PROCEDURAL SAFEGUARDS IN THE ADMINISTRATIVE PROCESS

by

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ABSTRACT

Throughout the common law countries studies and investigations have been carried out to reform the procedure used by administrative tribunals. The procedural rules to which tribunals in British Columbia must adhere are found in the common law rules of natural justice and in the tribunals' establishing statutes. This system has been severely criticized as it is inconsistant and unpredictable.

There is no consensus amongst the common law jurisdictions as to which solution to the problem of procedural safeguards in the administrative process is most preferable. The competing interests; protection of the public from unfair government actions, and the efficiency of the administration, are the reasons for this lack of consensus.

It is the thesis of this essay that procedural reform is needed in British Columbia. Therefore, British Columbia would benefit from a minimum administrative procedure act applicable to all administrative tribunals' adjudicative functions.

The method used to establish this thesis was to research the present situation in British Columbia. As a background to this, a description of the common law rules of natural justice and a study of the procedural rules of three provincial tribunals enacted by the Legislature are given. This essay continues with a description of the solutions used in Ontario and in the United States where minimum procedure rules have been enacted, applicable to most administrative tribunals.

After considering these different solutions, along with the investigations of law reform reports from various common law jurisdictions, it has been concluded that certain fundamental procedural safeguards

should be enacted by way of an administrative procedure act. The main argument for this is that such an act would serve an educational purpose by informing both administrators and the public of the procedural rules.

As the suggested procedural rules are very fundamental, it is also concluded that it is necessary to carry out further investigations into each tribunal. In this way, more detailed procedural rules could be enacted, applicable to a specific tribunal, if deemed necessary.

In summary, the conclusion of this thesis is that a minimum administrative procedure act will fill an educational purpose and, at the same time, might help to achieve a more consistant, predictable administration with regard to procedure. It might also work as a catalyst by promoting further studies into the procedural aspect of the administrative process.

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INTRODUCTION

The development of governmental intervention in new areas of society is one of the most significant changes of the post-industrial world. Administrative agencies have been created to control, regulate, and make decisions involving individuals and their property, to an extent unheard of at the beginning of this century. These administrative agencies have been seen as having the potential for speedy, inexpensive, and effective means to achieve the changes and control felt necessary by the government. On the other hand, in carrying out the goals of the government, they also have the potential to encroach upon individual rights and freedoms without the protection of due process.

Many inquiries and studies have been done all over the world to try to resolve the problems of competing interests between an effective administration, and the protection of individual rights. Common opinion has been that an effective administration can not be hampered too greatly by formalism. On the other hand, procedural safeguards are the most effective way to protect the private citizen from illegal, arbitrary, or unfair government actions. Is there possibly a compromise with regard to procedural safeguards? Are there some ultimate solutions which would keep the administration lawful, fair, and correct without putting unnecessary constraints on the agencies' flexibility in carrying out the government's decisions and policies?

The main objective of this thesis is to study the problem of procedural safeguards in the administrative process in British Columbia. Here, administrative procedure is regulated by the common law rules of natural justice which have been developed by the courts to protect the

individual from unfair governmental actions. However, the British Columbia Legislature enacts procedural safeguards in the establishing statutes of tribunals as well. I plan to describe the procedural rules that are enacted and demonstrate the consistency, if any exists with regard to procedure, between the different tribunals. In order to do this, I have selected three administrative provincial tribunals. I have then selected the more common procedural safeguards necessary for a fair procedure, and have described each, under its own heading, as it pertains to each of the three tribunals. The procedural safeguards I have chosen are: Notice, Right to Particulars, Hearing, Disclosure of Information, Adjournment, Applicability of the Rules of Evidence, Counsel, Cross-Examination of Witnesses, Hearing by Person Who Decides, Reason for Decision, and Bias. (1)

These procedural rules are those most commonly connected with natural justice and with a fair administrative process. However, as they naturally overlap, it is sometimes difficult to distinguish them from one another. An example of this difficulty is illustrated between Notice as opposed to Right to Particulars. Because of ambiguous language, it is difficult to determine exactly what the procedural requirement of Notice entails. It may mean only giving notification of the time of a hearing in one instance, or the notification of an issue in another. As I will demonstrate later on, some cases suggest that Notice includes particulars. The Right to Particulars, on the other hand, is more clearly definable. It is the right to all information concerning the issue, including under what statutory power the issue falls and the reasons for which the proceedings are initiated. Despite this difficulty, it seems important to try to discuss each separately.

Difficulty arises again when one attempts to define 'Hearing'. In the administrative process, a hearing can vary from being an informal telephone call to a proceeding not far removed from regular courtroom practice. (2)

Many common law countries have tried to achieve some form of consistency in their administrative process regarding procedural requirements. The solution given in British Columbia, to rely upon the common law and some enactments by the legislature, is one which has been severely criticized throughout common law jurisdictions. In Chapter II I will describe two different solutions to this problem. The first is found in the province of Ontario where the rules of natural justice have been codified (3) and applied to most administrative agencies. The second is the enactment in 1946 of an Administrative Procedure Act (4) in the United States of America. This enactment goes much further in regulating and organizing administrative procedure than other jurisdictions.

The concluding chapter of this thesis is a discussion of the virtues of each solution, with an attempt to find an ideal solution to the procedural problem in British Columbia. The problem of competing interests between an effective administration and the protection of the individual will be considered. I have also outlined those procedural rules which I believe are essential for minimal procedural protection and which can be applied to all adjudicative administrative proceedings.

CHAPTER I

PROCEDURAL SAFEGUARDS IN THE ADMINISTRATIVE PROCESS IN BRITISH COLUMBIA

The procedure to which administrative tribunals [1] in British Columbia must conform is to be found in the common law rules of natural justice together with some rules laid down by the legislature in the tribunals' establishing statutes.

This chapter gives a broad description of the natural justice rules in the common law as a background to the more detailed study of the three tribunals from British Columbia. These three tribunals are the Rentalsman, the Fire Marshal and the Labour Relations Board. The functions and jurisdiction of each board will be discussed and special attention paid to statutory procedural rules.

THE COMMON LAW RULES OF NATURAL JUSTICE

The common law has developed a set of fundamental procedural rules referred to as "natural justice". They are said to consist of two basic concepts: a) no-one shall be the judge in his own case, b) no-one shall be condemned without being heard. (2) These rules have their first roots in the ancient world and can be traced back to medieval precedents. (3)

The common law rules of natural justice are designed to provide certain procedural safeguards in the administrative process. The procedural substance of the rules of natural justice is linked closely to the procedural rules applied in the courts. As statutory rules are, in this respect, scarce, and because they differ from one tribunal to another, the courts, with the help of the concept of natural justice, have sought to judicialize the administrative process. Natural justice, created by the courts to apply to administrative tribunals, covers any risk of an omission of a procedural requirement in the statutory requirements. (4) Natural justice rules also cover the situations where procedural safeguards have not been complied with by a tribunal when arriving at a decision. (5)

The courts have presumed that the intention of the Legislature was that the administrative decision-maker must follow a "fair" procedure even if no procedural rules are enacted in the tribunal's enabling statute. However, the courts respect the supremacy of the Legislature if it has clearly enacted, for example, that a tribunal does not need to hold a hearing. After the courts' presumption that it was intended that fair procedure be followed, they give substance to what this means

in each separate case. (6)

The question of what "fair" administrative procedure entails is left to the courts to decide. They have the authority to grant judicial review of all administrative actions, this being a part of their role as a supervisory control over inferior tribunals. (7) There may be statutory provisions for appeal to the courts regarding a decision made by a tribunal. If the court establishes that the tribunal's decision was made in disregard of the rules of natural justice, it may declare that the tribunal in question lacks jurisdiction and, in so doing, declare the decision ultra vires. (8) Before establishing what makes for a fair procedure, it is important first to establish to which tribunals the rules of natural justice apply.

The Applicability of the Common Law Rules of Natural Justice

The rules of natural justice are not applicable to all administrative tribunals. (9) The courts have classified the functions of each tribunal in order to establish whether or not the natural justice rules are applicable. If the tribunal's function is classified as being judicial or quasi-judicial, the tribunal must comply with the rules of natural justice when arriving at its decision. (10) If, however, the court finds the tribunal to be purely administrative in its function, the rules are held not to apply. (11) The major problem of administrative procedure lies in this classification of function. It is said that no certainty can be derived from the courts' decisions in this context. (12) It is frequently not clear what the terms judicial, quasi-judicial and administrative really mean, (13) a fact which creates uncertainty not only for the decision-makers in the tribunals, but also for those subject to the jurisdiction of the tribunals.

The terminology used is circular. [14] The courts reason that the rules of natural justice are applicable if the tribunals' powers are judicial or quasi-judicial. If the rules do not apply, then the tribunals' powers are said to be purely administrative. [15]

The uncertainty felt by both administrators and participants in administrative actions is primarily due to the fact that there is no certain test which can be used to determine whether natural justice can be applied to any particular case. [16]

The approaches taken by the courts in deciding the question of the classification of the tribunals' powers, are said to be so numerous that no rational test has been developed to determine the issue. [17] Reid[18] has identified four basic approaches to the classification of the functions, [19] but says:

> "There does not seem to be any order of preference of importance among the four common approaches. If there were, much of the present uncertainty would disappear . . . ."
>
> "The result is that both the substantive and the adjective elements of the supervisory process of the courts are contorted, uncertain and confused. The picture is one of illogic, arbitrariness and mystery despite the general sincerity of intentions. The everlasting search for the distinction between "administrative" and "judicial" occurs in an air of frustration and unreality." (20)

Some of the approaches taken by the courts in the classification of tribunals' functions are described in the following subsections. [21]

Is There a Duty to Act Judicially?

In a famous statement by Lord Atkin in the Electricity Commissioner's

case, [22] the test was said to have been the determination of whether an agency has the power to affect the rights of subjects, and if there is a super-added duty to act judicially. If these two criteria are satisfied, the tribunal is said to be judicial, or quasi-judicial, and thus is affected by the rules of natural justice.

On the other hand, it is said that this "super-added" test has fallen from grace, and thus, the Courts of British Columbia now look mainly at whether persons or property are affected by agency actions.[23]

Right or Privilege Distinction

There are several cases, that of Nakkuda Ali [24] in particular, which rely on the distinction between whether a right is affected by the action of an agency, or a privilege. If it concerns merely a privilege, the function of the tribunal is classified as being administrative, and no procedural safeguards are afforded. However, it seems impossible to determine what is a right and what is merely a privilege. [25] In Nakkuda Ali [26] a textile dealer's licence to carry on business was held by the Privy Council to be merely a privilege, and its revocation was an administrative decision. Other cases dealing with licensing suggest that the distinction should be made between the initial licensing decision, which is administrative, and revocation, which affects a right and therefore is a "judicial" decision worthy of the protection of natural justice. However, licensing powers have generally been held as being judicial or quasi-judicial. [27] In two Canadian cases, Howarth v. Prince George [28] and R. v. Bird ex parte Ross, [29] the dismissal of a municipal building inspector and a fireman was held not to affect rights on the grounds that there is no right to continued employment.

Fairness

The different approaches in the classification of the functions of a tribunal, whether judicial or administrative, have been severely criticized as being meaningless labelling. (30) Since 1967 a new approach has been developing in the United Kingdom, generally called the fairness approach. It is held to apply to all administrative decisions, without classification of functions. (31) The tribunals must reach their decisions fairly, and in doing so, must fulfill the procedural requirements, (32) which the court determines as essential.

The British approach to fairness has not yet found a foothold in Canada, where the courts continue to classify the functions of the different tribunals before determining whether natural justice rules are applicable or not. (33) There are, however, some recent Canadian cases which have been interpreted as examples showing that classification is not necessarily essential before the courts can afford the protection of natural justice. On the other hand, the courts do not openly rely on the British authorities as a basis for these non-classification cases. (34)

The Procedural Content of the Rules of Natural Justice

The following subsections describe some of the rules of natural justice under the headings explained in the Introduction. The courts may hold that an adjudicative agency, once its functions have been classified as being judicial or quasi-judicial, must comply with one or more of these procedural safeguards. It is important to appreciate the fact that if a tribunal's functions have been classified as either judicial or quasi-judicial, it does not mean all of the natural justice

rules need apply uniformly. (35) The extent to which the rules will apply depends upon the circumstances of each case. (36)

Notice

In the case of Klymchuk v. Cowan, (37) where a permit as a used car dealer was cancelled without notice or hearing by the Registrar of Motor Vehicles, it was held that despite that fact that the statute did not require that notice be given, "the demands of justice will insist that notice be given". (38) Smith, J. continued:

> "The requirements of notice and an opportunity to be heard need not involve anything in the nature of formal proceedings. All that is required is that reasonable notice be given, with the grounds of complaint, and that a reasonable opportunity to answer the allegations against him be afforded." (39)

The points illustrated in this case are that the essential factors include the form, (grounds of complaint), timing, (reasonable notice), and sufficient information, (reasonable opportunity to answer the allegations). (40)

Right to Particulars

It is most often held that the notice has to include the "grounds of complaint". (41) This is so that the affected party knows in advance what he is up against, and is thereby given an opportunity to prepare his defence. (42)

Hearing

When a tribunal has been classified as judicial or quasi-judicial, it is held to "act in good faith and fairly listen to both sides" (43)

by the courts. The general rule is that the tribunal shall hear both sides, though not treating the proceedings as if it were a trial. (44) The hearing does, however, "bear a basic resemblance to a hearing in a court". (45)

Disclosure of Information

It is said generally that tribunals are required to disclose information in order to give the affected parties a fair chance to make their case. (46) However, not all material need be disclosed. (47) There appears to be a distinction between the material submitted by the parties involved, which is disclosed, and the material collected by the agency, which does not have to be disclosed. (48)

Adjournment

In some circumstances, the courts have held that failure to adjourn a hearing is a denial of natural justice. (49) This rule is a part of the whole concept of giving a party a fair chance to make his case, but, there are no strict guidelines laid down as to when one should adjourn. The courts have considered if the adjournment was sought bona fide, and not just used to obstruct the tribunal proceedings. (50)

Applicability of the Rules of Evidence

The procedural rules of natural justice do not require that tribunals adhere to the formal rules of evidence. (51)

Counsel

The right to counsel is not an absolute rule in natural justice. The court apparently considers the seriousness of the possible action,

the more serious, the more willing the court is to give the party concerned the right to counsel. (52)

Cross-Examination of Witnesses

There is no general right to cross-examination in the administrative process. (53) If cross-examination in a particular case appears to be the only effective means to afford a party a full and fair opportunity to make his case, the courts hold that the refusal of a tribunal to allow cross-examination is a breach of natural justice. (54)

Hearing by Person Who Decides

Generally speaking, the decision-making authority must be present while the evidence is being presented. The authority for this is The King v. Huntingdon Confirming Authority, (55) where it was said by Lord Hanworth:

> "It is quite possible that all the justices who heard the case and the evidence on April 25 may not be able to attend on any further hearing, but however that may be, those justices who did hear the case must not be joined by other justices who had not heard the case for the purpose of reading a decision, on this question of continuation." (56)

Reason for Decision

The common law does not insist that the tribunals provide the affected persons with a reason for their decisions (57) unless it is so stated in the tribunals' establishing statutes. Sometimes however, the courts do express the opinion that it is desirable that the tribunals give the reasons for their decisions. (58)

Bias

Bias, or the likelihood of bias constitutes a denial of natural justice. (59) The test used to determine bias is usually an objective one. (60) The test is that if a reasonable person, after considering all the circumstances, feels that there is reason to suppose improper interference from the decision-maker, then there is a likelihood of bias. (61)

These rules of natural justice are those to which the tribunals in British Columbia must adhere once the court has classified the tribunals as judicial or quasi-judicial. The Legislature has not left all procedural questions to be regulated through the common law. In most tribunals' enabling statutes in British Columbia, the Legislature has enacted some procedural safeguards which are supplemented by the common law. Which ones, and to what extent will be the theme throughout the following description of three tribunals in British Columbia.

THE RENTALSMAN [1]

The office of rentalsman was established in 1974. [2] Prior to this, only the courts, and in particular the Small Claims Court, had jurisdiction in deciding landlord and tenant disputes. [3] While there were some administrative tribunals which dealt with these problems, their work consisted merely of receiving, investigating and attempting to mediate complaints. [4] They could only recommend a solution, and had no jurisdiction to give any legally binding decision. [5]

The creation of a rentalsman was suggested in the report of the Law Reform Commission of British Columbia on Landlord Tenant Relationships. [6] The Commission had studied the rentalsman in Manitoba, [7] having been dissatisfied with the court's role in the adjudication of landlord - tenant disputes in British Columbia. [8] They were dissatisfied because the courts acted slowly, had no powers of investigation, and lacked expertise in landlord and tenant disputes, [9] all arguments frequently used when taking jurisdiction from the courts, and expanding the administrative justice.

The office of rentalsman was established, and its jurisdiction defined by the Landlord and Tenant Act of 1974. [10] This was repealed in 1977, and replaced by the Residential Tenancy Act [11] which came into force November 1, 1977. [12] The new act is much the same as its predecessor.

