Issues and Practice* (Carswell, 1995).

9.4(d)(ii) Content of the Principles of Natural Justice

The requirements of natural justice and fairness are determined by the specifics of the individual circumstances in question. That is to say, they are "contextual" – driven by the context in which they are to operate.[32.59B] And they can vary from case

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Practices Commission), [1979] 1 S.C.R. 311 (S.C.C.) make the following statement in volume 4 at page 264:

> It is thus essential for the Court in each case to look into the actual scope of the administrative action performed by the agency. If the action is purely preliminary and, as such, has no immediate impact on the rights or interests of the persons affected, the Court must not intervene because under the duty to act fairly, the agency is not bound by the *audi alteram partem* rule. But conversely, where at a later stage the action does lead to the decision, the agency may not remain outside the ambit of the rule without running the risk of having its decision quashed by the Court. [footnotes omitted]

See also *Ruffo c. Québec (Conseil de la magistrature)*, [1995] 4 S.C.R. 267 (S.C.C.) which concerned, among other things, the propriety of the Quebec Conseil de la magistrature's decision to refer a complaint against Judge Ruffo to enquiry without having given her an opportunity to be heard on the matter. Justice Gonthier, writing for the Court, stated:

> More generally, I point out that the scope of the requirements imposed by the duty to act fairly and the *audi alteram partem* rule varies depending on the circumstances of each case. Among the factors to be considered, the nature of the inquiry and its consequences are extremely important. It is also interesting to note that this principle, which was stated by this Court in *Irvine v. Canada (Restrictive Trade Practices Commission)*, [1987] 1 S.C.R. 181, at p. 231, was also recognized in Europe in the judgments of the European Court of Human Rights *Le Compte, Van Leuven and De Meyere* of 23 June 1981, Series A No. 43, and *Albert and Le Compte* of 10 February 1983, Series A No. 58 (reported in Pierre Lambert, "Les droits relatifs à l'administration de la justice disciplinaire dans la jurisprudence des organes de la Convention européenne des droits de l'homme", (1995) *Rev. trim. dr. h.* 161, at pp. 164-65).
>
> I am therefore of the opinion that it cannot be argued in this case that the duty to act fairly meant the appellant had to be given the opportunity to express her views during the initial examination of the complaint, despite the possible consequences of the decision to hold an inquiry concerning her and perhaps to suspend her during that inquiry pursuant to s. 276 *CJA*. The appointment of an examiner is the first step in a procedure that can itself be described as preliminary, since after the formal inquiry the Conseil and the Comité can of their own initiative only reprimand the judge concerned or *recommend* that removal proceedings be initiated. It will be recalled that removal is ultimately not their responsibility but that of the government, following an inquiry by the Court of Appeal (s. 95 *CJA*). In this context and in the specific circumstances of the case, the Conseil's decision to depart from the usual procedure by not appointing an examiner certainly cannot be seen as evidence of bias."

32.59B This assertion is now commonplace in Canadian administrative law and can be found easily, in almost every case in which fairness is discussed. See in illustration: *Inuit Tapirisat of Canada v. Canada (A.G.)*, [1980] 2 S.C.R. 735, 115 D.L.R. (3d) 1 (S.C.C.); *Martineau v. Matsqui Institution Disciplinary Board (No. 2)* (1979), 106 D.L.R. (3d) 385, [1980] 1 S.C.R. 602 (S.C.C.); *Singh v. Canada Minister of Employment & Immigration)*, [1985] 1 S.C.R. 177, 17 D.L.R. (4th) 422, 12 Admin. L.R. 137 (S.C.C.); *Khan v. University of Ottawa* (1997), 34 O.R. (3d) 535, 148 D.L.R. (4th) 577, 2 Admin. L.R. (3d) 298 (Ont. C.A.); *Therrien (Re)*, 2001 CarswellQue 1013, 155 C.C.C. (3d) 1, 30 Admin. L.R. (3d) 171, 200 D.L.R. (4th) 1, [2001] 2 S.C.R. 3 (S.C.C.); *Ruby v. Canada (Solicitor General)*, 2002 CarswellNat 3225,

to case as those circumstances differ. The drivers that determine the particular requirements in any given context are both internal and external. Internal drivers are inherent in the nature of the thing to be done. These are the procedures which, in the absence of any external factor, are called for by the nature of thing to be done itself, and the circumstances in which it is to be done. These are things which the nature of the thing itself in the particular circumstances in which it is to be done, calls for in order for the doing of the thing to be considered fair. External drivers are things that are not necessarily called for by the inherent nature of the thing to be done but which are imposed by considerations outside of that nature such as legislative direction or procedural promises by the decision-maker which a person can be said to have a "legitimate expectation" will be followed.

In *Baker v. Canada (Minister of Citizenship & Immigration)*, 1999 CarswellNat 1124, 174 D.L.R. (4th) 193, 243 N.R. 22, 14 Admin. L.R. (3d) 173, [1999] 2 S.C.R. 817 (S.C.C.), the Supreme Court of Canada attempted to draw the various strings of internal and external drivers that are considered in determining the requirements of fairness in any given circumstances into the following formulation (which was stated not to be exhaustive):

> Although the duty of fairness is flexible and variable, and depends on an appreciation of the context of the particular statute and the rights affected, it is helpful to review the criteria that should be used in determining what procedural rights the duty of fairness requires in a given set of circumstances. I emphasize that underlying all these factors is the notion that the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.
>
> Several factors have been recognized in the jurisprudence as relevant to determining what is required by the common law duty of procedural fairness in a given set of circumstances. . . . The more the process provided for, the function of the tribunal, the nature of the decision-making body, and the determinations that must be made to reach a decision resemble judicial decision making, the more likely it is that procedural protections closer to the trial model will be required by the duty of fairness. . . .
>
> A second factor is the nature of the statutory scheme and the "terms of the statute pursuant to which the body operates": *Old St. Boniface, supra*, at p. 1191. The role of the particular decision within the statutory scheme and other surrounding indications in the statute help determine the content of the duty of fairness owed when a particular administrative decision is made. Greater procedural protections, for example, will be re-

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2002 SCC 75, 219 D.L.R. (4th) 385, 49 Admin. L.R. (3d) 1, [2002] 4 S.C.R. 3 (S.C.C.).

Thus, in *Nishnawbe Aski Nation v. Eden*, 2009 CarswellOnt 4518, 2009 WL2247509 (Ont. Div. Ct.) the Divisional Court held that natural justice did not require the disclosure of information which went to a matter over which the proceeding at hand had no jurisdiction to deal with.

quired when no appeal procedure is provided within the statute, or when the decision is determinative of the issue and further requests cannot be submitted . . .

A third factor in determining the nature and extent of the duty of fairness owed is the importance of the decision to the individual or individuals affected. The more important the decision is to the lives of those affected and the greater its impact on that person or those persons, the more stringent the procedural protections that will be mandated.

Fourth, the legitimate expectations of the person challenging the decision may also determine what procedures the duty of fairness requires in given circumstances. . . .

Fifth, the analysis of what procedures the duty of fairness requires should also take into account and respect the choices of procedure made by the agency itself, particularly when the statute leaves to the decision-maker the ability to choose its own procedures, or when the agency has an expertise in determining what procedures are appropriate in the circumstances . . . While this, of course, is not determinative, important weight must be given to the choice of procedures made by the agency itself and its institutional constraints: *I.W.A., Local 2-69 v. Consolidated Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282, 42 Admin. L.R. 1, 68 D.L.R. (4th) 524 (S.C.C.), *per* Gonthier J."[32.60]

Baker gathers together the various types of factors to be considered in determining what is fair in the circumstances, but those factors are not always to be considered as a whole and balanced out. The *Baker* list (which is not intended to be exhaustive) is a compendium of things that can be looked at as could be relevant in the particular case, and should not be taken as direction to balance each against the other.

Some factors are determinative and when present do not require a consideration of the others. Thus, specific procedural direction by legislation (either in the enabling statute or in a statute of general application such as Ontario's Statutory Powers Procedure Act or British Columbia's Administrative Tribunals Act) is usually determinative of what is fair unless trumped by constitutional principle[32.60A] or by some other paramount legislative direction (such as the Canadian Bill of Rights). (Legislative direction and procedural fairness is discussed extensively later in this text in chapter 12.2(c) "Hearings Must Be Fair".) Similarly, a procedural promise by a decision-maker that meets

32.60 This fifth factor was reformulated by the Supreme Court of Canada in *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*, 241 D.L.R. (4th) 83, [2004] 2 S.C.R. 650, 17 Admin. L.R. (4th) 165 (S.C.C.) to "the nature of the deference accorded to the body". The Court explained that this last factor is intended to be an acknowledgment that "the public body may be better positioned than the judiciary in certain matters to render a decision, and to examine whether the decision in question falls within this realm." This reformulation is problematic, particularly in light of the Supreme Court of Canada's assertion in *Dunsmuir* (2008 SCC 9, 69 Admin. L.R. (4th) 1, [2008] 1 S.C.R. 190 (S.C.C.)) that no deference is to be accorded an agency respecting issues of procedural fairness. It appears that the *Lafontaine* reformulation has dropped by the wayside and the mainline judicial approach in referring to *Baker* is to refer to the original formulation of the fifth factor — see in illustration *McLeod v. Alberta (Securities Commission)* (2006), 2006 CarswellAlta 993, 272 D.L.R. (4th) 94 (Alta. C.A.), leave to appeal refused (2007) 2007 CarswellAlta 209 (S.C.C.) and M. *(N.N.) v. Nova Scotia (Minister of Community Services)*, 2008 CarswellNS 398, 2008 NSCA 69, 295 D.L.R. (4th) 193 (N.S. C.A.).

32.60A For example, the requirement in s. 7 of the Charter that no one is to be deprived of the right to life, liberty and security of the person except in accordance with the principles of "fundamental justice". "Fundamental justice" is discussed later in this text in chapter 12.2(c)(ii) "Fundamental Justice Requirements for a Fair Hearing".

the requirements of a legitimate expectation, unless in conflict with legislation, is also usually determinative of what is required by fairness in the circumstances.

