LAW REFORM COMMISSION OF BRITISH COLUMBIA

REPORT ON CIVIL RIGHTS

(Project No. 3)

PART III PROCEDURE BEFORE STATUTORY AGENCIES

LRC 17

1974

The Law Reform Commission of British Columbia was established by the *Law Reform Commission Act* in 1969 and began functioning in 1970.

The Commissioners are:

Leon Getz, Chairman.
Ronald C. Bray.
Paul D. K. Fraser.
Peter Fraser.
Allen A. Zysblat.

Keith B. Farquhar is Director of Research to the Commission.
Arthur L. Close is Counsel to the Commission.
Edward E. Bowes is Legal Research Officer to the Commission.

Miss Patricia Thorpe is Secretary to the Commission.

The Commission offices are located on the 10th floor, 1055 West Hastings Street, Vancouver, British Columbia.

TABLE OF CONTENTS

TO THE HONOURABLE ALEX B. MACDONALD, Q.C.
ATTORNEYGENERAL FOR BRITISH COLUMBIA:

The Law Reform Commission of British Columbia has the honour to present the following:

REPORT ON CIVIL RIGHTS
(Project No. 3)
Part III Procedure Before Statutory Agencies

This Report has been prepared in the Commission's study on Civil Rights, which is Project No. 3 in the Commission's Approved Programme.

It is the result of an examination by the Commission of the existing law relating to the procedures by which agencies of government apply the policies of the Legislature to individuals and their property.

It differs from all previous Reports of the Commission in that no substantive recommendations for reform are made, for reasons which are made clear in the body of the Report. What has been attempted, rather, is a careful isolation of the relevant issues, coupled with a recommendation that they be the subject of an evaluation by a specially constituted body of inquiry.

CHAPTER I INTRODUCTION

A. ___General

In any modern society it is inevitable that the executive branch of government, in administering the policies of the legislature, will be called upon to make decisions involving the individual and his property. These decisions may be entrusted to the LieutenantGovernor in Council, Ministers of the Crown, tribunals, boards, commissions, local authorities, civil servants or municipal employees, and in this Report we refer collectively to these bodies and individuals as "agencies."

2. *Royal Commission Inquiry into Civil Rights* 38 *et seq*. (Ontario 1968) [hereinafter cited as *Royal Commission Inquiry*].

3. *Ibid*.

4. For a summary of the historical development of the present common law position, *see* de Smith, *Judicial Review of Administrative Action* 4 *et seq*. (3rd ed. 1973).

In a recent and wideranging survey of the law in this area a distinction was drawn between the power of the executive branch of government to conduct the business operations of government on the one hand and to exercise "statutory subordinate legislative, administrative, judicial and ministerial powers" on the other.

Of the latter power it was said:

> Persons in the executive branch on whom such powers are conferred are in an entirely different position from persons who act only as agents or servants of the sovereign in business operations carried on under the ordinary law. By the exercise of these powers they can change or take away or determine finally the rights of individuals. They have, therefore, a power to encroach or infringe on rights.

One of the most fundamental ideals of a democratic society is that the power of the executive branch "to encroach or infringe on rights" should not be exercised arbitrarily but, rather, should be exercised in a fair and just manner according to law. But what is considered to be fair and just in particular situations, and what the law is or ought to be has throughout the common law world been differently perceived at different times by legislatures and courts. For historical reasons common law jurisdictions have been opposed to the setting up of separate courts for the resolution of administrative law matters, and this has contributed to a lack of consistent principle in the law governing the complex relationships between the legislature, the courts, the executive and the individual when the fairness or legality of the acts of the various agencies of the executive towards the individual are in issue.

This lack of consistent principle is as evident in the area of the law governing the procedures by which agencies should arrive at their decisions as it is in any other area of administrative law. There is, on the one hand, the view that agencies performing courtlike functions ought to adopt procedures similar to those of courts. There is on the other hand, the view that however desirable in the abstract the adoption of courtlike procedures by agencies might be, there is a price to be paid for this in the sacrifice of sound and efficient public administration.

It is with the uncertain state of the law in this area, and the compromises between the two views which ought to be reached when the two are in conflict, that this Report is concerned.

B. History of Procedural Reform in Administrative Law

Numerous formal attempts have been made in common law jurisdictions over the last forty years to confront the issue of the way in which agencies may be regulated in arriving at decisions affecting individuals and their property.

In England in 1932 the Committee on Ministers' Powers made a number of recommendations for change,

6. Report of the Committee on Administrative Tribunals and Enquiries (1957, Cmnd. 218).

7. 6 and 7 Eliz. II, c. 66.

8 5 U.S.C. ss. 551 559. and in 1957 the Report of the Committee on Administrative Tribunals and Inquiries, appointed in 1955, was submitted to the Lord Chancellor. The result of the latter Committee's findings was the enactment of the *Tribunals and Enquiries Act, 1958* under which has been constituted the Council on Tribunals. The Council is instructed to survey the procedures of certain named tribunals, but its functions are primarily advisory.

In the United States an *Administrative Procedure Act* was enacted at the federal level in 1946, and in the same year the National Conference of Commissioners on Uniform State Laws promulgated a *Model State Administrative Procedure Act*, revised in 1961. Both pieces of legislation attempt to set out general principles on the judicial model for the conduct of some agency proceedings. In addition an *Administrative Conference Act* was enacted at the federal level in 1964, setting up an Administrative Conference to make studies of administrative procedure, and to collect and arrange for the interchange of information.

In New Zealand the Public and Administrative Law Reform Committee has been considering for some years the question of procedure before agencies, but in facing the question whether there should be a comprehensive statutory code of procedure for all agencies, has concluded that such a code is not practicable.

In Canada the matter has been the subject of recent study in two jurisdictions. In Alberta *The Administrative Procedures Act*

11. *Ibid*. s. 2(a).

12. *Ibid*. s. 3.

13. 1 *Royal Commission Inquiry* 212 13.

14. S.O. 1971, c. 47. *See* Appendix B.

was passed in 1966, setting out a code of procedure on the judicial model, applicable to all persons "authorized to exercise a statutory power." The Act, however, does not apply to any agency unless it is specifically brought within the ambit of the Act by the Lieutenant Governor in Council.

In Ontario, in 1964, the Provincial Secretary appointed a Royal Commission of Inquiry into Civil Rights, and among the broad range of governmental matters studied by this Commission was the issue of administrative procedure. In its final report the Commission recommended the enactment of minimum rules of procedure applicable to all agencies, whether judicial or administrative, with certain defined exceptions. The result was *The Statutory Powers Procedure Act, 1971,* which applies to all agencies which are constituted by statute, exercise powers of decision and are required by law to hold hearings.

We refer in more detail throughout this Report to the legislation and experiences of these other common law jurisdictions in the field of procedural reform in administrative law.

C. The Commission's Report

The Commission began this project by retaining Mr. David Huberman (formerly of the Faculty of Law, University of British Columbia) for the purpose of conducting the background research for the study and formulating recommendations for reform. In this Mr. Huberman was joined more recently by Professor Alistair Lucas (also of the Faculty of Law, University of British Columbia).

Our consultants reviewed some existing tribunal practices, relevant case law, legislation and literature, and were aided significantly in this exercise by the work of the Ontario Royal Commission Inquiry into Civil Rights. During the course of their study our consultants also conducted two workshops in Victoria on June 28 and July 3, 1973 in cooperation with Mr. D. R. Sheppard, then Director of Legal Research and Reform, Department of the AttorneyGeneral. The first session was attended by members of the Department of the AttorneyGeneral who regularly provide legal advice to agencies. The second was attended by a group of administrators representing some fifteen different agencies. Tentative proposals were presented through a discussion paper, and comment and criticism received. In addition, interviews were later conducted with a number of administrators and agency members not reached through the workshops.

The Commission acknowledges with much gratitude the work of Mr. Huberman and Professor Lucas, and of Mrs. Joan Marshall, who assisted Mr. Huberman. Their research was invaluable and has provided the basis for much of the expository portions of this Report. We must, however, point out in fairness to them that the Commission's conclusion is not the one which they proposed to us. They suggested to us that, subject to an important qualification, a set of minimum standards of procedure should be enacted which would apply to all agencies. The qualification was that before the statute became one of universal application, the agencies themselves should have an op-

portunity to analyze their functions in the light of the statute and make submissions to a specially constituted body on whether the provisions of the statute would unduly inhibit them in the discharge of those functions.

The Commission was not able to accept this proposal, for reasons which are set out in the body of this Report.

It is the Commission's normal practice, before submitting a report to the AttorneyGeneral, to circulate a working paper for comment and criticism by interested members of the public. In view, however, of the special nature of the recommendation made in this Report, it was thought inappropriate that a working paper be circulated in this instance.

CHAPTER II THE NATURE OF THE ADMINISTRATIVE PROCESS

A. Basic Assumptions

As a starting point it is necessary to specify the assumptions underlying the examination which follows of the current law and practice of administrative procedure in British Columbia. This analysis is based on the explicit recognition of the following characteristics of the administrative process:

(a) That it is a *process* that may range through many stages over long intervals of time, and may be identifiable as rulemaking, adjudication or investigation only at certain points;

2. *See*, Law Reform Commission of British Columbia, A *Procedure for the Judicial Review of the Actions of Statutory Bodies*, Working Paper No. 10 (1974).

(b) That the basic objective of the Legislature in creating agencies, at least in the broad sense, is the carrying out of government policy as expressed in the statutes that establish the agencies.