The rentalsman is appointed by the Lieutenant-Governor in Council, and holds office for a five year term on good behaviour. [13] Additional terms can be prescribed. [14] The Lieutenant-Governor in Council may also appoint one or more persons to be deputy rentalsmen. [15] The

rentalsman, subject to the Public Service Act, [16] may then appoint such employees as he considers necessary.[17]

The Law Reform Commission recommended that the rentalsman should have legal qualifications. [18] Their reasons for this suggestion were that the rules of natural justice should be observed and that it was therefore important for the person who was to hold the position to know the law and legal procedure when deciding matters which deal with possessions. [19]

Under the Landlord and Tenant Act, as first enacted, the rentalsman alone had the power to carry out investigations, give orders, etc. [20] When the employees of the rentalsman's office had completed an investigation, they would make recommendations to the rentalsman, who would make the final decision. The rentalsman himself was more or less a 'rubber stamp'. [21] This way of functioning was successfully challenged in the case, Greenhut v. Scott, [22] and so the Act was amended to give the rentalsman the power to delegate all his functions. [23] This change has been carried forward into the new Act. [24]

Jurisdiction of the Rentalsman

One of the objectives of the Legislature when establishing the rentalsman was to remove the court's jurisdiction over landlord and tenant disputes. [25] The Law Reform Commission's view of the division between the courts and the rentalsman was that:

> "General jurisdiction in landlord and tenant matters should remain in the Courts and the rentalsman should undertake only those functions which are specifically allocated to him. For example, the rentalsman should have the power to direct repairs to damaged premises,

> but any action for damages arising out of a failure to repair, whether framed in contract or in tort, should continue to be pursued in the Courts." (26)

Under the Residential Tenancy Act of 1977, the Legislature has given the rentalsman exclusive jurisdiction to receive an application, investigate, hear and make an order (27) with respect to over thirty enumerated matters. (28) The most important of which are: a) the validity of notice of termination, (29) b) the right to occupy residential premises, (30) c) the power to terminate a tenant's contract. (31) The majority of the remaining enumerations are related to these fields. The exclusive jurisdiction also extends to security deposits (32) and abandoned chattels. (33)

The rentalsman's functions, under s. 51(2), have been described by Klippert to be "principally quasi-judicial" (34) and by the courts to be quasi-judicial. For example, in the case of Greenhut v. Scott, (35) the question being that of termination of contract, it was said:

> "It is not disputed that the rentalsman, (or the deputy), is acting in a quasi-judicial capacity in proceedings such as those here under review . . . ." (36)

The Law Reform Commission apparently still regarded most of the work done by the rentalsman as being purely administrative. The only exception acknowledged by them was the jurisdiction to make possession orders. (37)

The rentalsman also has functions which do not result in binding decisions and orders; he is to advise landlords and tenants in tenancy matters, (38) he is to promote the principles of the Act and public understanding of and compliance with these principles, (39) and he is to educate and advise landlords and tenants of the rights and remedies regarding rental practice. (40) The rentalsman also has the important

function of acting as mediator in landlord and tenant disputes. (41)

Most of the rentalsman's workload is settled by mediation. (42) In 1977, 10,597 files were opened, (43) and of these, 1,367 resulted in binding orders. (44) Approximately nine hundred files were closed per month, of which less than one hundred were subject to a hearing. (45) In the fields where the rentalsman has exclusive jurisdiction, most of the orders made concerned the notice of termination of contracts. There were 754 cases where notice of termination was set aside, and only thirteen where the notice was upheld. (46) Four hundred and eighty-six orders of possession were issued.

A good example of how much mediation is used is illustrated in the handling of security deposits. Security deposits make up the largest part of complaints dealt with by the rentalsman, numbering 2,809 cases in 1977. (47) Despite this, only nineteen binding orders were issued. (48)

Procedural Requirements

The Law Reform Commission said the following with regard to procedural requirements:

> "We should also state at the outset our belief that the rentalsman, in discharging his functions, ought to observe to the best of his ability the rules of natural justice, but ought not to be handicapped to any significant extent by formal rules of procedure or evidence." (49)

To what extent must the rentalsman comply with the rules of natural justice? The Legislature has enacted some procedural rules with which the rentalsman must comply, and the courts have widened this field. (50)

Notice

There is no mandatory rule in the Act stating that the rentalsman must give notice to concerned parties when he investigates, or intends to hold a hearing. However, in Redman v. Siegler, (51) the County Court Judge held that the failure of the rentalsman to hold a hearing, and to give notice thereof, was a breach of the rules of natural justice.

Right to Particulars

As there is no notice requirement enacted in the Act, the question of particulars is also left to the discretion of the rentalsman and subject to the common law rules of natural justice.

Hearings

According to s. 48(1), the rentalsman may conduct hearings and investigations as he sees fit. The wording in this section suggests that it is a matter of discretion. This would also be subject to the common law, for example Redman v. Siegler. (52)

In s. 48(2), it states inter alia, that a hearing may include a submission made orally, including that which has been spoken over the telephone, or made in writing.

Disclosure of Information

Any information obtained in a hearing conducted by the rentalsman should be communicated to the other party who should then be given the opportunity of rebutting the submission. This right is stated in s.

48(2), but appears to apply only to the information obtained in what the rentalsman regards as hearings. The opposite seems to hold true for any other information the rentalsman obtains, as it is stated in s. 50(3):

> For the purposes of this section and section 49, except with the consent of the person from whom the information was obtained or except for the purposes of this Act, the rentalsman, the commission or an authorized person shall not
>
> (a) communicate, or allow to be communicated, to another person information obtained by or on the behalf of the rentalsman or the commission under this section or section 49, or
>
> (b) allow another person to inspect or to have access to information obtained by or on the behalf of the rentalsman or commission under this section or section 49. (53)

Adjournment

The question of adjournment is left up to the discretion of the rentalsman, as there are no guiding rules to be found in the Act.

Applicability of the Rules of Evidence

It is stated in s. 48(1) that:

> In a matter before him, the rentalsman . . .
>
> (c) in his discretion, may receive and accept, on oath, affidavit, or otherwise, such evidence or information as he considers necessary and appropriate, whether or not such evidence or information would be admissible in a court of law, . . .

The reason for the administrative agency's lack of formal rules of evidence is stated in the report of the Law Reform Commission, (54)

and is as follows:

> "We have said that the rentalsman ought not, in discharging his functions under the proposed Act, be bound by the rules of evidence. We recognize that this, on its face, may appear to be a drastic proposal, but we are conscious of the fact that to impose the rules of evidence would delay the rentalsman in many cases, when we have said that the ability to act quickly is one of his most desirable attributes." (55)

Counsel

There is nothing stated in the Act giving involved parties the right to counsel. The report of the Law Reform Commission appears, however, to take this right for granted.

> "As to the question relating to the legal profession, it appears that this is scarcely an important issue. Table V in Appendix D shows that under the present system of dispute solving, legal representation is not a significant factor. We see no reason why members of the legal profession should not represent clients before the rentalsman." (56)

Cross-Examination of Witnesses

The rentalsman is not bound by the rules of evidence. (57) The general provision in s. 48(1)(c) gives him the right to use such information as he finds necessary. The Law Reform Commission said in their report with regard to witnesses:

> "We have considered whether the rentalsman ought to be granted the power to compel the attendance of witnesses, but have concluded that this is unnecessary. As the rentalsman, according to our

> proposals, will not be bound by the rules of evidence, he will be able to act, if he thinks fit, in the absence of evidence which might be required by a Court. Therefore, we would stop short of granting him power to issue subpoenas to persons." (58)

This would not prohibit the rentalsman from using witnesses if he feels it is necessary or appropriate to do so on a voluntary basis. The proceedings are then naturally subject to the common law rules with regard to cross-examination.

Hearing by Person Who Decides

As the rentalsman is given the power to investigate, hear, and make an order, he has also been made to hear the matter himself, and may not depend solely on the recommendations of the investigating officer when making the final decision. This is apparent from the case of Greenhut v. Scott. (59) The new Act, however, gives the rentalsman the right to delegate all his powers, (60) thus making it easy for the rentalsman to comply with this rule of natural justice. On the other hand, there is no provision in the Act stating that the hearing officer is also the person who shall decide the case.

Reasons for Decision

It is stated in s. 48(1)(d):

> In a matter before him, the rentalsman ...
>
> (d) shall, at the request of a party to a dispute, make his decisions in proceedings under this Act available in writing, . . .

The limitations here are that it must be a concerned party who must make the request to the rentalsman, before the rentalsman need give any

decisions in writing. The reasons for his decisions need not be stated, which leaves this section somewhat lacking in substance.

Bias

There are no rules or guidelines in the Act constituting bias on the behalf of the rentalsman. The courts apply the rules of natural justice, as can be illustrated in the case of Greenhut v. Scott: (61)

> "In passing I would like to point out that even had the Act authorized the officer to make the decision as to whether or not the notice of termination should be set aside, the decision could not be permitted to stand. Only a few months earlier, prior to becoming a rentalsman's officer, he appeared for a tenant in a dispute with the same landlord; he helped organize a tenant's rights group in the apartment block of the same landlord. Another member of that group was the present respondent Kathy Scott. As was stated by Pigeon J. in Blanchett v. C.I.S. Ltd., [1973] 5 W.W.R. 547, [1973] S.C.R. 842, [1973] I.L.R. 1-532, 36 D.L.R. (3d) 561:
>
> "In my view the principle to be applied is the same for judges as for arbitrators. A reasonable apprehension that the judge might not act in an entirely impartial manner is ground for disqualification as was held in respect of an arbitrator in Ghirardosi v. B.C. Minister of Highways, 55 W.W.R. 750, [1966] S.C.R. 367, 56 D.L.R. (2d) 469."
>
> Those words have equal application to the present case. On the facts herein the officer's refusal to disqualify himself, having regard to the repeated requests of the applicants for him to do so, a sense of basic fair play should have dictated that he disqualify himself from having anything to do with the case once he became aware of the identity of the parties. Equally incomprehensible is the failure of the rentalsman to remove the officer from this case when the fear of the potential bias of the officer was pointed out to him." (62)

THE FIRE MARSHAL

The Fire Marshal and his Local Assistants receive their powers from the Fire Marshal Act. (1) The Act was first promulgated in 1921 (2) but has since been amended in order to keep up with the increasing requirements of fire prevention. The Act lays down the broad powers of the Fire Marshal, his Inspectors, and the Local Assistants. The more detailed rules, with regard to what standards buildings must comply to for fire safety, are enacted in municipal by-laws. (3)

The main functions of the Fire Marshal are: to investigate and collect information with regard to fires in the province; (4) to inspect buildings and premises with an eye to fire prevention; (5) and to license movie theatres. (6) He is helped in these duties by Inspectors and Local Assistants in all municipalities throughout the province. The Local Assistants are usually the chiefs of the fire departments. (7)

The Fire Marshal also has an advisory function. He is to make recommendations to firebrigades on questions of administration, (8) water supply (9) and installation and maintenance of fire-alarm systems. (10) His advice is also called for by the municipalities, in the enactment and enforcement of by-laws for the prevention of fire. (11)

The Jurisdiction of the Fire Marshal

Investigation of Fires

The investigation of fires is carried out by the Local Assistants. (12)

Their duties are to report, in writing, all facts regarding the cause, origin, and circumstances of the fire to the Fire Marshal. (13) The Fire Marshal can then hold an inquiry if he deems it necessary. (14) Any interested person may attend the inquiry, and may be heard, either in person or through counsel. (15) If the Fire Marshal finds that there is sufficient evidence to charge anyone with arson, or attempted arson, his findings are reported to the Attorney-General. (16)

Inspection of Fire-Hazards

The Fire Marshal is responsible for fire prevention, and his powers and duties in this field are stated in section 17 of the Act. His Inspectors and Local Assistants (17) carry out the tasks of inspecting all buildings and premises which may be potential fire-hazards, and ascertaining them as safe. (18) These inspections are carried out in accordance with provisions in the Act and regulations provided by Municipal Councils. (19) Places of amusement, and public resorts are inspected at least once every two months, for example. (20)

If the Fire Marshal or his Inspectors are not satisfied with the safety of a building or premise, they may order, in writing, (21) the owner or occupier of the place in question to remove, destroy, repair, or alter the use or occupancy of the building or premises. (22) If there exists an impending, serious danger, the Inspector is given certainemergency powers. (23) The normal state of affairs is, however, that inspections are carried out in the regular fashion, and orders are given under s. 17 of the Act. (24)

During 1977, there was a total of 91,418 inspections carried out in the province, which resulted in 1,544 orders. (25) Of these some

50 - 60% were appealed under s. 21(2) to the Fire Marshal. (26) In Vancouver, an appeal board is being established to handle appeals from orders given by Local Assistants. In this way, it is hoped to reduce the workload of the Fire Marshal. (27)

Licensing

The third power given to the Fire Marshal is the licensing of Moving-Picture Theatres, Kinematographs, and projectionists. (28) The Act states in s. 36(2), inter alia:

> "The Fire Marshal may in his discretion refuse to grant a licence applied for under this Part, and may suspend or cancel any licence issued under this Part; . . ."

Though undoubtedly a very wide discretionary power, the Fire Marshal has not in fact revoked a licence "for years". (29)

Procedural Requirements

Having discussed the Fire Marshal's duties and powers, the following statement from the Law Reform Commission (30) may be of some interest before the discussion of the procedure with which the Fire Marshal must comply.

> "Whether or not the Fire Marshal ought to comply with the canons of procedural fairness in exercising his powers of entry would seem to depend, at least in part, on whether a potential emergency exists which would make it undesirable that he delay, and on whether the community can afford the cost of the Fire Marshal's holding a hearing before he enters a building. On the other hand, if as a result of exercising a power of entry the Fire Marshal proposes that an owner should remove or destroy a building because

> it is a fire-hazard, a better case might be made out for compliance with a fair procedure, although even in this instance the issue may be blurred if the situation is one involving manifest emergency and the risk to the community is high." (31)

The description here, with regard to procedural requirements, is limited to inspection and licensing. The investigation, on the other hand, results only in a report with any eventual recommendations for prosecution. (32)

Notice

There is nothing in the Act which states that notice must be given. When carrying out routine inspections, the Fire Marshal does not need to give notice of when to expect an inspection. The Act gives him the right to enter any building, during reasonable hours, and inspect it. (33) These routine inspections are treated in the same manner as are emergency inspections. (34) According to the Act, no notice is required even in cases concerning the eventual withdrawal of a licence for a movie theatre. (35) In R. v. Barry, (36) it was held that the Fire Marshal could order the prohibition of smoking in theatres without holding a hearing and without notifying the interested parties.

In some cases, the order can act as a notice, because the order can be appealed. (37) On this level, the interested parties may make themselves heard. (38) The Act does not specify to whom the order must be given. Should it be given to the owner of the property, or the occupant? In a case from Alberta, Fefferman v. McCargar, (39) it was held that the order should be given to both the owner and the occupant. In this way, the occupant would have a fair chance to a hearing on

appeal. It is usual, in British Columbia, for the Inspectors to give the order to both the occupant and the owner. (40) The orders are given on special forms which include a description of where and when to appeal. (41)

Right to Particulars

The Fire Marshal or his Inspectors can investigate any building in the province, (42) and if it is felt that the building is in a state of disrepair, or is used or occupied in such a way that fire is a possibility, he can order that the hazardous contents be removed, or that the building be destroyed or repaired. (43) These are the qualifications which have to be fulfilled before the order can be made. There is, however, nothing in the Act which states that the order must include these qualifying grounds, so as they can serve as particulars on an appeal of the initial order to the Fire Marshal.

In Fefferman v. McCargar, (44) where the order said "This Building is a Fire Hazard", it was argued that it ought to include the grounds. The judge held that an order should entail the qualifying grounds. He said:

> "This finding is: "This Building is a Fire Hazard." It will be noted that this does not set out any of the facts which under the section authorize an order being made. It is largely meaningless, as every building is, to some extent, a fire hazard." . . .
>
> " . . . This order does not show that the facts exist which under the section would authorize an order being made and, therefore, does not show jurisdiction." (45)

In British Columbia, the forms used by the Inspectors have a place in which to state findings. (46)

Hearing

There is only one provision in the Act requiring that a hearing may be conducted. Section 41 of the Act states that the officers may seize and remove, at any time, any film from a movie theatre which they may consider to be in poor physical condition and thus, a fire-hazard. The section continues:

> (2) The film or reel of film so seized shall be retained by or placed in the control of the Fire Marshal, and the Fire Marshal, after considering the facts, and after hearing any person interested who requests to be heard, may declare the same to be forfeited to the Crown and direct what disposition shall be made of the same.

The Fire Marshal's orders invariably deal with property rights, an area which often receives special protection from the rules of natural justice. However, the courts do not like to put procedural restrictions on the Fire Marshal. In Re Fire Prevention Act, (47) a case from Saskatchewan in which a demolition order for an apartment block was made, the judge said:

> "The legislature is supreme in its field and The Fire Prevention Act, 1954, does not require any preliminary hearing, and it sets out the procedure to be followed and which was followed by the respondent herein. In my opinion, in the case at bar there was no denial of natural justice in that provision is made in the Act that he now can be heard before the fire commissioner and by way of this application. It is possible that in this case of fire hazards the rights of individuals should be infringed upon for the common good and sometimes it is necessary to do this in an Emergency." (48)

While in R. v. Barry, (49) the judge said:

> "I think, therefore, there is no doubt

> that the Fire Marshal has power to make an order without hearing evidence or notifying interested parties. The nature of the orders to be made and the need to protect the public from hazards necessarily require that this power be given." (50)

The above examples illustrate the reluctance of the courts to require that the Fire Marshal apply the rules of natural justice, at least in the first instance, (this being the person who carries out the investigation and makes the order).

In Fefferman v. McCargar, (51) it is indicated that the real opportunity for anyone who is aggrieved to get a hearing lies in the appeal process:

> "There is an even more fundamental ground on which the defendant can claim the order is bad. The tenant was in possession of the accommodation mentioned, and had established business there. He had gone to considerable expense in fixing up the premises. He would be put to expense and inconvenience and loss if he had to close or move. He had a right to be heard .... He was not served with the order and thus was not given an opportunity to appeal and present his objections to the order and endeavour to have the order varied. This is not in accord with well-established principles of British justice." (52)

In the British Columbia Fire Marshal Act, there are a number of sections dealing with appeals from orders made by Local Assistants. For example, section 21(3) of the Act states, inter alia, that the Fire Marshal shall promptly investigate every appeal under this section, and affirm, modify, or revoke the order. However, nowhere is it stated that the Fire Marshal must hold hearings before deciding the appeals. The procedure which has developed over the years in British Columbia, is that the Fire Marshal does hold a hearing at the place of inspection after an appeal. (53)

Disclosure of Information

There is nothing in the Act which forces the Fire Marshal or his officers to disclose any information or facts upon which they may have built their decision.