However, absent a legislative direction or a legitimate expectation one must look to the nature of the question to be decided as the guide as to what would be considered to be fair. This is very much a balancing of multiple considerations including (without attempting to be exhaustive) such things as exactly what is to be decided, who it effects, the importance of the decision (both to those affected directly by it and the state as a whole), and the realities of the situation in which the decision must be made.[32.60A.1] The balance of this discussion canvasses the balancing of these considerations in the determination of what is fair in any given context.

32.60A.1 See, in illustration the Supreme Court of Canada decision in *Mavi v. Canada (Attorney General)*, 2011 CarswellOnt 4429, 2011 SCC 30 (S.C.C.). In that case the Supreme Court affirmed the flexible nature of procedural fairness and that the specific content of that principle is shaped by and depends on the context of the particular decision being made.

"41 Once the duty of procedural fairness has been found to exist, the particular legislative and administrative context is crucial to determining its content. We are dealing here with ordinary debt, not a government benefits or licensing program. It is clear from the legislative history of the *IRPA* that over the years Parliament has become increasingly concerned about the shift to the public treasury of a significant portion of the cost of supporting sponsored relatives. Family reunification is based on the essential condition that in exchange for admission to this country the needs of the immigrant will be looked after by the sponsor, not by the public purse. Sponsors undertake these obligations in writing. They understand or ought to understand from the outset that default may have serious financial consequences for them.

42 A number of factors help to determine the content of procedural fairness in a particular legislative and administrative context. Some of these were discussed in Cardinal, a case involving an inmate's challenge to prison discipline which stressed the need to respect the requirements of effective and sound public administration while giving effect to the overarching requirement of fairness. The duty of fairness is not a "one-size-fits-all" doctrine. Some of the elements to be considered were set out in a non-exhaustive list in Baker to include (i) "the nature of the decision being made and the process followed in making it" (para. 23); (ii) "the nature of the statutory scheme and the 'terms of the statute pursuant to which the body operates'" (para. 24); (iii) "the importance of the decision to the individual or individuals affected" (para. 25); (iv) "the legitimate expectations of the person challenging the decision" (para. 26); and (v) "the choices of procedure made by the agency itself, particularly when the statute leaves to the decision-maker the ability to choose its own procedures, or when the agency has an expertise in determining what procedures are appropriate in the circumstances" (para. 27). Other cases helpfully provide additional elements for courts to consider but the obvious point is that the requirements of the duty in particular cases are driven by their particular circumstances. The simple overarching requirement is fairness, and this "central" notion of the "just exercise of power" should not be diluted or obscured by jurisprudential lists developed to be helpful but *not* exhaustive."

In the case in point the Court held that the decision to enforce the contractual obligations of sponsors of immigrants that they would be responsible for any social assistance paid to those immigrants was a matter of debt collection and did not require an elaborate adjudicative process. It was sufficient that notice be given the sponsor, an opportunity provided to make submissions in writing, to consider the relevant circumstances highlighted by those submissions, and to give notice of the decision.

The Court also held that insofar as this was a case of simply holding people responsible for their his or her contractual undertakings, in light of the legislative and regulatory framework, the non-judicial nature of the process and the absence of any statutory right of appeal, that it was not necessary for the Crown to provide reasons for its decision.

Having said that, the courts have boiled down what is necessary to be fair to two basic principles:

i. an individual should have an adequate opportunity to be heard before a decision is made affecting his or her interest; and

ii. the decision must be made by an independent decision-maker.[32.60B]

But mere inconvenience does not amount to "unfairness".[32.61]

First Principle of Fairness: The Adequate Opportunity to Be Heard

The requirement to have an adequate opportunity to present one's case deals with matters relating to the ability of an person to be able to fully present his or her evidence and argument to the decision-maker and his or her ability to know and meet the case against him or her.

The right to be heard is fundamental to a fair proceeding. Fairness demands that before a decision is made which affects an individual's interest he or she must be provided with some opportunity to know the case being made against that interest and to make their own submissions.[32.62] Even if the agency feels that the argument that an individual wishes to make is hopeless, the individual must still be given an adequate opportunity to put that argument before the agency.[32.63]

32.60B *Therrien (Re),* 2001 CarswellQue 1013, 155 C.C.C. (3d) 1, 43 C.R. (5th) 1, 270 N.R. 1 (S.C.C.).

32.61 *A Solicitor v. Law Society (British Columbia)* (1995), 33 Admin. L.R. (2d) 314, 8 B.C.L.R. (3d) 377, 128 D.L.R. (4th) 562 (S.C.).

32.62 *Nicholson v. Haldimand-Norfolk (Regional Muncipality) Commissioners of Police,* [1979] 1 S.C.R. 311, 88 D.L.R. (3d) 671. *Canadian Pharmaceutical Technologies International (C.P.T.) Inc. v. Canada (Attorney General),* 2006 CarswellNat 1625 (Fed. Ct.) (Health Canada branding a company's product as a drug requiring a drug identification number without providing any opportunity to company to call expert evidence or otherwise make submissions on issue.)

The obligation applies to issues which are incidental to the main proceeding such as the request for an extension of time that was considered by the Nova Scotia Supreme Court in *Islam v. Nova Scotia (Human Rights Commission),* 2012 CarswellNS 85, 2012 NSSC 67 (N.S.S.C.). In that case the Nova Scotia Human Rights Commission dealt with a request for an extension of time to bring a complaint application through written proceedings. It received the request for extension in writing and sought and received submissions from the respondent in writing. It did not give the applicant an opportunity to respond to the written submissions from the respondent which raised an issue which the applicant had not addressed. The Commission did not have any formal procedure as to when a right of reply should be provided choosing to approach the matter on an *ad hoc* basis depending on the facts in each case. The Nova Scotia Supreme Court held that fairness required that the applicant should have been given an opportunity to address those issues.

> "24 The Commission is free to determine its own procedures. That being said, those procedures must meet minimal demands of procedural fairness. I am not satisfied that denying a right of reply in these circumstances accords with this standard. The distinguishing point is that Dalhousie's submission ignored the issue upon which it was invited to provide its views — prejudice to the University arising from an extension of time for Dr. Islam to file his complaint — and instead offered the university's views on exceptional circumstances and the public interest. I am satisfied that procedural fairness demanded that Dr. Islam be given an opportunity to reply to the University's position on these issues."

32.63 See, for example, *Miramichi Agricultural Exhibition Assn. Ltd. v. New Brunswick (Lotteries*

Administrative action often entails both the initial decision that action should be taken and a subsequent decision to carry out or execute that decision. Having had an adequate hearing respecting the former will usually obviate any further obligation by a decision-maker to provide an additional hearing respecting the execution of its decision. Arguably, however, where the execution of the decision rests on some determination not resolved or raised in the original hearing fairness should require that the person affected by the execution be given an opportunity to be heard respecting that additional determination.

In illustration, *see Antonenko v. White Fox (Village)*, 2010 CarswellSask 374, 2010 SKQB 213 (Sask. Q.B.). In that case the Saskatchewan Court of Queen's Bench held that a municipality was not required to give an individual notice and an opportunity to be heard respecting the municipality's decision to execute aproperty clean-up order which it had earlier given the individual. The individual had had a full opportunity to be heard respecting the original making of the order, had been given a time limit to clean-up his property which he failed to meet, and, after delaying sometime further the municipality had executed the clean-up order and cleaned up the property itself.

> "65 What legitimate expectations could have been engendered by the meeting with council on July 22, 2004? The plaintiff was told to clean up, and he said he would do so. Although the plaintiff promised to comply by cleaning up his premises, and although the plaintiff had not done so more than two months after agreeing he would, he argued the Village was nonetheless bound by a duty of procedural fairness to provide another formal notice to him before proceeding to remedy his persistent default.
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> . . .
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> 67 The plaintiff was derelict in his obligations. If he needed additional time from the Village, he could have requested it. He made no effort to do so. If the plaintiff's position is that he was lulled into a false sense of security because no action was taken immediately, it must be emphasized that at the advanced stage the matter had then reached, the burden of inquiry was upon the plaintiff. He made no effort to contact the Village or to attend before council at any meeting they held after his promise to clean up at the meeting of July 22, 2004.

Commission)(1995), 100 C.C.C. (3d) 431, 126 D.L.R. (4th) 557, 166 N.B.R. (2d) 286 (C.A.) where the New Brunswick Court of Appeal held that the holder of a bingo licence was entitled to some form of opportunity to present its case no matter how tenuous its position was thought to be by the decision-maker. Furthermore, the licence holder was entitled to be assured that the decision would be taken by the proper authorities and that those responsible for the investigation would not be making the final determination. To the same effect see *Mobil Oil v. Canada Newfoundland Offshore Petroleum Board*, [1994] 1 S.C.R. 202, 21 Admin. L.R. (2d) 248 where the Supreme Court of Canada held that it was improper for the Chair of an agency to refuse to permit an applicant to put its case before the Board even though the Chair was correct in his belief that the applicant did not have the right to apply. The decision as to the rights of the applicant were to be made by the authorized statutory decision-maker. Also see *A.T. Farms Ltd. v. Byrnes* (1995), 32 Admin. L.R. (2d) 284, 130 Sask. R. 175 (Q.B.) (Sask. Water Board erred in refusing to hear certain matters on an appeal on the grounds claiming that they were *res judicata* without giving the appellant some opportunity to make submissions first on whether they were *res judicata* or not.

68 There was nothing unfair or unreasonable about the Village's decision to proceed with the cleanup. If a duty of fairness did exist, I would be unable to find any breach of that duty by the Village."

Extrapolating beyond the facts in *Antonenko* if there had been a dispute in that case as to whether the property owner had actually cleaned up his property it might be argued that a further opportunity to be heard might have arisen respecting that issue. In such a case, however, the obligation to provide the hearing would likely have been owed by the person executing the decision rather than council. Council would have already have addressed all of the issues before it and determined that if a certain set of circumstances existed (i.e., failure by the property owner to clean up his property) then its clean up order was to be executed. There remained nothing further for Council to decide. On the other hand the person charged with the determination of compliance with Council's decision and the execution of the order would arguably be under an obligation to provide the property owner with some opportunity to show that the property had been cleaned up before the execution of the order.