(c) That the effects of agency decisions are not limited to individuals who directly invoke the agency process, but may extend to a wide segment of the public in a variety of ways;

(d) That individual rights, property and reasonable expectations may be significantly affected by agency decisions, investigations, and rules;

(e) That agencies differ significantly in their powers, objectives, staff and skill, and the individual and public impact of their activities:

(f) That while many powers of decision are vested in the LieutenantGovernor in Council or in a minister of the Crown, in fact the effective power may be exercised by expert public servants through advice and recommendations.

Much of the study of administrative procedure in England and in other Canadian jurisdictions has emphasized only certain parts of agency decisionmaking. There has tended to be a focus on only the *formal* parts of agency decision processes those involving the "hearing" or formal informationgathering and on the formal "decision" and the possibilities for judicial review immediately following the decision.

This emphasis is not surprising in view of the lawyer's common preoccupation with the trial model. It is important to note, however, that intervention at other points in the administrative process such as the rulemaking stage is possible, and indeed may be necessary to ensure adequate safeguards for affected members of the public. It must

also be emphasized that the trial model, as exemplified by the adversarystyle public hearing, is only one of a number of techniques that may be used to promote administrative fairness. Other techniques include the use of "public defenders" and "agency ombudsmen", based on a mediation model. Special education programmes for administrators may also be used, to foster an awareness of the need for procedural fairness and an understanding of what procedures are likely to achieve basic fairness in particular circumstances.

B. Control Points in the Administrative Process

The administrative process must be viewed as *a process*. Only in this light does it become obvious that a number of possibilities for control exist in addition to those arising from formal rules or mechanisms for judicial review.

The diagram which follows illustrates in simplified form a typical licensing tribunal process, and the points at which control may be exercised.

[DIAGRAM OMITTED]

Each control point requires brief explanation:

(1) Safeguards can be included in the governing statute by the Legislature in the first instance, or can be introduced by specific amendment. These, for example, could take the form of mandatory notice and hearing procedures, mandatory consultation of experts, public interest advocates or appeal provisions in short, statutebystatute enactment of the kind of procedural safeguards referred to in Chapter III.

(2) The nature of the appointing body and the qualifications, tenure, salary and "effective independence" of agency members and staff provide another possibility for control.

(3) Policy development and interpretation could be subjected to procedural requirements including notice, representation and publicity, and therefore marks another control point.

(4) The development of procedural rules by an agency, and an agency's own interpretation of broad statutory procedural requirements which may apply to it, can similarly be subjected to procedural requirements. The provision for open proceedings and consequent publicity may be regarded as an important control technique in itself.

(5) Adequate notice of agency proceedings can be given to all interested parties. A liberal interpretation of who is an "interested party" will allow participation in the administrative process by persons representing a wide range of interests, and this can be an effective form of control of the process.

(6) Adequate information disclosure requirements (which might include informal consultation and negotiation with affected parties) are likely to ensure fully informed submissions by individual participants in agency proceedings.

(7) A requirement that the formal hearing be conducted according to basic rules of procedural fairness (outlined more fully in Chapter III) is a significant form of control. Openness ensures a maximum opportunity for publicity.

(8) A formal reasoned decision by the agency again provides opportunity for publicity, and also furnishes the basis for administrative or judicial review, or both.

(9) Administrative review refers to the provision of rights of statutory appeal to a separate administrative agency.

(10) Judicial review refers to supervision of agency actions by the courts according to specified legal principles. The vehicle for this supervisory function might be a statutory appeal, or one of the traditional public law remedies such as review by way of *certiorari,* prohibition or mandamus.

4. *Ibid*. 383 *et seq*.

(11) Institutions of the kind represented by ombudsmen are not yet common in our system, though ombudsmen do exist in several provinces. It should be noted that other bodies such as the English Council on Tribunals perform the same functions of scrutiny, investigation and mediation as might an ombudsman.

(12) Legislative review might include legislative committees, Royal Commission review, or simple variation or reversal of agency decisions by statute. These controls are all based on the underlying principles of representative legislators and ministerial responsibility in a parliamentary system.

(13) and (14) Basic rules of procedural fairness might also ensure a greater measure of protection for individuals affected by the investigatory or prosecutorial functions which may be entrusted to agencies.

C. Adjudication, Investigation and Rulemaking

For the purposes of present analysis, the administrative process may be divided into three types of functions adjudicative, investigative and rulemaking. Of the three, only the first, the adjudicative function, has received extensive judicial, scholarly and legislative attention in Canada. Even law reform bodies have devoted little attention to investigatory and rulemaking powers. The Ontario Royal Commission of Inquiry for example, dealt summarily with the subject of rulemaking, and gave only slightly more consideration to problems associated with investigative proceedings.

Adjudication refers to the process by which agencies make decisions, authorized by law, which determine rights, duties or legitimate expectations of specific persons, and result in binding, enforceable orders. This process is often analogous to that of the ordinary courts. The situation may not, however, always be strictly one involving a dispute between parties and therefore it must be emphasized that the analogy of procedures in the ordinary courts should not be rigorously applied.

Investigative proceedings are those involving the statutory power of one or more persons to conduct investigations of the affairs, conduct or character of individuals, and then to make a report with or without recommendations to an agency with ultimate decision-making power in the matter. Thus an investigative authority does not make an order that is itself binding or legally enforceable. No formal charges will be involved. The process itself is designed to determine facts that will allow a decision to be made as to what further steps should be taken in the matter. Further steps will often involve the laying of formal "charges" under regulatory Acts, or even criminal or quasicriminal prosecutions.

Rulemaking includes the process of regulation-making by agencies. The term is intended, however, to extend to agency activities that are less formal than the development and promulgation of subordinate legislation. Thus, rulemaking includes the making of informal procedural rules or guidelines, and decision criteria or policies intended to guide agencies in the exercise of decision functions.

It is against the background of the preceding general analyses of the administrative process, and its component functions, that an attempt is made to set out in the following chapter the lack of consistent and coherent principle in the law relating to procedural fairness in the process.

CHAPTER II EXISTING LAW AND PRACTICE

A. Common Law Procedural Safeguards

The common law provides certain basic procedural safeguards for persons affected by tribunal proceedings, even if no explicit safeguards are found in the relevant statute. As Byles J. stated in the early and fundamental case of *Cooper* v. *Wandsworth District Board of Works:*

2. *See* Robert F. Reid, *Administrative Law and Practice* 111 *et seq*. (1971) [hereinafter cited as *Reid*].

> "a long course of decisions ... establish that although there are no positive words in a statute requiring that a party shall be heard, yet the justice of the common law will supply the omission of the legislature.

These common law safeguards, normally described as "the rules of natural justice," may even provide protection where statutory procedures do exist, but they lack consistency in their application and may be found inadequate in particular instances.

How effective is the protection provided by these common law principles? The answer depends in turn on the answer to four fundamental questions:

1. To what tribunal decisions do the rules of natural justice apply?

2. When the rules apply, what procedure must the particular tribunal follow?

3. What individuals or organizations are entitled to the protection or advantage or the procedural rules of natural justice?

4. How can compliance with the rules of natural justice be enforced; and how effective is this enforcement?

These questions will be considered in relation to each of the three functions explained above adjudication, investigation and rulemaking. First, however, it is appropriate to discuss two issues fundamental to this branch of the law which cut across all types of decision processes. The first is the problem of "characterization." It is this judicial exercise that, in the absence of specific statute, determines the answer to the first question. The second fundamental issue is that of *locus standi*. On this concept depends the answer to the third question.

1. Administrative or Judicial Characterization

Characterization of the function of an agency determines whether or not the rules of natural justice apply to it. The authorities are relatively clear that the rules do apply where the function is "judicial"

4. *See Battaglia* v. *Workmen's Compensation Board (1960)*, 24 D.L.R. (2d) 21 (B.C.C.A.); *Western Mines Ltd*. v. *Greater Campbell River Water District* (1967), 58 W.W.R. 705 (B.C.C.A.); *Hlookoff* v. *City of Vancouver* (1968) , 67 D.L.R. (2d) 119 (B.C. S.C.) .

5. *See Veteran's Sightseeing and Transportation Co*. v. *Public Utilities Commission*, [1946] 2 D.L.R. 188 (B.C.C.A.); *Geise et al*. v. *Williston* (1963), 37 D.L.R. (2d) 447 (B.C.C.A.); *Re Swanson and Minister of Lands and Forests* (1960), 23 D.L.R. (2d) (B.C. S.C.). Cf. *Re Pergamon Press Ltd*., [1971] Ch. 388, and *Maxwell* v. *Department of Trade and Industry,* [1974] Q.B. 523 (C.A.).

6. *See R*. v. *Board of Industrial Relations (Alberta), ex parte Tanner Building Supplies Ltd*. (1965), 48 D.L.R. (2d) 259, 266; *Re Coles Sporting Goods (1965),* 50 D.L.R. (2d) 290, 296.

7. *See Wiswell* v. *Metropolitan Corporation of Greater Winnipeg*, [1965] S.C.R. 512.

8. *See Reid* at 112, 119120; 1 *Royal Commission Inquiry* 136, 139.

9. *See Reid* at 128; 1 *Royal Commission* Inquiry 139.

10. *See Reid* at 127130. or "quasijudicial,"

12. *See Reid* at 121130; S.A. de Smith, *Judicial Review of Administrative Action* 68 *et seq*. (3rd ed. 1973). but do not apply where the function is "administrative," ministerial" or "legislative." What is not clear, however, is what these various terms mean, and in particular, how they are used or applied by courts in specific cases. It is common to find apparently carefully reasoned decisions that proceed as follows: the agency exercises a judicial function; therefore, the rules of natural justice apply; therefore, adequate notice and opportunity to be heard ought to be given. But it is not at all common to find the decisional criteria used by the court to make the initial characterization stated in its judgment. When criteria are stated, they are usually imprecise, incomplete and sometimes entirely incomprehensible. The result is that the decided cases now make it impossible to develop a rational test for determining this issue. In fact, the subject has become so confused and confusing that most writers now treat the question of characterization simply by outlining the various approaches. As Robert Reid states in his recent text:

> There is ... nothing of greater importance in administrative law, yet nowhere is the law more confused and illogical.

