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Tribunals Imitating Courts - Foolish Flattery or Sound Policy?

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In his 2004 Horace E. Read Memorial Lecture, David Mullan assesses the impact of the "due process explosion." To what extent has the evolution of Canadian law (both statutory and common) in the domain of procedural fairness been responsible for the phenomenon of excessive judicialization of the administrative process? Has the increase in the number of decision-makers subject to the obligation of procedural fairness and the growth in the parallels between tribunal and court processes affected adversely the interests of the administrative justice system and the public that it is meant to serve? The author suggests that there is a basis for this concern. He also argues that one potentially profitable way of dealing with it is for tribunals to recognize that they do not always have to function in the same way procedurally for all matters coming before them for resolution. While some tribunals have accepted this and make provision in their rules for variegated procedures depending on context, the author contends that the time may now have come to legislate for this possibility in the manner of the 1981 Model State Administrative Procedure Act.

Dans la conférence qu'il prononçait en 2004 dans le cadre des Horace E. Read Memorial Lecture, David Mullan évaluait l'incidence de l'augmentation exponentielle du nombre d'affaires où une partie a invoqué le droit à l'application régulière de la loi. Dans quelle mesure l'évolution du droit au Canada (tant les textes de loi que la common law) dans le domaine de l'équité procédurale est-elle à blâmer pour le phénomène de judiciarisation excessive du processus administratif? L'augmentation du nombre de décideurs soumis à l'obligation d'équité procédurale et la croissance des parallèles entre les processus des tribunaux et des cours ont-elles eu une incidence négative sur les intérêts du système judiciaire administratif et sur le public que le système doit servir? L'auteur avance que cette inquiétude serait fondée. Il prétend en outre qu'une façon potentiellement rentable de régler la question serait que les tribunaux reconnaissent qu'ils n'ont pas toujours à suivre la même procédure pour toutes les questions qu'ils doivent trancher. Même si certains tribunaux ont accepté ce fait et intégré dans leurs règles des dispositions prévoyant des procédures différentes en fonction des contextes, l'auteur prétend qu'il est peut-être temps de légiférer sur cette possibilité, à la façon de la Model State Administrative Procedure Act américaine de 1981.

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1. This is a revised version of the 2004 Horace E. Read Memorial Lecture, delivered on January 22, 2004. I am very grateful for the assistance of Martha Boyle, LL.B/M.P.A. (Queen's, 2004) and Michael Gottheil, Chair of the Human Rights Tribunal of Ontario. More generally, I want to express my thanks for the mentoring that Innis Christie, Professor Emeritus, Faculty of Law, Dalhousie University, provided me, both as a graduate student in 1970-1971 and as a junior colleague from 1973 to 1977.

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Prologue

Many thanks to the Faculty and to the Read family for the invitation to deliver this year's Horace E. Read Memorial Lecture. I was a junior faculty member here on the occasion of the first Read Lecture in 1976.² The thought never crossed my mind that I would one day return to Dalhousie to give that lecture.

When I came to the Dalhousie Law School from Queen's in 1973, Dean Read was still a frequent presence around the faculty. He was someone who had a formidable reputation yet he was particularly welcoming to new faculty members and, in my case, especially so when he learned that I would be teaching Contracts and using the current edition of his casebook on that subject. I had also learned of Dean Read from the founding dean of the Queen's University Faculty of Law, William R. Lederman, whose own teaching career had started at Dalhousie. In John Willis's *History of Dalhousie Law School*,³ Lederman praises Dean Read as a "fine scholar," a distinguished public servant, and a dean whose example he was proud to follow in fulfilling his decanal responsibilities at Queen's.⁴ It is therefore a privilege to deliver the lecture established in honour of one of the great leaders of this faculty.

Introduction

One of the characteristics of Canadian administrative law over the past thirty-five years has been, to borrow an American expression, the "due process explosion."⁵ As a result of both common law developments and

2. The inaugural lecture was given by Professor John M. Kernochan, Professor of Legislation at Columbia University School of Law. It appeared as "Statutory Interpretation: An Outline of Method" (1976) 3 Dal. L.J. 337.

3. John Willis, *A History of Dalhousie Law School* (Toronto: University of Toronto Press, 1979).

4. *Ibid.* at 133.

5. A term coined by Henry J. Friendly in "Some Kind of Hearing" (1975) 123 U. Pa. L.Rev. 1267.

statutory change, there has been a very significant increase in the procedural “protections” that the State must accord those with whom it deals. In most respects, there can be no doubting that this is a highly desirable evolution in our law. For a whole host of reasons, including ensuring the “accuracy” of decision-making and providing the balm that comes from being heard when a decision affects your key interests, procedural fairness is an essential part of sound administrative practices and moral virtue. Indeed, the struggle for adequate procedural fairness is almost certainly still not over. The nature of much administrative law litigation testifies to that as do recent important government-sponsored studies on the nature of the administrative process in, for example, Nova Scotia,⁶ British Columbia,⁷ and also the United Kingdom.⁸

What is, however, emerging more and more as a concern is the extent to which, at least in some contexts, Canadian law may have gone too far in the nature and the extent of procedural fairness obligations that are imposed on or adopted by some decision-makers. In particular, there is a sense abroad, as reflected in the title to this lecture, that many agencies and tribunals are almost indistinguishable from regular courts in the procedures that attend the exercise of their responsibilities; that they function in the manner of a traditional adversarial adjudicative model. That raises questions about whether it is a good thing, particularly if one’s vision of the administrative process is one of providing an alternative to the regular courts in order to ensure more accessible, speedy and efficient decision-making. As a result of the “due process explosion,” have we reached the stage where proceedings before some agencies and tribunals have become so procedurally hide-bound as to operate in conflict with their essential mission; where the delivery of substantive programmes is being compromised by the procedures attendant on their delivery? In short, is there a point at which so-called “procedural protections” can stand in the way of providing justice? Those are the essential questions that I want to explore in a preliminary or tentative way in this lecture - tentative or preliminary, not because these concerns represent new insights (they have

6. Law Reform Commission of Nova Scotia, *Final Report on Reform of the Administrative Justice System in Nova Scotia* (Halifax: Law Reform Commission of Nova Scotia, 1997).

7. See, generally, Attorney General of British Columbia, *On Balance: Guiding Principles for Administrative Justice Reform in British Columbia* (Victoria: 2002), the administrative procedure sections of which were much influenced by Ministry of Attorney General, *The Statutory Powers and Procedures of Administrative Tribunals in British Columbia* (Victoria: 2002) (prepared by Frank A.V. Falzon). Subsequently, there was Ministry of Attorney General, *Model Statutory Powers Provisions for Administrative Tribunals* (Victoria: 2003). All of this led to the *Administrative Tribunals Act*, S.B.C. 2004, c. 45.

8. Sir Andrew Leggatt, “Tribunals for Users—One System, One Service” (March 2001), online: Review of Tribunals <<http://www.tribunals-review.org.uk>>.

been with us for quite some time) but because I believe that this is a complex issue and requires much work before we grasp its dimensions fully.

In the first part of the lecture, I will provide a general overview of the extent and causes of the “due process explosion.” I will then attempt to expose some of the problems that have arisen because of it. Finally, I will explore ways in which those problems might be reduced or minimized. In this context, I will pay particular attention to the utility of general procedural codes such as the Ontario *Statutory Powers Procedure Act*,⁹ the American *Administrative Procedure Act*¹⁰ model, and the *Administrative Justice Act* recommended by Nova Scotia’s Law Reform Commission in its 1997 Final Report,¹¹ *Reform of the Administrative Justice System in Nova Scotia*. Ultimately, my conclusion will be that the National Conference of Commissioners on Uniform State Law’s 1981 *Model State Administrative Procedure Act*¹² and its provision of a menu of hearing models provides a sound basis for combatting tendencies towards over-judicialization within the context of a general procedural code. I also see it as an antidote that is preferable to relying on judicial review, tribunal initiatives, or tribunal-specific legislation.