Without providing anything like a complete list, determining what amounts to a "fair" hearing generally involves questions such as:

- whether you should have an oral hearing or will the opportunity to make written submissions suffice;
- what should you be told of the argument or evidence against your interest;
- how much and what type of notice telling you of the "hearing" do you require;
- are adjournments in the process required; and
- whether legal counsel or other representation required to assist the individual.[32.64]

The process involved in determining what amounts to a "fair" hearing in any given case is discussed in some detail later in this text in c. 12.2(c) "Hearings Must Be Fair". In essence, however, the determination in any given situation as to what is "fair" is a balance between:

i. what is necessary for the effective and efficient performance of public duties; and

ii. what is necessary for the protection of the interests of the individual.

The goal is to reach a procedure which will allow government to operate while ensuring that the interests of individual are adequately protected. Where there is a conflict between the procedures required for the effective operation of the state and the procedures which the individual may require to adequately protect his or her rights one must attempt to balance the two taking into account the relative impor-

32.64 See chapter 12 of this text for a discussion of the various elements which may comprise a "fair" hearing.

tance of the state's and the individual's interests that are at stake.[32.65] An extremely important individual interest in conflict with a lesser aspect of state operation might force the state to adopt a procedure perhaps less effective for it if that procedure will adequately protect the individual's interest. A lesser individual interest might have to settle for a lesser procedure if an important state function cannot accommodate a procedure which might be better for that individual interest. Similarly, more procedural rights may be accorded when an individual is attempting to defend an inter-

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32.65 *I.W.A. Local 2-69 v. Consolidated Bathurst Packaging Ltd*, [1990] 1 S.C.R. 282, 68 D.L.R. (4th) 524; *Chiarelli v. Canada (Minister of Employment & Immigration)*, [1992] 1 S.C.R. 711, 90 D.L.R. (4th) 289; *Thompson Newspapers Ltd. v. Canada (Director of Investigation & Research)*, [1990] 1 S.C.R. 425. For an example of such a balancing act see *Chan v. Canada (Minister of Citizenship & Immigration)*, [1996] 3 F.C. 349, 43 Admin. L.R. (2d) 314, 136 D.L.R. (4th) 433 (T.D.). In that case s. 82.1(10) of the Immigration Act, which provide for *in camera, ex parte* hearings in specific circumstances, was held not to amount to a denial of fundamental justice. Section 82.1(10) provided that in the event of an application for judicial review of a decision of the Minister of Immigration to refuse to issue a visa to a person on the grounds that the person is a member of an organization that is involved in criminal activity the Minister may make an application for judicial review to the Federal Court *in camera* and in the absence of the person for the non-disclosure to the person of information obtained in confidence from the government or an institution of a foreign state. The section went on to provide that the Court (still *in camera* and *ex parte*) shall examine the information and provide counsel for the Minister with an opportunity to make representations as to why the information should not be disclosed to the person on the grounds of national security or the safety of persons. The Court could then either decide that the disclosure of the information would not be injurious to national security or the safety of persons (in which case the information would not be considered on the main judicial review) or that it would be injurious in which case the information would not be disclosed to the person but could be considered by the Court on the main judicial review. In determining whether this statutory scheme amounted to a breach of fundamental justice the Court held that the individual's right to know had to be balanced against the competing interests of the state in protecting the safety of Canadian society and promotion of international order. It also noted that an alien had no right to enter or remain in Canada. While the individual would be somewhat handicapped in her ability to make a full and fair response the Court also noted that (unlike a criminal case) the possible consequence which she faced from the proceedings was that she was merely denied the opportunity to come to Canada, an opportunity to which she had no right in the first place. Also, while the individual did not get a summary of the confidential information she was at least told that the officer considered that she was a member of an inadmissible class under the appropriate provision of the Immigration Act and that the officer had reasonable grounds to believe that she was a member of the Sun Yee On triad. The secret information would be reviewed by a Court which would consider whether or not it could be revealed. The Court concluded that Parliament had sought to strike a reasonable balance between the competing interests of the individual and the state. The adage that fundamental justice demands a fair, not a perfect, system of full disclosure was repeated.

For a decision where the interests at stake were not quite as high as the foregoing, see *Utovac v. Canada (Treasury Board)*, 2006 CarswellNat 1484, 2006 FC 643 (Fed. Ct.) which involved the fairness of an employment classification process. There, after reviewing various earlier decisions that held such a grievance process to be at the low end of the spectrum of fairness the Federal Court held that "The classification grievance process is not an adversarial process, and in my view neither griever nor employer has a vested right to respond to the other's submission to the [Grievance] Committee."

est particular to himself or herself than where the question at stake is more political and affects the rights of the broad community.[32.66] Ultimately, however, where vital state interests clash with a vital individual interest and there is no compromise possible between the two as to procedure, the individual must yield to the state.[32.66A]

This balancing of interests can easily be seen in the context of interim steps in a process. As noted earlier, the Courts are reluctant to impose procedural fairness where the only decision made is to refer a matter to hearing or a further inquiry. Practicality is the key here. The interest of the individual is clearly affected insofar as he or she must now face a hearing and its incumbent expenses. At the same time the effect of the decision is to grant that person a forum for a full inquiry in which he or she will have the full protections afforded by law. Provided that no conclusions as to the ultimate decision to be made is reached as the preliminary stage the law balances the interest of the individual against the effective operation of the state and comes down on the side of the state.[3266B] In some cases the agency is required to come to a conclusion as to the final decision that is ultimately to be made. For example, Human Rights Commissions in deciding to forward a matter to a full inquiry are often required to conclude that discrimination has been established. This is perceived as impacting more greatly upon the interests of the individual. Yet at the same time the effect of the decision is to provide the individual with an opportunity to defend himself or herself. In those cases the Commission is required to provide some fairness to the individual before concluding that discrimination has been established. But, in light of the fact that the individual will ultimately be given a full opportunity to defend himself or herself a lesser standard of fairness is imposed at the Commission stage

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32.66 Which is at least suggested by the Supreme Court of Canada in *Chiarelli v. Canada (Minister of Employment & Immigration)*, [1992] 1 S.C.R. 711, 90 D.L.R. (4th) 289 (S.C.C.). The balancing of interests was considered again in *Canada (Attorney General) v. Canada (Commissioner of Inquiry on the Blood System)* (1997), 151 D.L.R. (4th) 1 (S.C.C.) where it was referred to as a "careful balancing". In that case, after noting the important role played by Commissions of Inquiry vis-a-vis investigation and education of the public the Court cited Justice Décary in the Federal Court of Appeal that "[t]he search for truth does not excuse the violation of the rights of the individuals being investigated". The Court agreed saying that "This means that no matter how important the work of an inquiry may be, it cannot be achieved at the expense of the fundamental right of each citizen to be treated fairly."

32.66A For illustrations of the latter, more administrative proceedings where objectors are given the right to present their own cases without necessarily being given the right to examine the material of others or to cross-examine thereon, see *Bushell v. Secretary of State for the Environment*, [1980] 2 All E.R. 608 (H.L.) (Ministerial decision as to where highway should be located); *Pembroke Civic Hospital v. Health Services Restructuring Commission (Ont.)* (1997), 36 O.R. (3d) 41, 106 O.A.C. 96 (Ont. Div. Ct.), leave to appeal to C.A. refused (1997), 36 O.R. (3d) 41n (C.A.) (recommendations re. hospital restructurings); *Turcotte v. Moncton (City)*, 2002 CarswellNB 295, 2002 NBQB 289, 32 M.P.L.R. (3d) 180 (N.B. Q.B.) (granting municipality tourist area status).

32.66B *Dehghani v. Canada (Minister of Employment & Immigration)*, [1993] 1 S.C.R. 1053, 10 Admin. L.R. (2d) 1, 101 D.L.R. (4th) 654; *Dairy Producers Co-operative Ltd. v. Saskatchewan (Human Rights Commission)*, [1994] 4 W.W.R. 90 (Sask. Q.B.), affirmed [1994] 4 W.W.R. 115 (Sask. C.A.); *Hawrish v. Cundall* (1986), 76 Sask. R. 208.

(for example perhaps only an opportunity to know the case against one and make written representations.)[32.66C]

Cases where emergency action is required or where advance procedural fairness would defeat the purpose of the exercise of the power (notice to criminals, for example, of an intention to secure a search warrant) illustrate this last point (that of the individual interest yielding to the state). H.W.R. Wade in his *Administrative Law* cites the example of urgent action which must be taken on grounds of public health or safety or to order the removal to hospital of a person with an infectious disease. For another example see the decision of the Ontario Court of Appeal in *Bishop v. Ontario (Securities Commission)*. In *Bishop* the Court considered section 19(1) of the Ontario Securities Act, R.S.O. 1950, c. 351 which authorized the suspension of a particular trading advantage to a security trader simply on notice of the suspension being given to the trader. The statute provided that the trader had the right, exercisable within 30 days after receiving notice of the suspension, to request a hearing to review the suspension. The Court made the following comments:

> In *Lymburn et al. v. Mayland*, [1932] 2 D.L.R. 6 at p. 9, 57 C.C.C. 311 at p. 314 . . . the Privy Council per Lord Atkin in referring to certain provisions in the Security Frauds Prevention Act, 1930 (Alta.) said this:
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> > There is no reason to doubt that the main object sought to be secured in this part of the Act is to secure that persons who carry on the business of dealing in securities shall be honest and of good repute, and in this way to protect the public from being defrauded.
>
> The same can be said of the Securities Act of this Province. It is to protect the public from being defrauded that the Legislature by s. 19(3) empowered the Commission to withhold in certain circumstances the benefits or privileges flowing from s-ss. (1) and (2) of s. 19. If the public are to be protected from being defrauded the power and duty entrusted to the chairman under s. 3 may have to be exercised promptly. The whole purpose of the Act might be defeated if the chairman could make an order or ruling under that section only on notice to the person or company affected and the conclusion of the hearing during which time those persons or that company if dishonest and disreputable could continue to prey upon the public and plunder and fleece many people. For that reason it was empowered to act promptly and without notice to the person or company sought to be affected. The chairman's first duty is to the public and in empowering him to discharge that duty the Legislature has by appropriate legislation at the same time protected the person or company affected by the order by giving to him on it at their election [sic] the right to have the order reviewed by the Commission.[32.67]

32.66C *Syndicat des employés de production du Québec et de l'Acadie v. Canadian Human Rights Commission*, [1989] 2 S.C.R. 879; *Radulesco v. Canada (Human Rights Commission)*, [1984] 2 S.C.R. 407, 14 D.L.R. (4th) 78. For other cases where only lesser standards of fairness were required in light of the interim nature of the decisions see *Varity Corp. v. Dutton* (1989), 63 D.L.R. (4th) 408; *Griffin v. Summerside (City) Director of Public Services* (1998), 159 D.L.R. (4th) 698 (P.E.I. S.C.).