Adjournment, Applicability of Rules of Evidence, Counsel, Cross-Examination of Witnesses, and, Heard By Person Who Decides, have not been covered by the Fire Marshal Act.

Reasons for Decision

The orders which the officers make in 'first instance' do not appear to require any special form, other than that they must be in writing. (54) No reasons need be given for the order. An appeal concerning decisions made by Local Assistants to the Fire Marshal is a different matter. Section 21(3) of the Act reads:

> "The Fire Marshal shall promptly investigate or cause to be investigated every appeal under this section, and affirm, modify, or revoke the order appealed from, and in writing communicate his decision and the reasons therefor to the owner or occupier and the person who made the order."

The above quotation is the only provision found in the Act, which states that the reasons for any decision must be given.

In R. v. Castle, (55) the court held strongly that the reasons must be given by the Fire Marshal. The Fire Marshal had written, in this case, a letter which stated simply that following personal inspection of the building, he had decided to disallow the appeal. The judge refers to this letter while considering section 21 of the Fire Marshal Act in the following:

> "The section says he shall, on dismissing the appeal, giving his reasons in writing. Subsection (1) of s. 23 of the Interpretation Act, R.S.C.B. 1936, c. 1. says that the word "shall" is to be construed as imperative.
>
> I have considered a number of Authorities where the facts are similar, . . . , with the facts of this case, and those cases say that where interference with private property is authorized by statute, the person authorized to interfere must strictly adhere to the powers conferred, and proceed by the mode, (if any), indicated by the Act.
>
> I think s. (3) is an absolute enactment and not directory.
>
> The Fire Marshal Act has given the Fire Marshal power to interfere with private property, and in so doing, in my opinion he must fulfill the requirements of the statute exactly, and proceed by the mode indicated in the Act before he prosecutes an owner for not obeying his order. This he did not do when he failed to give his reasons in writing for dismissing the appeal." (56)

Bias

There are no provisions in the Act which state when a Fire Marshal, his Inspector, or Local Assistant are guilty of bias.

THE LABOUR RELATIONS BOARD

The Labour Relations Board, as it is constituted today, started to operate January 1st, 1974. (1) The procedures and powers of the Board are given in the Labour Code of British Columbia, (2) and the Labour Code of British Columbia Regulations. (3) It is made clear in the Code, however, that the new Board is continuing the work of the former Labour Relations Board. (4)

The Board is composed of a chairman, one or more vice-chairmen, and an equally proportioned group of members representing employers and employees. (5) Today the Board consists of eighteen members, six of whom represent the employers, and six who represent the employees. The chairman and his five vice-chairmen (6) are appointed for a five year term by the Lieutenant-Governor in Council. (7)

The members of the Board are divided to form panels. (8) Each of these panels have the same power and authority as the Board. (9) The chairman may refer any matter to one of these panels. (10) The Act lays down the rules according to how the panels should be constructed, (11) and also gives quorum rules. (12)

The chairman can establish a special panel which gives a binding decision on a question of law, when consulted by other panels. (13) In this way, problems resulting from inconsistant decisions with other panels are avoided.

The Board can appoint a special officer to carry out investigations, and if necessary, act as a mediator. (14) He can also simply investigate and report his findings to the Board. (15)

The Jurisdiction of the Labour Relations Board

The Labour Relations Board has jurisdiction over a vast area of industrial relations, continuing the tendency to move labour disputes from the courts. (16) The general provision, giving the purposes and objectives of the Board, is s. 27 of the Labour Code. This section expresses the desire that the main function of the Board is to promote harmonious industrial relations.

The Labour Relations Board's jurisdiction covers the certification of trade unions, (17) and "either exclusive, concurrent, or supervisory jurisdiction over every phase of collective bargaining law within the Province". (18) The investigation and adjudication of unfair labour practice complaints fall under the Board's jurisdiction, (19) as do strikes, lockouts, and picketing. (20)

It seems in order to also mention something about the processes in the Labour Relations Board, this being due to the fact that it works using different techniques, such as investigation, mediation, and adjudication. The chairman of the Board, Professor Paul Weiler, believes that there are two features which contrast the process of the Board with that of the courts. (21) The first is that the Board has several techniques for solving disputes, "not just adjudication", and the second is the fact that the Board has control over the funnelling of disputes into these procedures. (22) He also says:

> "But in the broad range of human conflict which arises under a system of labour law, whether it involves a charge of an unfair labour practice, a grievance under a collective agreement, and now a complaint or illegal work stoppage, the Board does make a determined effort to solve the problem by

> mediation: a process in which each side can feel that its interests have been considered and that it has had some real role in arriving at the terms of the solution. Our objective is to minimize the use of the formal legal approach in labour relations in which lawyers throw 'rights' and 'duties' at each other. Our experience, whether it be with unfair labour practice charges, or outbreaks of illegal strikes and picketing is that we succeed about 60 percent of the time." (23)

In his article, (24) Professor Weiler has also tried to estimate the extent to which the different methods of solving labour disputes are used;

> "Nearly three-quarters of our caseload is disposed of by pure investigation. More that 15 per cent are settled through mediation. No more than 10 per cent are resolved in the traditional adjudicative format." (25)

The Board's workload is estimated to be more than four thousand cases per year, of which a large number are routine and repetitive. (26)

There are permanent industrial relations officers throughout the province (27) who are normally the first to come in contact with any labour dispute. (28) When a party has filed a complaint with the Board, an officer takes over. It is the officer who hears all the parties concerned. The procedure is very informal, consisting mainly of meeting with all the concerned parties giving them the opportunity to make their submissions, and if necessary, their rebuttals. The investigation officer then talks to the parties separately, in order to get any information which the persons involved do not want released in front of the opposing party. Through this procedure, 90% of the cases are informally settled. (29)

It is not unless the investigation officer finds that an informal settlement is impossible that the Board becomes directly involved. It

receives a detailed and confidential report from the investigation officer, (30) and the written submissions of the involved parties. These are used by the Board as a basis for its final decision, thus disposing of the cases and reducing the workload. (31)

It stands to reason that the Board must, sometimes, use its power of adjudication in order to make binding decisions. (32) The chairman refers to the procedure used in these cases in the following passage:

> "When the Board must issue a binding decision about the illegality of a work stoppage, it can afford the parties essentially the same procedure for presenting their case as they would have in court (albeit in a somewhat more relaxed, informal atmosphere): an oral hearing, evidence given under oath and subject to cross-examination, argument from counsel, and written reasons for decision." (33)

Procedural Requirements

The Board has the power to determine its own practice and procedure.(34) Its discretion on this point, however, is not without limits. The Board cannot restrict the opportunity of the parties involved to make submissions and present evidence. (35) There are also particular procedural rules laid down both in the Code itself, and in the Regulations.(36)

Notice

The Code and its Regulations have notice requirements under several different sections. Section 7 of the Regulations covers the majority of situations likely to be put before the Board. It states that when an application is made to the Board, the Board shall give notice to all persons whom it deems directly affected.

More specific notice requirements are given in the following situations; when a hearing is to be held, (37) when complaints regarding unfair labour practice has been received, (38) or when a hearing is to be held to determine whether or not to certify a trade-union as a bargaining agent. (39)

Right to Particulars

There are many rules which state that the concerned parties have a right to an opportunity to present their cases fully. This implies the right to particulars, but is far from being explicit.

Hearing

That the Board shall determine its own procedure and practice is stated in the Code, (40) but the Regulations lay down some general guidelines, which must be considered by the Board in determining its own practice with regard to hearings. The Regulations state:

> "21. Where, in any proceeding, the Board deems it necessary to hear oral evidence or argument, the Board shall fix the time, date and place for a hearing and shall give notice of the hearing to all parties concerned."

Sometimes the Legislature has found it necessary, however, to confine the Board's discretion when it comes to deciding whether or not a hearing should be held. In a situation where the Board must decide if a trade-union should be certified as a bargaining agent, the Legislature has made it compulsory for the Board to hold a hearing. (41)

It seems possible to argue that, under certain other circumstances, it is compulsory for the Board to hold a Hearing. The Regulations

apparently make hearings mandatory in s. 42 concerning binding orders by the Board under s. 28 of the Act (strikes, lockouts and picketing), and concerning directions by the Board to employers not to hinder the formation of a trade-union. It is enacted that the Board may decide certain enumerated matters within these areas "after conducting a hearing". (42) The following section, (s. 43), gives some exceptions to the hearing requirement. When the two sections are read together it would appear that the majority of powers given in the Regulations, s. 42, can be exercised only after a hearing.

The Legislature seems to have felt that matters of strikes, lockouts, and picketing, (all of which were under the court's jurisdiction before the enactment of the Code), should be protected by a more judicial approach to the fact findings, and therefor, a more formal process should be used.

While under the heading of 'Hearings', it seems appropriate to discuss not only oral hearings, but also the rights of the parties concerned to rebut the submissions from the other side. Granted, this is more a question of communication of material, however it serves the same purpose as a hearing, that is to give the involved parties a fair chance to present their case.

Section 21 of the Code establishes the right for the Board to determine its own procedure, and continues:

> ". . . but shall give full opportunity to the parties to any proceedings to present evidence and to make submissions, . . ."

It is made clear in the Regulations that, when any application is submitted to the Board, the Board must give notice to all persons affected. (43) This notice seems to have to include a copy of the

initial application, as a reply by persons affected shall consist of an admittance or denial of each statement in the application. (44)

When a reply has been received by the Board, it must be communicated to the applicant for further submissions. (45) No further communication is required by the Regulations. The case Regina v. LRB (B.C.); ex parte Loomis Armoured Car Service Ltd., (46) (a case which was decided under an act prior to the Code), involved a certification procedure. The employer replied to an application submitted to the Board, which passed the employers reply to the union. The union replied to the employer's submission. No further communication took place. The court held that the employer had the right to have the union's new submission communicated to him, and thus went a step further than is required in the Regulations.

Disclosure of Information

With regard to applications and submissions from the involved parties, there are no problems of disclosure because the Act states that these must be communicated. (See under the headings 'Notice' and 'Hearing'). The problem of access to information is instead the disclosure of the material which is submitted by the persons appointed by the Board to investigate disputes.

There was a practice of non-disclosure by the Board, with regard to the industrial relations officer's reports. This practice was upheld by the British Columbia Supreme Court in the case Re Robinson, Little & Co. Ltd. (47) The employer, in this case, had challenged the fairness of the hearings due to the fact that the Board had refused to disclose the industrial relations officer's report. Judge Toy said:

> "In my respectful view, bearing in mind the many obligations imposed on the industrial relations officer charged with responsibilities of inquiry and in many instances to attempt to settle disputes and the statutory provisions requiring secrecy to those reports, I accept as appropriate the Board's past policy of non-disclosure." (48)

This practice of non-disclosure has since been enacted in the Code with an amendment by the Legislature. (49)

The possibility of non-disclosure reaches further than just with concern to the reports of the industrial relations officers. Evidence and information that the Board has obtained is left to the discretion of the Board as to whether or not it should be disclosed to the involved parties. (50)

Adjournment

In the Regulations there are rules giving the Board the discretion to adjourn hearings, (51) and to abridge or prolong the time limits prescribed by the Regulations. (52) This being the case, there is nothing to prevent the Board from adjourning a hearing at the request of one of the concerned parties. There are, however, no rules which force the Board to adjourn when requested.

Applicability of the Rules of Evidence

The section most important in this instance is s. 19(1) of the Code, which states:

> "19.(1) The board may receive and accept such evidence and information on oath, affidavit, or otherwise as in its discretion it considers proper, whether or not

> the evidence is admissible in a court of law."

This rule, giving the Board the discretion to accept evidence, is repeated in the Regulations. (53) As this is the case, no formal rule of evidence has to be complied with by the Board.

Counsel

Neither the Code nor the Regulations state specifically whether counsel is allowed at hearings. On the other hand, they do not state that the parties involved cannot be represented by counsel. Despite the fact that the chairman has written that the Board's main objective is to minimize the use of a formal approach, where lawyers throw 'rights' and 'duties' at each other, (54) he seems to accept lawyers when it comes to a matter of adjudication. (55)

The Regulations also recognize counsel, as is illustrated in section 15. Here it states that any document required to be given to a party, can be given to the solicitor or agent who is representing the party.

Cross-Examination of Witnesses

Both the Code and the Regulations are silent on this point, as it appears to be adequate to refer to the rules which state that the Board shall give the parties concerned a full opportunity to present evidence and to make their submissions. (56) From what Chairman Weiler has written, it seems clear that the cross-examination of witnesses is acceptable when the Board holds a formal hearing. (57)

Heard by Person Who Decides

In a question of adjudication following a hearing, or that of decisions made after applications and written replies, there does not appear to be any apparent problem in complying with this rule of natural justice. On the other hand, if one were to consider that the Board's decision is based on the industrial relations officer's report, the question is put into a different light. Is the Board really only a 'rubber stamp'?

Reasons for Decision

Both the Code and the Regulations have rules about written decisions. The Code states:

> "23. The Board shall make all its decisions in proceedings under this Act available in writing for publication."

Section 28 of the Regulations states, inter alia:

> "All decisions and orders of the Board shall be in writing and all parties affected shall be notified thereof."

Basically, these rules mean only that the Board need have its decision in writing, they do not force the Board to give any written reasons for its decision.

Bias

The problem of impartial and biased decision-makers becomes particularly difficult in an administrative tribunal where it is constituted on the tripartite model. The whole purpose of such a composition is to have people represent "different sides".

Neither the Code nor the Regulations give any rules regulating the question of when a member of the Board, through a special interest in any particular case, has a likelihood of being biased. (58) On the other hand, the courts have found members of a board biased under certain circumstances, despite the tripartite composition of a Labour Relations Board.

In the case of Regina v. Ontario Labour Relations Board; Ex parte Hall, (59) the Ontario High Court held that in order to establish bias, one must use an objective test, which is to consider if a "reasonable person in all the circumstances might suppose that there would be an improper interference". (60)

The distinction between the membership in a trade-union of a member on the Labour Relations Board, and membership which constitutes bias is well distinguished in the headnote of the aforementioned case:

> "There is a distinction between mere membership in a trade-union by a member of the Labour Relations Board and the holding of executive office in a central labour body by such a member; and where he is such an officer (and indeed the chief executive officer) and is charged in that capacity to carry out policies of the central labour party body which include, inter alia, the promotion of the interests of certain affiliated unions and a concerted drive to oust as bargaining agents certain other unions not associated in the central body, he should disqualify himself from sitting in a certification proceeding where there is a contest for bargaining rights between one of the unions opposed by it. Prohibition will go to the Labour Relations Board in such a case if he sits as a member." (61)

The British Columbia Court of Appeal held in Regina v. British Columbia Labour Relations Board (62) that a paid union official can not sit on a case certifying a local union, which is a member of the

(central) union paying the official. Even if he should disqualify himself from taking part in the decision, yet remains with the Board during the proceedings and in the private session, however silent he may be, there is a reasonable apprehension of bias. This leaves the Board's decision open to certiorari proceedings in which to establish a breach of the rules of natural justice. (63)

CHAPTER II

TWO ADMINISTRATIVE PROCEDURAL CODES

Some common law jurisdictions have found the rules of natural justice and the inconsistent procedural enactments in the tribunals' enabling statutes so unsatisfactory that they have enacted administrative procedural codes to apply to all administrative decision-makers.

In Canada, the provinces of Alberta (1) and Ontario (2) have enacted minimum procedure acts. The Federal Government (3) and most of the states (4) in the United States of America have also enacted administrative procedure acts. England, Australia, New Zealand and the Federal Government of Canada, (5) on the other hand, have felt that a minimum procedure act is not a good solution to the procedural problem in the administrative process.

This chapter consists of a description of the solutions used in Ontario (6) and the United States. (7) The purpose of this is to see if the code approach is a successful method to use in order to reform the administrative procedure.

THE STATUTORY POWERS PROCEDURE ACT IN ONTARIO

In 1964, a Royal Commission of Inquiry into Civil Rights [8] was established by the Government of Ontario. The Chief Justice of the High Court of Ontario, Mr. J.C. McRuer, was appointed 'Commissioner'. The Royal Commission submitted reports [9] with suggestions for new legislations to protect the citizens from encroachment of their civil rights through government action.

In 1971, the Legislature enacted a number of statutes, designed to implement the recommendations in the McRuer Report concerning administrative procedure: The Statutory Powers Procedure Act, [10] The Public Inquiries Act, [11] and The Judicial Review Procedure Act. [12]

The Statutory Powers Procedure Act deals with the rules with which administrative agencies must comply. It could be classified as being a codification of the rules of natural justice. The McRuer Report said:

> "Much advantage is to be gained from setting out specific rules for the guidance of those exercising statutory powers, even though many of them are a mere codification of the common law. Not only will they know the procedure they must follow, but those who have matters before tribunals will know the controlling procedure." (13)

The Commission studied the rules of natural justice and investigated how and when these rules should be applied to administrative agencies, and to whom they should apply. It examined the way in which similar problems had been solved in the United States and in the United Kingdom, and recommended that "the best" be taken from the solutions of the two countries, and be considered in the handling of the administrative

procedure in Ontario. (14) The McRuer Report therefore made a proposal for both minimum procedural rules, as found in the U.S., and the establishment of a Rules Committee, as found in the U.K. The Report stated:

> "Minimum and basic procedural standards enacted by legislation have distinct value. They are in nature of a procedural Bill of Rights, controlling draftsmen and guiding administrators and the courts. The time has come when the Legislature should declare in clear terms those minimum safeguards to which every citizen is entitled in the administrative processes of government. We therefore recommend the enactment of a Statutory Powers Procedure Act with provision for a Statutory Powers Rules Committee." (15)

This is exactly what was done by the Ontario Legislature in 1971.