1. *The Due Process Explosion - A Potted History*

1. *Statutory Codification*

In many senses, the first real manifestation of the “due process explosion” in Canada was the Ontario *Statutory Powers Procedure Act*. It came into force in 1971 and was based on the recommendations of the McRuer Commission Report,¹³ a compendious study of government law and institutions in the province of Ontario. John Willis, by then at the University of Toronto Faculty of Law, had criticized trenchantly this portion of the

9. R.S.O. 1990, c. S. 22, as am. by S.O. 1993, c. 27, Sched.; S.O. 1994, c. 27, S.O. 1997, c. 23, s. 13; S.O. 1999, c. 12, Sched. B, s. 16, R.S.O. 2002, c. 17, Sched. F. [the Act] First enacted as S.O. 1971, c. 47. (In fact, the first administrative procedure statute in Canada was the Alberta *Administrative Procedure Act*, S.A. 1966, c. 1 (now R.S.A. 2000, c. A-3), a far less detailed set of provisions, the operation of which depends on Lieutenant Governor in Council designation of the tribunal (section 2) or the provisions of the tribunal’s enabling legislation.)

10. Pub. L. No. 404, 60 Stat. 237 (1946).

11. *Supra*, note 6.

12. 15 U.L.A. 1 [Model Act].

13. Ontario *Royal Commission - Inquiry into Civil Rights*, vol. 1 (Toronto: Queen’s Printer, 1968-71).

McRuer Report.¹⁴ The proposals on which the Act was based offended Willis because of their “one model fits all” mentality. Essentially, the Act provided for an adjudicative, adversarial form of hearing in the style of the regular courts, though without all of the procedural details and with some nods in the direction of the particular nature of the administrative process in the form of flexible rules of evidence,¹⁵ including the concept of official notice,¹⁶ and the ability to restrict representation by counsel.¹⁷

However, the Act was not universal in its application. By reason of a statutory formula¹⁸ and specific exclusions,¹⁹ it applied only to those administrative tribunals that at that time would have been characterized as more adjudicative than administrative in nature - bodies such as the then Human Rights Board of Inquiry, the Ontario Municipal Board, the Ontario Labour Relations Board, and the like.²⁰ The Act also contemplated modifications by specific statutory provision of the extent of its application to even those bodies²¹ and, indeed, an omnibus Act was passed contemporaneously making hundreds of such adjustments.²² As well, the Act created the Statutory Powers Procedure Rules Committee which was charged with the monitoring of the Act’s operation and also the procedures of those decision-makers not coming within the general ambit of the legislation.²³ In other words, there had been a certain amount of tailoring and recognition that the basic model was not suitable for all

14. John Willis, “The McRuer Report: Lawyers’ Values and Civil Servants’ Values” (1968) 18 U.T.L.J. 351 at 358-59. See also John Willis, “Canadian Administrative Law in Retrospect” (1974) 24 U.T.L.J. 225 at 240-41. I deal in greater detail with this aspect of the Willis critique of McRuer in “Willis v. McRuer: A Long Overdue Replay with the Possibility of a Penalty Shoot-Out” (2005) 55 U.T.L.J. 535 at 561-72.

15. *Statutory Powers Procedure Act*, R.S.O. 1990 c. 22, s. 15.

16. *Ibid.*, s. 16.

17. *Ibid.*, s. 22(2), (3).

18. S. 3(1) requires that the tribunal be exercising “a statutory power of decision” and be required under its empowering legislation or “otherwise by law” to hold or afford to the parties a hearing before reaching a decision.

19. S. 3(2) contains a list of exclusions, including the courts, investigative and rule-making bodies. As well, the *Civil Rights Statute Law Amendment Act, 1971*, S.O. 1971, c. 50, enacted contemporaneously, included a multitude of mostly partial exclusions and that pattern has continued in subsequent Ontario legislation establishing administrative tribunals, with the application of the Act sometimes excluded in whole or in part.

20. *Supra* note 15 at s. 3(1). In effect, the Ontario Court of Appeal interpreted section 3(1) as restricted to those bodies specifically required to hold a hearing or which, under 1971 common law, were sufficiently judicial in character to attract to a common law obligation to comply with the principles of natural justice. See *Re Webb and Ontario Housing Corporation* (1978), 93 D.L.R. (3d) 187 (Ont. C.A.).

21. *Supra* note 15 at s. 32. Section 32 provided that the Act applied save to the extent that it was specifically overridden in other legislation.

22. See *Civil Rights Statute Law Amendment Act, 1971*, *supra* note 19.

23. *Supra* note 15 at Part III.

decision-makers and that even if generally suitable, specific adaptations might still be necessary.

Moreover, as a model, it did (and does) have considerable attraction. It trades in what most would regard as sound concepts of procedural fairness: adequate and timely notice of what is going to be at stake at the hearing,²⁴ an oral or in-person hearing at which the parties would have an adequate opportunity to put forward their proofs and arguments and to contest the other side's proofs and arguments,²⁵ and, well in advance of the common law,²⁶ a right to reasons on request.²⁷ As such, it served in many contexts as a source that drafters of procedural rules looked to for guidance.

Nonetheless, with the exception of an earlier, more skeletal Alberta Act and much later, very different Quebec²⁸ and British Columbia²⁹ administrative procedure Acts, the idea of such a model did not take hold in Canada. Over the years, there was certainly some interest but a proposed federal Act went nowhere³⁰ and the Nova Scotia Law Reform Commission's recommendations remain unimplemented (and I am told are moribund) seven years later. Indeed, in time, the Ontario Act's reputation suffered. Successive governments failed to provide proper funding and support for the Statutory Powers Procedure Rules Committee and, as a consequence, a core component of the whole reform exercise faltered and then faded away. The Act also became dated in two important respects. In an era where pre-hearing procedures (including various forms of alternative dispute resolution ("ADR")) were becoming more and more of a feature of regular court proceedings and a *de facto* characteristic of many tribunal processes,

24. *Supra* note 15 at ss. 6 and 8.

25. Primarily by implication from ss. 10, 12, 15.

26. It was not until *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, that the Supreme Court recognized that, at least in certain circumstances, statutory authorities had a common law duty to provide reasons for their decisions.

27. *Supra* note 15 at s. 17(1). Section 7 of the Alberta *Administrative Procedures Act* also contained a reasons provision, in its case mandatory.

28. *Administrative Justice Act*, S.Q. 1996, c. 54. The procedural dictates of Quebec are stated at a far greater level of generality than those of the Ontario *Statutory Powers Procedure Act*, *supra* note 15. The Act does, however, make specific provision for emergency situations as well as prescribing a statement of principles to govern those dispensing administrative justice.

29. *Administrative Tribunals Act*, S.B.C. 2004, c. 45, described *infra* at text accompanying note 107-08.

30. On April 18, 1995, the Administrative Law Section of the Department of Justice issued its *Proposal for a Federal Administrative Hearings Powers and Procedures Act* under the name of Martin Freeman, General Counsel. A revised version was issued on December 21, 1995 and yet a further revision, this time under the name of James H.L. Sprague of the Department's Public Law Policy Section, in September 1996. Thereafter, the initiative appears to have sunk without a trace.

the Act was virtually mute on these matters.³¹ With rampant technological advances, written and even electronic hearings were becoming the norm or at least possible in many contexts. The Act was based on the traditional oral or in-person hearings.