32.67 *Bishop v. Ontario (Securities Commission)*, [1964] 1 O.R. 17, 41 D.L.R. (2d) 24 (C.A.). To

The decisive factors in such emergency cases appear to be 1. the need for immediate action to protect the public interest (or at least the need for some action which cannot await the delays inherent in a hearing); and 2. the provision of some protection of the individual's interest through the provision of some form of after-decision process in which the decision can be reviewed.[32.67.1]

"Hearing" does not always mean "oral hearing".[32.68] Natural justice and fairness do not require an oral hearing in all cases. There may be instances where written proceedings are quite sufficient to allow the individual to *adequately* be able to adequately present the case necessary to protect his or her interest at stake.[32.69]

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the same effect see also *Bunn v. Law Society (Manitoba)* (1990), 63 Man. R. (2d) 210 (Q.B.), reversed (1990), 63 Man. R. (2d) 294 (C.A.); *Mohan v. College of Physicians & Surgeons (Ontario)* (1991), 81 D.L.R. (4th) 108 (Ont. Gen. Div.); *R. v. Secretary of State for Transport; Ex parte Pegasus Holidays (London) and another*, [1989] 2 All E.R. 481 (Q.B.); *Conway v. Ontario (Attorney General)* (1991), 14 Admin. L.R. (2d) 140, 86 D.L.R. (4th) 655 (Ont. Gen. Div.); *Ontario Civilian Commission on Police Services v. Wallaceburg Police Services Board* (1997), 33 O.R. (3d) 261 (Div. Ct.).

32.67A Given the development of the law respecting reasons for decisions if a decision-maker chooses to proceed without notice on the basis of either a common law or statutory authority respecting urgency the decision-maker should specify the basis of the urgency or at least ensure that that basis is evident on the face of the record. The dangers of failing to do so can be see in *Malik v. British Columbia (Financial Institutions Commission)*, 2006 CarswellBC 1107 (B.C.S.C.). In that case the B.C. Superintendent of Financial Institutions was authorized to make an order without giving the affected person notice and a hearing where the Superintendent considered that the length of time that would be required to hold a hearing would be detrimental to the due administration of the statute. Purportedly acting under that authority the Superintended issued an order removing an individual from his directorship of a credit union without notice or a hearing. The order did not state why it was necessary to move summarily, nor was that need obvious on the face of the record. The British Columbia Supreme Court on judicial review, quashed the order as a breach of fairness for failing to provide notice.

"The Superintendent did not say why, in the circumstances, he was of the view that the due administration of the FIA required Mr. Malik's summary removal. . . . If the Superintendent had reasons for his decision to proceed without notice, he ought to have provided them at the time. Once again, it is not for this Court to search the record for reasons or to speculate as to why the Superintendent decided to issue the removal order without first providing Mr. Malik with an opportunity to be heard.

In any event, if the Superintendent was of the opinion that the matter of Mr. Malik's removal as a director was urgent, no such urgency is apparent from the record."

32.68 Where a "hearing" is required by statute, of course, the meaning of that term is to be derived by the ordinary rules of statutory interpretation; what did Parliament or the Legislature mean in using that term. See, for example, *Cape Breton Development Corp. v. Nova Scotia (Workers' Compensation Board)* (1995), 139 N.S.R. (2d) 369, 397 A.P.R. 369 (C.A.) ("inquiry" as mandated by statute meant oral proceeding); *Manitoba (Attorney General) v. Canada (National Energy Board)*, [1976] 2 F.C. 502, 48 D.L.R. (3d) 73 (T.D.).

For cases holding that an agency is not required to structure its hearings in the same manner or order as a court see footnote 30 in chapter 12.2(d) "The Form of Administrative Agency Hearings Is Dictated By The Mandate To Be Accomplished".

32.69 *R. v. Quebec (Labour Relations Board), Ex p. Komo Construction Inc.* (1967), [1968] S.C.R. 172, 1 D.L.R. (3d) 125; *Quebec (Labour Relations Board) v. Canadian Ingersoll Rand Co.*,

There may be instances where written hearings are perfectly adequate to present a case. There may also be cases where written proceedings are not adequate. Thus, in *Singh* Madam Justice Wilson wrote:

[1968] S.C.R. 694, 1 D.L.R. (3d) 417; *Singh v. Canada (Minister of Employment & Immigration)*, [1985] 1 S.C.R. 177, 12 Admin. L.R. 137, 17 D.L.R. (4th) 422; *Hundal v. British Columbia (Superintendent of Motor Vehicles)* (1985), 64 B.C.L.R. 273, 20 D.L.R. (4th) 592 (C.A.); *Raichura v. Manitoba (Registrar of Motor Vehicles)* (1992), 4 Admin. L.R. (2d) 1, 78 Man. R. (2d) 203 (C.A.); *Simmonds v. Law Society (Prince Edward Island)* (1995), 134 Nfld. & P.E.I.R. 328, 417 A.P.R. 328 (P.E.I.T.D.), affirmed (1996), 145 Nfld. & P.E.I.R. 26 (P.E.I.C.A.); *Nova Scotia Confederation of University Faculty Associations v. Nova Scotia (Human Rights Commission)* (1995), 143 N.S.R. (2d) 86, 411 A.P.R. 86 (S.C.). *Baker v. Canada (Minister of Citizenship & Immigration)* (1999), 14 Admin. L.R. (3d) 173, 174 D.L.R. (4th) 193, 243 N.R. 22 (S.C.C.); *Marine Atlantic Inc. v. Canadian Merchant Service Guild* (2000), 258 N.R. 112 (Fed. C.A.). See also *Behnke v. Canada (Department of External Affairs)*, 2000 CarswellNat 1543, [2000] F.C.J. No. 1166 (Fed. T.D.) where the Federal Court Trial Division noted that in determining whether an oral hearing is required in any given instance one considers factors such as: the complexity of the matter; whether the issues raise questions of public interest that are novel so that oral argument would be of great assistance to the court; whether an assessment of the credibility of witnesses and full legal argument is required; whether the parties cannot adequately present their cases in writing; the urgent of the matter and which form of hearing may be more expedient; and the procedural ability of the format being considered to operate efficiently in light of the number of parties. As there were no complex questions or issues in the case before it, the Court directed that the proceeding be in writing; *Benitez v. Canada (Minister of Citizenship & Immigration)*, 2006 CarswellNat 2587, 2006 FCA 279 (Fed. C.A.) (disposal of an appeal by the Federal Court of Appeal through only a written proceeding. The Court refused the opportunity of an oral hearing on the grounds that the questions in dispute were purely legal and not unduly complex.); *Chaudhary v. Canada (Department of Fisheries & Oceans)*, 2006 CarswellNat 1614 (Fed. Ct.) (Human Rights Commission restricting applicant to written communications following unsettling and sometimes violent oral communications); *Wyant v. British Columbia (Workers' Compensation Board)*, 2006 CarswellBC 1079, 2006 BCSC 680 (B.C.S.C.) (not unfair to conduct written appeal proceedings when nothing could have been added by an oral hearing).

See also *Van Unen v. British Columbia (Workers' Compensation Board)*, 2001 CarswellBC 656, 87 B.C.L.R. (3d) 277 (B.C.C.A.) where the British Columbia Court of Appeal held that the rules of natural justice did not require the Appeal Division of the Workers' Compensation Board to hear an appeal of a Review Board decision orally. The appellant had had a full oral hearing before the Review Board. A single member of the Appeal Division conducted the appeal proceeding by listening to the tape of the review proceeding through which he reviewed all of the evidence submitted at the initial hearing. He also received written submissions from the appellant's counsel. The Appeal Member also searched back through Board files on the appellant and provided the appellant with a copy of a relevant report which the Member discovered on the search but which the appellant was not aware of. The Member advised the appellant that he was prepared to accept additional written representations. In rejecting the demand for an oral hearing, the Court of Appeal stated:

> Section 90 of the Workers' Compensation Act deals with appeals from an officer of the Workers' Compensation Board to the Review Board. Section 91 deals with appeals from the Review Board to the Appeal Division. There is nothing in s.91 to indicate that what is contemplated is something other than a true appeal. A hearing *de novo* is not specifically required by the statute. In the absence of such a requirement, and in circumstances where it is possible for a member of the Appeal Division to review that evidence, and

I should note, however, that even if hearing based on written submissions are

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in circumstances where the Review Board made findings of fact on the very issue raised by the worker, it is my opinion that it is not a breach of natural justice for the findings of fact based on credibility, veracity of testimony, and expert opinion, to be assessed by the Appeal Division without the requirement of an oral hearing.

It is clearly not intended to be the function of the Appeal Division to repeat precisely the work of the Review Board. Instead, the Appeal Division is required to assess the correctness of that work and to decide whether it is flawed. That determination must be conducted in the usual way of a true appeal. But, of course, the Appeal Division may choose to hear oral evidence if it seems to it to be right and fair to do so. The Appeal Division decided not to do so in this case. In my opinion it was not in breach of natural justice in reaching that decision, in the circumstances that I have described.