The Statutory Powers Procedure Act consists of two main parts. Part I deals with minimum rules, while Part 2 establishes a Rules Committee. What does this legislation entail, and what is its scope?

Applicability of the Minimum Rules

The scope of the Act is basically defined in section 3(1), read together with certain definitions in section 1. Section 3(1) states:

> 3.(1) Subject to subsection 2, this Part applies to proceedings by a tribunal in the exercise of a statutory power of decision conferred by or under an Act of the Legislature, where the tribunal is required by or under such an Act or otherwise by law to hold or to afford to the parties to the proceedings an opportunity for a hearing before making a decision.

Section 1(1), (d) and (e) states:

> 1.(1) In this Act, . . .

> (d) "statutory power of decision" means a power or right, conferred by or under a statute, to make a decision deciding or prescribing,
>
> (i) the legal rights, powers, privileges, immunities, duties or liabilities of any person or party, or
>
> (ii) The eligibility of any person or party to receive, or to the continuation of, a benefit or licence, whether he is legally entitled thereto or not;
>
> (e) "tribunal" means one or more persons, whether or not incorporated and however described, upon which a statutory power of decision is conferred by or under a statute.

"To make a decision deciding or prescribing" has been interpreted to mean that only a final decision is subject to the minimum rules. The rules, therefore, do not apply to investigations or to advisory reports and recommendations.[16] These sections are naturally also subject to the constitutional limitations, meaning that they only apply to provincial legislation.

The difficult problem in administrative law of classifying agencies 'judicial', 'quasi-judicial', or 'administrative' has been avoided through the use of the words, "deciding or prescribing" in s. 1(1)(d).

> "Note the use of the words "deciding or prescribing". This is one of the most significant features of the Act in that the use of both words in the context of "rights", "privileges", "benefits", etc. means, at least at first blush, that it is no longer necessary to determine whether the tribunal is acting judicially or quasi-judicially as opposed to administratively, as a condition of entitlement. Had the above definition used only the word "deciding", then a statutory power of decision under the Act would have been restricted to judicial or quasi-judicial

> (d) "statutory power of decision" means a power or right, conferred by or under a statute, to make a decision deciding or prescribing,
>
> (i) the legal rights, powers, privileges, immunities, duties or liabilities of any person or party, or
>
> (ii) the eligibility of any person or party to receive, or to the continuation of, a benefit or licence, whether he is legally entitled thereto or not;
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"To make a decision deciding or prescribing" has been interpreted to mean that only a final decision is subject to the minimum rules. The rules, therefore, do not apply to investigations or to advisory reports and recommendations. (16) These sections are naturally also subject to the constitutional limitations, meaning that they only apply to provincial legislation.

The difficult problem in administrative law of classifying agencies 'judicial', 'quasi-judicial', or 'administrative' has been avoided through the use of the words, "deciding or prescribing" in s. 1(1)(d).

> "Note the use of the words "deciding or prescribing". This is one of the most significant features of the Act in that the use of both words in the context of "rights", "privileges", "benefits", etc. means, at least at first blush, that it is no longer necessary to determine whether the tribunal is acting judicially or quasi-judicially as opposed to administratively, as a condition of entitlement. Had the above definition used only the word "deciding", then a statutory power of decision under the Act would have been restricted to judicial or quasi-judicial

> decisions. But the word "prescribing" encompasses purely administrative decisions and thus appears to remove the necessity of performing the type of verbal gymnastics which have permeated this area of the law." (17)

On the other hand it is held in Re Robertson et al. and Niagara South Board of Education, (18) that not all administrative decisions are statutory powers of decision, and it appears from the judge's reasoning that the old distinction between quasi-judicial, judicial and administrative tribunals is still valid. However, this judgement is by no means clear and it is difficult to draw any conclusions from it. The judge said:

> "The right or privilege of the applicants to have their children attend a particular school was not a "legal" right or privilege within the meaning of those statutes. The decision to close the school was an administrative decision and was not rendered judicial or quasi-judicial because it was openly opposed by the applicants." (19)

Section 3(1) limits the scope of the applicability of the minimum rules to tribunals which are required, by or under an act, to hold a hearing. These limitations are, however, avoided by the use of the words "otherwise by law". These words catch all those tribunals which do not have explicit provisions for hearings, but which are still subject to the rules of natural justice. Naturally, this does not avoid the uncertainty as to which tribunals are, or are not, subject to natural justice, but once this has been established, it does clarify whether they do, or do not, have to conform to the minimum rules. It appears that the remaining uncertainty will be removed:

> "The application of the rules where a hearing is required "otherwise by law"

> is a transitional provision pending review and amendment of the existing statutes to provide expressly for hearings in appropriate instances. All statutes of Ontario establishing tribunals are now being reviewed for this purpose. When the amendments have been completed, the expression "otherwise by law", will cease to have significance except as a residual protection." (20)

On the other hand, in Re Carrington's Building Centre Ltd. and Ontario Housing Corporation, (21) there was no explicit hearing requirement in the involved tribunal's enabling statute and it would appear that the court had forgotten the words "otherwise by law". The facts were that Carrington's was a supplier of building materials. They filed a notice of claim under the Public Works Creditors Act in regard to materials supplied to two builders. A hearing was held on the behalf of the Ontario Housing Corporation by a Mr. Caputo, to determine the compensation for all creditors. Mr. Caputo recommended that Carrington's claim should be paid in full. However, the decision-makers, the Ontario Housing Corporation's board of directors, did not accept Carrington's claim. No reason was given by the board for their decision not to allow Carrington's claim and they also denied Carrington a copy of Mr. Caputo's report.

Carrington submitted to the Court, inter alia, that the Statutory Powers Procedure Act was applicable to the board of directors. The ratio seems to be that the Public Work Creditors Act did not have a hearing requirement, and as a result the Statutory Powers Procedure Act did not apply. The judge said:

> "It appears to us, under the above mentioned section, that the Statutory Powers Procedure Act, 1971 does not apply to proceedings under the

> Public Works Creditors Payment Act. Under the latter Act, a tribunal is not required to hold, nor to afford to the parties of the proceedings the opportunity for, a hearing before making a decision." (22)

There are also explicit exceptions from the applicability of the minimum procedure rules. Section 3(2) exempts, inter alia, the Assembly, the Supreme Court or any other court, a justice of the peace, a labour arbitrator and a coroner's inquest. The section then makes some very vital exemptions.

> (2) This Part does not apply to proceedings, . . .
>
> (g) of one or more persons required to make an investigation and to make a report, with or without recommendations, where the report is for the information of the person to whom it is made and does not in any way legally bind or limit that person in any decision he may have power to make;
>
> (h) of a tribunal empowered to make regulations, rules or by-laws in so far as its power to make regulations, rules or by-laws is concerned.

This makes it clear that both investigation and rule making powers given to administrative agencies are exempt from compliance with the Act's procedural safeguards.

The Legislature can also exempt tribunals from complying with the Statutory Powers Procedure Act, through the use of expressed language. Section 32 of the Act states:

> 32. Unless it is expressly provided in any other Act that its provisions and regulations, rules or by-laws made under it apply notwithstanding anything in this Act, the provisions

> of this Act and of rules made under section 33 prevail over the provisions of such other Act and over regulations, rules or by-laws made under such other Act which conflict therewith.

This section also gives the Legislature the ability to be more flexible as they can establish tribunals which have to conform only to special sections of the Act. Another way of achieving the tribunal's necessary speed and flexibility is illustrated in section 4. This section states that any proceeding may be disposed of by agreement, consent or decision, without a hearing or other natural justice requirements, if the parties involved waive their rights to these procedural safeguards.

Procedural Requirements

As has been stated, the Act is, more or less, a codification of the rules of natural justice. Under this heading, a description of the rules of the Act with which the Ontario administrative agencies must comply, will be dealt with under the headings which were explained in the Introduction.

Notice

The Act states in section 6(1), that the parties shall be given reasonable notice of the hearing. This is mandatory, but no further guidelines are given to clarify exactly what 'reasonable notice' means. For the sake of interpretation, one must return to the common law rules which say what is reasonable under certain circumstances. The answer is that the notice is considered to be a reasonable one, only

if it allows the involved persons a fair chance to prepare their case.

In section 6(2), the Act also gives rules which define what a notice must entail. There must be a statement of the time, place and purpose of the hearing, and a reference to the statutory authority under which the hearing is held. (23) The notice must also include a further statement warning the party that the tribunal may proceed in his absence, in which case no further notice will be given to him in the following proceedings. (24)

In a rather recent case, Re Seven-Eleven Taxi Co. Ltd. and City of Brampton, (25) the judge said that a reasonable notice also must entail particulars, and in so doing, went a step further than section 6:

> "Notice must be sufficient to give any person, whose rights are in jeopardy, an opportunity to respond to what is, in effect, the charge against him. Anything short of that is not "reasonable notice". It is crystal clear that Seven-Eleven Taxi was given no idea of what was the basis upon which its licences were being considered for cancellation." (26)

Section 24 of the Act deals with a special problem concerning notice requirements. If the tribunal is of the opinion that the parties are so numerous, or if for any other reason it is impractical to serve notice in the usual manner, notice may be given through public advertisement or by any other means which the tribunal finds appropriate. This section deals not only with the question of having too many involved parties, it also gives the tribunal a wide discretion in two areas. The section applies to "any other reason", and the notice can be given "otherwise as the tribunal may direct". Professor Atkey has said the following concerning the Act, with regard to the tribunal's

discretion:

> "Indeed, the two loopholes in this section may well constitute direct statutory authority permitting a tribunal to effectively vitiate the specific notice requirements of section 6." (27)

The Right to Particulars

Section 8 of the Act states:

> 8. Where the good character, propriety of conduct or competence of a party is an issue in any proceedings, the party is entitled to be furnished prior to the hearing with reasonable information of any allegations with respect thereto.

As is illustrated in this section, it is not necessary for all tribunals always to give particulars to an involved party. The hearing must deal with the involved person's good character, propriety of conduct or competence before the Act can give him the safeguard of particulars. However, as shown in Re Seven-Eleven Taxi, (28) the common law seems to require that particulars be given even of matters other than those enumerated in section 8. It is noteworthy that this section is also limited to cover only "reasonable information" in these cases, not all information. It is the tribunal's responsibility to make certain that this rule has been honoured, before the hearing is to take place.

> "The duty of compliance falls upon the administrator or person making the allegations or proposing to put the documentary evidence or report before the hearing. The function of the tribunal is to satisfy itself at the hearing that the provisions have been complied with so that the party or applicant or licensee is not surprised by allegations or evidence. Where the

> tribunal feels that these provisions have not been complied with to the prejudice of the party or the applicant or licensee, the tribunal should grant an adjournment." (29)

Hearings

Before the Act is applicable the tribunal's enabling statute must entail a hearing requirement. (30) Hearings are, however, not necessarily mandatory in all proceedings. The right to a hearing can be waived by the parties, or there can be consent or agreement between the involved parties making a hearing unnecessary. (31)

The Act lays down some basic rules with regard to hearings in section 9. It states that as a general rule the hearing should be open to the public. There are two exceptions to this rule: matters involving public security, and intimate financial or personal matters. In these cases the tribunal may hold a hearing *in camera*. (32)

It is, however, difficult to really appreciate what the hearing requirement really entails, for example how formal must it be? (33) One might mention a particular part of one section which gives very general provisions with regard to the involved party's rights when at a hearing. The provision in question is found in section 10, which states *inter alia*:

> 10. A party to proceedings may at a hearing, . . .
>
> (b) call and examine witnesses and present his arguments and submissions;

Adjournment

Section 21 of the Act, gives two alternatives with regard to how

an adjournment can be allowed. The first possibility is that the tribunal can decide at its own discretion that a hearing be adjourned. The second possibility is that if one of the involved parties can prove that a fair hearing can be held only after the tribunal has adjourned the present hearing, the tribunal can do so. Here the burden of proof lies with the party, who must show the hearing tribunal that adjournment is necessary.

> "Although this provision only gives a power to the tribunal to adjourn proceedings, it should not refuse an adjournment and insist that the hearing goes on, where a party will be prejudiced. On the other hand, grounds for an adjournment should be substantial and an adjournment should not be allowed to be used as a device for causing delay. The governing consideration of fairness that underlies the procedural rules of natural justice should be given effect to by the tribunal in exercising its power." (34)

Applicability of the Rules of Evidence

Section 15 of the Act codifies the ordinary practice in administrative law of not forcing the tribunals to comply with the formal rules of evidence. This permits a more informal and expeditious hearing procedure, one of the main purposes for the establishment of tribunals.

Section 15 states that a tribunal may admit any oral testimony, document, or any other thing relevant to the subject matter and not unduly repetitious, as evidence. There are also some restrictions:

> 15(2) Nothing is admissible in evidence at a hearing,
>
> (a) that would be inadmissible in a court by reason of any privilege under the law of evidence; or

> (b) that is inadmissible by the statute under which the proceedings arise or any other statute.

An example of evidence which would be regarded as inadmissible according to subsection 2(a) is that the solicitor can not be compelled to give evidence of information given to him by his client when he has this privilege in a court. The same would apply to the party's spouse. (35)

Section 15(3) also provides an exception from the general rule in section 15(1). It is that if any act expressly limits the extent to which testimony, documents, or any evidence may be admitted, the act in question shall prevail.

Counsel

The Act gives a party the right to counsel in a very straightforward manner. The right is without limitations. Section 10 states, inter alia:

> "A party to proceedings may at a hearing,
> (a) be represented by counsel or agent; . . ."

The agent does not need to be a "legally qualified practitioner". (36) However, the tribunal may exclude the counsellor or agent from a hearing, depending on his conduct. (37)

Cross-Examination of Witnesses

As previously illustrated, a party to proceedings under the Act is allowed to call and examine witnesses. (38) There are also rules which

regulate the cross-examination of witnesses. Section 10(c) states, inter alia:

> 10. A party to proceedings may at a hearing, . . .
>
> (c) conduct cross-examinations of witnesses at a hearing reasonably required for a full and fair disclosure of the facts in relation to which they have given evidence.

The tribunals have also been given the explicit power to limit further cross-examination when satisfied that the examination has sufficiently disclosed all the facts given by the witness. (39)

Heard by Person Who Decides

It is possibly taken for granted by the Legislature that, as there is now a hearing requirement, the tribunal which presides at the hearing will also be the one to decide. However, the fact is, there are no rules in the Act to provide for the manner which the tribunal should make its decision. This being the case, this rule of natural justice is not codified. This leaves any involved persons relying on the common law rules, if the tribunals' own statutes do not regulate this question.

Reasons for Decision

The form of the tribunals' decisions are regulated in section 17 of the Act, which states:

> 17. A tribunal shall give its final decision and order, if any, in any proceedings in writing and shall give reasons in writing therefore if requested by a party.

This means the Act ensures that a party is able to find out the reasons for a decision, a protection which has not been given under the common law. (40) Mundell, in his Manual of Practice, states what the reasons should consist of:

> "The reasons should set out a full explanation of the decision arrived at by the tribunal. Findings of fact should be stated separately from the propositions of law upon which the decision is based." (41)

Bias

The Act does not include any provision regarding impartiality or bias in the administrative process. The reason for this is that a distinction has been made between procedural rules of natural justice and bias rules of natural justice. The latter is not regarded, by some, as a procedural question. (42)

The common law is still the source of reference for deciding when, or under what circumstances, a member of a tribunal should be regarded as having been biased.

THE ADMINISTRATIVE PROCEDURE ACT IN THE UNITED STATES

The Federal Administrative Procedure Act [43] was enacted June 11th, 1946 [44] when the President of the United States gave his approval. The origins of the Act can be found in the early 1930's, when the rapid growth of administrative agencies was seen as a threat to due process, and a sacrifice of private rights. [45] In 1933 the American Bar Association created a Special Committee on Administrative Law, [46] and in the years following, they pressed for "legislation to assure the fundamentals of due process". [47]

In 1938, it was time for government intervention. President Roosevelt requested the Attorney General to create a committee to study administrative procedures and make recommendations for changes. [48] The appointed committee, The Attorney General's Committee on Administrative Procedures, consisted of lawyers, scholars and administrators. [49]

The Committee investigated the operations of some of the more important administrative agencies in great detail. Twenty-seven monographs were published on its findings. [50] A Final Report was also submitted, including recommendations. [51] Extensive hearings were held before a subcommittee of the Senate in 1941 [52] but due to the war, work on the Act came to a halt until 1945. [53] At this time, a Bill was drafted and passed by both Houses of Congress without a dissenting vote [54] and on June 11th, 1946 the President signed the Administrative Procedure Act, [55] or APA as it is commonly described.

Generally speaking, APA is said to have four basic purposes; 1) to inform the public of agencies, organizations, procedures and rules;

2) to provide for public participation in the rule making process; 3) to prescribe uniform standards for formal rule making and adjudicatory proceedings; and 4) to restate the law of judicial review. (56) The sections on uniform standards are naturally of main interest here.