Eventually, in 1994, these concerns led to amendments to the Act.³² Unfortunately, the reality of the demise of the Statutory Powers Procedure Rules Committee became the law and that Part of the Act was repealed. More positively, the Act now recognizes and makes provision for ADR in the form of mediation,³³ written and electronic hearings,³⁴ and also more fulsome pre-hearing procedures.³⁵ However, in all of these respects, the provisions in question are triggered only by a tribunal's exercise of its newly conferred authority to make procedural rules.³⁶ This many tribunals have done though, in a number of instances, in accordance with a standard template.³⁷

All of this sounds promising and promotive of procedural flexibility, and, in many respects, it has been. However, there is one sense in which the new regime supported by the Act and the procedural rules adopted by individual tribunals may have exacerbated the due process explosion. Indeed, it was almost inevitable that, with the advent of court-like pre-hearing disclosure and discovery regimes and the movement in the direction of more court-like processes at actual oral or in-person hearings, there would be an increase in the complexity of, and time taken over, matters that go to formal hearings.³⁸ In many settings, pre-hearing motions

31. S. 8, *supra* note 15, made provision for prehearing exchange of information other than notice of the proceedings. In what is a far cry from current discovery regimes, section 8 provides that where "the good character, propriety of conduct or competence of a party" is in issue, the other side must, "prior to the hearing" provide that party "with reasonable information of any allegation."

32. In the *Statute Law Amendment Act*, S.O. 1994, c. 27. The Act was subsequently modified in 1997, 1999, and 2002; *supra* note 9. The original set of amendments came into force on April 1, 1995.

33. *Supra* note 15 at ss. 4.8, 4.9. While this paper argues for the recognition of a middle ground between ADR and formal hearings, I do regard it as important that ADR be addressed in some detail in any administrative procedure Act. The Ontario Act now does that. For an even more comprehensive model, see the United States *Administrative Dispute Resolution Act of 1996*, Pub. Law 104-320.

34. *Supra* note 15 at ss. 5.1, 5.2, and 5.2.1.

35. *Ibid.* at ss. 5.3 and 5.4.

36. *Ibid.* at s. 25.1

37. Rules made under s. 25.1 (on file) in many instances have provisions in common.

38. I must admit that this assessment is not based on any systematic empirical research but rather a combination of my own observations as a part-time member of the Human Rights Tribunal of Ontario and conversations with other tribunal members and lawyers appearing before some of the province's tribunals. It is also reflected in the pleas for less judicialization and more efficient procedures to be found in the 1997 Ontario Government Task Force on Agencies, Boards and Commissions in its *Report on Restructuring Regulatory & Adjudicative Agencies* (Toronto: Queen's Printer, 1997), ("Wood Committee Report," after its Chair, Bob Wood, M.P.P.) and the 1998 Report of the Agency Reform Commission on Ontario's Regulatory and Adjudicative Agencies, *Everyday Justice* (Toronto: Queen's Printer, 1998) ("Guzzo Commission Report", after its Chair, Garry Guzzo, M.P.P.).

abound, particularly over issues such as disclosure and discovery, and a more adversarial environment features from the outset. In the course of actual hearings, there are also many more formal objections to the admission of evidence or other matters pertaining to the conduct of the proceedings. All of these phenomena can and do have the consequence of making settlement and other efforts at ADR much more attractive alternatives than a formal hearing.

In some senses, that is a good thing from a policy perspective. However, for those disputes where an oral or in-person hearing is essential or the reasonable preference of one of the parties, the resource consequences may have become much greater and effective access to a full hearing just as problematic in the tribunal setting as it is in the regular courts. In such a context, settlement can become an economic necessity - not a mutually acceptable resolution of a problem. Any promise of the administrative justice system as a more accessible way of resolving issues has been undercut. In creating the opportunities for more informal ways of resolving issues, the formal has become more formal in a way that redounds to the disadvantage of many parties. It is trite that longer, more procedurally complex hearings cost more and, where the pressures for settlement do not work, they increase the possibility of unrepresented participants. This too can lead to still further inefficiencies.

I will return to the whole issue of statutory procedural codes later. However, it is also important to evaluate what has been happening with the common law of procedural fairness over the same period.

2. *The Common Law*

It is now over twenty-five years since the Supreme Court of Canada delivered its landmark judgment in *Nicholson v. Haldimand-Norfolk (Regional Municipality) Commissioners of Police*.³⁹ In that case, the Court held that a probationary police constable was entitled at common law to procedural fairness before he was let go. In so doing, the Court lowered the threshold that the common law imposed for being able to assert a claim to procedural fairness. This change opened the door to procedural fairness claims on the basis of interests theretofore excluded from the benefit of the rules of natural justice - inmates,⁴⁰ those on parole,⁴¹ immigrants (including convention refugee claimants) seeking status in Canada,⁴² the

39. [1979] 1 S.C.R. 311 [*Nicholson*].

40. *Cardinal v. Kent Institution*, [1985] 2 S.C.R. 643.

41. *Gough v. Canada (National Parole Board)* (1990), 45 Admin. L.R. 304 (F.C.T.D.), aff'd. (1991), 47 Admin. L.R. 226 (F.C.A.).

42. *Singh v. Canada (Minister of Employment and Immigration)*, [1985] 1 S.C.R. 177; *Baker v. Canada (Minister of Citizenship and Immigration)*, *supra*, note 26.

holders of positions at pleasure,⁴³ those seeking tenure at universities,⁴⁴ to name but a few. This clearly contributed to the “due process explosion” but in a desirable form. The previous law confining the reach of procedural fairness to an often narrowly conceived category of “true rights holders” was far too restrictive of the circumstances under which procedural fairness should have attended statutory and prerogative decision-making.

It was also the case that, in *Nicholson*, Laskin C.J.C. (delivering the judgment of the majority) did not conceive of the lowering of the threshold as also involving in this new terrain adherence to the norm of full natural justice, characterized typically by a full-scale adjudicative hearing. In remitting the issue of Nicholson’s dismissal to the Board, Laskin C.J.C. stipulated that the Board had a discretion to proceed orally or in writing.⁴⁵ Subsequently, in *Knight v. Indian Head School Division No. 19*,⁴⁶ the Court made it abundantly clear that a series of informal meetings in the nature of contract renewal discussions was perfectly adequate to fulfill the School Board’s procedural fairness obligations towards a director of education who served at pleasure and whose contract was not renewed.

Nonetheless, in what seems a typical manifestation of the notion of “once bitten, twice shy,” administrators and indeed legislators often tend to overreact to judicial correction of their procedural failings. Thus, when the Board resumed its consideration of Nicholson’s status, despite the discretion to proceed in writing if it wished, the Board accorded Nicholson an in-person hearing at which he was entitled to be represented by counsel, to present evidence, and cross-examine witnesses.⁴⁷

We see this same phenomenon occurring in the context of student matters at least at some universities. The Courts, in cases such as *Khan v. University of Ottawa*,⁴⁸ have obviously imposed a quite high standard of procedural fairness on university decision-making processes which have a significant impact on a student’s academic status, whether it be expulsion, suspension or the repeating of a year, including the requirement of an in-person or oral hearing whenever issues of the student’s credibility arise. In practice, this then is translated into formal, lengthy hearings on issues such as plagiarism. Thus, two or three summers ago, a three-person panel of professors at my faculty spent a total of two weeks each

43. See, e.g., *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653.

44. See, e.g., *Ruiperez v. Lakehead University* (1981), 130 D.L.R. (3d) 427 (Ont. Div. Ct.), aff’d. (1983), 147 D.L.R. (3d) 154 (Ont. C.A.).

45. *Supra* note 39 at 328.

46. *Supra* note 43.

47. See the facts as recorded in *Nicholson v. Haldimand-Norfolk (Regional Municipality) Commissioners of Police* (1983), 11 O.A.C. 65, at para. 3 (Div. Ct.).

48. (1997), 148 D.L.R. (4th) 577 (Ont. C.A.).

hearing and deliberating on two plagiarism cases, cases that also took up significant chunks of time of at least five other faculty members. Similarly, a complaint by a student questioning the fairness of the assignment of grades in a first-year course continued through all of his three years in the LL.B. programme, involving many stages both within and outside the faculty, occupying vast amounts of faculty time (including that of the dean), and, ultimately, leading to the use of outside counsel by each side, and all this with the possibility of an application for judicial review at the end of the process. It is highly questionable whether anyone's interests are served by this escalation in process and whether in fact the cause of procedural fairness, even in an abstract sense, is forwarded by such lengthy, multi-layered and resource heavy processes. It is also highly questionable whether the courts through the common law do in fact demand as much process as this.