See also, *Grewal v. Conservative Party of Canada*, 2004 CarswellOnt 2232 (Ont. S.C.J.) (Consideration of written affidavit setting out position of individual opposing political party's rejection of him as candidate); *VIA Rail Canada Inc. v. Canadian Transportation Agency* (2005), 251 D.L.R. (4th) 418 (Fed. C.A.) (oral hearing not required where written proceeding adequate – but written opportunity must be adequate to itself meet requirements of fairness.) *Hamedi v. Canada (Minister of Citizenship & Immigration)*, 2006 CarswellNat 3015, 2006 FC 1166 (Fed. Ct.) (The Immigration and Refugee Board made no error in law in holding that section 117(9)(d) of the Immigration and Refugee Protection Regulations was not unconstitutional. Nor did the Board commit any procedural error in making that decision on the basis of written submissions without according the applicant an oral hearing which she felt was necessary in order to establish that her breach of the regulations was an innocent one. The Board relied on a significant chain of decisions of the Federal Court of Appeal and the Federal Court up-holding the constitutionality of the provision in question, a number of which had specifically dealt with the issue of the impact of an innocent, as opposed to an intention, breach of the regulations.)

Similarly, see *Ulmer v. British Columbia Society for the Prevention of Cruelty to Animals*, 2010 CarswellBC 319, 2010 BCSC 199 (B.C. S.C.). In that case the B.C. Supreme Court held that fairness did not require that the hearing provided by a municipal officer in determining whether seized animals should be returned to their owners or euthanized did not necessarily have to be oral in nature where the written materials were sufficient to make the decision at hand:

> 56 . . . In both cases the petitioner knew or must have known the concerns the Society had regarding the animals. In both cases a large number of animals were seized, leading to a high cost of retaining the animals on the part of the Society. There is nothing in the facts of this case that would lead to the conclusion that a higher level of procedural fairness than that given in *Pieper* was necessary. An oral hearing would have made no difference regarding the ability of Ms. Moriarty to assess whether individual animals should be returned to Ms. Ulmer, as Ms. Moriarty had fulsome and relevant written material before her. I find that an oral hearing was not necessary in these circumstances. No breach of the principles of procedural fairness occurred.

Similarly, see *Sidhu v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2010 CarswellBC 502, 2010 BCSC 277 (B.C.S.C.), where the B.C. Supreme Court held that the B.C. Workers' Compensation Appeal Tribunal was not required to hold an oral hearing where the issues were purely legal or policy based. The Court stated:

> 86 Here, there were no issues of credibility or, for that matter, issues of a factual nature. The issues were legal or based on policy.
>
> 87 In these circumstances, the Panel was justified in not holding a hearing. . . .

Again, see *Broers v. Real Estate Council of Alberta*, 2010 CarswellAlta 1458, 2010 ABQB 497 (Alta. Q.B.) where the Alberta Court of Queen's Bench held that fairness did not

consistent with the principles of fundamental justice for some purposes, they will

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direct oral hearing process for a professional disciplinary proceedings where there was no issue of credibility and the matter proceeded on the basis of agreed facts.

"90 The duty to be fair does not always necessitate an oral hearing. While the requirement for such a hearing is very often found in instances where ones personal livelihood or reputation is at stake, fairness may be achieved through a process short of one inviting oral submissions or viva voce evidence. . . .

91 I find that the evidentiary process afforded to Broers was fair in the circumstance and that on the facts of this case he was not entitled to an oral hearing. As previously stated, while a hearing under Part 3 attracts a right to oral submissions under s. 42(b), Rule 38 is silent in this regard. Here, the Executive Director chose to proceed under Rule 38. I find that neither *McLeod* nor *Khan* assist Broers. In *Khan*, the Court was clear that credibility was the central issue. In *McLeod*, the Court expressed a reservation on finding an issue of credibility absent an oral hearing."

In *Allard v. North Fraser Region Assessor, Area No. 10,* 2010 CarswellBC 2667, 2010 BCCA 437 (B.C.C.A.) the B.C. Court of Appeal held that it was not procedurally unfair for the B.C. Property Assessment Appeal Board to hold a written, rather than an oral, hearing to determine a property assessment appeal – even when facts were in dispute. The party alleging the unfairness claimed that the written proceeding denied the party the opportunity to introduce evidence through cross-examination. Applying the various *Baker* factors outlined by the Supreme Court of Canada for determining the requirements of fairness the Court of Appeal found that the written proceeding was fair. The Court particularly noted that the party had had the opportunity to introduce the evidence which it wished to introduce through the written proceeding, that the party did not have a legitimate expectation of an oral proceeding, and that the Supreme Court in *Baker* had stated that the analysis of what procedures the duty of fairness should take into account and respect the procedural choices of the agency – particularly where the statue gives the agency the discretion to choose its own procedures or where the agency has an expertise in determining the propriety of procedures in particular circumstances.

And again as to the same point see *Jones v. IWA-Canada, Local 1-3567,* 2011 CarswellBC 1834, 2011 BCSC 929 (B.C.S.C.). In that case the B.C. Supreme Court held that a reconsideration proceeding did not have to be conducted orally where a party's versions of the fact were assumed to be true.

74 The petitioner did not have any legitimate expectation of an oral hearing. The LRB is the master of its own procedure. Some hearings before it are conducted orally, and others are done in writing. In the case of the petitioner, Vice-Chair Saunders in the original decision, after indicating he had considered the complaint, the submissions of the parties, the LRB's files with respect to the complaint, and the decision of Madam Justice Gill, said at para. 3:

I conclude there is no need for an oral hearing or an order for production of further documents, and that I am in a position to decide the complaint on its merits, based on the written submissions (including the complaint itself). In particular, I am not satisfied on the submissions before me, that the Employer's report concerning the harassment complaint is relevant to whether the Union's decision-making contravenes Section 12. Where material facts are in dispute, I have assumed the material facts asserted by Jones are true.

[Emphasis added.]

75 The need for an oral hearing arises generally where the credibility of witnesses needs to be tested by one or more of the parties. I fail to see how a party whose version of the facts has been assumed to be true can have a legitimate expectation of an oral hearing. I

not be satisfactory for all purposes. In particular, I am of the view that where a serious issue of credibility is involved, fundamental justice requires that credibility be determined on the basis of an oral hearing. Appellate courts are well aware of the inherent weakness of written transcripts where questions of credibility are at stake and thus are extremely loath to review the findings of tribunals which have had the benefit of hearing the testimony of witnesses in person . . . I find it difficult to conceive of a situation in which compliance with fundamental justice could be achieved by a tribunal making significant findings of credibility solely on the basis of written submissions.[32.70]

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find no support for the petitioner's argument that the Original Decision failed to adopt his version of the facts where they were material to the complaint and in dispute.

32.70 *Singh v. Canada (Minister of Employment & Immigration)*, [1985] 1 S.C.R. 177, 12 Admin. L.R. 137, 17 D.L.R. (4th) 422 at p. 465. For other cases where oral hearings were felt necessary due to the material role played by credibility see *Cashin v. C.B.C.* , [1984] 2 F.C. 209, 55 N.R. 112 (C.A.); *Cadillac Investments Ltd. v. Northwest Territories (Labour Standards Board)* (1993), 24 Admin. L.R. (2d) 81, [1994] N.W.T.R. 224 (S.C.); *Khan v. University of Ottawa* (1997), 34 O.R. (3d) 535, 148 D.L.R. (4th) 577 (C.A.). *Labelle v. Ontario Provincial Police Force Commissioner* (1997), 11 Admin. L. R. (3d) 162 (Ont. Div. Ct.). However, in *Nuosci v. Canada (Human Rights Commission)* (1994), 167 N.R. 153 (*sub nom. Nuosci v. Canada (Attorney General)* (Fed. C.A.) the Federal Court of Appeal held that an oral hearing was not necessary, notwithstanding the existence of an issue of credibility, where there was otherwise an adequate basis in the record to support the decision. Similarly, see *McLeod v. Alberta (Securities Commission)*, 2006 CarswellAlta 993, (2006) 272 D.L.R. (4th) 94 (Alta. C.A.) where, amongst other findings, the Court of Appeal concluded that a failure to determine credibility in a disciplinary process through an oral process was not fatal where the particular issue where credibility was in issue was a very small part of the larger concerns of the proceedings with respect to many other contraventions identified and not challenged by the individuals subject to the process. The Court therefore did not find the incident sufficiently material to require an oral hearing to ensure procedural fairness.

In *McAuley v. Chalk River Technicians & Technologists Union*, 2011 CarswellNat 1522, 2011 FCA 156 (Fed. C.A.) the Federal Court of Appeal held that while issues of credibility or the existence of contradictory evidence often warrant the holding of an oral hearing, rather than a written proceeding, that was not always the case. In the case in point the Court of Appeal held that an oral hearing was not required insofar as it was not necessary to deal with the contradictory evidence in order to resolve the issue at hand.

> "8 Section 16.1 of the Code provides that the Board may decide any matter before it without holding an oral hearing. Our Court has already decided that issues of credibility or the existence of contradictory evidence do not automatically warrant an oral hearing (*Guan v. Purolator Courier Ltd.*, 2010 FCA 103; *Nadeau v. United Steelworkers of America*, 2009 FCA 100).
>
> 9 In this case, the contradictory evidence concerned the status of the applicant, i.e., whether he was on probation or a short-term service employee. The Board was alive to this issue, but a final determination was not essential to the outcome because the legal opinion obtained by the Union, before it made its decision, concluded that the grievance would not likely succeed even if the complainant was not a probationary employee (respondent's record, volume 1, tab 5 at page 30). For the same reasons, the production of documents relating to the applicant's employment status was unnecessary."