A number of approaches are suggested by the cases. Several of these require brief comment, illustrating the extreme uncertainty in this area.

(a) *Duty to act judicially*

Early cases suggested that natural justice would be required whenever a person's rights or property were affected by an agency's process.

15. *E.g., Local Government Board* v. *Arlidge,* [1915] A.C.

16. *E.g., R*. v. *The Board of Broadcast Governors, ex parte*.

17. *R*. v. *The Electricity Commissioners, [1924]* 1 K.B. (H.L.).

18. *See R*. v. *The Legislative Committee of the Church Assembly, ex parte HayesSmith*, [1928] 1 K.B. 411.

19. *Nakkuda Ali* v. *Jayaratne*, [1951] A.C. 66 (P.C.).

20. [1959] S.C.R. 24. *See also Howarth* v. *National Parole Board* (unreported decision of the Supreme Court of Canada, October 11, 1974). Later this requirement was expressed as a "duty" to act judicially. Eventually, however, the consequence became the criterion and the test whether natural justice principles were relevant became whether there was a duty to act judicially.

In 1924, Lord Atkin made his famous statement in the *Electricity Commissioners* case, subsequently interpreted to lay down a dual requirement that the agency must have power to affect the rights of subjects, and a duty to act judicially. This meant that the courts were required in each case to search for a "superadded" duty to act judicially imposed on the tribunal. Naturally they looked in most cases to the governing statute, with the result that no longer was the "omission of the Legislature" being rectified where the statute was silent on procedural safeguards of notice and hearing. Rather, if the statute was silent it was assumed that there was no "duty to act judicially." This approach was approved by the Privy Council in *Nakkuda Ali* v. *Jayaratne*. *Nakkuda Ali* was applied in 1957 by the Supreme Court of Canada in what is still the leading Canadian case on this subject, *Calgary Power* v. *Copithorne*. In British Columbia it was applied by the Court of Appeal in 1962 in *Geise* v. *Williston*.

22. [1964] A.C. 40.

23. *Ibid*. at 76, *per* Lord Reid.

24. *E.g.* , *Hlookoff* v. *City of Vancouver,* n. 4 *supra*.

25. Though the case has been mentioned occasionally for example, by Tysoe J.A. dissenting in *Western Mines* v. *Greater Campbell River Water District,* n. 4 *supra*.

26. *See Re Foremost Construction Co. Ltd. and The Registrar of Companies* (1967), 61 D.L.R. (2d) 528 (Sask. Q.B.); *Crux* v. *Leonville Union Hospital Board,* [1973] 1 W.W.R. 723; *Marin* v. *Board of Governors of University Hospital* (1970), 74 W.W.R. 55, 13 D.L.R. (3d) 324, affirmed [1971] 1 W.W.R. 58 (Sask. C.A.).

27. N. 4 *supra*.

28. *Errington* v. *Minister of* Health, [1935] 1 K.B. 249 (English Minister of Health confirming a clearance order).

29. *Wilson* v. *Esquimalt and Nanaimo Railway,* n. 3 *supra*.

More recently, however, the "dual test" as laid down in *Nakkuda Ali* has fallen from favour. It is now generally accepted in most Canadian jurisdictions, following the reinterpretation of Lord Atkins statement and apparent overruling of *Nakkuda Ali in Ridge* v. *Baldwin,* that the basic criterion is whether persons or property are affected by agency action. There is no "superadded duty to act judicially." Rather, the duty is "inferred ... from the nature of the power." Most recent British Columbia decisions are consistent with this approach. It may, however, be significant that no British Columbia court yet appears to have followed *Ridge* v. *Baldwin* expressly on this point. Nor, it appears, has the Supreme Court of Canada. Saskatchewan courts have continued to apply *Nakkuda Ali*.

Even if the wider principle of "affecting rights" is accepted as the criterion for characterization, serious difficulties remain. Rights, and indeed property, were clearly affected in *Geise* v. *Williston* yet the Minister's function was characterized as administrative. Perhaps the decision can be explained simply as involving a ministerial decisionmaker. Yet functions of Ministers of the Crown have been characterized as judicial; and indeed a power of decision of the British Columbia Cabinet has been held to be judicial. It has been suggested that the only way to rationalize the cases is to classify them by type or agency and isolate principles applicable to each class. Reid, however, dispels this notion by setting out two lists of cases involving several types of decisionmakers-including ministers of the Crown, licensing tribunals, municipal tribunals, etc.first, those in which the function was classified as administrative, and second those in which it was classified as judicial or quasi-judicial. The same agencies appear on both lists.

31. [1945] 3 D.L.R. 324 (Ont. C.A.).

32. *See Western Mines* v. *Greater Campbell River Water District,* n. 4 *supra; Battaglia* v. *Workmen's Compensation Board* [1960), 24 D.L.R. (2d) 21 (B.C.C.A.).

33. *See Wade, The Twilight of Natural Justice,* (1951) 67 L.Q.R. 103; Comment on *R*. v. *Metropolitan Police Commissioner, ex parte Parker,* (1954) 70 L.Q.R. 203.

34. *See Nakkuda Ali* v. *Jayaratne,* n. 19 *supra; R*. v. *Metropolitan Police Commissioner, ex parte Parker,* [1953] 2 All E.R. 717 (Q.B.D.)

35. N. 19 *supra*.

(b) *Decisions on policy or law*

Another conceptual test used by the courts to characterize the functions of an agency is whether the agency applies predetermined principles of law to found facts, or whether it simply decides on the basis of policy and is therefore "a law unto itself." Perhaps the best statement of this approach is found in *Re Brown & Brock & Rentals Administrator.*

This test is difficult to apply inasmuch as there is no satisfactory means of identifying what is a question of law or a question of policy in any particular case. A further difficulty is that there are many types of proceedings that are at some stage closely analogous to legal proceedings, but which at other stages are not.

These difficulties appear to have been recognized by the courts and this approach is now rarely articulated in judgments.

(c) ___*Right or privilege*

The basis of this distinction has long been debated in the literature. The essence is that a privilege confers a lower order of interest that is by its nature subject to summary revocation or suspension. The distinction seemed particularly apt in licence or permit cases and was applied by the courts, culminating in *Nakkuda Ali's* case in the Privy Council.

Since that time, however, the rigidity of the distinction appears to have weakened, and licence and franchise interests have gradually come to be recognized as at least closely analogous to property interests.

Thus, the functions of agencies have been characterized as judicial in a number of recent British Columbia cases involving suspension or revocation of licences.

38. *Delmonico* v. *Director of Wildlife* (1969), 67 W.W.R. 340.

39. *Ibid*. at 343.

40. *E.g., Western Mines* v. *Greater Campbell River Water District,* n. 4 *supra*. It is interesting to note that in 1913 the B.C. Court of Appeal held that a decision by Licensing Commissioners not to grant a liquor licence was reviewable on *certiorari: R*. v. *Licence Commissioners of Point Grey* (1913), 14 D.L.R. 721.

41. *See Schmidt* v. *Secretary of State for Home Affairs,* [1969] 1 All E.R. 904 (C.A.) .

42. *E.g., Re Foremost Construction Co. Ltd. and* the *Registrar of Companies* (1967), 61 D.L.R. (2d) 528; *Thorpe* v. *Village Motor Hotel Ltd*. (1969), 70 W.W.R. 316 (Sask. C.A.).

43. Compare the judgments at trial (Dryer J. unreported, October 14, 1966, Vancouver Registry No. X844/66) and on appeal in *Western Mines Ltd*. v. *Greater Campbell River Water District,* n. 4 *supra*.

A distinction has developed between the original grant of a licence and its suspension or revocation. The licence interest once granted is regarded as "something akin to a prescriptive right, " but even the original grant of a licence has been characterized as judicial in several cases.

The result is that the "rightprivilege" distinction is no longer so important, though it still enjoys currency in several areas, such as immigration. It is also very much alive in Saskatchewan, and appears in the occasional British Columbia judgment.

(d) ___*Functional approaches*

(i) ___*Lis inter partes*; judicial trappings

This approach to characterization involves a comparison of an agency's powers and process with those of the ordinary courts. Thus if a *lis inter partes* a dispute between parties to be determined by an authoritative decision-maker based on found facts exists, the function is likely to be characterized as judicial.

45. *E.g., R*. v. *Board of Broadcast Governors, ex parte Swift Current Telecasting Co. Ltd*. (1962), 33 D.L.R. (2d) 449 (Ont. C.A.).

46. *Durayappah* v. *Fernando,* [1967] 2 All E.R. 152 (P.C.).

47. (1958), 24 W.W.R. 371 (Man. Q.B.).

48. *Ibid*. at 376.

49. [1965] S.C.R. 512. In the same way, the applicability of procedures similar to those applicable in courts will be carefully considered. Is the agency required to hold a hearing? Is there a right of appeal? Does it make a binding order?

The difficulty associated with this approach is that it is narrow and fails to recognize that procedural safeguards may be as necessary, and possibly more necessary, in many less formal processes than in those where proce-

dures are analogous to those of courts. Agencies with few statutory procedural requirements would rarely be required to follow natural justice principles if this approach gained wide support.