Administrators are not alone in this tendency to overreact. For over twenty years (and indeed earlier in the month in which I delivered the Read Lecture⁴⁹) Jeffrey Simpson of the *Globe and Mail* has been railing against the Supreme Court of Canada for its 1985 decision in *Singh v. Canada (Minister of Employment and Immigration)*,⁵⁰ a judgment which he seemingly holds entirely responsible for Canada's costly and, in his view, unmanageable refugee determination system. Yet, at root, the prescription that the Supreme Court laid down in that case for fairness or "fundamental justice" in a convention refugee determination process was no more than access in person to someone with the authority to make a decision with knowledge of and an opportunity to contest those facts which were leading towards a rejection of the application.⁵¹ That prescription, in a case where rights protected by both the *Canadian Charter of Rights and Freedoms* and the *Canadian Bill of Rights* were in jeopardy,⁵² seems no more than an assertion of the true core or essence of what procedural fairness involves and not as necessarily leading to the particular regime that Parliament enacted subsequently and has tinkered with ever since.

In other respects, however, the courts have contributed more directly to the "due process explosion." The last twenty-five years of judicial review have led to far higher levels of entitlement (in most, though not all contexts)

49. Jeffrey Simpson "Our refugee system costs more than we think" *Globe and Mail* (7 January 2004) A17.

50. *Supra* note 42.

51. *Supra* note 42 at paras. 60-64 and 100-11.

52. In fact, three of the judges decided the case by reference to section 7 of the *Charter* and three by reference to section 2(e) of the *Bill of Rights*, the seventh judge, Ritchie J., not taking part in the judgment.

to access to all relevant adverse material at least at the hearing.⁵³ In contexts which have any passing similarity to the charging of persons with offences, some courts (and agencies for that matter) have accepted the applicability of the *Stinchcombe*⁵⁴ criminal process rules of full pre-trial discovery of the relevant fruits of the investigation. Thus, in Ontario, the Human Rights Commission has been held subject to this obligation,⁵⁵ while the Supreme Court of Canada has recently sustained as not unreasonable the Ontario Securities Commission's adoption of such a regime.⁵⁶ As already noted, oral or in-person hearings have become the expected norm whenever issues of credibility arise in an administrative adjudication. Long after the obligation was accepted in both the Ontario *Statutory Powers Procedure Act*⁵⁷ and the Alberta *Administrative Procedures Act*,⁵⁸ the Supreme Court in *Baker v. Canada (Minister of Citizenship and Immigration)*⁵⁹ held that there was, at least in the context of many administrative adjudications, a requirement to provide reasons for the ultimate decision. Tribunals and courts are still struggling with the parameters of this principle.⁶⁰ There is also a much greater willingness on the part of the courts to demand, in the absence of statutory authorization, that administrative adjudication

53. See, e.g., *Napoli v. British Columbia (Workers' Compensation Board)* (1981), 126 D.L.R. (3d) 179 (B.C.C.A.).

54. *R. v. Stinchcombe*, [1991] 3 S.C.R. 326.

55. *Ontario (Human Rights Commission) v. Ontario (Board of Inquiry into Northwestern General Hospital)* (1993), 115 D.L.R. (4th) 279 (Ont. Div. Ct.), though cf. *CIBA-Geigy Ltd v. Canada (Patented Medicine Prices Review Board)*, [1994] 3 F.C. 425 (C.A.).

56. *Deloitte & Touche LLP v. Ontario (Securities Commission)*, [2003] 2 S.C.R. 713.

57. *Supra* note 9.

58. *Supra* note 9.

59. *Supra* note 26.

60. See, e.g., *Brochu v. Bank of Montreal* (1999), 251 N.R. 207 (F.C.A.), holding that the obligation does not attach to a decision of the Canadian Human Rights Commission not to refer a complaint to the Canadian Human Rights Tribunal, a ruling followed recently in *Wang v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2005 FC 654. It is interesting that, at the provincial level, Nova Scotia really led the way in the movement towards a common law requirement of reasons. For over twenty years, Dean Read was the part-time chair of the Nova Scotia Labour Relations Board. If I have the story correct, in the early years of his tenure, he regularly gave reasons for his decisions. However, all that changed when the Supreme Court of Canada quashed his ruling in *Smith and Rhuland v. The Queen*, [1953] 2 S.C.R. 95, on the basis of the reasons provided by Dean Read for denying an application for certification as a bargaining unit brought by a union which was under the direction of a member of the Communist Party of Canada. As I heard it when I arrived at Dalhousie, the day the judgment came down Dean Read declared that henceforth there would be no more reasons from the Board, a resolution he allegedly kept until he retired and was replaced by Innis Christie. While Dean Read's reasons were generally quite brief before his decision in *Smith and Rhuland*, he limited himself to findings of fact after that decision; see R. Blake Brown, "'To Err is Human, to Forgive Divine': The Labour Relations Board and the Supreme Court of Nova Scotia, 1947-1965" in P. Girard, J. Phillips & B. Cahill, *The Supreme Court of Nova Scotia 1754-2004: From Imperial Bastion to Provincial Oracle* (Toronto: University of Toronto Press for the Osgoode Society, 2004). It was, however, in a Labour Relations Board context that the Nova Scotia Court of Appeal in 1997 accepted that the common law of procedural fairness could require the provision of reasons: see *Future Inns Canada Inc. v. Nova Scotia (Labour Relations Board)* (1997), 4 Admin. L.R. (3d) 248 (N.S.C.A.).

processes be structured in such a way as to ensure that the decision-makers are independent and impartial in an institutional sense.⁶¹ Finally, in what is not a full catalogue of procedural accretions to the administrative process, account has to be taken of the influence since 1982 of the *Canadian Charter of Rights and Freedoms*. While it has not in fact had an impact on as much of the administrative process as many thought originally,⁶² where it (and, in particular, section 7 and the principles of fundamental justice) applies, there is often a tendency to see this as a procedure enhancer beyond the levels expected normally by the common law.⁶³ However, more significantly, in the wake of the Supreme Court's recent judgment in *Martin v. Nova Scotia (Workers' Compensation Board)*,⁶⁴ it is now much more the norm rather than the exception that adjudicative tribunals will have to hear and rule on *Charter* and other constitutional issues that arise in the course of proceedings before them, including *Charter* challenges to their empowering or enabling legislation. This, of course, can add major dimensions to a hearing.

In using these illustrations, I am not in any sense being critical of all of them. Some were long overdue such as the duty to provide reasons, particularly if understood and applied in the flexible, context-sensitive manner described by L'Heureux-Dubé J. in delivering the majority judgment in *Baker*.⁶⁵ However, especially when linked with the post-*Nicholson* expansion in the overall reach of procedural fairness obligations, they in total represent a considerable accretion to the detail of what the common law will require in many settings. More generally, it is also the case that the tone of much administrative adjudication has changed in the wake of *Nicholson*. Informality has become far less acceptable in a world where the clientele of many administrative processes are represented by counsel more familiar with the world of civil and criminal litigation and insistent on the application of those standards. Indeed, the following extract from John Willis's 1973 Caesar Wright Lecture, "Canadian Administrative Law in Retrospect,"⁶⁶ well illustrates the change in the culture. In the context

61. See, e.g., 274-3174 *Québec Inc. v. Québec (Régie des permis d'alcool)*, [1996] 3 S.C.R. 919.

62. Most recently, as a consequence of *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307, interpreting restrictively the scope of "liberty" and "security of the person" in the context of a complaint of violation of the anti-discrimination provisions of a human rights code.

63. This emerges most clearly from *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3 at paras. 114-18, where the Court accepts that the fact that *Charter* rights are in issue before a tribunal will add weight to the claim for procedural protections, a claim that should not be adjudicated by reference to straight common law principles.