In *Canada Post Corp. v. Workers' Compensation Board (Sask.)*[32.70A] the Saskatchewan Court of Queen's Bench highlighted the basic principle that the form of hearing is determined by the nature of the thing which is to be done and the needs implicit to accomplish that thing. In the context of a workers' compensation proceeding the Court stated that:

> In most cases involving compensation claims, the primary issue is the extent of the injury or disability which in turn mainly involves medical evidence and medical considerations. Submissions from an employer in such cases are usually of little assistance to the Board and can likely be adequately considered on the basis of a written submission.
>
> But compensation claims that involve entitlement considerations are a different matter. Often the submission of the employer is essential to provide the Board with all the relevant factors it requires to make a fair and accurate decision. The evidence from which the Board must determine whether the applicant is entitled to compensation, may be contradictory and very much in dispute. Medical considerations are likely not the primary issue. Credibility issues cannot be decided in a vacuum so to speak. The Board cannot adequately fulfill its mandate in such circumstances unless it observes and hears the parties directly. This is particularly so if the entitlement question involves allegations of improper conduct on the part of the employer or the employee.

It is thought by some that the importance of the interest at stake is the most important factor in determining the extent of the hearing or the extent of the process granted. This view is based on judicial comment such as that by Justice Beetz in *Singh*:

> It is true that the principles of fundamental justice will not impose an oral hearing in all cases. The most important factors in determining the procedural content of fundamental justice in a given case are the nature of the legal rights at issue and the severity of the consequences to the individuals concerned.[32.71]

I disagree with this view, however. For one thing it disregards as a factor in the equation the goal the state is attempting to achieve and the importance of that goal. Furthermore, taken to an extreme, it can lead to the assertion that individuals are entitled to procedures which are not necessary to protect, or at least not necessary to adequately protect, their interest but which should be given anyway

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32.70A (1998), 174 Sask. R. 284 (Q.B.).

32.71 *Singh v. Canada (Minister of Employment & Immigration)*, [1985] 1 S.C.R. 177, 12 Admin. L.R. 137, 17 D.L.R. (4th) 422 at p. 427. The seriousness of the question did play a significant role in the decision of the Supreme Court of Canada in *Baker v. Canada (Minister of Citizenship & Immigration)* (1999), 174 D.L.R. (4th) 193, 243 N.R. 22 (S.C.C.) where the Court held that fairness imposed a duty upon a decision-maker to give reasons for a refusal to allow an applicant to remain in Canada on humanitarian and compassionate grounds because of the "profound importance" of the decision to those affected.

because the interest at stake is extremely important. I suggest, further, that notwithstanding Justice Beetz's comment above, the Supreme Court is simply not following such a simplistic approach.[32.72]

The common perception is that written hearings may be more expeditious than oral hearings in that, for example, they do not require special scheduling or special accommodations, and do not involve the delays attributable to arrivals, adjournments and so forth. However, one of the weaknesses of the written proceeding (aside from the inability to judge demeanor and the restriction of the ability to judge credibility on matters evident through writing) is that they are not as reactive to unexpected circumstances, misunderstandings and failings. Often what can be easily and quickly addressed at an oral hearing by a quick question or clarification by the hearing officer can require extensive back and forth communications if done in writing. Thus, written hearings may require greater attention to be paid to the instructions or notices provided by agencies respecting the proceeding to ensure that all of the likely problems or issues are set out in advance

32.72 See the extradition cases for example (*Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779, 84 D.L.R. (4th) 438 (S.C.C.) and *Idziak v. Canada (Minister of Justice)*, [1992] 3 S.C.R. 631, 9 Admin. L.R. (2d) 1, 97 D.L.R. 94th) 577, application for re-hearing refused (1992), 9 Admin. L.R. (2d) ln (S.C.C.) where the extremely importance interest of the individual (he was being extradited to face a possible death penalty) did not entitle him to a hearing before the Minister as he had already had a hearing before the courts on the judicial issues (though not on the political ones the Minister was deciding).

in order to avoid as much as possible being dragged into an extensive series of subsequent communications.[32.72A] Nor are they as capable of taking into account

(*Continued on page 9–20.17*)

32.72A The annual income tax package is an example of an excellent piece of planning and direction for a written proceeding.

In planning for a written proceeding it is important to anticipate the likely areas in which problems may arise in order to give advance notice of those problems and the agencies standard approach with respect thereto. See, in illustration, the decision of the Federal Court in *Malik v. Canada (Minister of Citizenship & Immigration)*, 2009 CarswellNat 4345, 2009 FC 1283 (Fed. Ct.). In that case the issue was whether, in a written process, an immigration officer had breached the requirements of fairness when he declined to accept a statutory declaration as evidence of a brother's Canadian residency, and he failed to advise the individual that such information was insufficient and to provide him with a further opportunity to submit evidence. At the beginning of the process the individual had been given an extensive document setting out the process, a strict timeline for the submission of material and setting out the types of evidence that had to be submitted – which included a warning that affidavits and statutory declarations would not be satisfactory proof of residence in Canada for his relatives, and cautioning the individual that the authorities would not request further documentation to support an application. Immigration authorities argued that the volume of applications and the demands of the system required the adoption of this approach. The Federal Court found that the required degree of fairness had been met in the case.

. . .In such circumstances, the duty of fairness owed the Applicant is low, and in any event has been met in this case through the prior notice provided to him specifying clearly the process that would be followed and the documentation required in order to support his application.

One of the arguments raised by the Applicant is that if the immigration officer was of the mind to refuse the statutory declaration of the Applicant's brother, he was

weaknesses in sophistication, education or the ability to communicate in writing – thereby often requiring the intervention of counsel or agents. These are practical considerations which should be kept in mind along with the relevant legal principles in determining the form of hearing.

I assert, again, that the form of hearing to be granted is arrived at by a consideration of four factors: i. the goal of the state hoped to be accomplish and the importance of that goal; ii. the degree to which the procedure asserted by the state is necessary to effectively and efficiently accomplish that goal;[32.73] iii. the interest of the individual at stake and its importance;[32.74] and iv. the degree to which the procedure asserted by the individual is necessary in order to adequately protect that interest.[32.75] If one had to identify one factor as being paramount in

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then under a duty of fairness to inform the Applicant of the matter and give him an opportunity to respond. This argument fails both on the facts and on the applicable legal principles. Indeed, from a factual perspective, the Applicant was clearly notified in writing that affidavits and statutory declarations would not be considered in these circumstances. He was further notified in writing that the immigration officials would not send him any further request for documentation. Consequently the Applicant was properly notified, and he disregarded that notice. In such circumstances, a second notice was not required to be sent to the Applicant.

Care must also be taken in attempting to address in advance likely concerns and problems that the agency does not fetter, or give the impression of fettering, its discretion by binding itself unalterably to the advance instructions or advice but is prepared, when required, to consider its general position in the context of the specific circumstances. See *Malik* above. Also see the general discussion respecting guidelines in chapter 6 "Binding and Non-Binding Agency Instruments – Orders, Rules and Guidelines" and the discussion respecting the proper exercise of discretion in chapter 5B "Discretion".

32.73 See, for example, *Canada (Attorney General) v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735, and *Wedge v. Canada (Attorney General)* (1995), 34 Admin. L.R. (2d) 237 (Fed. T.D.) (motion) and (1997), 4 Admin. L.R. (3d) 153 (Fed. T.D.) (main decision) where the nature of the decision-maker (the Governor General in Counsel) was a factor in determining the procedure felt adequate. *MacInnis v. Canada (Attorney General)* (1996), 41 Admin. L.R. (2d) 22, 204 N.R. 384 (Fed. C.A.), leave to appeal to S.C.C. refused (September 11, 1997), Doc. 25877 (S.C.C.). But see *Baker v. Canada (Minister of Citizenship & Immigration)* (1999), 174 D.L.R. (4th) 193, 243 N.R. 22 (S.C.C.) where the "profound importance" of the decision to the affected parties led the Supreme Court of Canada to impose a duty in fairness to give reasons.

32.74 See for example cases like *Chiarelli v. Canada (Minister of Employment & Immigration)*, [1992] 1 S.C.R. 711, 90 D.L.R. (4th) 289; *Dehghani v. Canada (Minister of Employment & Immigration)*, [1993] 1 S.C.R. 1053, 101 D.L.R. (4th) 654 ; *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653, 43 Admin. L.R. 157, 69 D.L.R. (4th) 489, 83 Sask. R. 81; *McColl v. Gravenhurst (Town)* (1993) 67 O.A.C. 55 (Div. Ct.) for cases where the lesser interests of the individuals at stake were important factors in determining the adequacy of the procedures offered.

32.75 See for example, *Dasent v. Canada (Minister of Citizenship & Immigration)* (1996), 39 Admin. L.R. (2d) 62, 107 F.T.R. 80 (note) (C.A.), leave to appeal to S.C.C. refused (1996), 206 N.R. 74 (note) (S.C.C.) where the fact that the decision in question was extremely discretionary to be made on the basis of humanitarian or compassionate grounds. Thus, the individual did not require a high degree of procedural protection in order to adequately get the information required before the decision-maker. In *McAllister v. Canada (Minister of Citizenship & Immigration)*, [1996] 2 F.C. 190 (T.D.) the Federal Court Trial Division stated that "The principles of fundamental justice, under section 7 of the Charter, and the right to a fair hearing in

this calculation I would say that it is need for the particular procedure in question, not the importance of the interest that the procedure is geared to protecting. What does the individual require to adequately protect his or her interest? What does the state require to adequately perform its goal? The cases dealing with lesser protections in emergency situations illustrate this point.[32.76] However, it is somewhat of a mug's game to attempt to say which factor in the calculation is paramount because it generally is the four factors in conjunction which determines what is fair. It cannot be denied that the importance of the interest at stake is an important factor in this equation (both of the individual and the state) and less procedures have been found sufficient when the interest was not sufficient to warrant greater.