Most states have enacted minimal procedural acts, modelled after the Federal Administrative Procedure Act or after the Model State Administrative Procedure Act. (57) The Model Act was formed at the same time as the Federal Act, and was approved of by the National Conference of Commissioners on Uniform State Laws. (58)

Applicability of the Minimum Rules

APA is made to apply to all government agencies, with some exceptions. The definition of an agency is determined by the following:

> "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency,... (59)

Following this general definition covering all sides of government authorities, the exemptions are listed. Amongst those which are exempt are: The Congress, the courts, the Government of the District of Columbia and courts martial. (60)

APA covers all federal administrative agencies, without any reference to whether they are judicial, quasi-judicial, or administrative. However, APA makes vital distinctions depending on the functions of the agencies. There are different regulations regarding rule making and adjudication. It is therefore of fundamental importance to make this classification:

> (4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices facilities, appliances, services or allowances thereof or of valuations, costs, or accounting, or practices bearing on any of the foregoing; (61)
>
> (5) "rule making" means agency process for formulating, amending, or repealing a rule; (62)

This enumeration of what is regarded as rule making is not exclusive. (63)

The Attorney General's Manual on APA says that to determine whether an agency is "rule making", one must consider the purposes of the statute involved, and the considerations the agency has to make. (64) The Manual continues:

> "Rule Making is agency action which regulates the future conduct of either groups of persons or a single person; it is essentially legislative in nature, not only because it operates in the future but also because it is primarily concerned with policy considerations." (65)

Adjudication is defined as:

> (6) "order" means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing; (66)
>
> (7) "adjudication" means agency process for the formulation of an order; (67)

The Attorney General's Manual explains adjudication in the following passage:

> "Conversely, adjudication is concerned with the determination of past and present rights and liabilities." (68)

APA prescribes different minimum procedural rules according to whether the agency is classified as rule making or adjudicative in nature. For the purpose of this thesis, the following description will be limited to the latter.

Procedural Requirements for Adjudication

The minimum procedural safeguards apply to "every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing". (69)

In order to make APA's minimum rules applicable, the statute which has established the agency must include a requirement for a hearing. A statute authorizing the agency to hold a hearing, (if deemed necessary), is not enough to fulfill the expressed hearing requirement. (70) The same holds true for an agency which holds a hearing, though without being required to do so. It does not have to comply with the Administrative Procedure Act. (71)

Section 554 enumerates certain exemptions, for example: "a matter subject to a subsequent trial of the law and the facts de novo in a court", (72) and, "proceedings in which decisions rest solely on inspections, tests, or elections". (73)

The minimum procedural rules that an agency has to comply with are laid down in sections 554 - 558 of APA.

Notice

Notice must include the time, place and nature of the hearing [74] as well as the legal authority and jurisdiction under which it is to be held, [75] together with the matters of fact and law asserted. [76] This last requirement means that it is necessary to advise the parties of the legal and factual issues involved. [77]

Right to Particulars

The notice requirement covers the question of particulars as well.

Hearings

One of the objectives of APA is to achieve a separation of functions within agencies. There are rules in section 554 which separate the hearing officer (or decision-maker) from the investigation and prosecution. The investigator or prosecutor is not allowed to "participate or advise in the decision". This makes the American administrative process more "judicial" as more of the courts' adversary system is adopted. [78] The separation of functions within the agencies is, on the other hand, not an absolute rule as there are some exceptions. Exempt are, for example, initial licensing decisions and the setting of certain rates. [79]

Disclosure of Information

Official records should be made available to "persons properly and directly concerned" in a case. [80] Due to the fact that APA establishes a more adversary system in the administrative proceedings, it also guarantees that the investigator, or prosecutor, present their

information before the hearing officer. However, there are no explicit rules which state that a party has the right to all the information available to the decision-maker. (81)

Adjournment

There are no mandatory rules which set the standards for when an adjournment is necessary. APA does state, however, that before fixing the time for a hearing "due regard shall be had for the inconvenience and necessity of the parties or their representatives". (82)

Applicability of the Rules of Evidence

The rules concerning evidence are found in section 556(d) of APA, which proves that "any oral or documentary evidence may be received". It is, however, up to the agencies' discretion to exclude material found to be irrelevant, immaterial or unduly repetitious. The formal rules of judicial evidence are not to be found here. The section however, does enact as a rule respecting burden of proof that "the proponent of a rule or order has the burden of proof". (83) Other statutes can, however, provide by a different rule.

Counsel

A party compelled to appear in person before either an agency, or just a representative for the agency, has the right to use counsel. (84)

Cross-Examination of Witnesses

APA allows a party the right to conduct a cross-examination, if it is required for "a full and true disclosure of the facts." (85) It is

not an absolute right but merely a presumption that it may be necessary to allow cross-examination in order to give the person involved a fair chance to present his case.

Heard by Person Who Decides

Here, the general rule is that the person who hears, should also decide. If the agency does not hear the matter itself, but appoints an employee to be the hearing officer in accordance with APA, it is this person who must make the initial decision. (86) There are, however, possibilities for the agency to require the whole record certified from the hearing officer, and then make the decision itself. (87) If there is no inside appeal or review route the hearing officer's initial decision becomes the agency's decision. (88)

Reasons for Decision

Throughout the procedure of the agency, a record has to be kept of the proceedings which is then made available to the parties concerned. The record must contain (89) all decisions, and these decisions must consist of:

> "(A) findings and conclusions, and the reasons or basis therefore, on all the material issues of fact, law, or discretion presented on the record; and
>
> (B) the appropriate rule, order, sanction, relief, or denial thereof. (90)

Bias

Unlike the Ontario Act, (91) the American Administrative Procedure Act has not stopped short of giving rules pertaining to bias on the

part of the decision-maker. In section 556, it is enacted that everyone who participates in the decision making shall conduct his work in "an impartial manner". (92) If one should deem himself disqualified, he may withdraw. (93) It is also enacted that a party is able to file, "in good faith", an affidavit presenting an officer as being biased. (94) In such a case the agency has to determine the matter in the proceedings and make its decision a part of the record. (95)

These last two chapters have attempted to present a concise description of the common law and the present situation in British Columbia with regard to administrative procedure. Two codes already in use which try to solve the problem of procedural safeguards have been discussed in detail. With this background, these questions arise: Which is the best way to deal with administrative procedure? Which solution gives the individual most protection and which hampers the efficiency of the tribunal the least? These are just some of the questions which will be dealt with in the following chapter.

CHAPTER III

SHOULD BRITISH COLUMBIA ENACT A MINIMUM ADMINISTRATIVE PROCEDURE ACT?

This chapter discusses some of the things done and said about administrative procedure in different common law jurisdictions. Criticism of the common law approach and of the statutory procedure enactments will be discussed and analyzed.

Included in this chapter is also a proposal for a minimum administrative procedure act. It will attempt to solve the question of applicability of the act and the problem of which safeguards are necessary in such an act.

REFORM OR STATUS QUO

As has been discussed in Chapter I, the procedure of tribunals in British Columbia is regulated by a mixture of the rules of natural justice and by provisions in the tribunals' establishing statutes. This system has been investigated and criticised by the Law Reform Commission of British Columbia [1] and there has been at least one proposal for an administrative procedure act for B. C. In 1973, Mr. Wallace, a private member of the Legislative Assembly, proposed the enactment of the Guarantee of Natural Justice Act, [2] but this did not pass.

The Law Reform Commission's Report on Administrative Procedure did not suggest the enactment of minimum rules, [3] although it appears that those who carried out the research involved in the report, did recommend such an enactment. This proposal did not receive approval from the Commission itself. [4] The Law Reform Commission was not satisfied with the present situation, [5] but felt there was a flaw in the approach of statutes regulating procedural fairness. [6] This flaw consists of the possibility of limiting the flexibility of the administrative tribunals by placing unnecessary constraints on some of their functions. A code of natural justice might suit some proceedings, but not all, for example the procedure of a tribunal in an emergency situation. [7] Instead, the Commission recommended an inquiry body to identify the tribunals' functions and to consider these functions and their purposes with regard to the question of procedural fairness. [8]

Thus, while the common law stand has been severely criticised as being a poor solution to procedural fairness in the administrative process, the approach taken in Ontario and in the United States has also

been criticised as defective.

The Arguments

The major argument for the common law rules of natural justice is really negative. If strict procedural rules were enacted, the flexibility and efficiency of the tribunals might disappear. (9) The purpose behind letting the tribunals take over traditional court problems was to facilitate a speedy, flexible and inexpensive solution to the growing number of government interventions. The Law Reform Commission also questions the fairness of asking the community to bear the added costs, in terms of time, money and staff, should administrative tribunals have to conform to an administrative procedure act. (10)

The division between the two approaches lies in the arguments for efficiency and the arguments for the protection of the individual. One administrative scholar, John Willis, writes:

> "Under the present common law rules of 'natural justice', uncertain as they are in their application and in their content, we have inherited from a series of English cases an approach to administrative procedure so relaxed that all a deciding authority really has to do is to give the citizen 'a fair shake'. If you set up mandatory statutory codes of minimum procedural decencies, however devised, you will, in my view, inevitably reintroduce into 'non-court' deciding authorities the 'court'atmosphere that they were created to avoid - where following the prescribed ritual is more important than getting at the merits, and strings of procedural objections are regularly made for no other purpose than to give the lawyer who loses on the merits of a second string to his bow in the court of review." (11)

However, to argue Professor Willis' point, it can also be said that without the guidelines of a minimum procedure code, lawyers can misuse the inconsistency and uncertainty of the rules of natural justice to obstruct and delay the administrative actions by challenging the proceedings with every conceivable rule of natural justice. There may also be higher values than administrative efficiency, for example, the protection of individuals from what can be considered as unfair governmental actions.

This leads to the argument against the present situation in British Columbia. The major problem with the common law is the inconsistent and uncertain manner in which the courts handle the classification of functions into judicial, quasi-judicial or administrative, a classification that is entirely dependent on the on the facts and circumstances surrounding each separate case. The Law Reform Commission of British Columbia, in their conclusions on this issue, said:

> "Conceptual rationales in judgments are often quite meaningless, and may amount to no more than post hoc labelling. Either decisions based on explicit facts and contextual considerations are being obscured by confusing and inconsistant conceptual rationalizations, or realities are being ignored in favour of dubious conceptual analysis. The resulting confusion has rendered the common law quite unable to ensure systematic procedural safeguards for individuals affected by agency action." (12)

The McRuer Commission [13] summarized its criticism by saying that before a court has decided how to classify a tribunal's functions in any particular case, it can not be said with certainty whether the tribunal need conform to the rules of natural justice or not. [14] This gives rise to two difficulties: 1) the tribunal does not know whether

the rules of natural justice are applicable, and 2) the affected parties do not know the procedural safeguards available to them. (15) McRuer also found that the common law is inadequate because, although the tribunal might know that it must follow a fair procedure, the substance of the procedure is uncertain. (16)

The McRuer report concludes:

> "These criticisms emphasize that the development of procedural requirements of limitations applicable to tribunals with a wide variety of powers and a wide variation in their constitution, cannot be satisfactorily left to the courts. In any case it is quite unrealistic to expect laymen to be presumed to know when and under what circumstances and to what extent the rules of natural justice apply to the statutory powers they exercise. It is also unrealistic to expect the courts to evolve suitable rules for individual tribunals. It is therefore essential that means be found to develop rules appropriate to the varying purposes and characteristics to which they are respectively applicable." (17)

In New Zealand, two reports (18) argued that a minimum procedure act had virtues in protecting the individual and helping to clear up some of the uncertainty and unpredictability left by the common law. However, when Mr. K.J. Keith did the final investigation on "A Code of Procedure for Administrative Tribunals", (19) the conclusion was the same as that of the Law Reform Commission in British Columbia. That is that a minimum procedure act might hamper the efficiency of the tribunals, and that as the administrative tribunals are so diverse, it is impossible to lay down procedural rules which could be applicable to all, without consideration of the particular functions of the tribunal concerned, or of the circumstances and facts surrounding the case.

The McRuer Commission also dealt with the problem of competing interest between efficiency and individual rights. While conceding that detailed procedural rules cannot be enacted without impeding the efficiency,(20) the Commission nonetheless thought that "generally recognized fundamental procedural requirements" could well be enacted, being applicable to the "exercise of any statutory power where a fair procedure is required." (21) These fundamental minimum procedural safeguards should then be followed by more detailed rules applicable to the specific tribunal. (22)

According to the McRuer Report, the virtue of minimal procedural protections is that the draftsmen would be controlled and administrators and courts guided. In this way, the uncertainty in the common law would be clarified. (23) The McRuer Report also states that through one such procedural act, every citizen will have expressed to him in clear terms the safeguards to which he is entitled in the administrative process. (24)

The main arguments for a minimum administrative procedure act are: a) the public will have a greater understanding of which procedural safeguards are available to them, b) administrators will know, with greater certainty, with which procedural requirements they must comply,(25) and c) it would clear up some of the unnecessary inconsistencies of procedure between different tribunals.

By way of summary, one might say that the majority of law reform reports, and the literature, are unanimous about the uncertainty, inconsistency, and unpredictability of the common law rules of natural justice when applied to tribunals' procedural problems. All are in agreement that something must be done, as long as it does not involve a detailed administrative procedure act applicable to all tribunals. (26)

This is where the consensus ends, as there is, as yet, no general agreement as to how the problem should be solved. The most commonly suggested solutions are; to establish a "rules committee", [27] to review all existing tribunals with the possible enactment of detailed procedure in each establishing statute, [28] or to enact a minimum administrative procedure act together with an enactment in the enabling statutes or regulations of more detailed rules applicable to the tribunal in question, [29] or even a combination of all the above. [30]

Because of the many different proposals, it seems impossible to say that one solution is "right" while the other is "wrong". The best solution is a matter of personal taste. Which solution gives the individual the most protection? Which solution hampers administrative efficiency the least?

Personally, I feel that the present situation in British Columbia is unsatisfactory. This is mainly due to the unpredictability of the common law, and the inconsistency of fundamental procedural safeguards enacted by the Legislature in the tribunals' establishing statutes. A minimum procedure act may not solve all the problems, but it would provide a start for a more systematic study of the functions of the different tribunals and their procedure. The educational aspect, both for the administrators and the public, in my view cannot be over emphasized. The public may not be better protected in fact, but it will have a feeling of "fair play" if fundamental, easily understood procedural rules are enacted and made available and the administrator given guidelines to follow.

The question remains: Which rules can be applied to all tribunals without hampering their efficiency?

SOME SUGGESTIONS FOR A MINIMUM ADMINISTRATIVE PROCEDURE ACT FOR BRITISH COLUMBIA

No two administrative tribunals deal with identical problems. When carrying out their duties, the tribunals must all consider different facts relating to different problems before arriving at a decision. This appears to be the reason why it is a truism, throughout the jurisdictions of the common law, that a detailed procedural code should not be enacted. It is also true, however, that justice not only should be done, but should also be seen to be done. Therefore, some fundamental procedural rules have been regarded as a method by which to guide administrators as well as to increase the public's confidence in the administrative process.

The bulk of the literature dealing with administrative procedure is based on a description of the common law and its criticism, but very little has been said about what a fair procedure should entail, and thus, what would be appropriate to enact in a minimum procedure act. Primarily, of course, there is the question of the applicability of such an act.

Applicability of a Minimum Administrative Procedure Act

It is important first to establish which administrative functions should be regulated by an administrative procedure act. A distinction is often made between adjudicative, investigative and rule making functions. (31) Adjudication is said to be a process in which the tribunal determines the rights and duties of specific persons with the result of a binding enforceable order. (32) Investigative proceedings are those

used to collect information before making a report, which might later be used by the tribunal when making its final decision. (33) The report itself is not binding or enforceable. Rule making, generally speaking, is the process of regulation-making by the tribunals. (34) The term also encompasses the making of informal procedural rules, guidelines, and policy standards. (35)

As has already been discussed, (36) the Statutory Powers Procedure Act in Ontario (37) completely exempts investigation and rule making from its scope. This appears to be a wise solution as neither investigation nor rule making have been studied in detail and it is possible to presume that any procedural rules applicable to them would unnecessarily hamper the tribunal's functions. (38) It seems to be protection enough that the final proceedings, which may well have been initiated by an investigation or regulation made by the tribunal, must be reached in accordance with procedural safeguards. For example, if a tribunal's investigation also must conform to the same procedural rules, it would probably be best to separate the functions within the tribunal as has been done in the United States (39) with the semi-independent hearing officers. (40) This approach is one which has been severely criticized, however, and in a Senate-Committee report it was said:

> "It has achieved some uniformity of procedure, some assurance of the application of fairer standards, but with its emphasis on "judicialization" has made for delay in the handling of many matters before these agencies." (41)

The American "judicialization" seems to have gone too far in regulating the administrative process. Professor Davis writes:

> "My opinion is and has long been that trial-type hearings are a clumsy way

> to determine how many banks and which banks ought to serve a community. Some of the worst processes of the federal government are those of the Federal Communications Commission and the Civil Aeronautics Board, whose proceedings in comparative application cases often cost individual parties several hundred thousand dollars and yet seem to have little utility. I think hearings in the banking cases should be held if, but only if, the prospects are that in particular circumstances such hearings will be the most efficient way to do what needs to be done; clearly trials are the best way to resolve disputes about specific facts." (42)

This "judicialization" has also generated non-compliance by agencies covered by the jurisdiction of the A.P.A., for example:

> "The Parole Board's refusal to give reasons for a denial of parole is a clear-cut violation of the Administrative Procedure Act, and the violation has continued from the time that act was made law in 1946." (43)

As the American method of separating functions within the agencies has been severely criticized, and as there is no similar separation in the Canadian common law, (44) it is my opinion that it has no place in an administrative procedure act for British Columbia.

An administrative procedure act for British Columbia should encompass all administrative decision-makers performing an adjudicative function. One of the main purposes of a code of natural justice is to avoid the common law distinctions between judicial, quasi-judicial, and administrative tribunals. The Ontario Legislature intended to avoid the common law distinction by stating that their procedure act should apply to all statutory powers of decision, (45) but this approach has given

rise to considerable difficulties, as the case of Re Robertson et al. and Niagara South Board of Education [46] illustrates. Here, the court still appears to make a classification of functions.