64. [2003] 2 S.C.R. 504. See also *Paul v. British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585 (applying the same principles to tribunal determination of First Nations rights issues) and *Okwuobi v. Lester B. Pearson School District*, [2005] 1 S.C.R. 257.

65. *Supra* note 26 at paras. 40-44.

66. *Supra* note 15.

of extra-hearing contacts between a party and the decision-maker, Willis, reflecting on his six years as a part-time member of the Ontario Securities Commission, mused whether it

[w]as it all right for me, as chairman of a disciplinary panel, to telephone the Commission lawyer in the middle of a week's adjournment and tell him "if you want to make good your position in this case you'd better get such and such a piece of evidence" or "the line of argument you've been pursuing will get you nowhere with us, why don't you try this one?" On the civil servant's side of my mouth my answer was of course yes: as members of a regulatory authority we were all, quite unlike honest to god magistrates or judges, responsible for the future smooth working of the area in which we were to give our decision; we could not afford the do-nothing luxury of complete neutrality that they enjoy. On the lawyer's side of my mouth my answer was "well, I wonder, whoever heard of a magistrate phoning the crown attorney with suggestions of that kind" and as I did my telephoning I was always apprehensive of what Mr. McRuer might say.⁶⁷

Willis goes on to provide support in the contemporary literature for the activist position.⁶⁸ However, while conceding that this kind of intervention still goes on even in the case of some judges, I would venture to say that today, a court would have no hesitation whatsoever in disqualifying Willis from participation on the basis of a reasonable apprehension of bias.⁶⁹ A combination of increased formality and commitment to adversarial adjudicative principles in such contexts, greater judicial valuing of the impact of discipline on the career of financial market registrants as well as a stronger general jurisprudence condemning such informal contacts between adjudicators and parties would coalesce to condemn the conduct.

II. *Dealing with the Dilemma*

Such is the extent to which the public psyche has been imbued with the values of procedural fairness that it is difficult to envisage a reversal of the overall trend toward more extensive procedural protections. Returning to the "bad old days" is simply not a feasible political or legal option at least in the sense of withdrawing procedural decencies from those situations brought under the umbrella for the first time by *Nicholson*. Indeed, it is hard to quarrel with the overall ambitions of the judgment in *Nicholson*: its recognition that common law hearing entitlements should be more broadly allocated than previously and the concomitant acceptance that, within the

67. *Supra* note 15 at 241-42.

68. *Ibid.* at 242, citing Robert F. Reid, "Bias in the Tribunals" (1970) 20 U.T.L.J. 119 at 136-38.

69. The strongest support for this is found in 2747-3174 *Québec Inc. v. Québec (Régie des permis d'alcool)*, *supra* note 61, and its insistence on maintaining an internal separation between the prosecutorial and adjudicative arms of the tribunal.

new world of procedural fairness, a concept of “one model fits all” could not prevail; that the exigencies of specific decision-making contexts had to be reflected in a flexible approach to determining the scope of procedural rights.

However, the desirability of much of the expansion notwithstanding, there still seems to me to be life left in Felix Frankfurter’s famous admonition. The origins and objectives of most administrative agencies should “preclude wholesale transportation of the rules of procedure, trial and review which have evolved from the history and experience of courts”.⁷⁰ In some circumstances, however, legislation, the common law, or the voluntary practice of administrative adjudicators have in effect coalesced to bring about such a transportation. As a consequence, there is a case to be made for stepping back and assessing whether better or more alternatives exist.

Indeed, there is something of an irony in the fact that, at least in Ontario, reforms of process in the regular courts have shown the way to more flexibility in administrative agency processes. Thus, the 1994 and 1999 amendments to the *Statutory Powers Procedure Act* and the rules of many of the province’s administrative tribunals reflect the new regime of the regular courts in their emphasis on pre-trial clarification and simplification of the matters in issue and the value of access to mediation and other forms of ADR. However, I do wonder whether simple transferral of the court regimes of pre-trial process and possibilities for mediation, settlement discussions, and the narrowing of issues is enough. Surely, there is room for at least some administrative agencies to both think and act outside the box. In particular, there should be attention to whether there are points between mediation and other processes aimed at settlement, on the one hand, and full adjudication, on the other.

In this regard, the United States National Conference of Commissioners on Uniform State Laws 1981 *Model State Administrative Procedure Act*⁷¹ provides some guidance in its recognition of several types of hearing ranging from the formal process characterized by close proximity to criminal and civil trials and exemplified by the original form of *Statutory Powers Procedure Act* hearing, through conference hearings, summary adjudicative hearings, and emergency hearings. The merit of this model (as opposed to one where the alternatives are in effect “mediate or litigate”) is that it does present options for an actual hearing and adjudication without following the full formal model. If operating optimally, the more informal

70. *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U.S. 134 at 143 (1940).

71. *Supra* note 12.

options will make a true hearing more accessible and also serve the traditional administrative justice objectives of speedy, low cost, efficient but effective resolution of issues. Writing in the highly problematic domain of social welfare regimes (where any money spent on hearings can have an impact on the availability of funds for substantive programmes), Rabin, around the time of *Nicholson*, proposed an informal model that could well serve many administrative justice schemes: “[h]ave an independent hearing officer who provides the claimant with a documented statement of reasons with an opportunity to respond though written or oral arguments - after which the examiner is required to provide a written explanation for his decision.”⁷²

It has, of course, long been recognized that, as in the world of real courts, administrative processes simply cannot work if all cases go forward to a hearing, even an informal one. Settlement, compromise through mediation, and plea bargaining are all vital components of the process. However, hearings and trials do have a value aside from providing participatory rights and justice to the parties. As opposed to settlement and mediation processes, they generally provide a public record and precedents for the resolution of future matters with like facts and issues, and are especially valuable at the remedial end of proceedings.

These points (and others about the value of public trials) have been made recently in an American Bar Association Report entitled *The Vanishing Trial*⁷³ and they have resonance in the world of the administrative process. The fewer the number of adjudications, the less guidance there will be for mediations and other forms of settlement discussion, and when negotiations take place both in secret and in a relative vacuum, the opportunities for outcomes influenced by economic and other forms of might or duress increase dramatically. The integrity of many administrative processes may well depend on a sufficient number of adjudications, and, if a formal model of adjudication is the only hearing option that is available, there is a strong possibility in some contexts that that critical mass may cease to exist.

Let me therefore explore in somewhat more detail the terms of the 1981 *Model State Administrative Procedure Act* (“Model Act”) to assess whether this might provide an appropriate vehicle for opening up the possibility of a range of procedural options within a general administrative procedure statute.

72. R.L. Rabin, “Some Thoughts on the Relationship Between Fundamental Values and Procedural Safeguards in Constitutional Right to Hearing Cases” (1979) 16 San Diego L. Rev. 301 at 311.

73. Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts* (2004), online: American Bar Association <<http://www.abanet.org/litigation/vanishingtrial>>. See also Judith Resnik, “Procedure’s Projects” (2004) 23 C.J.Q. 273.

While a formal trial-type hearing is the default position under the Model Act,⁷⁴ as mentioned already, it makes provision for three other species of hearings: conference,⁷⁵ summary,⁷⁶ and emergency.⁷⁷ However, as with many of the “new” provisions in the Ontario *Statutory Powers Procedure Act*, these alternatives, with the exception of the emergency option,⁷⁸ require a trigger to be available to any agency coming within the reach of the Act: the agency must adopt rules providing for these options. This process itself engages the notice and comment opportunity obligations attached to rule making under the Model Act,⁷⁹ leading to the strong possibility that there will be constituent involvement and perhaps even consensus over the detail of the rules that emerge.