By logical extension, natural justice and fairness does not prohibit mixed procedures hearings: some part oral, some part written and some part electronic (for example). [32.77]Nor must every participant in the proceeding be given the same procedural protection. The protections afforded may vary depending on the factors noted above in relation to that individual.[32.78]

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accordance with those principles, under paragraph 2(e) of the Canadian Bill of Rights, do not require an oral hearing in all circumstances, but the key factor is the adequacy of the opportunity for the person affected to state his or her case and to know the case that has to be met." For other instances where the broad discretionary basis of the decision called for lesser procedures, but procedures nonetheless adequate, to allow the case to be made see *Idziak v. Canada (Minister of Justice)* [1992] 3 S.C.R. 631, 97 D.L.R. (4th) 577, and the cases involving dismissal of "at pleasure" appointees: *Indian Head School Division No. 19 v. Knight*, [1990] 1 S.C.R. 653, 69 D.L.R. (4th) 489 (S.C.C.); *Masters v. Ontario* (1994), 18 O.R. (3d) 551, 27 Admin. L.R. (2d) 152 (Div. Ct.); and *Rochon v. Spirit River School District No. 47* (1994), 111 D.L.R. (4th) 452, 24 Admin. L.R. (2d) 115, 149 A.R. 106 (C.A.). Or see cases such as *Apotex Inc. v. Quebec (Minister of Health & Social Services)*, (1994), 26 Admin. L.R. (2d) 199, [1994] R.J.O. 795, 111 D.L.R. (4th) 622, 53 C.P.R. (3d) 479 (S.C.); *Bushell v. Secretary of State for the Environment*, [1980] 2 All E.R. 608 (H.L.); and *Bourque v. Richmond (Township)* (1978), 87 D.L.R. (3d) 349, 6 B.C.L.R. 130 (C.A.) where what was required to be demonstrated (i.e. the purpose of the proceeding) determined the procedures required.

32.76 See *MacInnis v. Canada (Attorney General)* (1996), [1997] 1 F.C. 115, 41 Admin. L.R. (2d) 22, 204 N.R. 384 (C.A.), leave to appeal to S.C.C. refused (September 11, 1997), Doc. 25877 (S.C.C.) where the oral cross-examination of experts was not required where written questions were adequate to the purpose of the examination notwithstanding the high importance of the individual to the interest at stake. See also the right to counsel cases where the right to counsel was dispensed with where it was clear that individual was perfectly capable of presenting his or her own case (*R. v. Board of Visitors* (1988), 115 N.R. 371 (H.L.); *Walker v. Kingston Penitentiary Disciplinary Board* (1986), 52 C.R. (3d) 106, 3 F.T.R. 109 (T.D.); *de la Sablonnière v. Sandhoff* (1993), 108 Sask. R. 110 (Q.B.)).

32.77 *Morista Developments v. Ontario Municipal Board* (1990), 2 Admin. L.R. (2d) 113 (Ont. Gen Div.).

32.78 *Country Music Television Inc. v. Canada (Canadian Radio-Television & Telecommunications Commission)* (1994), 178 N.R. 386 (Fed. C.A.), leave to appeal to S.C.C. refused (1995), 185 N.R. 400 (note) (S.C.C.). Hence procedures, or the right to participate in a hearing accorded to intervenors may be different than that accorded to the parties in light of the different interests and purposes of intervention at stake.

Fairness certainly does not require any form of hearing when that hearing would serve no purpose in protecting an interest. On this point see the decision of the Manitoba Court of Appeal in *S. (A.B.) v. Manitoba (Director of Child and Family Services); M. (B. v. Manitoba (Director of Child & Family Services*[32.79] That case considered Manitoba's Child Abuse Registry scheme in which a directory is maintained of names of individuals who are suspected of being child abusers. Section 19(6) of the Family Services Act, S.M. 1985-86, c. 8, provided that:

> 19(6) An agency shall report to the director for entry in the registry maintained under section 19.1 the name of a person who has abused a child and the circumstances surrounding the abuse where
>
> (a) the person has been convicted by a court of abusing a child;
>
> (b) the person has been found by a court in a proceeding under this Act to have abused a child; or
>
> (c) the agency child abuse committee is of the opinion that the person has abused a child.

The Manitoba Court of Appeal made the following comments as to when, vis-a-vis the three enumerated situations, a hearing would be required before an individual's name could be entered on the registry.

> When a name comes forward pursuant to cl. (a) or (b) of this provision, entry into the directory is made without any further requirement. If, however, the name is submitted because some agency child abuse committee has formed the opinion that a person has abused a child, then, for obvious reasons, further proceedings are required before an entry can be made. The impact upon a person's reputation and profession is so great that it would be grossly unfair if an entry, which then remains on the public record for 10 years, were permitted based solely on the opinion of an agency abuse committee which deliberates in private without the knowledge of the person affected.

Presumably, notice and a hearing were not necessary in the circumstances of clauses (a) and (b) because the individual would already have had his or her hearing and been found guilty. In those cases the entry into the registry were an automatic consequence of the finding in the hearing and not a separate finding which the individual should have a chance to defend. Affording an hearing would make no difference to the outcome.[32.80]

32.79 *S. (A.B.) v. Manitoba (Director of Child and Family Services); M. (B.) v. Manitoba (Director of Child & Family Services)* (1995), 122 D.L.R. (4th) 693, 100 Man. R. (2d) 47 (C.A.).

32.80 Quaere, however, why the individual is not at least entitled to a hearing to dispute that he or she was the individual that had been convicted in the earlier proceedings? To the same effect see *Hundal v. Superintendent of Motor Vehicles* (1985), 20 D.L.R. (4th) 592 (B.C.C.A.).

iv. the common law[32.104A.1]

v. non-binding guidelines and policies.[32.104B]

When the conflict is between sources of authority of the same nature, then (again absent legislative direction otherwise) then:

i. sources dealing with specific subject generally trump general subject sources;

ii. the more recent source trumps the earlier one; and

iii. conflicts between regulations from different statutes are determined on the basis of the paramountcy between the statutes authorizing each.

9.5 THE NECESSITY FOR PROCEDURAL DIRECTIONS BY AGENCIES

What is critical to the effective performance of any agency are workable rules or guides of practice and procedure. Ill-defined procedures may incur wasted time and result in lengthier, more expensive hearings in which the real merits cease to be focused. The consequences of uncertain procedure may include confusion among the parties as to the order of their appearance, the weight and order of the issues, ultimately adversely affecting the parties' contributions. Moreover,

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32.104A.1 In rejecting an application for an interim injunction the Federal Court of Australia noted that a common law right cannot prevail over a statutory direction that clearly and unambiguously displaces that right (*La Bara v. Minister for Immigration and Citizenship*, [2008] FCA 785 (Australia Fed. Ct.)).

32.104B In obiter comments in *Thamotharem v. Canada (Minister of Citizenship & Immigration)*, 2007 CarswellNat 1391, 2007 FCA 198 (Fed. C.A.), the Federal Court of Appeal affirmed the traditional position that a guideline which conflicts with a rule will be invalid. In this case the Court was speaking of procedural guidelines and rules of the Immigration and Refugee Board. See also *Craft-Bilt Materials Ltd. v. Toronto (City)*, 2006 CarswellOnt 7451, 57 C.L.R. (3d) 203 (Ont. Superior Ct. of Justice), affirmed 2008 CarswellOnt 51 (Ont. Div. Ct.) (municipal bulletin cannot alter operation of statutory Building Code); *Skyline Roofing Ltd. v. Alberta (Workers' Compensation Board)*, 2001 CarswellAlta 940, 34 Admin. L.R. (3d) 289 (Alta. Q.B.) ("If a statute, a regulation and a policy conflict, the statute would prevail over the regulation, and probably the regulation would prevail over the policy."). This general rule, as in the case of conflicts between statute and regulation, would be subject to the unusual situation where the statute permits such conflict (in which case there would be no real conflict).

And similarly see the short and to the point assertion by the Federal Court of Appeal in *Agraira v. Canada (Minister of Public Safety & Emergency Preparedness)*, 2011 CarswellNat 639, 2011 FCA 103 (Fed. C.A.) that:

"53 It is trite law that a departmental document cannot alter the law as laid down by Parliament. . . ."

the finished record upon which the decision is based is inevitably weakened by the procedural morass through which it proceeds.

In Report 26 entitled "Independent Administrative Agencies" the Law Reform Commission of Canada recognized the importance of procedural integrity in agency proceedings by recommending that an agency must have scope to organize and control its proceedings.

In its earlier *Working Paper 25* the Commission issued a guideline emphasizing agency control over hearing proceedings. As background, the Commission stated:

> Regardless of the type of hearing held, the agency should, of course, manage its proceedings effectively. The obligation of an agency official conducting a hearing is like that of a judge in the sense that the proceedings should at all times be governed with an eye to both efficacy and fairness. The major problem here is not that agencies exercise arbitrary powers with respect to the conduct of a hearing, but that they too frequently exercise too little control. In such circumstances, hearings can drag on with rambling, irrelevant or repetitive evidence being led, with the agency panel listening politely while time and money are being wasted. Firm chairmanship can expedite most proceedings without curtailing anyone's rights in any significant way. We recommend that:
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> . . . each agency should establish procedures whereby it may keep control over its proceedings and the timetable followed therein, and provision should be made for appropriate sanctions against parties who fail to comply with procedural rules.

I would add that every agency which conducts hearings of any sort should publish readily available rules of practice and procedure.[32.104C]

32.104C Agencies struggling with the task of making rules may wish to have reference to the Society of Ontario Adjudicators and Regulators model rules "Ontario Rules" (November, 2000). Drafted particularly from the standpoint of Ontario agencies subject to the provisions of that province's Statutory Powers Procedure Act, the model rules will nonetheless provide a thinking point for other agencies. The 220 page model rules are divided into subject categories (before hearing procedure, public access to documents, notices of hearing etc.) and each rule is accompanied by commentary wherein the authors discuss the thinking behind each rule and the purposes served by it. Model rules can be a useful starting point for any agency; however, in drafting rules an agency must take great care not to rely unduly on precedents or examples from other agencies. It is important always that one's rules be drafted from the perspective of the needs, difficulties, and authority of the particular agency. SOAR's model rules are available on the SOAR website www.SOAR.on.ca. SOAR may also be contacted c/o 1423 Nash Road, Courtrice, Ontario, L1E 2J9, (905) 436-0375.