(ii) *Tribunal purposes; effects of decision*

A number of recent cases suggest a more realistic approach to the question of characterization. The conceptual tests are rejected along with any rigid analogies to court procedures. The court instead looks at the agency, and its purposes and objectives by reference to its statute and the relevant surrounding circumstances. In addition, and most importantly, it considers the procedure used by the agency in the context of its entire process, and the impact of its decisions on individuals and their property. A good example is *Re Watt & Registrar of Motor Vehicles*. Freedman J. considered the fact that in deciding to suspend a driver's licence, the Registrar was required to consider and weigh evidence, and concluded that fair decisions in these circumstances required that notice and a full opportunity to be heard be given to the licensee.

A similar approach is implicit in the following statement by Judson J. dissenting in *Wiswell* v. *Metropolitan Corporation of Greater Winnipeg:*

> I do not think that it helps one towards a solution of this case to put a label on the form of activity in which the Metropolitan Council was engaged when it passed this amending bylaw. Counsel for the municipality wants to call it legislative and from that he argues that they could act without notice. The majority of the Judges prefer the term quasijudicial. However one may characterize the function, it was one which involved private rights in addition to those of the applicant and I prefer to say that the municipality could not act without notice to those affected.

51. *See Hlookoff v. City of Vancouver,* n. 4 *supra; Robertson* v. *The Deputy Superintendent of Brokers,* [1973] 3 W.W.R. 643 (B.C. S.C.), reversed by the Court of Appeal on another point, (1974), 42 D.L.R. (3d) 135.

52. N. 43 *supra*.

53. N. 4 *supra*.

54. (1970) C.T.C. 444, reversed (1971), 21 D.L.R. (3d) 681 (B.C.C.A.), affirmed (1972), 27 D.L.R. (3d) 610 (S.C.C.).

55. For a different approach *see R.* v. *The Board of Broadcast Governors, ex parte Swift Current Telecastings Ltd.*, n. 45 *supra*.

Several recent British Columbia cases also illustrate this more realistic approach.

(e) *Conclusions*

Even with the currency of the more realistic approach to characterization the overall situation is far from satisfactory. First, the multiplicity of judicial approaches to the question of characterization, and the unsettled state of the British Columbia authorities make it uncertain which approach will be adopted in a particular case. For example, in *Western Mines,* adoption by Dryer J. of the *Nakkuda Ali* "duty to act judicially" and "rightprivilege" approaches resulted in the Pollution Control Board's function being characterized as administrative. The majority of the Court of Appeal, however, placed more emphasis on the information gathering stage in the context of the permitissuing procedure and in particular, on the effects of the process on the applicant's rights and property. The result was a "quasijudicial" characterization. Similarly in *Re Woodward Estate,* different approaches at trial and on appeal resulted in different characterizations. There are numerous other examples. In summary, the result is extreme uncertainty.

Second, even if the more recent functional approach exemplified by the *Hlookoff and Western Mines* cases is adopted, it is still extremely uncertain in its application. A great deal depends on the court's perception of the particular facts and circumstances in each case. Would the decision in *Western mines* have been the same if the applicant had been a licence-holding individual (or a conservation group), rather than a water district authority? Again, would a judicial characterization have been reached in *Western Mines* had the matter involved summary suspension

of the permit by the Board to avoid a massive killing of fish? Would the characterization by Munroe J. in *Re Woodward* have been the same had the decisionmaker not been the Premier and Minister of Finance, and had the taint of confiscation not been so strong?

> For the purpose of subsection (1), the Minister, in his absolute discretion, may determine whether any purpose or organization is a religious, charitable, or educational purpose or organization.

58. *See Reid* at 131144 where a number of classes of cases are listed in which similar functions have been classified as both administrative and judicial. Perhaps the most startling example is the class of disciplinary functions.

59. *See Hall* J. dissenting in Guay *v. LaFleur,* [1965] S.C.R. 12, 19.

60. *See Smith* v. *A.G. Ont*., [1924] S.C.R. 331; *Cowan* v. *C.B.C*. (1966), 56 D.L.R. (2d) 515 (Ont. C.A.); *Jamieson* v. *A.G. B.C*., [1971] 5 W.W.R. 600 (B.C.S.C.). G. Turriff, Comment (1972) 7 U.B.C. L. Rev. 312; J.G. Matkin, *Environmental Policy Formu*lation: *Public Participation* and the *Role of the Courts in Environmental Abuse* and the Canadian *Citizen: A Study of the Adequacy of Legal Remedies,* (Faculty of Law, U.B.C., Feb. 1973).

61. (1967) , 60 D.L.R. (2d) 331 (B.C.C.A.) .

In short, beyond the limited development of exceptionridden classes of agencies usually acknowledged to be administrative (such as Ministers of the Crown) or judicial (such as the disciplinary bodies of professional organizations), characterization of an agency's function ultimately turns on the facts and surrounding circumstances in each particular case. 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 inconsistent 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.

2. ___Locus Standi

Canadian courts have usually taken a narrow view of what persons should be entitled to standing as "parties" in agency proceedings. The civil action standard of sufficient interest or special damage has generally been applied in one form or another to administrative proceedings.

Thus, in *R*. v. Zoning *Board of Appeal, ex parte N. W. Point Grey Home Owners' Association* the British Columbia Court of Appeal held that an unincorporated homeowners' association and a resident were without standing to seek *certiorari* to quash a decision of the Zoning Board of Appeal. The Board had approved a plan that included separate basement servants' quarters for a house located in a district zoned for singlefamily dwellings. The Court held that neither the association nor the individual were "persons aggrieved" in the sense that they had no "peculiar grievance of their own beyond some grievance suffered by them in common with the rest of the public."

There have been several recent cases in other Canadian jurisdictions that suggest a relaxation of requirements as to standing in similar circumstances.

> I am of opinion that, in the last resort, if the AttorneyGeneral refuses to leave in a proper case: or improper or unreasonably delays in giving leave; or his machinery works too slowly; then a member of the public who has a sufficient interest, can himself apply to the court itself. He can apply for a declaration and, in a proper case, for an injunction, joining the AttorneyGeneral if need be, as defendant.

64. N. 63 *supra*.

65. *See Re Township of Hamilton and Rio Investments Ltd*. (1973), 30 D.L.R. (3d) 666 (Ont. H.C.); *Wilde United Properties Ltd*. v. *Corp. of City of Yellowknife,* [1972] 6 W.W.R. 717 (N.W.T.S.C.). In *L'Association Des Proprietaires Des gardins Tache Inc*. v. *Les Entreprises Dasken,* n. 63 *supra* the Supreme Court of Canada reached a more liberal position on the issue of *locus standi* than the B.C. Court of Appeal in the *North West Point Grey Home Owners' Assn*. case. The Supreme Court held that the Ratepayers Association lacked standing, but that individual property owners in the single family zone did have standing to maintain an action to quash certain building permits issued in contravention of the zoning bylaw.

66. *Green* v. *The Queen in Right of the Province of Ontario,* [1973] 2 O.R. 396, 403404 (Ont. H.C.).

67. *Thorson* v. *AttorneyGeneral of Canada* (1974), 43 D.L.R. (3d) 1.

68. *See Stein* v. *City of Winnipeg*, [1974] 5 W.W.R. 484 (Man. C.A.) and *Re MacNeit et al*. v. *Nova Scotia Board of Censors et al*. (1974), 46 D.L.R. 259 (N.S. S.C.). In both cases the principles of *Thorson* were extended. The decision in *Re Zadrevec and Town of Brampton,* however, in which it was held that a municipality must give all affected ratepayers notice and an opportunity to be heard when it

passed a zoning bylaw to implement a landuse contract with a developer, was recently reversed by the Ontario Court of Appeal. Other recent decisions indicate that these cases merely confirm that a small range of property owners in the same municipal zone have *locus standi* to attack municipal development approvals. Thus where an individual who owned no land in the area sought an injunction to restrain the destructive effects on the amenities of a provincial park of sand removal activities just outside the park boundary, the plaintiff was held to lack standing since the defendant's action had caused him no "special and peculiar damage."

It should be noted, however, that the Supreme Court of Canada has recently afforded a federal taxpayer standing to apply for a declaration that the *Official Languages Act* and its accompanying *Appropriation Acts* were unconstitutional. What impact this decision has on the law relating to standing beyond the impugning of the constitutionality of federal legislation remains to be seen.

Several additional points should also be noted. First, there are in fact two separate situations in which the question of standing can arise: (a) before the agency, and (b) before a court in judicial review proceedings. Both questions may be in issue since lack of standing before the agency is sometimes raised by way of defence in judicial review proceedings.

70. *Ibid.; also Re Zadrevec* v. *Town of Brampton,* n. 63 *supra*.

71. N. 61 *supra,* at 33943.

72. *See* de Smith, *op. cit*. n. 12 *supra,* at 42829.

73. A British Columbia case in which the court was prepared to exercise the discretion as an alternative basis for decision *(locus standi* was found) is *Re Surrey Bylaw, 1954 No. 1291* (1957), 6 D.L.R. (2d) 768, 769 (B.C.S.C.). In *Thorson* v. *AttorneyGeneral of Canada* n. 67 *supra*, Laskin J. referred, *obiter,* to the existence of more liberal rules of standing to apply for the prerogative writs. In these situations the courts appear to treat both issues together, and to regard the question of standing before the agency as determinative of the question of standing before the court.

Second, it would appear that the issues of standing and characterization may be closely related. For example, if a court characterizes an agency's function as judicial because of its profound effects on the applicant's rights and property, it may already have determined that the applicant has been aggrieved and indeed has suffered special damage. If this approach is taken, standing is made to depend on the confusing and uncertain application of the principles of characterization.