A possible solution to this problem may be to state that a statutory power is a power conferred by statute on an administrative, quasi-judicial or judicial tribunal. [47] This would cover the possibility of a court classifying a decision-maker as administrative, and thereby avoid the protection of the act, because it is clearly stated that the act also applies to administrative functions.

The proposal that an act should apply to all adjudicative tribunals, whether administrative, quasi-judicial or judicial, and not specially consider the particular tribunals functions, has been considered as a major flaw in the code approach by the Law Reform Commission in British Columbia. [48] This is due to the fact that it might put an extra burden on some administrative functions. The examples used in the Commission's report are emergency situations where speed is essential. [49] In my opinion, this problem is over emphasized, as it is possible to solve the problems involved in emergency situations by making exemptions. As the structuring of the tribunals is not based upon the similarity of their functions, the exemptions would have to include all tribunals which may need emergency powers. (In Sweden, administrative authorities with special powers are classified as carrying out "police functions" under certain circumstances. In this way they are exempt from the normal procedural rules). A good example is the Fire Marshal. As he carries out his inspections following a relatively regular scheme, it would not be necessary to exempt all proceedings from compliance with the minimum procedural rules. If an inspector

finds that there is a lack of the necessary fire fighting equipment, then he should be able to give the owner of the premises an opportunity to rebut the findings and present his side of the case, before an order is issued. In order to achieve the necessary efficiency, time limits could be stipulated for the rebuttal. This practice of fair procedure, before an order is issued, might also reduce the number of appeals the Fire Marshal needs to deal with. (50) At the same time, guidelines defining an immediate emergency could be stipulated and in emergency situations the inspector could carry out the necessary steps to protect the community. The procedural safeguards could be made available to the affected party after the actions have been carried out, if he should feel that the steps taken were unjustified.

The Law Reform Commission's use of the Fire Marshal to illustrate their criticism of the code approach with regard to emergency situations, appears to confuse the functions of the Fire Marshal. The Commission apparently thought that an administrative procedure act should be applicable to the power of the Fire Marshal to enter any building for inspection. (51) However, there is naturally a distinction between the power to enter and the power to make binding orders. The power to enter for inspection is generally regarded as a fair interference with private property for the benefit of the community. The Fire Marshal's investigative function would not be affected by an administrative procedure act, but the act would give the affected party an opportunity to challenge the findings and he would still have all the procedural safeguards necessary as protection from unfair or arbitrary government actions available to him.

All legal studies in this area have been concerned that a minimum

procedure act would hamper administrative efficiency due to the fact that the tribunals deal with such diverse areas of society. In Alberta, the Lieutenant in Council stipulates which tribunals should be affected, either in part or totally, by the Act. (52) The Ontario Act stipulates that there must be a hearing requirement in the enabling statute of the tribunal, before the minimum rules apply. (53)

My suggestion for British Columbia is that an act be applied to all tribunals, but that exemptions can be made by the Legislature, by expressly stating in the enabling statute of specific tribunals, that they are to operate notwithstanding the administrative procedure act. (54) I consider this to be a more positive yet more realistic approach to the problem, as procedural protection should be the normal state of affairs, and exemptions from it, unusual. In short, it is my opinion that a minimum procedure act in British Columbia should apply to all tribunals, regardless of whether they are classified as administrative, quasi-judicial or judicial, if the question they have to deal with concerns rights, duties, privileges, disciplinary action, or any other similar action. Such would be the case, unless the Legislature has explicitly declared in the establishing statute that a particular tribunal can operate notwithstanding the act. (55)

Fundamental Procedural Safeguards to be Enacted in an Administrative Procedure Act

There are a number of reports (56) and articles (57) suggesting which basic minimum procedural rules should be enacted in an administrativeprocedure act. Despite this, there appears to be no critical analysis of each rule, nor any discussion as to how much each may inhibit

administrative efficiency. As stated earlier, it has generally been agreed that a conflict exists between efficiency and procedural safeguards, but no one has evaluated the extent of this conflict. Until now, the criticism of minimum rules has been very general. (58)

In order to avoid hampering the efficiency of the administration, the rules are required to be very fundamental, and in essence, no more than a codification of the more essential rules of natural justice. It can be argued that, as these rules are so basic, the tribunals probably follow them already, and if this is the case, that it would be better to wait for a full investigation of each tribunal, as has been suggested by the Law Reform Commission of British Columbia. (59) However, it can also be argued that a minimum procedure act would serve as a method of educating both the administrators and the public, as well as help increase the public's confidence in the fairness of the public administration. The Ontario enactment does not appear to have hampered nor unnecessarily constrained the administration. (60) One may well consider a minimum procedure act as the beginning of more detailed procedural reforms by acting as a catalyst. One should keep in mind the Law Reform Commission's suggestion of making in inquiry into each tribunal, (61) which may well amount to over eight hundred separate studies, (62) and that since this suggestion was made, four years ago, nothing has been done.

My proposals and arguments for basic procedural requirements will be limited to the rules which have been used as sub-headings throughout the preceeding chapters. (63)

Notice

The most basic requirement to ensure fairness to those affected by the actions of a tribunal, is to give notice. This should be given allowing the affected persons reasonable time, and should include both information about the issue in question and a reference to the statutory authority under which the proceedings are to be held. (64) Time limits for communication should be stipulated, or the time and place of an eventual hearing stated. (65) In the majority of administrative tribunals the issues are repetitive and so it would be possible to use a standard form for notice. (66) This notice requirement can, in my opinion, apply to the rentalsman without hampering his efficiency as both landlords and tenants should have the right to know whether a proceeding is initiated which might result in adjudication. The Labour Relations Board already has to conform to similar notice requirements in both the Code and the Regulations. (67) The Fire Marshal, as stated earlier, (68) should not have to notify an owner or occupant of a building before his inspection, but should conform to this basic notice requirement before issuing an order.

Right to Particulars

As the notice requirement has been extended here to include both the issue in question and which statutory authority the proceedings are to be held under, the affected party should have all the information necessary to prepare his case. (69)

Hearing

The Ontario Act (70) is applied to statutory powers of decision when a tribunal is required to hold a hearing. It is my opinion that such an enactment would unnecessarily inhibit administrative efficiency

due to the fact that a hearing might not be needed in all proceedings where it is necessary to utilize other procedural safeguards. In Sweden, very few administrative decisions are made following an oral hearing. A hearing, in the Canadian context, can be extremely informal involving no more than a telephone call, as is the case in the rentalsman's hearing requirement. (71)

I suggest that an administrative procedure act should have a provision stating that no decision may be rendered before the affected party has been informed of all the information provided for the case, by persons other than the party himself, and that he may be given the opportunity to rebut the provided information. (72) Such a provision makes it necessary for the deciding tribunal to decide, at its own discretion, if a formal hearing is necessary, or if the case can be decided on the papers.

A minimum procedure act can be only a guideline for administrative decision-makers due to the diverse areas dealt with by each. The enactment which I have just described is similar to one used in Sweden. There they have established some exemptions to the communication requirement which seem to nullify it if any unscrupulous administrators should use their discretion. For example, the first exemption from the communication requirement is if the communication is "obviously unnecessary". If the administrator's discretion is left unfettered , the general communication requirement might well be rendered worthless. One must keep in mind, however, the different legislative processes in Sweden and Canada. The rules in Sweden are very general, but are exemplified in the extensive "preliminary work" carried out before any enactments are made. This "preliminary work" limits the interpreter's discretion

as it is used not only as a guideline for the administrators, but also as an instrument for the interpretation of the statutes by the Swedish courts. Thus, it nearly has the same status as the law itself. In the "preliminary work", the Swedish Parliament has made it clear that the exemption from the communication requirement, on "obvious unnecessary" grounds, applies only to application cases where the applicant is successful and where no one else's rights or privileges are affected. (73)

A second exemption is when a decision cannot be postponed. (74) This covers any emergency situations and excludes the communication requirement situations demanding speed. For example, an inspector's decision under the Fire Marshal Act, (75) when an order must be made and carried out immediately for the protection of the community. (76)

There must be exemptions in the provision of communication, but its success, if one were to follow the Swedish model, depends upon whether the rules are interpreted in good faith. A possible solution might be the formulation of policy guidelines by each tribunal concerning when the exemptions should be used. A guideline might also be enacted stating that after the rebuttal of a rebuttal, the communication be ended.

Disclosure of Information

In order to have a fair chance to make a case, it is important that one have full access to all the material used as a basis for the decision. An open society should be able to provide the parties involved with the information received or collected by their tribunals. A general rule should therefore be formulated assuring a party of his right to all material that will be used by the decision-maker when

arriving at his decision. In this way, the party involved can properly rebut the information and make his case. This rule naturally needs exemptions, but in most administrative proceedings it appears possible to let the party have the information. Justice can hardly seem to be done if the grounds for a decision is secret and not available for preparation of the rebuttal by the affected party.

The Ontario Act (77) apparently stops short of assuring this basic requirement except when the proceedings involve the good character of a party. If this is the case, the Ontario Act states only that "reasonable information" be given. (78)

If one makes it a general principle that all information be made available to the party concerned, there are two obvious exemptions which are needed. These are; information which is important for state security, and information which may harm or prejudice the source, if given to the involved party. This second exemption should not exclude disclosure completely. The tribunal could inform the affected party of the material without disclosing its source of information. This should not exclude the Labour Relations Board from informing the persons concerned of the findings in the Industrial Officer's report but the sources need not be disclosed. This could also apply to proceedings by the rentalsman, where complaints of disturbance should be made clear to the "accused", but the sources excluded. (79)

Adjournment

Considering the special facts and circumstances which may give cause for an adjournment, it is difficult to formulate a general rule as to when adjournment should be given. This decision must be left to

the discretion of the administrators. In order to protect the efficiency of the tribunals, it must be the exception rather than the rule to adjourn their proceedings. When material is circulated for rebuttal, there might instead be strict time limits. In this way the speed, necessary in administrative proceedings, can be achieved. (80)

Applicability of the Rules of Evidence

Rules of admissability of evidence might be a good procedural protection in the courts but they do not seem to have a place in an Administrative Procedure Act. (81)

Counsel

The right to counsel should be guaranteed in a minimum procedure act. There is a great consensus amongst those who have written on this subject that the affected party should have a right to counsel, (82) the reason being the protection of "the illiterate or inarticulate person". (83) The McRuer Report does not accept the argument that right to counsel creates an unnecessary additional expense and undue formality. (84) However, there does seem to be a problem with an unlimited right to counsel which has arisen due to the free legal aid service available to the public; the rentalsman often tries to solve landlord-tenant problems on the papers, but he also often uses an informal hearing, where the officer can meet with the parties. The former rentalsman, Mr. B. Clarke, expressed some concern over the fact that often tenants get a lawyer from Legal Aid to assist them at the informal hearing. This legal assistance is, of course, free. The

landlord, expecting an "informal hearing", finds his 'opponent' has legal counsel and invariably asks that the meeting be adjourned. He then hires his own legal representative for the next hearing. This series of events makes the rentalsmans job of mediation more difficult, and hampers the efficiency of his office due to delays and increases in the costs. (85)

Cross-Examination of Witnesses

Following the suggestion made in the McRuer Report, (86) the Statutory Powers Procedure Act (87) includes a provision (88) allowing a party to conduct the cross-examination of witnesses to obtain a full and fair disclosure of the facts. (89) This is one of the few procedural safeguards which has been directly criticised as being impractical.

> [T]he right to cross-examination. Must an Ontario regulatory authority taking disciplinary proceedings against one of its licensees refrain from acting on the statement of a complaint in British Columbia or on the report of a responsible official in its opposite number in British Columbia unless it can persuade them to come in person to Toronto?" (90)

As previously suggested, perhaps communication can often replace the administrative hearing, in which case, the question of cross-examination would not arise. One might also argue that an absolute right to cross-examination allows administrative proceedings to become too much like formal court room procedure, the avoidance of which was one of the major reasons of transfer from the courts to the tribunals. (91)

Hearing by Person Who Decides

It should be taken for granted that, before making a fair decision,

the decision-maker must be informed of all the relevant material in a case. It might, however, be possible to enact a rule stating that persons officiating at a hearing can not be joined by others who were not present when evidence was given. (92)

Reason for Decision

That the tribunal's decision should be made in writing, and each party notified is obvious, as it is necessary to inform the concerned persons of their legal position. However, should the communicated written decision also include the findings and reasons for the decision? The Alberta enactment (93) states that when the exercised power adversely affects the rights of a party, he should be given not only the decision in writing, but also a statement of the findings of facts upon which the decision has been based, and the reasons for the decision. (94) This extensive information duty has also been suggested in New Zealand. (95) The Ontario Legislature, on the other hand, decided not to impose what they felt to be too heavy a burden on the administration. The Statutory Powers Procedure Act (96) makes a compromise; reasons are to be given in writing if they are requested by a party. (97)

The general principle of the Swedish Act in this matter is that the decision should entail the reasons for the decision. (98) This principle is followed by exemptions which allow the tribunals the possibility (99) to omit the reasons. The major exemption is if the party was successful, the tribunal need not furnish him with their reasons. The party may still request that reasons be given however.

In British Columbia, I would suggest that the reasons accompany the written decision. Some exemptions are necessary - for example,

when the decision does not adversely affect a party's right, or, if state security is at stake.

This requirement does not have to hamper the efficiency of either the rentalsman or the Fire Marshal. The latter already has to give reasons when deciding appeals from the Inspector's decisions, (100) but one would think that the Inspector's initial decision would also have to state the reasons. The Labour Relations Board does not have to give reasons, (101) but it should be required to do so when using formal adjudication.

The reasons should include the decision-makers findings of facts and of law. Providing the party with both the findings and the reasons for the decision helps him to understand the decision better and allows him to evaluate his chances for a successful appeal. At the same time, making the administrators write down their reasons for decision ensures a more thorough analysis of the case and may result in fairer judgment.

Bias

The McRuer Report stopped short of codifying the common law rules regarding bias. (102) It seems necessary, however, to make some guidelines defining when an administrator is biased.

> "A glance at the judgments of the recent past disclosures that the incidence of proceedings alleging bias in tribunals is constant and increasing. One reason for this is the persisting uncertainty about the relationship between the tribunals and interested persons or their representatives. Another is the fact that many tribunals comprise of business competitors of the 'accused' - all domestic tribunals regulating professions

> do for instance and this leads, at times, to dark apprehensions of bias.
>
> There are no doubt other reasons. Until the relationship of tribunals to their own personnel and the outside world become better defined and until their proceedings become more regular and uniform, allegations of bias are not likely to decrease." (103)

The Swedish bias rule, (104) which is applicable to all administrative authorities, might be used to provide guidelines applicable even in a Canadian context. This rule provides that administrators involved in an administrative case are biased if, inter alia; (1) the matter concerns himself, or if the decision of the case can be presumed to result in favour or prejudice to him or anyone close to him; (2) he has handled the matter in another instance; (3) he has previously represented anyone who is a party in the matter; and finally, the blanket clause, (4) a particular circumstance is at hand likely to cause apprehension of impartiality in the matter. The section continues by adding that impartiality can be overlooked if it is obviously irrelevant.

Such an enactment does not solve all the problems of determining bias but it at least gives some guidelines. In order to protect the tribunals from abusive use of this section, an appeal of the tribunal's decision due to a question of bias can only be done once the final decision has been rendered on the merits of the matter.

These Swedish bias rules are not nearly as rigid as those applicable to judges and all administrative court judges in Sweden. (105)

The suggested guidelines for determining bias do not cause any problems for the rentalsman or Fire Marshal though they may prove difficult for the Labour Relations Board with its tripartite composition. (106)

When one considers such cases as Regina v. Ontario Labour Relations Board; Ex parte Hall [107] and Regina v. British Columbia Labour Relations Board, [108] (which were discussed in Chapter I), it seems as if the above guidelines would cover these situations.

CONCLUSION

Throughout my studies for this thesis I have become more and more aware of the fact that administrative law has been extensively researched, but without any consideration to its relationship to and its effect on the administrative process. Administrative tribunals have been enacted by the Legislature when it was felt necessary to do so, but very little thought seems to have been taken when establishing the procedural rules and guidelines. The public sector as a whole, is very unstructured, and without easily available information about what powers the different tribunals have, it is difficult to say for certain whether a minimum procedural act has much of a purpose to fill.

On the other hand, it would be unsatisfactory if the future development of administrative procedure was left entirely up to the courts. Both the administrators and the public need further information and more guidelines in the administrative justice system. This should be the responsibility of the Legislature. A minimum procedure act may be a good start in achieving a structured, conformed, and predictable administrative system.

A minimum procedure act is only a method of establishing guidelines and should, therefore, be enacted mainly for an educational purpose for the benefit of the administrators and the public. It would be a thin varnish over a very unstructured system, however, as the reform of the administrative justice system has to go deeper. This being the case, I am in full agreement with the Law Reform Commission of British Columbia that an inquiry is needed into each and every administrative tribunal. Such an inquiry should involve not only a look at procedural

questions, but also an investigation to try to find a method of structuring the tribunals after their function. It may also be possible, through the inquiry, to reduce the number of tribunals by combining those working in the same general areas.

FOOTNOTES: INTRODUCTION

1. I have chosen these eleven rules because I felt that they were the most common rules generally connected with a fair administrative process. For reference see, for example, the headings used in:

   Royal Commission Inquiry Into Civil Rights, Report I, Vol. 1 (1968), pp. 213-218;
   Law Reform Commission of British Columbia, Report on Civil Rights, Part 3 - Procedure Before Statutory Agencies (LRC 17 1974), pp. 23-29;
   Reid, Robert F.; Administrative Law and Practice (Toronto: Butterworths 1971) pp. 209-223;
   Laux, Frederick A.; The Administrative Process (Faculty of Law, University of Alberta, 3d reprint 1977) pp. 427-528.