See also the *Compendium of Model Rules of Practice for Ontario Regulatory and Adjudicatory Agencies* a collection of alternative procedural provisions prepared by a joint committee of Ontario agencies representatives (through SOAR) and the government of Ontario (through the Ministry of the Attorney General). The *Compendium*, which predated the November, 2000 version of SOAR's model rules, as well as the latest SPPA amendments, focuses on those aspects of the hearing process that were thought to be the most effective in reducing the length of hearings, or in diverting cases from the hearing to alternative forums of resolution. The *Compendium* is reproduced with the permission of the Ontario government in Appendix 9.1. See also, as an example, rules once made by the

A note on nomenclature here. As I discuss at length in chapter 6. A rule is a legally authorized binding standard . A policy is a non-binding statement of general policy or intent.

Many, if not most, agencies are given the statutory authority to make rules or regulations respecting procedure. Such rules are binding. That is to say, the agency does not have a discretion whether or not to follow those rules in any given situation unless the rules are drafted in such as way as to preserve that discretion — through the use of the discretionary word "may" as opposed to the imperative "shall" for example, or through safety valve provisions in the regulations which authorize the agency to deviate from an established rule when appropriate in the circumstances.

Where an agency does not have the authority to make rules it may, nonetheless still establish procedural policies through its general authority of procedure. However, the power to make procedure is a discretionary power. That is to say that the agency cannot fetter or bind its authority to make procedures appropriate to the situation. Thus, the appropriateness of procedures established by guideline to any given situation must always be considered. Like all acts of discretion the agency must be prepared to consider both the general propriety of the procedure and the particular propriety of its application in any given instance.[32.104D] Procedural guidelines are sometimes expressed as "guidelines" or may even be found in information pamphlets.

Personally, I have no preference between the two. Which ever course an agency adopts, rule or guideline, will depend on the circumstances of that agency. For example, an agency which is just starting out may wish to cast its procedures in terms of guidelines in order that they may be tested in the fire of experience before being cast in the form of rules. A friendly, conversational style procedural guideline may be more understandable to the individual unfamiliar with formal proceedings than a more formally drafted procedural regulation. What is important is that there be some procedural guidance out there for the participants in proceedings before the agency.

Usually, the statutory authority of an agency to make rules is discretionary. The provision states that the agency "may" make rules. This is, of course, a "legislative" power. The courts do not generally attempt to force the exercise of

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Ontario Municipal Board in Appendix 5.1. These rules pre-date the 1994 amendments to the SPPA.

32.104D See for example, *Crawshaw v. Canada (Attorney General)* (2000) CarswellNat 1537 (Fed. T.D.) where an Inmate Trust Fund Board apparently refused to consider an inmate's request to subscribe to an American magazine on the basis that the inmate had not made an application to the Board in the form that it required. The Federal Court Trial Division found that all of the information that the Board required was in the inmate's completed form in which he requested the that the subscription be paid and that by failing to treat that as the request the Board had failed to exercise its discretion. It appears that the procedures of the Board were fixed simply through their discretionary power over procedure rather than through a binding rule. Thus, the Board should have considered whether it had a "request" before it, even if it did not match their regular procedure.

a legislative power granted a delegate.[32.105] As noted by John Mark Keyes in his comprehensive text on subordinate legislation, *Executive Legislation* (Butterworths, Toronto, 1992), this is, at least partly, due to the reluctance of the courts to inquire into the minimum content of such rules.[32.106] Thus, section 25.1(1) of Ontario's *Statutory Powers Procedure Act*, which provides that "A tribunal may make rules governing the practice and procedure before it." likely does not impose any duty on agencies in that province to make such rules.

However, where regulations or rules are essential in order for some other right granted by statute to be exercised the discretionary power to make those rules is really a duty, notwithstanding the use of the word "may". The most obvious example is a legislative right of an individual to make an application for something which states that the application shall be filed in the form prescribed by regulation. The absence of regulations prescribing the form make it practically impossible to comply with the legislative directions to use the form. Thus, the failure of the agency to make rules technically prohibits an individual from exercising the right to make an application.

As I understand the case law, where an agency has a common law or statutory authority to do something and also has the discretion to make regulations respecting that action the failure to make regulations does not, generally, preclude the agency's exercise of its common law power to act. This is in accordance with the permissive nature of the legislative power. On this point see *Maple Lodge Farms Ltd. v. Canada*[32.107] the Supreme Court of Canada held that a statutory provision that a Minister may issue a permit, subject to such terms and conditions as he prescribes, while making it impossible to issue a permit contrary to any prescribed regulations, did not strip the Minister of the discretion to issue permits in circumstances not addressed by the regulations.[32.108]

32.105 The leading case in this area is *Capital Cities Communications Inc. v. Canada (Radio-television & Telecommunications Commission)*, [1978] 2 S.C.R. 141, 36 C.P.R. (2d) 1, 81 D.L.R. (3d) 609, 18 N.R. 181. Re *Pim v. Ontario (Minister of the Environment)* (1978), 23 O.R. (2d) 45 (Div. Ct.); *French v. Canada Post Corporation*, [1988] 2 F.C. 389 (Fed. C.A.); *Ontario Association of Radiologists v. Ontario (Ministry of Health)*, [1999] O.J. No. 3027 (Div. Ct.); *Kirkpatrick v. Ford Motor Co. of Canada*, [2001] O.J. No. 4387 (Ont. S.C.J.); *British Columbia v. Reid*, [1996] B.C.J. No. 2619 (B.C.S.C.); *Marchment & Mackay Ltd. v. Ontario (Securities Commission)*, 1997 CarswellOnt 2231, 101 O.A.C. 154, 149 D.L.R. (4th) 354, 34 O.R. (3d) 284, 20 O.S.C.B. 3511 (Div. Ct.).

Contrast these cases with decisions where the power to make regulations was expressed in mandatory terms using the direction that the decision-maker "shall" make regulations. That mandatory direction can result in a duty on the decision-maker to do so. See *Re Jacobs* (1974), 45 D.L.R. (3d) 424 (Man. C.A.); *Re Ontario Nurses Association v. Wellesley Hospital* (1989), 71 O.R. (2d) 501 (H.C.).

32.106 I refer the reader to the discussion of this question in Mr. Keyes text, at pp. 73 to 77.

32.107 [1982] 2 S.C.R. 2, 137 D.L.R. (3d) 558, 44 N.R. 354.

32.108 In *French v. Canada Post* Corp. (1988), 87 N.R. 233 (Fed. C.A.) the Federal Court of Appeal held that the discretionary authority of Canada Post to make regulations providing for the closure of post offices did not strip the corporation of its general statutory power to make such closures where the corporation chose not to enact any regulation. The Court stated that

There are two exceptions to this general rule. The first is where specific words in the legislation indicate the absolute necessity for the rules or regulations (see *French* case noted in the footnote above).[32.108A] The obvious example is the power which can practically only be performed where rules have been made — i.e. the situation where one may file an application but one must use a prescribed form. The absence of the regulations prescribing the form operates practically to stop one from being able to file the application. The second exception is where the nature of the power sought to be exercised is such that the regulations are so clearly part of its essential nature that the legislature must have intended the existence of regulations to be a precondition to the exercise of the power in question.[32.109]

"A power to make regulations in respect of a matter is not, in the absence of specific words, to be read as subtracting from of cutting down on an otherwise general power to act in the same area." See also *Jamieson's Food Ltd. v. Ontario (Food Terminal Board)*, [1961] S.C.R. 276, 27 D.L.R. (2d) 112; *Dental Technicians Assn. (Nova Scotia) v. Fall River Dental Lab Ltd.* (1994), 134 N.S.R. (2d) 149, 383 A.P.R. 149 (S.C.) which also cites in support this proposition the decision of the Privy Council in *Carling Export Brewing & Malting Co. v. R.*, [1931] A.C. 435, [1931] 2 W.W.R. 258, [1931] 2 D.L.R. 545 and of the Supreme Court of Canada in *Irving Oil Ltd. v. New Brunswick (Provincial Secretary)*, [1980] 1 S.C.R. 787, 109 D.L.R. (3d) 57, 31 N.R. 291, 29 N.B.R. (2d) 529, 66 A.P.R. 529. See also the discussion in D.C. Pearce's *Delegated Legislation in Australia and New Zealand* (Butterworths, Sydney, 1977) at pp. 96-97.

See also *Saskatchewan (Labour Relations Board) v. R.*, 1955 CarswellSask 81, [1956] S.C.R. 82, [1955] 5 D.L.R. 607, 55 C.L.L.C. 15,242 (S.C.C.) (where there was a right to make an application to agency, agency required to make the rules specifying the necessary matters to make such an application).

32.108A Ontario's Statutory Powers Procedure Act contains numerous examples where regulations are expressly required before an agency subject to the Act can exercise the power in question. See, for example, the following:

Section 17.1 "Subject to subsection (2), a tribunal may, in the circumstances set out in a rule made under section 25.1, order a party to pay all or part of another party's costs in a proceeding."

Section 4.8 (1) "A tribunal may direct the parties to a proceeding to participate in an alternative dispute resolution mechanism for the purposes of resolving the proceeding or an issue arising in the proceeding if,

(a) it has made rules under section 25.1 respecting the use of alternative dispute resolution mechanisms; and

(b) all parties consent to participating in the alternative dispute resolution mechanism."

Section 4.5(3) "A tribunal or its administrative staff shall not make a decision under subsection (1) unless the tribunal has made rules under section 25.1 respecting the making of such decisions . . ."

32.109 See *Thibodeau-Labbée c. Quebec (Régie des permis d'alcool)* (1991), 2 Admin. L.R. (2d) 69 (Que. C.A.). In that case the Régie des permis d'alcool had the authority to suspend a liquor licence for a violation of the public tranquillity. Section 114(8) of the Act Respecting Liquor Permits, R.S.Q. c. P-9.1 gave the Régie the discretion to make regulations determining the factors which it must particularly consider to see whether public tranquillity will be disturbed in the relevant cases. The Régie never made such regulations, but, nonetheless, purported to suspend a licence for a violation of the public tranquillity. Although the Quebec