Third, the older cases suggest that for purposes of judicial review by means of the prerogative writs of *certiorari* and *prohibition* the court has a discretion to hear a matter even at the instance of a person who has no special interest or peculiar grievance. These judicial powers were discussed by Norris J.A. who dissented in the *North West Point Grey Home Owners' Association case*. This jurisdiction appears to be based on the public nature of the writs instruments to supervise the administration of justice by inferior tribunals. Thus, a person with no standing, on any of the current tests, to participate before an agency, may nevertheless be allowed as a matter of discretion to come before a court to enforce procedural requirements. It should be noted, however, that the majority of the Court of Appeal in the *North West Point Grey Home Owners' Association* case did not discuss this discretionary power, and there are few modern examples of its use.

B. Existing Statutory Procedural Safeguards

Provisions relating to notice, a hearing, and other procedural safeguards are already present in many British Columbia statutes. For example, section 6 of the *Securities Act* provides that in hearings before the Commission or the Superintendent, the following rules apply:

> 6. At the hearing required or permitted under this Act to be held before the Commission or the Superintendent or a person delegated by either of them, the following rules apply:

(1) In addition to any other person or company to whom notice is required to be given, notice in writing of the time, place, and purpose of the hearing shall be given to any person or company who or that, in the opinion of the Commission or the Superintendent or person delegated by them, is primarily affected by the hearing, and any such notice is sufficient if sent to the person or company by prepaid mail at the last address of the person or company appearing on the records of the Commission or, if not so appearing, to such address as is directed by the Commission or the Superintendent or person delegated by them:

(2) At the hearing, the person presiding has, for the purpose of the hearing, the same authority, powers, rights, and privileges as a person appointed to make an investigation under section 23:

(3) At the hearing, the person presiding shall receive the evidence submitted by a person or company to whom or which notice has been given or by any other person or company that is relevant to the hearing, but the person presiding is not bound by the legal or technical rules of evidence:

(4) At the hearing, all oral evidence received may be taken down in writing, or preserved in such other manner as the Superintendent shall direct, and together with such documentary evidence and things as are received in evidence by the Commission shall form the record:

(5) Where the direction, decision, order, or ruling made after a hearing adversely affects the right of a person or company to trade in securities, the Superintendent or the person presiding at such hearing shall, at the request of the for the direction, decision, order, or ruling:

(6) Notice of every direction, decision, order, or ruling, together with a copy of the written reasons therefor (if any), shall be given upon the issuance thereof to a person or company to whom notice of the hearing was given and to a person or company who or that, in the opinion of the Superintendent or of the person who presided at the hearing is primarily affected thereby, and any such notice is sufficient if sent to the person or company by prepaid mail at the last address of the person or company appearing on the records of the Commission or, if not so appearing, to such address as is directed by the Commission or the Superintendent:

(7) A person or company attending or submitting evidence at a hearing pursuant to rule (1) may be represented by counsel.

Hearing provisions are present in a number of other statutes including the *Pollution Control Act,*

76. S.B.C. 1973, c. 122, ss. 1323.

the *Labour Code of British Columbia Act* the *Water Act,*

79. *E.g., Land Commission Act,* S.B.C. 1973, c. 46, s. 8; *Energy Act,* S.B.C. 1973, c. 84, ss. 30, 48; *Mineral Land Act,* S.B.C. 1973, c. 53, s. 23; *Water Utilities Act,* S.B.C. 1973, c. 91, s. 4; *Safety Engineering Services Act,* S.B.C. 1972, c. 56, s. 15 (investigation by Director)

80. *E.g., Debt Collection Act,* S.B.C. 1973, c. 26, s. 6 (written reasons may also be required); *Fair Sales Practices Act,* S.B.C. 1973, c. 32, s. 6(4).

81. *E.g., Medical Amendment Act,* S.B.C. 1973, c. 50, s. 6; *Corporation Capital Tax Act,* S.B.C. 1973, c. 24, s. 31.

82. *E.g., Government Liquor Amendment Act,* S.B.C. 1973, c. 37; *Safety Engineering Services Act,* S.B.C. 1972, c. 56, s. 46 (suspension of engineer's certificate); *Archaelogical and Historic Sites Protection Act,* S.B.C. 1972, c. 4, s. *5(3); Ambulance Service Act,* S.B.C. 1973, c. 4, s. 5 (suspension of licence by Minister). Under the latter Act the licensing system is left to be invoked by ministerial order under s. 3. and the *Environment and Land Use Act*. A number of recent statutes establishing new agencies contain very explicit hearing provisions. Other statutes contain certain safeguards such as the right to counsel

86. N. 78 *supra, e.g.* ss. 32, 33 (Certificate of Public Convenience and Necessity), s. 47 (suspension of utilities). or to some form of notice. A large number of other recent statutes establishing agencies contain, however, few or none of the recognized procedural safeguards.

Most existing statutory procedural requirements are unsatisfactory for several reasons:

(a) Few statutes expressly provide for a full range of basic procedural requirements. For example, the *Debt Collection Act,* the *Fair Sales Practices Act,* and the *Automobile Insurance Act,* all provide a right to counsel, but do not guarantee a hearing at any stage of the process. The *Energy Act,* on the other hand, specifically requires a hearing in certain circumstances, and specifies that "reasonable notice" is to be given, but does not mention whether participants may be represented by counsel, whether they can crossexamine, or whether they are entitled to written reasons for decisions.

88. Tribunals are often specifically given the power to determine their own procedure, *e.g., Pollution Control Act* , n. 74 *supra , s* . 10 (h) .

89. *E.g., Automobile Insurance Act,* S.B.C. 1973, c. 6, s. 36(7) (Rates Appeal Board). Under the *Social Assistance Act,* R.S.B.C. 1960, c. 360, s. 15 as amended by S.B.C. 1973, c. 81, s. 1B, the appeal tribunal itself as well as procedure is to be established by regulation.

90. *Mineral Land Tax Act,* S.B.C. 1973, c. 53, s. 21(3) (Mineral Land Tax Review Board).

91. *E.g.,* the *Land Commission Act,* n. 78 *supra,* s. 8, incorporating s. 703 of the *Municipal Act,* R.S.B.C. 1960, c. 255, as amended.

92. *E.g.*, compare the licence suspension powers under the *Ambulance Service Act,* S.B.C. 1973, c. 4, s. 5 (no hearing specifically required, no procedure); the *Energy Act,* S.B.C. 1973, c. 29, s. 33 (hearing required); and the *Debt Collection Act, S.B.C.* 1973, c. 26, s. 6 (right to counsel etc. provided a hearing is held, but no specific direction to hold a hearing). Section 37(2) of the *Automobile Insurance Act,* S.B.C. 1973, c. 6, specifically requires the Superintendent of Motorvehicles or the Motor Carrier Commission to suspend licences for nonpayment of additional insurance premiums "without any formal or public or other hearing."

93. Examples include the *Pollution Control Act,* n. 74 *supra, s. 13(4); Water Act,* R.S.B.C. 1960, c. 405, s. 9(2); *Environment and Land Use Act,* n. 77 *supra,* s. *4; Fair Sales Practices Act,* n. 79 *supra, s*. 6. In many statutes procedure is expressly left to the discretion of the agency, or to be prescribed by the LieutenantGovernor in Council, either by regulation or otherwise. In any of these cases, even if procedural rules are formally promulgated (and this is unusual especially when procedure is in the discretion of the tribunal), they rarely include all procedural safeguards. Some agencies have relatively complete sets of statutory procedures; others have little or none. Some are required to hold hearings; while others exercising similar types of powers are not.

(b) Agencies are often given a discretion whether or not to hold a hearing in a particular case. This often means that few hearings will be held. If hearings are held they will generally be the result of either substantial public or political pressure, or the agency's concern to demonstrate fairness in a noncontroversial area.

96. N. 4 *supra,* at 707.

97. *See* definition of "contested case" in U.S. *Model State Administrative Procedure Act, s*. 1(3); also *U.S. Administrative Procedure Act,* 5 U.S.C. s. 551 (6) and (7). There is a danger that even if an agency has been scrupulously fair in exercising its discretion to deny a hearing, the fairness will not be apparent, even to informed observers.

© Where procedures are either partly set out in the statute, or not set out at all, their relation to the common law principles of natural justice is inconsistent and confusing. It has already been noted that lack of statutory procedures may be regarded by a court as either consistent with a "judicial" characterization (where the fact that rights and property are affected is regarded as significant), or indicative of an administrative function (where the "duty to act judicially" test is applied or where the agency's lack of similarity to a court is considered significant). There are cases in which incomplete statutory procedures were considered indicative of legislative intent to eliminate further need to comply with the principles of natural justice. In other cases, courts have enforced natural justice requirements in the face of clear statutory authority for the agency to disregard them. The *Western Mines* case is a good example of the latter type. The statute expressly conferred a discretion on the Board to deny a "hearing." The British Columbia Court of Appeal nevertheless held that this did not include denial of the requirements of adequate notice, or an informal right to be "heard" by correspondence.

Thus, statutory procedural requirements in British Columbia are generally inconsistent and incomplete, and their presence often compounds the difficulties involved in determining whether the common law natural justice principles apply. Agencies are left without guidelines as to what procedures they must use, and affected individuals are uncertain of their procedural rights and duties.

C. Adjudication

In this section "adjudication" means the process by which agencies make decisions authorized by law, determining the rights, duties, or legitimate expectations of specific persons and resulting in binding enforceable orders. The term, therefore, excludes both investigations, which do not result in binding enforceable orders, and rulemaking, which involves orders of general rather than specific application.

1. Application of the Rules of Natural Justice

As a general principle, the rules of natural justice apply only to agencies whose functions are characterized as judicial or quasijudicial, but the discussion of characterization has already shown that this situation is unsatisfactory. The process of characterization is surrounded by uncertainty for the following reasons:

100. Many ministerial powers of decision fall into this category. Many of these powers involve decisions allocating natural resources such as land, timber or minerals.