2. See specially Reid, supra, note 1, pp. 53-67.

3. The Statutory Powers Procedure Act, S.O. 1971, c. 47.

4. The Administrative Procedure Act, 5 U.S.C. 551-559.

FOOTNOTES: CHAPTER I

PROCEDURAL SAFEGUARDS IN THE ADMINISTRATIVE PROCESS IN BRITISH COLUMBIA

1. The word tribunal will be used to cover all administrative bodies in the same manner as was adopted by the McRuer report. Infra, note 5, p. 28.

2. Wade, H.W.R.; Administrative Law (Clarendon Press: Oxford 3d 1971) p. 172.

3. Ibid, p. 173.

4. For example, see; The Board of Health for the Township of Saltfleet v. Knapman [1956] S.C.R. 877.

5. Royal Commission Inquiry into Civil Rights,report 1, vol. 1 (Frank Hogg 1968) p. 145. Hereafter referred to as the McRuer Report.

6. McRuer Report, ibid, p. 136.

7. Wade, Supra, note 2, chapter 3, pp. 46-102.

8. Wade, Supra, note 2, p. 50.

9. Law Reform Commission of British Columbia, Report on Civil Rights Part 3 - Procedure Before Statutory Agencies (LRC 17 1974) p. 19.

10. Ibid, see also McRuer Report, Supra, note 5, pp. 138.

11. Ibid.

12. McRuer Report, Supra, note 5, p. 139.

13. Supra, note 9, p. 12.

14. McRuer Report, Supra, note 5, p. 139.

15. Ibid.

16. Ibid, p. 138, see also Supra, note 9, p. 13.

17. Supra, note 9, p. 13.

18. Reid, Robert F.; Administrative Law and Practice (Toronto: Butterworths 1971) p. 212.

19. Ibid, p. 121 - The four approaches are; a) the nature of the process; b) the nature of the power; c) the nature of the result; and d) the duty to act judicially.

20. Ibid, p. 124.

21. This part is built mainly upon the structuring of the Law Reform Committee's report on procedure, Supra, note 9, pp. 13-17.

22. R. v. The Electricity Commissioners [1924] 1 KB 171 (H.L.) This case is followed by Nakkuda Ali v. Jayaratne [1951] A.C. 66 (P.C.) and in Canada by Calgary Power v. Copithorne [1959] S.C.R. 24, where the super-added duty to act judicially was used as the test.

23. Supra, note 9, p. 14.

24. Supra, note 22.

25. Reid, supra, note 18, p. 149.

26. Supra, note 22.

27. Reid, supra, note 18.

28. Howarth v. Prince George (1958), 14 D.L.R. (2d) 752.

29. R. v. Bird, ex parte Ross, (1963), 38 D.L.R. (2d) 354.

30. See Law Reform Committee Report, Supra, note 9, p. 17; McRuer Report, Supra, note 5, pp. 146-147; and Reid, Supra, note 18, pp. 128-130.

31. This trend is held to have started in In re H.K. (an infant) [1967] 2 Q.B. 617 (D.C.). See Mullan, D.J.; Fairness: The New Natural Justice (1975), 25 University of Toronto Law Journal 281, pp. 283-288.

32. R. v. Gaming Board of Great Britain, Ex parte Benaim and Khaida [1970] 2 Q.B. 417 (C.A.). On the other hand, it does not appear certain whether fairness has any procedural content. See Mullan, Supra, note 31, pp. 296-298.

33. Mullan, Supra, note 31, pp. 296-298. The author has found, however, some indications of attempts to adopt the fairness approach, i.e. Ex parte Beauchamp [1970] 3 O.R. 607 (Ont. H.C.) and two other cases. The approach, however, has not been adopted as ratio in any case. In two parole cases, the Supreme Court of Canada has upheld the dichotomy between the administrative-judicial functions; Howarth v. National Parole Board (1974), 50 D.L.R. (3d) 349 (S.C.C.) and Mitchell v. The Queen (1976), 61 D.L.R. (3d) 77 (S.C.C.). The dissenting judges, on the other hand, seem to adopt the fairness approach. In an unpublished article by David J. Mullan, Martineau and Butters v. Matsqui Institution Inmate Disciplinary Board: Its Potential Impact on the Jurisdiction of the Trial Division of the Federal Court, he says that in both the Howarth and Mitchell cases (plus two others), the Supreme Court has an opportunity to remark upon the fairness approach, but that the Court avoided these opportunities, apart from making "some statements of a most cryptic kind". (quoted from the conclusion of said article).

34. Hlookoff v. City of Vancouver (1968), 67 D.L.R. (2d) 199 (B.C.S.C.) See also Mullan, Supra, note 31, p. 292.

35. McRuer Report, supra, note 5, p. 138.

36. Ibid.

37. Klymchuk v. Cowan (1964), 45 D.L.R. (2d) 587.

38. Ibid, pp. 598-599.

39. Ibid, p. 600.

40. Supra, note 9, p. 23.

41. Supra, note 37, and Supra p. 10.

42. For example, see where particulars were not sufficient, Re Wilson and Law Society of British Columbia (1974), 47 D.L.R. (3d) 760 (B.C.S.C.). (NB the case was not decided on these grounds). On the other hand, where notice was held sufficient without particulars, due to the fact that the person concerned had knowledge and experience, and thus should have realized what he was up against, is found in: Regina v. Ontario Racing Commission, Ex parte Taylor, Infra, note 46.

43. Board of Education v. Rice [1911] A.C. 179, p. 182.

44. Ibid.

45. Reid, Supra, note 18, p. 57. See also, Law Reform Commissions Report, Supra, note 9, p. 24, where the content of a hearing requirement is summed up:

> "Thus, the general notice of the hearing depends on the type of agency, and whether in all the circumstances a fair and adequate opportunity is accorded affected individuals to present their case."

46. For example, Supra, note 4, and Regina v. Ontario Racing Commission Ex parte Taylor (1971), 1 O.R. 400 (Ont. C.A.).

47. Supra, note 9, p. 26.

48. Re Robinson, Little & Co. Ltd., [1976] 1 W.W.R. 171. See also Lazarov v. Secretary of State of Canada (1974) 39 D.L.R. 738 (Fed. C.A.), where it was stated, regarding confidential material:

> "That is not to say that a confidential report or its contents need to be disclosed to him but the pertinent allegations which if undenied or unresolved would lead to rejection of his application must, as I see it, be made known to him to an extent sufficient to enable him to respond to them and he must have a fair opportunity to dispute or explain them."

49. See Reid, Supra, note 18, p. 214 for cases.

50. Re Piggot Construction Ltd. v. United Brotherhood of Carpenters & Joiners of America (1974), 39 D.L.R. (3d) 311 (Sask. C.A.). The grounds for the decision appears to be that the adjournment was sought at the hearing when the party had known for a long time that he would be unable to attend.

51. McRuer Report, Supra, note 5, p. 138. See also, Board of Education v. Rice, Supra, note 43, where the Board could "obtain information in any way they think best."

52. Pett v. Greyhound Racing Association Ltd. [1968] 2 All E.R. 545 (C. A.) where Lord Denning seems to hold that if a man's reputation or livelihood is at stake, he should have the right to counsel. (at p. 549).

53. Reid, Supra, note 18, p. 215.

54. Toronto Newspaper Guild v. Globe Printing [1953] 2 S.C.R. 18. See also, St. John v. Fraser [1935] 3 D.L.R. 465 where the Supreme Court held that no right to cross-examination was to exist under the circumstances.

55. The King v. Huntingdon Confirming Authority, [1929] 1 K.B. 598. See also Mehr v. Law Society of Upper Canada, [1955] S.C.R. 344, and Re Ramur, [1957] 7 D.L.R. (2d) 378 (Ont. C.A.).

56. Ibid, p. 714.

57. McRuer Report, Supra, note 5, p. 138.

58. See Reid, Supra, note 18, pp. 253-254, and the cases cited there. If no reasons are given, the courts can presume that no good reasons are behind the decision. This was apparently the case in Padfield v. Minister of Agriculture Fisheries and Food, [1968] 2 W.L.R. 924. In this case, the Minister refused to refer a complaint from the farmers about a denial of an increase in prices by the local Milk Marketing Board to a special investigative committee. Lord Denning, M.R., said the following about the Minister's reasons:

> "Good administration requires that complaint should be investigated and that grievances should be remedies. When Parliament has set up machinery for that very purpose, it is not for the Minister to brush it on one side. He should not refuse to have complaint investigated without good reason.
>
> But it is said that the Minister is not bound to give any reason at all. And that, if he gives no reason, his refusal cannot be questioned. So why does it matter if he gives bad reasons? I do not agree. This is the only remedy available to a person aggrived. Save, of course, for questions in the House which Parliament itself did not consider suitable. Else why did it set up a committee of investigation? If the Minister is to deny the complaint a hearing - and a remedy - he should at least have good

> reasons for his refusal: and, if asked, he should give them. If he does not do so, the court may infer that he has no good reason. If it appears to the court that the Minister has been, or must have been, influenced by extraneous considerations which ought not to have influenced him - or, conversely, has failed, or must have failed, to take into account considerations which ought to have influenced him - the court has power to interfere."

59. Mullan, D.J.; Administrative Law (Carswell: Toronto 1973), paragraphs 45-49.

60. Ibid, paragraph 48.

61. For example, see Regina v. Labour Relations Board; Ex parte Hall (1963), 39 D.L.R. (2d) 113 and for more details see infra, p. 42. See also Reid, Robert F. Bias and the Tribunals (1970) 20 University of Toronto Law Journal, p. 119.

FOOTNOTES: CHAPTER I

THE RENTALSMAN

1. Established in Residential Tenancy Act, S.B.C. 1977, c. 61.
2. In the Landlord and Tenant Act, 1974 (B.C.) c. 45.
3. Klippert, G.B.; Residential Tenancies in British Columbia (Coswell Toronto 1976) p. 5.
4. For example, Vancouver Rental Accommodation Board.
5. Klippert, Supra, note 3.
6. Law Reform Commission of British Columbia, Report on Landlord and Tenant Relationships: Residential Tenancies. (LRC 13, 1973). Hereafter referred to as the Report.
7. Ibid, p. 27.
8. Ibid, p. 9.
9. Klippert, Supra, note 3, p. 5.
10. Supra, note 2.
11. Residential Tenancy Act, S.B.C. 1977, c. 61, hereafter referred to as the Act.
12. Some parts, of no importance to this thesis, had other dates of coming into force.
13. The Act, s. 42(1).
14. Ibid.
15. Ibid, s. 45(2).
16. The Public Service Act.
17. The Act, s. 45(7).
18. The Report, Supra, note 6, p. 42. The first appointed rentalsman, Mr. Barry Clark, is a radio-broadcaster and former Liberal Member of the Legislative Assembly in British Columbia.
19. Ibid.
20. Klippert, Supra, note 3, p. 197.
21. Ibid, p. 195.

22. Greenhut v. Scott, [1975] 4 W.W.R. 645 (B.C.).

23. Amendment, 1975, c. 4, s. 9.

24. The Act, s. 45(8).

25. Supra, p. 14.

26. The Report, Supra, note 6, p. 31.

27. The Act, s. 51(1).

28. Ibid, s. 51(2).

29. Ibid, s. 51(2)(1), see also Klippert, Supra, note 3, p. 196.

30. Ibid, s. 51(2)(f).

31. Ibid, s. 51(2)(t).

32. Ibid, s. 51(2)(s).

33. Ibid, s. 51(2)(x).

34. Klippert, Supra, note 3, p. 197.

35. Supra, note 22.

36. Ibid, p. 650.

37. The Report, Supra, note 6, p. 40.

38. The Act, s. 52(a).

39. Ibid, s. 52(b).

40. Ibid, s. 52(c).

41. Ibid, s. 52(d).

42. Interview with the Rentalsman, Mr. Barry Clark, Feb. 21, 1978.

43. Office of the Rentlasman: Monthly Statistics, December 1977, (January 24, 1978).

44. Ibid, however, disputed termination files were 1.665.

45. Ibid. Of the one hundred cases that went to a hearing, approximately 50% were not more formal than required in s. 48 of the Act, some of the hearings being held over the telephone, for example. Mr. Barry Clark said that his office encourages a settlement, but holds strongly that hearings are necessary as a right. One of the main advantages of hearings, he feels, was that during them, 50% of the cases were settled due to the fact that the parties involved had a chance to "get a lot off their chests".

46. Ibid.

47. Ibid, table 3.

48. Ibid, table 1.

49. The Report, Supra, note 6, p. 31.

50. Supra, p. 18.

51. Redman v. Siegler, [1976] 3 W.W.R. 609 (B.C.) p. 616.

52. Ibid, see Supra, p. 18.

53. Section 50(3) refers back to s. 49, which states:

> The rentalsman and the commission have the power, privileges and protection of a commissioner under sections 7, 10, and 11 of the Public Inquiries Act.

54. The Report, Supra, note 6.

55. Ibid, p. 38.

56. Ibid, p. 39.

57. Supra, p. 19.

58. The Report, Supra, note 6, p. 39.

59. Supra, note 22.

60. The Act, s. 45(8).

61. Supra, note 22.

62. Supra, note 22, p. 650.

FOOTNOTES: CHAPTER I

THE FIRE MARSHAL

1. The Fire Marshal Act, R.S.B.C. 1960, c. 148 (hereafter referred to as the Act.)
2. Jenns, H.K.: A Study of City of Vancouver Fire Bylaw No. 2193, 1976.
3. Ibid.
4. The Act, Supra, note 7, s. 9(1)(a)(b).
5. Ibid, s. 17(1).
6. Ibid, s. 36(1).
7. Ibid, s. 6(1)(a).
8. Ibid, s. 9(e)(i).
9. Ibid, s. 9(e)(ii).
10. Ibid, s. 9(e)(iii).
11. Ibid, s. 9(e)(iv).
12. Ibid, s. 10(1).
13. Ibid, s. 10(1) and (2).
14. Ibid, s. 12(1).
15. Ibid, s. 13(2).
16. Ibid, s. 14.
17. Ibid, s. 17(1) and (2) and s. 18.
18. Ibid, s. 17(1).
19. Ibid, s. 20(1).
20. Ibid, s. 20(2).
21. Ibid, s. 17(2)(a).
22. Ibid, s. 17(2)(b).
23. Ibid, s. 19(1).
24. Interview with Inspector W.C. Millar, Office of the Fire Marshal, February 20th, 1978.

25. Annual Report of the Fire Marshal for 1974, (B.C.).

26. Supra, note 24.

27. The Vancouver Sun, Monday February 6th, 1978.

28. The Act, Supra, note 7, s. 31-41.

29. Supra, note 24.

30. Law Reform Commission of British Columbia, Report on Civil Rights, Part 3: Procedure Before Statutory Agencies (LRC 17, 1974).

31. Ibid, p. 40.

32. Supra, p. 24.

33. The Act, Supra, note 1, s. 17(1).

34. Ibid, s. 19(1).

35. Ibid, s. 31-41.

36. R. v. Barry, [1950] 1 D.L.R. 284 (N.B.C.A.).

37. The Act, Supra, note 1, s. 21(e).

38. Ibid, s. 21(3).

39. Fefferman v. McCargar, [1947] 2 W.W.R. 742.

40. Supra, note 24.

41. Ibid.

42. The Act, Supra, note 1, s. 17(1).

43. Ibid, s. 17(2).

44. Supra, note 39.

45. Ibid, pp. 746-747.

46. Supra, note 24.

47. Re Fire Prevention Act (1963), 42 W.W.R. 568 (Sask.).

48. Ibid, p. 567.

49. Supra, note 36.

50. Ibid, p. 289.

51. Supra, note 39.

52. Ibid, p. 748.

53. Supra, note 24.

54. The Act, Supra, note 1, s. 17(2).

55. R. v. Castle (1941), 82 C.C.C. 318 (B.C.).

56. Ibid, pp. 319-320.

FOOTNOTES: CHAPTER I

THE LABOUR RELATIONS BOARD

1. Labour Code of British Columbia Act, R.S.B.C. 1973, c. 122, hereafter referred to as the Code.

2. Ibid.

3. Labour Code of British Columbia Regulations, Office Consolidiation 1977, hereafter referred to as the Regulations.

4. The Code, Supra, note 1, s. 12(1).

5. Ibid, s. 12(2).

6. Weiler, Paul C.: The Administrative Tribunal: A View From The Inside, (1976), 26 University of Toronto Law Journal 193, att. p. 199.

7. The Code, Supra, note 1, s. 26(2).

8. Weiler, Supra, note 6, p. 199.

9. The Code, Supra, note 1, s. 13(1).

10. Ibid, s. 13(2).

11. Ibid, s. 13(3).

12. Ibid, s. 14(1).

13. Ibid, s. 16.

14. Ibid, s. 8(2).

15. Ibid, s. 96(1)(a)(b).

16. Arthurs, H.W.: "The Dullest Bill": Reflections on the Labour Code of British Columbia, (1977), 9 University of British Columbia Law Journal, 280, p. 281.

17. The Code, Supra, note 1, s. 39-60.

18. Weiler, Supra, note 6, p. 198.

19. The Code, Supra, note 1, s. 8.

20. Ibid, s. 79-91. This area was prior to the Code, and was left to the exclusive jurisdiction of the Courts.

21. Weiler, Supra, note 6, pp. 200-201.

22. Ibid.

23. Ibid, p. 203.

24. Ibid.

25. Ibid, p. 205.

26. Ibid, p. 201.

27. Ibid, p. 201.

28. Interview with Mr. D. Jordan, employee of the LRB in Vancouver, March 21, 1978.

29. Ibid.

30. Ibid.

31. Weiler, Supra, note 6, p. 201.

32. Ibid, p. 203. Here Weiler writes:

> "There are some points in a collective bargaining relation when a firm, binding order is the best technique to end a troublesome problem. In other disputes a voluntary settlement simply is not achievable. For each of these situations, Board adjudication remains a live option."