Leaving aside the exceptional category of emergency procedures, the least formal of the three other options is the summary hearing. Asimow has characterized its essential characteristics: “[i]n short, summary procedure entitles a person subject to an adverse agency decision to have appropriate notice, a chance to state his or her point of view, an explanation of an adverse decision, and an administrative review of the decision.”⁸⁰

This contrasts with conference hearings which have many more of the trappings of a formal hearing but dispense with a pre-hearing conference and subpoenas or discovery. There is also “no formal presentation of evidence or cross-examination, and no right of non-parties to participate.” Rather, “the parties can testify, present written exhibits, and offer comments on the issues. Some elements of a formal hearing are retained: the requirements of notice, an unbiased decisionmaker, separation of functions, limits on *ex parte* contacts, a statement of findings and reasons, and agency review...”⁸¹

It must, however, be acknowledged that the 1981 Model Act has not attracted significant legislative support in the United States. Thus Asimow, a strong supporter of many of the components of the Model Act, reports that it “has been adopted only in a very few states” and even then “[n]one

74. *Supra* note 12 at s. 4-201(2).

75. *Ibid* at s. 4-401, 4-403.

76. *Ibid*. at s. 4-502, 4-506.

77. *Ibid* at s. 4-501.

78. *Ibid* at s. 4-201(3).

79. *Ibid*. at ss. 1-102, 3-103. S. 1-102 defines a rule to include rules of procedure and practice.

80. Michael Asimow, “Towards a New California Administrative Procedure Act: Adjudication Fundamentals” (1992) 39 U.C.L.A. L. Rev. 1067 at 1101.

81. *Ibid* at 1097.

of those states came close to adopting all of it.”⁸² Among the explanations he provides are its over-ambition, a concern that it subjected too broad a range of decision-making to its adjudicative provisions, and satisfaction in many States with their existing administrative procedure legislation.⁸³

Nonetheless, I do believe that there is a strong case for moving in this direction and creating the possibility of tribunals experimenting with “hearings” with varying levels of formality. Indeed, such flexibility is not without precedent in Canadian law. Thus, for example, section 110 of the Ontario *Labour Relations Act, 1995*⁸⁴ allows for the making of rules not only dispensing with hearings but also permitting less formal hearings notwithstanding the provisions of the *Statutory Powers Procedure Act*. This has led to the adoption for certain purposes of a process described as a consultation. On the Ontario Labour Relations Board’s website, a consultation is described as follows:

A consultation is less formal and meant to be less costly to the parties than a hearing. The Vice-Chair or panel plays a much more active role in a consultation. The goal of the consultation is to allow the Vice-Chair or panel to expeditiously focus on the issues in dispute and determine whether any statutory rights have been violated. While the precise nature of the consultation varies depending on the nature of the case and the approach of the individual adjudicators, there are some universal features. To draw out the facts and arguments necessary to decide whether there has been a violation of a statute, the Vice-Chair or panel may: (1) question the parties and their representatives; (2) express views; (3) define or redefine the issues; and (4) make determinations as to what matters are agreed to or in dispute. The giving of evidence under oath and the cross-examination of witnesses are normally not part of a consultation, and when they are, it is only with respect to those matters that are defined by the Board. Because the opportunity to call

82. Michael Asimow, “The Fourth Reform: Introduction to the *Administrative Law Review* Symposium on State Administrative Law” (2001) 53 *Admin. L. Rev.* 395 at 396. See also Michael Asimow, “The Influence of the Federal Administrative Procedure Act on California’s New Administrative Procedure Act” (1996) 32 *Tulsa L. Rev.* 297 at 320-22, in which he compares the 1995 *California Administrative Procedure Act* to the 1981 Model Act. The California Act does not go as far as the Model Act, but does nonetheless open up the possibility of “informal hearings”: see Cal. Gov’t Code, ss. 11455.10 - 11455.60.

83. *Ibid.* Indeed, the National Conference of Commissioners on Uniform State Laws has now embarked on another revision of the Model Act, a revision that proposes to abandon the approach of the 1981 Model Act and move much more in the direction proposed by the Law Reform Commission of Nova Scotia in its Final Report, *supra* note 6 (and described in more detail in the notes accompanying notes 105-06, below): a set of compulsory or core principles followed by additional options: see U.S. National Conference of Commissioners on Uniform State Law, *Preliminary Report on Model State Administrative Procedures Act*, (Pittsburgh: 2005), online: The National Conference of Commissioners on Uniform State Laws <<http://www.law/upenn.edu/bll/ulc/msapa/2005AMAdminReport.htm>>. The American Bar Association is also studying the Federal *Administrative Procedure Act* and is recommending revision.

84. S.O. 1995, c. 1, Schedule A., ss. 110(20)(b), 110(21).

witnesses and present evidence is limited, the Board relies heavily on the information that is provided in the application and response. As such, the parties are required to provide in their application and response all of the material facts that they intend to rely on. Parties who fail to do so may not be allowed to present any evidence or make any representations about these facts at the consultation.⁸⁵

In short, what the Board seems to have adopted is an alternative process that has some of the features of an inquisitorial model and some of the features of the Model Act's own conference style of hearings. If one accepts that there is a need to be wary of the tendency to overjudicialization of tribunal procedures, such experiments in alternative hearing methodologies are to be encouraged.

However, the problem that the Labour Board example raises is how this willingness to deploy different hearing models might become more widespread. It is, of course, significant that the Board's constitutive Act conferred specific authority on the Board to engage in this kind of exercise, an authority that applied notwithstanding the provisions of the province's *Statutory Powers Procedure Act*. Without that kind of explicit authority, the provisions of the *Statutory Powers Procedure Act* itself would have been insufficient to permit such experimentation. Certainly, the Act does confer rule-making powers on those tribunals coming within its reach.⁸⁶ However, that rule-making power is related specifically to the terms and structure of the Act,⁸⁷ and those terms and that structure are essentially formal in both their philosophy and detail. Of course, it might be argued that the ability to hold written and electronic hearings conferred by the Act does create a window of opportunity for experimentation. However, those bare-bones provisions would not seem to allow for the creation of a range of in-person hearing opportunities of the kind envisaged in the Model Act of 1981. The intermediate terrain between the truly formal and purely paper or electronic hearings remains unoccupied.

More generally, there have to be concerns as to whether the general procedural rule-making powers contained in statutes establishing tribunals

85. Ontario, Adjudication, Ontario Labour Relations Board (Toronto: Queen's Printer, 2003) online: Ontario Labour Relations Board <<http://www.olrb.gov.on.ca/english/hearing.htm>>. See also Ontario Labour Relations Board, Information Bulletin, No 11: Duty of Fair Representation Applications (Toronto: 2001), online: Ontario Labour Relations Board <<http://olrb.gov.on.ca/english/infob/infbul11.htm>>.

86. *Supra* note 15 at s. 25.1(1).

87. By virtue of s. 25.1(3), any rules made under section 25.1(1) must be consistent with the *Statutory Powers Procedure Act* and "the other Acts to which they relate." There may also be problems in situations where the tribunal's constitutive statute calls for the tribunal to "hold a hearing" (e.g., *Ontario Human Rights Code*, R.S.O. 1990, c. H.19, s. 39(1)). By virtue of s. 3(1) of the *Statutory Powers Procedure Act* that language triggers the processes of that Act and presumably forecloses the tribunal from exercising its rule-making powers to opt for anything less formal than that model.

across Canada (and even today exercised most commonly by way of Governor-in-Council or Lieutenant-Governor-in-Council regulation rather than unilaterally by the tribunals themselves) are apt to confer the authority to provide the kind of menu of possible procedures characterized by the Model Act. At the very least, it is to be expected that any mandatory imposition of informal procedural regimes will encounter procedural unfairness claims in the courts.

Of course, it may be the case that enlightened judges will recognize the merits of any such procedurally flexible regime and be willing to read expansively the procedural rule-making powers attached to that tribunal's constitutive statute. However, there is always the pull of traditional adjudicative models, models with which the judges in general are more familiar and comfortable. It is also the case that the courts do not have the capacity to be proactive agents of system-wide change in relation to issues of this kind. Our courts have not shown (and perhaps legitimately so) any inclination to compel agencies and tribunals to engage in rule-making let alone to prescribe the parameters and the content of the rules that they would like to see emerge from that exercise. Their role is largely reactive albeit one that at times can and does lead to significant procedural adaptation⁸⁸ though seldom other than incrementally or on a situation-specific basis.