101. *E.g.,* the initial grant of drivers' licences or the registration of motor vehicles by the Superintendent of Motor Vehicles under the *Motor Vehicle Act,* R.S.B.C. 1960, c. 253, s. 18; initial claims processing under the *Worker's Compensation Act,* S.B.C. 1968, c. 59, Part I.

102. *E.g., Western Mines Ltd.* v. *Greater Campbell River Water District* n. 4 *supra; Re Application of Hooker Chemicals (Nanaimo) Ltd.* (1970), 75 W.W.R. 354; *Re Piatocka and Utah Construction Mining Co.* (1971), 21 D.L.R. (3d) 87 (B.C. S.C.); *Re Hogan and Director of Pollution Control* (1972), 24 D.L.R. (3d) 363 (grant of pollution control permits under the *Pollution Control Act); Geise et al.* v. *Williston,* n. 5 *supra* (authority to use a logging road on public land).

103. *E.g., Robertson* v. *Deputy Superintendent of Brokers* n. 51 *supra.* The labour relations cases generally deal either with the wellrecognized certification interest, or arise out of arbitrations. There have been no cases involving the Workers' Compensation Board since the Board's constitutional authority and procedural duties were defined through a series of cases in the early 1960's.

104. [1971] 2 W.W.R. 148 (B.C.C.A.); affirmed by Supreme Court of Canada, [1973] S.C.R. 199.

(a) Most decided cases purport to be rationalized on the basis of one or more of a number of confusing and often circular conceptual tests. It is difficult to determine what test a court is likely to adopt in any particular case, and in many situations the same test yields a different characterization.

(b) Even if a court does make the characterization on the basis of articulated objective criteria, it is difficult to predict how much weight will be given to particular factors. To a significant extent each case turns on the nature and actions of the particular agency and the affected parties.

© Only a court decision can indicate clearly whether or not an agency is bound by the rules of natural justice in exercising a particular function. There is, however, no certainty that a court proceeding will be brought, especially in the case of agencies with small workloads or agencies that deal with large numbers of generally uncomplicated matters. The majority of British Columbia cases are concerned either with the appellate functions of agencies, or with initial determinations by agencies dealing with matters of fairly wide implication, involving, for example, major resource commitments, or securities licences. *Alden* v. *Gaglardi* is one of the few reported cases in which the processes of an agency involved in "mass decisionmaking" have been scrutinized, and even this was in fact a carefully prepared test case. It concerned the City of Vancouver Social Service Office and the Department of Social Welfare, and was an attempt by organized interest groups to use the court as a forum for the discussion of welfare policy in order to exert public pressure on the Department for policy changes.

106. *See Reid* at 24.

107. *See* de Smith, *Judicial Review of Administrative Action,* 171 *et seq*. (3rd ed., 1973).

108. *See Re Fairfield Modern Dairy Ltd*. and *Milk Board,* [1942] O.W.N. 579 (Ont. H.C.); *Western Mines* v. *Greater Campbell River Water District,* n. 4 *supra*. There appear to be over 800 agencies authorized by statute in this Province, and of these less than a tenth seem to have been the subject of judicial decisions. It is clear, therefore, that judicial guidance on procedural requirements is not available to the vast majority of provincial tribunals and to persons affected by their decisions. In addition, unless a decision of the highest court is obtained, such guidance as there is will always be subject to judicial reversal.

2. Content of the Rules of Natural Justice

If an adjudicative agency is characterized as judicial or quasijudicial, the question then arises as to what procedure the agency is legally obliged to follow. The rules of natural justice are often summed up in the *maxim audi alteram partem* that no man shall be condemned unheard, and that no man shall be judge in his own cause.

There are three basic requirements:

1. That an affected person be given adequate notice of the proposed action of a tribunal;

2. That he be given a full and fair opportunity to present his case; and

3. That the decisionmaker act fairly and impartially.

These requirements can be broken down further into a number of elements of basic procedural fairness. It is convenient to assess the effect of the decided cases under these headings.

(a) ___*Notice*

The authorities indicate that an agency must give reasonable notice of a proposed decision to any affected person, and it is difficult to be more precise. The interpretation of this proposition depends on the relevant legislation, the agency, the affected persons and the particular circumstances. The crucial factors are form, timing and the sufficiency of the information contained in the notice. No special form is required unless specified by statute; it must simply be reasonable in the circumstances.

110. *See Johnstone* v. *Association of Professional Engineers of Saskatchewan* (1970), 75 W.W.R. 740 (Sask. C.A.).

111. *See Forsyth* v. *Children's Aid Society of Kingston* (1962), 35 D.L.R. (2d) 690 (Ont. H.C.); *Re Veregin,* [1933] 2 W.W.R. 409 (Man. K.B.).

112. *See infra*.

113. (1959), 20 D.L.R. (2d) 377.

114. *Ibid*. at 383.

115. *See Wiswell* v. *Metropolitan Corporation of Greater* Winnipeg [1965] S.C.R. 512.

116. *See Maskall* v. *Chiropractor's Association of British Columbia* (1968), 62 W.W.R. (N.S.) 129 (B.C. S.C.); *Re Haddock and District of Northern Cowichan (1969),* 5 D.L.R. (3d) 147 (B.C.C.A.). It has been held that, in the absence of statute, the notice must be sufficient to convey the intended action of the agency so as to enable the person to whom it is directed to know the case he must meet. It must also be timely enough to allow adequate preparation. The sufficiency of notice is therefore closely related to the adequacy of the opportunity to be heard.

A good example of the judicial approach to the question of notice is the British Columbia case of *Jurak* v. *Cunningham*, even though a nonstatutory tribunal was involved. Norris J., in granting an interim injunction, considered significant the fact that following a decision to expel by a union trial committee, the applicant's solicitor had

written to determine when the next general meeting would be held, and that the union had not replied to his letter until after the next general meeting. On a subsequent motion to dissolve the interim injunction, however, evidence showed that the plaintiffs had attended a subsequent general meeting to present their case and had therefore submitted to the jurisdiction of the meeting, which unanimously affirmed the trial committee. It was held, therefore, that in the circumstances there was no lack of adequate notice.

Where the form and content of notice are laid down by statute or by informal agency rules, the rules must be strictly complied with, though minute variations resulting in no prejudice have been countenanced.

The ultimate result is that in the absence of statute, there are no clear guidelines. The circumstances are all important, and sufficiency and reasonableness of form and timing of notice in a particular proceeding can ultimately be determined only by a judicial decision.

(b) ___*Hearing*

In a wellknown statement in *Board of Education* v. *Rice* Lord Loreburn L.C. said:

> ... sometimes [a determination] will involve matter of law as well as matter of fact, or even depend upon matter of law alone. In such cases the Board of Education will have to ascertain the law and also to ascertain the facts. I need not add that in doing either they must act in good faith and fairly listen to both sides, for that is a duty lying upon every one who decides anything. But I do not think they are bound to treat such a question as though it were a trial. They have no power to administer an oath, and need not examine witnesses. They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view.

In *Re Fairfield Modern Dairy Ltd*.

119. [1942] O.W.N. 579.

120. *See generally Western Mines Ltd*. v. *Greater Campbell River Water District,* n. 4 *supra,* at 707708 per Davie J.A.; *Labour Relations Board of British Columbia* v. *Trader's Service Ltd*. (1959), 15 D.L.R. (2d) 305 (S.C.C.).

121. *See Reid* at 56.

the question was whether the Ontario Milk Control Board might suspend the licence of a milk distributor on the basis of information received that the distributor was not complying with the relevant regulations. Rose C.J.H.C. said:

> When the Act says that the Board may suspend the licence after due notice and opportunity of hearing, it means just what it says. A hearing is a real hearing at which the charge is made known, the evidence in support of it is adduced, the supposed offender is given an opportunity of meeting that evidence by cross-examination, or by the calling of witnesses, or otherwise as may be requisite, and it is against all ordinary principles of the administration of justice to call anything less than that a hearing.

The British Columbia cases indicate that the hearing required of a judicial or quasijudicial agency, is one that allows all affected persons a full and fair opportunity to present their side of the matter in issue. The formal court hearing may be a useful analogy, but it is quite clear that it is not in all its detail the required model for agencies.

Thus, it has been held that the hearing need not always be oral. This may be the case, for example, where an agency has a discretion to deny a formal oral hearing, or simply where in all the circumstances the court is satisfied that a full and fair opportunity to be heard has been given by other means.

124. *See Wilson* v. *Esquimalt and Nanaimo Railway,* n. 3 *supra; Regina* v. *Arbuckle* (1967), 59 W.W.R. 605 (B.C.C.A.); *R.* v. *Licence Commissioners of Point Grey,* n. 40 *supra,* at 727.

125. *See Re Barber and Warehousements Union* (1968), 68 D.L.R. (2d) 682 (Ont. C.A.). Or on evidence received totally *ex parte: Victoria* v. *Civic Employees Protective Association,* [1952] 2 D.L.R. 153 (B.C.C.A.); *reference Re Building Material* Union (1956), 4 D.L.R. (2d) 98 (B.C. S.C.).

126. N. 3 *supra*.

127. *See Re McCain and City of St. John* (1965), 47 D.L.R. (2d) 164 (N.B.C.A.) .

128. S.B.C. 1967, c. 45 as amended.

Thus, the general nature 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.