33. Ibid, p. 204.

34. The Code, Supra, note 1, s. 21.

35. Ibid.

36. See Supra, note 1, and 3.

37. The Regulations, Supra, note 3, s. 21.

38. The Code, Supra, note 1, s. 8(1).

39. Ibid, s. 40(3).

40. Ibid, s. 21.

41. Ibid, s. 40(3).

42. The Regulations, Supra, note 3, s. 42.

43. Ibid, s. 7.

44. Ibid, s. 11.

45. Ibid, s. 12.

46. Regina v. Labour Relations Board (B.C.); Ex parte Loomis Armoured Car Service Ltd. (1964), 42 D.L.R. (2d) 49.

47. Re Robinson, Little & Co. Ltd., [1976] 1 W.W.R. 171.

48. Ibid, p. 173.

49. The Code, Supra, note 1, s. 19(2).

50. The Regulations, Supra, note 3, s. 13.

51. Ibid, s. 22.

52. Ibid, s. 16.

53. Ibid, s. 13.

54. Weiler, Supra, note 6, p. 203.

55. Ibid, p. 204.

56. For example, the Code, Supra, note 1, s. 21 and s. 40(3).

57. Weiler, Supra, note 6, p. 204.

58. The test most commonly used is if a reasonable man would feel there is a real or reasonable likelihood of bias.

59. Regina v. Ontario Labour Relations Board; Ex parte Hall, (1963), 39 D.L.R. (2d) 113.

60. Ibid, the headnote, p. 113.

61. Ibid.

62. Regina v. British Columbia Labour Relations Board; Ex parte International Union of Mine, Mill & Smelter Workers, (1964), 45 D.L.R. (2d) 27.

63. Ibid.

FOOTNOTES: CHAPTER II

TWO ADMINISTRATIVE PROCEDURAL CODES

1. The Administrative Procedures Act, Alberta, 1966, c. 1.

2. The Statutory Powers Procedure Act, S.O. 1971, c. 47 (in this subsection referred to as the Act).

3. The Administrative Procedure Act, 5 U.S.C. 551-559 (referred to as APA).

4. See Mashaw, J.L. and Merrill, R.A.: Introduction to the American Public Law System (St. Paul, Minn., West Publ. Co.) 1975, p. 211.

5. Law Reform Commission of British Columbia, Report on Civil Rights, Part 3 - Procedure Before Statutory Agencies (LRC 17) 1974, p. 37.

6. Supra, note 2.

7. Supra, note 3.

8. Royal Commission "Inquiry Into Civil Rights" 1964 (hereafter referred to as the Commission).

9. Royal Commission "Inquiry Into Civil Rights" Report No. 1, 1968 (hereafter referred to as the McRuer Report).

10. The Statutory Powers Procedure Act, S.O. 1971, c. 47.

11. The Public Inquiries Act, S.O. 1971, c. 49.

12. The Judicial Review Procedure Act, S.O. 1971, c. 48.

13. McRuer Report, No. 1, Vol. 1, p. 23.

14. Ibid, p. 212.

15. Ibid, p. 211.

16. Mundell, D.W., Manual of Practice on Administrative Law and Procedure in Ontario, Department of Justice & Attorney-General, 1972, p. 4.

17. Atkey, Ronald G., The Statutory Powers Procedure Act, 1971, (1972) 10 Osgoode Hall Law Journal 155, pp. 156-157. See also Mundell, Supra, note 16, p. 4.

18. Re Robertson et al. and Niagara South Board of Education (1974), 41 D.L.R. (3d) 57.

19. Ibid, the headnote p. 57.

20. Mundell, Supra, note 16, p. 5.

21. Re Carrington's Building Centre Ltd. and Ontario Housing Corporation (1974), 43 D.L.R. (3d) 178.

22. Ibid, p. 181.

23. The Act, Section 6(2)(a) and (b).

24. Ibid, Section 6(2)(c).

25. Re Seven-Eleven Taxi Co. Ltd. and City of Brampton (1976), 64 D.L.R. (3d) 401.

26. Ibid, p. 405.

27. Atkey, Supra, note 17, p. 164.

28. Supra, note 25.

29. Mundell, Supra, note 16, p. 13.

30. See Supra, p. 48.

31. The Act, Supra, note 2, s. 4.

32. Ibid, s. 9.

33. See Supra, p. 2.

34. Mundell, Supra, note 16, p. 23.

35. Ibid, p. 18.

36. Ibid, p. 15.

37. The Act, Supra, note 2, s. 23(3).

38. See Supra, p. 54.

39. The Act, Supra, note 2, s. 23(2).

40. See Supra, p. 12.

41. Mundell, Supra, note 16, p. 22. In Re DiNardo and Liquor Licence Board of Ontario (1975), 49 D.L.R. (3d) 537, one of the questions involved was whether the nineteen page summary, and half page long conclusion of the proceedings before the Liquor Licence Board was adequate as "written reasons". The judge held that it was not, because it did not "set forth adequate reasons for the decision as it makes no findings and refers to no consideration bearing upon the result stated." (at p. 547).

42. Mundell, Supra, note 16, p. 22. This distinction is here made. However, it is put within brackets.

43. Administrative Procedure Act, 5 U.S.C. 551-559 (hereafter referred to as APA).

44. Attorney General's Manual on the Administrative Procedure Act, W.M. W. Gaunt & Sons Inc. Florida, reprint 1975, p. 5.

45. Administrative Procedure in Government Agencies, Report of the Committee on Administrative Procedure, University Press of Virginia, 1968, p. vi.

46. Ibid.

47. Ibid.

48. Supra, note 44, p. 5.

49. Ibid.

50. Ibid.

51. Ibid.

52. Ibid.

53. Ibid, p. 6.

54. Ibid.

55. Ibid.

56. Ibid.

57. Mashaw and Merril, Introduction to the American Public Law (St. Paul, Minn. 1975), p. 211.

58. Ibid, however, a revised Model State Administrative Procedure Act was passed in 1961.

59. APA, 551(1).

60. Ibid.

61. Ibid, 551(4).

62. Ibid, 551(4).

63. Supra, note 44, p. 14.

64. Ibid.

65. Ibid.

66. APA, 551(6).

67. Ibid, 551(7).

68. Supra, note 44, p. 17.

69. APA, 554(a).

70. Supra, note 44, p. 41.

71. Ibid.

72. APA, 544(a)(1).

73. Ibid.

74. Ibid, 554(b)(1).

75. Ibid, 554(b)(2).

76. Ibid, 554(b)(3).

77. Supra, note 43, p. 47.

78. In the Canadian common law there are no rules regarding separation of powers within a tribunal. The only common law restriction similar to a separation of powers is that a decision-maker cannot hear an appeal from his own decision. The courts classify this as a breach of the rules of natural justice regarding bias. See R. v. Alberta Security Commission Ex parte Albrecht (1963), 36 D.L.R. (2d) 199, and King v. The University of Saskatchewan, [1969] S.C.R. 678, where the decision was reversed as it involved the conferring of degrees.

79. APA 554(d)(2).

80. Ibid, 552(d).

81. However, in the United States they also have a Freedom of Information Act, 5 U.S.C.A. p.552, dealing with the publication of agency organization procedures, policies and decisions, etc. Subsection (3) provides that agencies shall make available all other "identifiable records" at the request of any person. This rule is then supplemented by nine enumerated exemptions from the disclosure of agency records.

82. APA 554.

83. Ibid, 556(d).

84. Ibid, 555(b).

85. Ibid, 556(d).

86. Ibid, 557(b).

87. Ibid, 557(b).

88. Ibid.

89. Ibid, 556(e), 557(c).

90. Ibid, 557(c) (A) (B).

91. Supra, p. 58.

92. APA, 556(b).

93. Ibid.

94. Ibid.

95. Ibid.

FOOTNOTES: CHAPTER III

SHOULD BRITISH COLUMBIA ENACT A MINIMUM ADMINISTRATIVE PROCEDURE ACT?

1. Law Reform Commission of British Columbia, Report on Civil Rights, Part 3 - Procedure Before Statutory Agencies (LRC 17) 1974.

2. Bill: Guarantee of Natural Justice Act, No. 98. Mr. Wallace, 1973 second session.

3. Supra, note 1, p. 55.

4. Ibid, p. 7.

5. Ibid, p. 36.

6. Ibid, pp. 38-43.

7. Ibid, p. 39.

8. Ibid, pp. 43-46.

9. Willis, John: The McRuer Report: Lawyers' Values and Civil Servants' Values, (1968), 18 University of Toronto Law Journal 351.

10. Supra, note 1, p. 5, p. 39.

11. Supra, note 9, p. 358.

12. Supra, note 1, p. 17.

13. Royal Commission, Inquiry Into Civil Rights, Report 1 (Ontario 1968) McRuer Report.

14. Ibid, p. 146.

15. Ibid.

16. Ibid, p. 147.

17. Ibid.

18. Public and Administrative Law Reform Committee, Administrative Tribunals Constitution Procedure and Appeals Report, New Zealand (1970) Orr. G.S., Report on Administrative Justice in New Zealand (Wellington, New Zealand), 1964.

19. Keith, K.J., A Code of Procedure for Administrative Tribunals, number 8 (Auckland, New Zealand), 1974.

20. McRuer, Supra, note 13, p. 210.

21. Ibid, p. 211 and 212.

22. Ibid, p. 211.

23. Ibid.

24. Ibid.

25. In an interview with both the rentalsman, Mr. B. Clarke, as he then was, and Inspector Millar, they felt that a minimum administrative procedure act would be a help. The rentalsman specially emphasized the educational value of such an act. He had found one of the major problems he had in the present system was in getting his staff to understand the concept of natural justice.

26. See, for example, McRuer report, Supra, note 13, p. 210.

27. Report of the Committee on Administrative Tribunals and Enquiries (The Frank's Committee)(London, 1957).

28. Law Reform Commission of British Columbia, Supra, note 1.

29. McRuer Report, Supra, note 13.

30. Ibid, p. 211.

31. Law Reform Commission of British Columbia, Report on Civil Rights, Part 3 - Procedure Before Statutory Agencies (LRC 17) 1974, p. 11.

32. Ibid.

33. Ibid.

34. Ibid.

35. Ibid, p. 32.

36. Supra, p. 50.

37. The Statutory Powers Procedure Act, S.O. 1971, c. 47.

38. Supra, note 31, p. 11.

39. The Administrative Procedure Act, 5 U.S.C. 551-559.

40. Supra, p. 63.

41. Report on Regulatory Agencies to the President - Elect, Senate Judiciary Committee, 86th Congress, 2nd session (1960) p. 16.

42. Davis, Kenneth Culp; Discretionary Justice: A Preliminary Inquiry. University of Illinois Press, (4th print) (1977) p. 129.

43. Ibid, p. 14. Davis' book includes several examples of non-compliance, for example, p. 129.

44. See footnote 78 in Chapter II.

45. Supra, note 37, s. 3(1).

46. Re Robertson et al. and Niagara South Board of Education (1974), 41 D.L.R. (3d) 57. See also Supra, p. 48.

47. This is done in the Alberta Administrative Procedures Act, R.S.A. 1970 c. 2.

48. Supra, note 31.

49. Ibid, pp. 41-42.

50. Supra, p. 25.

51. Supra, note 31, p. 40.

52. Supra, note 47, s. 3.

53. Supra, note 37, s. 3(1). See Supra p. 48.

54. This is taken from the solution found in the Canadian Bill of Rights, S.C. 1960, c. 44, R.S.C. 1970, s. 2.

55. I feel that it is unnecessary to enact anything "for greater certainty, but without restricting the generality of the foregoing", which is the common drafting method used in Canada. This, however, may well be influenced by the fact that I am used to a different legislative technique.

56. Royal Commission Inquiry Into Civil Rights, Volume 1, Toronto (McRuer Report), (1968), Report on Administrative Justice in New Zealand. Orr, G.S. (Wellington, New Zealand) (1964).

57. Englander, A. and Marantz, J.; Required: An Administrative Procedure Act for Ontario (1960-63), 2 Osgoode Hall Law Journal 1976. Harris, M.C.; A Critical Analysis of the Composition, Hearing Procedure, and Appellate Structure and Powers of South Australian Administrative Tribunals (1971-72), 4 Adelaide Law Review 489.

58. Willis, John; The McRuer Report: Lawyers' Values and Civil Servants' Values, (1968), 18 University of Toronto Law Journal 351.

59. Supra, note 37.

60. There does not appear to be any critical evaluation of what happened after the enactment in 1971.

61. Supra, note 31, p. 43.

62. Ibid, p. 22.

63. There may well be other rules that could have a place in an Administrative Procedure Act, however, they lie outside the scope of this thesis.

64. See Supra, note 56 and 57, where all writers have suggested a notice requirement along these lines.

65. Ibid. For a distinction between communication and hearings, see infra p. 81.

66. Naturally, a notice requirement is applicable only when it fills a purpose, as it might not be necessary in application cases not involving a third party, and where the decision is more a matter of form, for example, social assistance, family allowance, or the renewal of a lost driver's licence.

67. See Supra, Pp. 35-36.

68. See Supra, pp. 77-78.

69. In Sweden the Administrative Procedure Act includes a positive declaration to the effect that civil servants shall help and guide the involved party in order to enable him to present his case. Thus, if the party does not understand the issue, or feels the need for further information regarding particulars, the civil servants are under a duty to supply him with the necessary information. Forvaltningsrattslagen No. 290, 1971.

70. Supra, note 37, s. 3(1).

71. Residential Tenancy Act, S.B.C. 1977, c. 61, see Supra, p. 18. What a "hearing" entails varies from statute to statute, and from court ot court. For further reference see Reid, R.F.; Administrative Law and Practice. Toronto, Butterworths (1971), specially chapter 2; The Nature of the Hearing, pp. 53-101.

In British Columbia, the hearing requirement can be complied with by a phone call, as is the case with the rentalsman. It can also mean a written communication, as is the case for the Superintendant for Credit Unions when he makes inquiries into the affairs of the Credit Unions. The latter is due to the provision made in the Credit Union Act, S.B.C. 1975, c. 17, s. 178, which states that everyone addressed by the Superintendant "shall reply promptly to the inquiry and, if so required, in writing." The hearing requirement can even be expressly excluded, as is the case in the Societies Act, S.B.C. 1977, c. 80. Here, section 91 provides:

> "Except where otherwise expressly specified in this Act or the regulations, it is not necessary for the minister, the commission, the registrar, or any other person to hold a hearing as to receive submissions as a condition precedent to the exercise of a power, function or duty under this Act."

72. After the Swedish Forvaltningsrattslag, 1971, No. 290, s. 15.

73. Stromberg, Hakan; Allman Forvaltningsratt (Lund, Sweden) 1974 (7d) p. 117.

74. Forvaltningsrattslagen, Supra, note 72, s. 15(4).

75. The Fire Marshal Act, R.S.B.C. 1960, c. 148.

76. Ibid, s. 17.

77. Supra, note 37.

78. Ibid, s. 8.

79. The suggested rule is basically the same as that in s. 14 of the Swedish Administrative Act, Supra, note 69. In Sweden, public documents and information are made readily available to the public. A person involved in administrative proceedings has an even greater freedom of information. This Swedish "openess" has attracted a great deal of attention from various common law jurisdictions.

80. From a Swedish view point, it is difficult to appreciate the fact that an administrative decision can come under judicial review, for example, challenged by a breach of natural justice, without a time limitation for this appeal possibility.

81. This appears to be the solution generally accepted. See, for example, Orr, G.S.; Report on Administrative Justice in New Zealand, (1964) paragraph 195 and paragraph 216. However, the Ontario Act, Supra, note 37, has some basic rules of evidence. Supra, p. 55. See also McRuer Report, Supra, note 56, pp. 216-217.

82. McRuer Report, Supra, note 56, p. 215.

83. Ibid.

84. Ibid.

85. Interview with the rentalsman, Mr. B. Clark, (as he then was), Feb. 21st, 1978. It seems impossible, however, to assure the right to counsel and exclude Legal Aid.

86. McRuer Report, Supra, note 56, p. 216.

87. Supra, note 37.

88. Ibid, s. 10(c).

89. See also, Orr, Supra, note 81, paragraph 198 and paragraph 216 where he suggests that the right to cross-examination should be encompassed in a proposed administrative act for New Zealand.

90. Willis, John; The McRuer Report: Lawyers' Values and Civil Servants' Values (1968), 18 University of Toronto Law Journal, pp. 358-359.

91. I fully realize that to admit to the fact that I would prefer cross-examination to be left out, is almost a sacrilege in the common law countries.

92. This would merely be a codification of the common law, see Supra, p. 12.

93. Supra, note 47.

94. Ibid, s. 8.

95. Supra, note 81, paragraph 216.

96. Supra, note 37.

97. Ibid, s. 17

98. Supra, note 71, s. 17.

99. The exemptions are not mandatory. The Act states that the tribunals may omit the reasons.

100. See Supra, p. 30.

101. See Supra, p. 41.

102. See Supra, p. 58.

103. Reid, Robert F.; Bias and the Tribunals (1970), 20 University of Toronto Law Journal 119, pp. 119-120.

104. Supra, note 71, s. 4.

105. Supra, note 73, p. 102.

106. See Supra, p. 32.

107. Regina v. Ontario Labour Relations Board; ex parte Hall, (1963), 39 D.L.R. (2d) 113. See case comment, Supra p. 42.

108. Regina v. British Columbia Labour Relations Board, (1964), 45 D.L.R. (2d) 27. See case comment, Supra, pp. 42-43.

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