Of course, over time, the imperatives of limited budget and personnel may lead tribunals themselves more and more in the direction of informal procedures as a matter of practice even without specific legislative mandate. On many occasions, this may well have the support of affected constituencies (the clientele of the tribunal) who are struggling with their own resource issues and cannot afford either the cost or the delay or both of the legislated formal procedure. In this regard, the Human Rights Tribunal of Ontario is instructive to the extent that it offers mediation of complaints referred to it by the Human Rights Commission,⁸⁹ a service that is utilized frequently and to considerable effect albeit that the Commission itself is statutorily mandated to try to effect a settlement as part of its initial investigative process.⁹⁰

88. See *Baker v. Canada (Minister of Citizenship and Immigration)*, *supra* note 26, with respect to the duty to give reasons; and *Martin v. Nova Scotia (Workers' Compensation Board)*, *supra* note 64, with respect to the authority of tribunals to consider *Charter* and other species of constitutional question.

89. See Ontario, *Human Rights Tribunal of Ontario Rules of Practice*, rules 49-53. The authority for the adoption of a mediation option comes from s. 4.8(1) of the *Statutory Powers Procedure Act*.

90. *Human Rights Code*, R.S.O. 1990, c. H.19, s. 33(1).

Indeed, as early as 1970, in an article rejecting the idea of a New Zealand administrative procedure statute,⁹¹ J.A. Farmer made this very point based on his observation of the real life workings of the American *Administrative Procedure Act*:

By providing procedures which are too formal to be successfully employed in most cases, the APA has forced the development of informal, largely unofficial, procedures in some areas where a wider adjudication (of a more enlightened kind) might have been better. Similarly, it has diverted attention away from the need for minimum safeguards to be established in those cases where informal adjudication is practised as being the only feasible alternative.⁹²

Reflecting many of the very same concerns, that same year, John Willis, in his critique of the McRuer Commission proposal for an Ontario administrative procedure statute,⁹³ was at his pungent best. Later, he was to describe the formal hearing processes of the *Statutory Powers Procedure Act* as lacking any real root in "the world of what actually happens as opposed to the dream world of lawyers."⁹⁴ However, he was far more inclined than Farmer to remain content with the informal processes developed by tribunals and agencies. As the quotation makes clear, Farmer was not sure that what came out of perceived operational necessity was inevitably the appropriate way for tribunals and agencies to carry out their decision-making responsibilities. Other means had to be found for striking a balance between, on the one hand, the pressures on agencies and tribunals to protect their resources through the development of extra-legal, informal mechanisms and, on the other, the rights of stakeholders to a procedure that afforded a sufficient degree of procedures to allow for fair and appropriate substantive outcomes. The compromises that emerged from such a totally internalized process of evolving extra-legal, informal processes were not guaranteed to be in the public interest or that of affected constituencies.

That then brings me back to the whole idea of a general statute against which Farmer, Willis, and others⁹⁵ railed. Let me rehearse their principal criticisms. Focussing on the American *Administrative Procedure Act* or

91. J.A. Farmer, "A Model Code of Procedure for Administrative Tribunals: An Illusory Concept" (1970) 4 N.Z.U.L Rev. 105.

92. *Ibid* at 115.

93. "The McRuer Report: Lawyers' Values and Civil Servants' Values", *supra* note 14 at 358-59.

94. "Canadian Administrative Law in Retrospect", *supra* note 14 at 241.

95. Another sceptic is Margaret Allars, "A General Tribunal Procedure Statute for New South Wales" (1993) 4 Public Law Review 19. Indeed, the birth of the 1946 *Administrative Procedure Act* was not without controversy. See, e.g., Arthur Earl Bonfield, *State Administrative Rule Making* (Boston: Little Brown, 1986, with 1992 Supplement) at 1.2.3.

the model recommended by McRuer, these critics were concerned about the extent to which such statutes were based on a concept of "one model fits all" and, secondly, on standard conceptions of judicial decision-making. However, those concerns do not speak necessarily to the folly of any kind of administrative procedure statute. More particularly, it is certainly possible to think in terms of a general statute that recognizes and authorizes a variety of decision-making processes; one which provides a framework or a template for tribunal development of appropriate decision-making processes within the realm of formal law, as opposed to informally or extra-legally. Indeed, as suggested already, the 1981 Model Act exemplifies those objectives.

Farmer's general preference for a checking mechanism to curb the rogue tendencies of internally developed processes while, at the same time, encouraging diversity was a modified version of the British Council on Tribunals. In the specific case of New Zealand, he advocated an independent body operating within but not under the control of the Ombudsman's office. Its mandate would be ongoing review of all tribunals and it would have the authority to direct those tribunals to modify their rules, presumably both formal and informal.⁹⁶

I have no problem with the creation of such a body. Indeed, it was one of the misfortunes of the Ontario system that a similar body, the Statutory Powers Procedure Rules Committee, established under the *Statutory Powers Procedure Act* was not maintained by successive governments and then legislatively abolished.⁹⁷ However, that in itself is a salutary lesson. When a province as resource rich as Ontario cannot fund and staff appropriately a body of this kind, one that was mandated by statute, it has to be wondered whether it is a realistic possibility in other provinces or territories.⁹⁸ At the very least and in any event, there is a strong case to be made for specific, legislative attention to the overall procedural dimensions of administrative justice in the form of a general framework within which procedural rules are made and which recognizes the need for diversity albeit within some kinds of constraints which have as their principal objective prevention of the too ready compromising of bedrock procedural fairness imperatives. Ideally, that statutory regime might well be supported by the creation of a tribunals office of some kind but, even without it, the statute itself could provide both the means and the impetus

96. *Supra* note 91 at 118-19.

97. As noted earlier, the Committee was abolished legislatively when the *Statute Law Amendment Act*, S.O. 1994, c. 27 repealed Part III of the original *Statutory Powers Procedure Act*.

98. In British Columbia, this role is now being played in some measure by the Administrative Justice Office, within the Ministry of the Attorney General. This was a spring 2003 offshoot of the Administrative Justice Project <<http://www.gov.bc.ca/ajo>>.

for tribunals to develop transparent, constituency-supported models of decision-making procedure.

In recent years, there have been many Canadian studies of the administrative process including its procedural dimensions.⁹⁹ In the last decade, those studies have led to significant legislative changes in British Columbia,¹⁰⁰ Ontario,¹⁰¹ and Quebec.¹⁰² However, in four other jurisdictions, significant proposals for legislative reform of tribunal processes have been left to collect dust: Alberta, New Brunswick, Nova Scotia and federally, though the Saskatchewan Law Reform Commission consultation appears to be ongoing.