© *Rules of evidence*

The authorities are relatively clear that unless a statute requires it the technical legal rules of evidence do not apply in all their rigour to the proceedings of judicial or quasijudicial agencies. An agency may not, however, act on totally irrelevant evidence. There are conflicting authorities on the question of the reception of hearsay evidence. In British Columbia it is likely that the early decision of the Privy Council in *Wilson* v. *Esquimalt and Nanaimo Railway* (which held that the LieutenantGovernor in Council of British Columbia was not bound by the hearsay rule in exercising judicial functions) will govern. But the Privy Council gave no reasons for this conclusion, and there is recent authority to the contrary in other provincial jurisdictions.

A number of statutes governing tribunal powers contain provisions relating to the rules of evidence. Perhaps the most common is a provision to the effect that an agency is not bound by the legal rules of evidence. An example is section 6(3) of the *Securities Act*

130. (1958), 11 D.L.R. (2d) (B.C.C.A.).

131. *See Re Fairfield Modern Dairy Ltd*., n. 118 *supra; Johnstone* v. *Institute of Professional Engineers of Saskatchewan,* n. 109 *supra; R*. v. Ontario *Racing Commission, ex parte Taylor,* [1971] 1 O.R. 400 (Ont. C.A.); *Radio Iberville Ltee*. v. *Board of Broadcast Governors,* [1965] 2 Ex. C.R. 43.

132. *See Errington* v. *Minister of Health,* [1935] 1 K.B. 249 (C.A.); *Victoria* v. *Civic Employees Protection Association,* n. 124 *supra; Hofer* v. *Communal Property Control Board* (1967), 60 W.W.R. 559 (Alta D.C.). In a recent Federal Court decision, a limited obligation to disclose "confidential information" for comment by affected parties was found notwithstanding that the statute provided that evidence of a confidential nature elected in the course of an inquiry should not be made public in such a manner as to be available for the use of business competitors. *See Re Magnasonic Canada Ltd. and AntiDumping Tribunal* (1973), 30 D.L.R. (3d) 118 (Fed. C.A.).

133. *Re Hogan and Director of Pollution Control,* n. 101 *supra; Western Mines Ltd*. v. *Greater Campbell River Water District,* n. 4 *supra*.

134. *Cf. Re Hogan and Director of Pollution Control,* n. 101 *supra,* and *R*. v. *Board of Broadcast Governors, ex parte Swift Current Telecasting Ltd*., n. 45 *supra*. *See also Re British Columbia Electric Co. Ltd's Increase in Electric Rates and Transit Fares* (1960), 21 D.L.R. (2d) 143, 15051 (B.C.C.A.). which states that:

> ... the person presiding is not bound by the legal or technical rules of evidence.

This type of provision appears simply to confirm the basic common law position, and perhaps clarify the agency's authority to admit hearsay. The wording of statutory provisions varies, however, and the statute will normally be construed strictly. Thus, it has been held that a power to accept such evidence as "in its discretion ... it deems proper" did not permit a Labour Relations Board to act on the hearsay evidence there in question.

It is probable that in the absence of a statutory requirement British Columbia judicial agencies are not obliged to admit sworn evidence only, notwithstanding the apparently contrary decision in *Perepolkin* v. *Superintendent of Child Welfare*. That case involved the decision of a Juvenile Court Judge in Committal proceedings under the *Protection of Children Act,* and it is unlikely that it governs the processes of agencies less closely analogous to ordinary courts.

(d) ___*Disclosures of information*

As a general principle an adjudicative agency is required to disclose information that would affect the adequate presentation of the case of an interested person. This does not amount to a full right of production and discovery analogous to that in proceedings before a court. An agency's duty to disclose has, however, been extended to material and representations submitted by opposing parties and, to an undetermined degree, to materials generated by the agency itself.

136. A judicial characterization is often expressed to require a tribunal to "act judicially" only at the informationgathering stage of its decision process; *see Western Mines Ltd*. v. *Greater Campbell River Water District,* n. 4 *supra*. There would appear to be no right to information at the later stage if the ultimate decisionmaker is a minister. *See Franklin* v. *Minister of Town and Country Planning,* [1947] 1 All E.R. 612 (C.A.) .

137. *See Johnstone and Company Builders Ltd*. v. *Minister of Health,* [1947] 2 All E.R. 395 (C.A.).

138. *See Local Government Board* v. *Arlidge,* [1915] A.C. 120 (H.L.); *contra, R*. v. *Ontario Racing Commission, ex parte Taylor,* [1971] 1 O.R. 400 (Ont. C.A.).

139. *See Hearts of Oak Insurance Co*. v. *AttorneyGeneral,* [1932] A.C. 392 (H.L.); *Reid* at 9296.

140. *Ibid*. *See also R. ex rel. Penner* v. *Board of Trustees of Edmonton School District No. 7,* [1974] 5 W.W.R. 762.

141. *See R*. v. *Pantelitis,* [1945] 1 D.L.R. 569 (B.C.C.A.) The cases are not consistent, though there is a suggestion that the closer the process of an adjudicatory agency conforms to the classic adversary model, the more likely it is that extensive information disclosure will be required.

The problem is compounded by the fact that, especially in regulatory situations, an agency may have authority, after a hearing of the adversary type, to make a discretionary decision on essentially policy grounds. It is not at all clear that any right to disclosure of information exists at this later stage. Nor is it clear that information gathered by an agency for other, or more general, purposes prior to a particular adjudication, must be disclosed to affected persons in the particular case. It is also uncertain whether reports of hearing officers of boards to decisionmakers must always be disclosed to affected persons, even in cases such as those involving licence suspensions, which are closely analogous to a quasicriminal trial.

(e) *Open hearings*

Generally, hearings by an adjudicative agency are required to be public, unless considerations of security or protection of individual privacy or property are dominant. The situation is therefore closely analogous to that of the ordinary courts.

(f) *Right to counsel*

While there is no absolute right to counsel before adjudicative agencies,

144. *E.g., Securities Act,* S.B.C. 1967, c. 45, s. 6(7); *Dentistry Act,* R.S.B.C. 1960, c. 99, s. 47.

145. N. 142 *supra*.

146. *See Re Leschenko* (1949), 4 D.L.R. 334, 341 (Man. Q.B.).

147. *St. John* v. *Fraser,* [1935] 3 D.L.R. 465, 475 *(S.C.C.). See also R*. v. *B. C. Turkey Marketing Board, ex parte Rosenberg* (1967), 61 D.L.R. (2d) 447 (B.C. S.C.) .

148. *Melton* v. *City of Calgary* (195354), 10 W.W.R. (N.S.) 428.

149. [1953] 2 S.C.R. 18, 35 (s.c.c.). it seems accurate to say that counsel will be permitted in situations where legally trained (or otherwise expert) counsel is necessary for an adequate presentation by affected persons.

This limited right to counsel is particularly clear in matters such as licence suspensions, which closely resemble quasicriminal proceedings. But again, the issue turns ultimately on the particular agency and the surrounding circumstances of the case. There appears to be no duty on the agency to inform affected persons of their right to obtain legal counsel.

A number of statutes contain a specific right to counsel. The question then has arisen as to what the term "counsel" means. *Re Kokorinis* suggests that counsel does not necessarily mean a lawyer, but may include a "friend, businessman, priest or any person of your choice." Similar provisions, however, have been held to mean a qualified lawyer. Thus, even where a statutory provision exists, there is no certainty that legal representation will be required or encouraged.

(g) *Crossexamination*

There is little consistency in judicial decisions on whether or not there is a right of crossexamination before adjudicative agencies. It has been held by the Supreme Court of Canada in a case from British Columbia that there is no such right. But it has also been held that there is a right to crossexamine a public official who gave evidence in a licence suspension hearing.

Perhaps the only principle of any generality that can be stated is that which emerges from the leading case of *Toronto Newspapers Guild* v. *Globe Printing,*

152. *See County of Strathcona* v. *Provincial* Planning *Board,* [1971] 3 W.W.R. 460, 464 (Alta. C.A.). It was held that there had been no denial of natural justice where the Board initially made a ruling restricting crossexamination then failed to enforce its ruling except as to the first witness. The court did, however, strongly condemn the practice of ruling in advance that crossexamination will be restricted or prohibited (at 466).

153. [1951] 2 D.L.R. 138 (B.C.C.A.).

154. *See Reid* at 254.

155. *See* Decision #1, Re: Publication of Decisions, (1973) 1 *Workers' Compensation Reporter 1,* 4.

156. *See* Janisch, Publication *of Administrative Board Decisions in* Canada, Canadian Association of Law Libraries (London, Ontario 1972).

namely, that where failure to allow crossexamination in the circumstance results in denial of a full and fair opportunity to be heard, it will deprive an agency of jurisdiction.

Again, whether or not crossexamination will be required depends on the function of the agency and the surrounding circumstances. The formality of the hearing conducted by the agency and, generally, the similarity to judicial procedures are important considerations. Thus, in *Brethour* v. *Law Society of British Columbia,* the British Columbia Court of Appeal found a right to crossexamine in disbarment proceedings even though the *Legal Professions Act* specifically freed the benchers from the rules of evidence and empowered them to ascertain facts in whatever manner they deemed fit.

(h) *Duty to give reasons for decisions*

Apart from statute, there is no duty on adjudicative agencies to give reasons for their decisions. The result is that few agencies do in fact give written reasons, although a change in attitude is beginning to emerge, and reasons are now being given by some British Columbia agencies. The Corporate and Financial Services Division of the Department of the AttorneyGeneral publishes a weekly summary containing brief reports of decisions in the securities regulation area. The Mines Branch publishes brief summaries of ministerial decisions under section 80 of the *Mineral Act,* and the Workers' Compensation Board has recently published the first part of a *Workers' Compensation Reporter* that will contain selected decisions of the Board.

It must be concluded, however, that there are still large numbers of significant agencies in British Columbia that either give no reasons for decisions at all, or publish only brief formal orders.

158. *Ghiradosi* v. *Minister of Highways, ibid; Reid* at 223.