It is, however, the case that, with one exception,¹⁰³ none of these studies (or subsequent legislative action) has really considered seriously the kind of framework found in the 1981 Model Act. Certainly, mediation and other forms of ADR are always touted as a potential cure for the ills of many administrative tribunals. Rejection of the "one model fits all" concept is universal. In turn, this has led to recommendations for administrative procedure legislation which would spell out a base level of procedural fairness and then confer on the tribunals themselves the capacity to develop or tailor additional procedures to their individual needs. A good example of this is the 1997 Law Reform Commission of Nova Scotia *Final Report on Reform of the Administrative Justice System in Nova Scotia*. Indeed, the most recent of the reforms, the 2004 British Columbia *Administrative Tribunals Act* actually goes even further in the direction of tribunal autonomy. It contains very few provisions of the kind found in the Ontario *Statutory Powers Procedure Act*. Indeed, rather than concerning itself with spelling out rules of procedure that constitute the ordinary stuff of the rules of natural justice or procedural fairness, it simply confers on tribunals (subject to their constitutive legislation) "power to control [their]

99. In addition to the federal, British Columbia and Nova Scotia initiatives referred to earlier (*supra* notes 6, 7, and 31, and accompanying text), there have been studies in Alberta (Alberta Law Reform Institute, Final Report No. 79, *Powers and Procedures for Administrative Tribunals in Alberta* (Edmonton: 1999)); Quebec (*Rapport du Groupe de travail sur les tribunaux administratifs* (Quebec: Ministry of Justice, 1987) ("the Ouellette Report"); *Rapport du Groupe de travail sur certaines questions relative à la réforme de la justice administrative* (Quebec: Ministry of Justice, 1994) ("the Garant Report")); New Brunswick (*Proposals for an Administrative Procedures Act: A Discussion Paper* (Law Reform Branch, Office of the Attorney General, 1991)); Saskatchewan (Law Reform Commission of Saskatchewan, *Consultation Paper: A Model Code of Procedure for Administrative Tribunals* (2003) - <http://www.lawreformcommission.sk.ca/Admin1.htm>); and Ontario (detailed *infra*). For an excellent summary of these reports (with the exception of the subsequent Saskatchewan initiative), see Falzon, *supra* note 7 at 29-47.

100. *Administrative Tribunals Act*, *supra* note 7.

101. *Supra* note 15 principally in the 1994 and 1999 amendments.

102. *Supra* note 28.

103. See text accompanying *infra* note 110.

own processes and [to] make rules respecting practice and procedure to facilitate the just and timely resolution of the matters before [them]”.¹⁰⁴

Under both these models, the recommended draft Nova Scotia *Administrative Justice Act* and the British Columbia *Administrative Tribunals Act, 2004*, it would certainly be feasible for an administrative tribunal, by the exercise of its rule-making powers, to provide for a system of varying levels of hearing as in the Model Act. However, there may be impediments real or perceived to doing this. Under the Nova Scotia recommendations, not only would tribunals be constrained by the terms of the base level procedures,¹⁰⁵ but also by a further list of provisions that would apply on a default basis.¹⁰⁶ In total, the minimum and the default rules amount to a traditional adversarial, highly judicialized form of hearing and might very well act as a disincentive to tribunals experimenting and moving too far away from the template. While the British Columbia Act is superficially much more liberalizing, it is, however, significant (and for understandable reasons) that the list of specific subjects on which the tribunal may make rules amounts, aside from a reference to ADR,¹⁰⁷ to a list of all the powers associated with typical adjudicative processes.¹⁰⁸ More generally, it is my view that tribunals are influenced by templates created by statutes or otherwise, and that, if greater creativity is the objective with more flexible options the end product, the empowering legislation will in most instances have to be more blunt or directive on the subject of varying levels of procedural entitlement and diverse hearing models.

Indeed, to my knowledge, the only study that came at all close to thinking in these terms was the 1997 Ontario Government Task Force on Agencies, Boards and Commissions in its *Report on Restructuring Regulatory & Adjudicative Agencies*.¹⁰⁹ This report, most commonly known by the name of its Chair, Bob Wood, MPP, in a very short section proposed “two prototype hearing procedures - one quick and one complex. The quick procedure sets out a process for the application, response, hearing (oral, written or electronic) and decision - all within sixty days in most cases. The complex procedure would allow up to seven months from

104. *Supra* note 30 at s. 11(1).

105. Part II (“Minimum Procedures”), s. 5-15

106. Part III (“Standard Powers and Procedures”), s. 16-29. These default provisions may be overridden by the tribunal’s enabling Act or the tribunal’s procedural regulations (section 17). Under the proposed legislation, tribunals would have autonomy in the making of procedural rules: s. 6(a).

107. *Supra* note 29 at 11(2)(b), admittedly expressed as not limiting the terms of s. 11(1).

108. *Supra* note 29 at 11(2)(a)-(w). Sections 12 and 13 also provide for the making of practice directives.

109. *Supra* note 38.

application to decision in most cases - with mandatory mediation before any hearing."¹¹⁰

While this recommendation required much more flesh to become a realistic option, it was not taken up either legislatively or specifically in the 1998 Report of the Agency Reform Commission on Ontario's Regulatory and Adjudicative Agencies, *Everyday Justice* (the "Guzzo Commission Report").¹¹¹ However, that Report did make favourable reference to the processes of the Ontario Insurance Commission (now part of the Financial Services Commission of Ontario).¹¹² According to the Report, the Commission had a three-stage process in cases arising out of the automobile accidents benefits scheme: mediation, neutral evaluation, and arbitration, with 80% of cases at that time being resolved at the mediation stage. The Commission then went on to urge the importance of devising tribunal processes "to resolve disputes without necessarily holding a full hearing."¹¹³ However, as with the British Columbia legislation, this report saw this objective being accomplished best by greater tribunal autonomy over the choice of "methods of providing faster, better service [which] are best suited to their clients."¹¹⁴

While I have little problem with more procedural autonomy for tribunals, it may well be the case that an initiative of the kind found in the 1981 Model Act will require more than the conferral of discretionary power that includes that possibility. Rather, explicit legislative commitment to the project may be a prerequisite to many tribunals moving in this direction given the persistence of the traditional adjudicative model and the various pressures for its continued status as the norm. Indeed, one way of giving this national prominence may well be to try to have the issue again made part of the agenda of the Uniform Law Conference of Canada. Back in 1991, the Conference in fact issued a Model Administrative Procedure Code,¹¹⁵ prepared by Professor Yves Ouellette, one of the very influential figures in the eventual enactment of the Quebec *Administrative Justice Act*.¹¹⁶ I would suggest that the time has come for the Conference to revisit this subject with the 1981 Model Act's proposals for varying levels of hearing as its starting point.

110. *Supra* note 38 at 12.

111. *Supra* note 39.

112. *Ibid* at 10.

113. *Ibid* at 10-11.

114. *Ibid* 39 at 11.

115. Yves Ouellette, "A Model Administrative Procedural Code," online: Uniform Law Conference of Canada <<http://www.ulcc.ca/en/us/index.cfm?sec=1&sub=1m3>>. The Code, which is a revision of an earlier 1985 version, was never adopted formally by the Uniform Law Conference, but rather was intended as a discussion or working paper.

116. The Ouellette Report, *supra* note 99, provided the initial impetus for the Quebec Act.

Conclusion

The administrative justice system is frequently under stress. The appointments process remains a recurring concern. In terms of resources, all but a few tribunals fare a lot worse than the regular courts despite the critical aspects of the overall justice system for which they are responsible. Yet, the pressures remain to deliver a high quality product. It has been one of the major thrusts of this paper that the delivery of that high quality product is not necessarily contingent on following court-like adjudicative processes. Indeed, in many instances, judicialization can impede significantly the effective and efficient management of mandates and tax severely already limited resources. To that extent, considerations of justice and optimal management of budgets and personnel coalesce in encouraging both tribunals and legislatures to become more imaginative and flexible in the processes that are deployed in the exercise of decision-making functions. In this regard, mediation and other forms of ADR have become indispensable features of the functioning of many administrative tribunals. In this lecture, I have suggested that, at present, for many tribunals, there is in fact no real middle ground between the “informality” of ADR and the “formality” which characterizes those tribunals’ constitutive statutes or procedural rules and, indeed, a statute such as Ontario’s *Statutory Powers Procedure Act*. More needs to be done in terms of experimenting with alternative decision-making modes and opening up the possibility of the same tribunal functioning with varying levels of formality depending on the nature of the matters in issue and, at least in some contexts, the wishes of the tribunal’s clientele. While some tribunals have in fact moved in this direction, it is my sense that this is an initiative that requires explicit legislative recognition and encouragement. At present, such a model exists in the form of the 1981 *Model State Administrative Procedure Act*, with its provisions for four levels of hearing process. This model deserves serious evaluation in a Canadian setting and the best way of ensuring that may well be to persuade the Uniform Law Conference to revisit the question of administrative procedures, something it did last in 1991.