159. *See Local Government Board* v. *Arlidge,* n. 15 *supra;* also *Reid,* at 226.

160. *See Merchant* v. *Law Society of Saskatchewan (1973),* 32 D.L.R. (3d) 170 (Sask. C.A.); *Reid* at 229; *Leeson* v. *General Council of Medical Education,* (1889) 43 Ch. D. 336 (C.A.) .

161. *See Franklin* v. *Minister of Town and Country* Planning, [1947] 1 All E.R. 612; *Re Swanson and Minister of Lands and Forests,* n. 5 *supra*.

162. *See Re Thompson* and *Union of Mine, Mill and Smelter Workers* (1962), 35 D.L.R. (2d) 333 (Man. C.A.); Canadian Airline *Pilots Association* v. *Canadian Pacific Airlines* (1966), 57 D.L.R. (2d) 417 (B.C.C.A.) (board of arbitration); *Re Swanson and Minister of Lands and Forests,* n. 5 *supra*. Clearly the result is that affected persons have no means of determining what standards they must meet. In addition, a lack of written reasons effectively limits rights of appeal and judicial review, since errors are not apparent and therefore cannot be directly attacked. Perhaps more important is the suspicion and lack of confidence which may result if the public assumes that the unwillingness to explain decisions is the result of arbitrary or at least questionable practices by the agency.

(i) *Unbiased Decisionmaker*

The rules relating to bias in the ordinary courts have in general terms been extended to adjudicative agencies. But again it is clear that applicable standards will differ somewhat with the particular agency. The general rule is that the agency will be disqualified if there is a "reasonable apprehension" or a real likelihood" of bias. It is not necessary to establish bias in fact, but only the appearance of bias.

The principle is difficult to apply in practice for the following reasons:

(a) Much depends on the type of agency and the relative formality of its procedures. Generally, the more closely it resembles a court, the more rigorously the bias test will be applied.

(b) Even where procedures are relatively formal, the rule cannot be strictly applied where, for example, an agency is empowered by its governing statute both to lay and to adjudicate disciplinary charges. Bias on this ground alone cannot be established in agencies of this type. Similarly, a regulatory or licensing agency is not disqualified for bias simply because it asserts that it has a policy to carry out, or its members have particular technical or social background which may indicate the favouring of certain views on a particular social issue. The essential problem in both these situations is that the agency has been given other duties in addition to its judicial duties. These additional duties usually involve a large element of policymaking or policyimplementation for example, the initiation of disciplinary proceedings with certain objectives in view, or the carrying out of a regulatory policy in the public interest through decisions in particular cases.

© Statutes can often be construed to authorize activities or procedures which would produce a reasonable apprehension of bias in a court. A clear example is the Ontario case of *Re Gardner* in which it was held that no bias was involved in the Chairman of the Ontario Securities Commission sitting on appeal from his own decision, since the statute named him a member of the appeal tribunal. But statutes differ widely and even the same statutory language might yield a different result if applied to different types of agencies. There are also indications that even in the face of statutory protection, disqualification may still result from bias in fact.

D. Investigative Proceedings

This heading refers to any statutory power in one or more persons to make a report, with or without recommendations, to a person or agency with ultimate decisionmaking power in a matter.

1. Application of the Rules of Natural Justice

Again, the governing principle is that the rules of natural justice apply only to those investigative functions characterized as judicial or quasi-judicial. The confusion and uncertainty of the law in this area has already been outlined in general and in relation to adjudicative functions.

171. *E.g., Re Swanson and Minister of Lands and Forests,* n. 5 *supra; R.* v. *Saskatchewan College of Physicians and Surgeons, ex parte Samuels* (1966), 58 D.L.R. (2d) 622 (Sask. Q.B.); *Re Foremost Construction Co. and Registrar of Companies* (1967), 61 D.L.R. (2d) 528 (Sask. Q.B.).

172. N. 146 *supra*.

In the case of investigative functions, however, the law is much clearer. The cases are almost uniformly to the effect that such proceedings are administrative in character. The consequence is that the rules of natural justice are not applicable. Procedural arbitrariness cannot be corrected short of fraud, bad faith or, where relevant, failure to comply with statutory procedural requirements.

The leading Canadian case is *Guay v. LaFleur.* The Supreme Court of Canada held that an individual, whose affairs, along with those of thirteen other individuals and corporations, were being investigated by a Department of National Revenue official under section 126(4) of the *Income Tax Act,* was not entitled to be notified of or to be present with his counsel at, the examination under oath of a number of the other witnesses. This decision was reached by the Court despite the fact that the witnesses summoned had been allowed counsel, and that questions were being asked about the affairs of the plaintiff in his absence.

The Court held that the inquiry was purely an administrative matter. The basis for this characterization was that the Commissioner could neither decide nor adjudicate upon anything. The investigation was merely a private investigation at which the plaintiff, LaFleur, was not entitled to be present or represented by counsel. The Supreme Court adopted the view that it was not abrogating or avoiding its function in respect of protecting individual liberties since the taxpayer in question had a right to file a notice of objection against any subsequent assessment, to appeal to the Tax Appeal Board and then to the courts. Similarly, if criminal charges were subsequently to be laid against him, he would have an opportunity to defend himself at that time. Thus, the taxpayer would have his day in court where he would be accorded the ordinary principles of "natural justice."

Support for the majority view of the Supreme Court in *Guay* v. *LaFleur* is found in other cases, including *St John* v. *Fraser,* an earlier Supreme Court of Canada decision concerning an investigation by the British Columbia Securities Commission, and *Re Schumacher,* a recent British Columbia case involving an investigation committee of the Council of the College of Dental Surgeons. In a recent Federal Court decision, Collier J. held that a hearing officer conducting a hearing under the federal *Expropriation Act* on objections to proposed Public Works Department expropriations of private homes for expansion of the Vancouver International Airport, exercised a purely administrative function.

The theme of these cases is that the sole function of the investigator, inquiry officer or committee of inquiry is merely to collect information and make a report, and that the officer or committee has no power either to impose a liability or to make a decision affecting the rights of persons. The individual's rights are not affected until a binding decision is made by the ultimate decisionmaker.

While the decisions in the cases may be analytically correct under one or more of the conceptual characterization tests outlined above, the rationale offered by the courts may be subject to some criticism. In practice, the object of such inquiries is to enable a superior official, often a Cabinet Minister, to determine whether to institute subsequent proceedings which may affect an individual's rights or property. The two most common proceedings of this type are as follows.

1. The first may be generally described as investigations to determine whether an individual has breached the provisions of a statute or regulation, or is guilty of some type of specifically prescribed conduct. There are in fact two slightly differing processes which fit this general description. First, some statutes provide authority for the appointment of an officer to conduct an investigation of certain circumstances or individuals and to report to a higher authority which, as a separate step, may pursue several alternative courses of action. Perhaps the most obvious example in British Columbia of this type of power is that contained in the *Securities Act*.

176. *E.g.,* s. 15 of the *Safety Engineering Services Act,* S.B.C. 1972, c. 56 empowers the Director or any other person designated to conduct an investigation and for this purpose, to compel witnesses, administer oaths, examine witnesses, hold the inquiry in private, employ technical or other assistance, and, generally to exercise all the power and privileges of a commissioner appointed under the *Public Inquiries Act*. Other powers of investigation include those in the *Medical Act,* R.S.B.C. 1960, c. 239, s. 48A, as amended S.B.C. 1973, c. 50, s. 6; the *Debt Collection Act,* S.B.C. 1973, c. 26, s. 4; the *Fair Sales Practices Act,* S.B.C. 1973, c. 32, s. 6; the *Real Estate Act,* R.S.B.C. 1960, c. 330. ss. 55, 56; the *Mortgage Brokers Act,* S.B.C. 1971, c. 36, s. 6; and the *Petroleum and Natural Gas Act,* S.B.C. 1965, c. 33, ss. 128133.

177. *See Re Merchant and Benchers of the Law Society (Sask.)* (1972), 25 D.L.R. (3d) 708 (Sask. Q.B.), rev'd on another ground (1973), 32 D.L.R. (3d) 178 (Sask. C.A.); *Re Dancyger and Alberta Pharmaceutical Assn., [1971]* 1 W.W.R. 371 (Alta. C.A.); *Banks* v. *Hall*, [1941] 4 D.L.R. 217 (Sask. C.A.). Section 53 of the *British Columbia Legal Professions Act,* R.S.B.C. 1960, c. 214, specifically allows members of a disciplinary committee to sit in convocation when a report of the disciplinary committee is considered. Section 23 authorizes the appointment of a person to make whatever investigation the Superintendent of Brokers deems expedient for the administration of the Act. There are many less well known powers of this type in other British Columbia statutes.

The second process is that commonly found in the exercise of disciplinary powers by trade and professional tribunals. Here, typically, an investigation committee will be authorized to investigate a complaint against a member, then present its recommendations to the full tribunal for decision. The chief difference from the first type of process is that the investigation stage is more clearly part of the larger disciplinary process. The investigator and the decision maker are really one and the same. In some cases this has been literally true, with members of the investigating committee participating in the ultimate decision of the tribunal. Courts in Alberta and Saskatchewan have recently held that this practice does not violate the principles of natural justice, since it involves only one adjudication.

179. *See The Expropriation Act,* R.S.O. 1970, c. 154, ss. 68; the *Expropriation Act,* R.S.C. 1970 (1st Supp.), c. 16, s. *8*. *See also* Law Reform Commission of British Columbia, *Report on Expropriation (1971)*.

180. S.B.C. 1973, c. 46, s. 8

181. *See* Hall J. dissenting in *Guay* v. *LaFleur,* n. 169 *supra,* at 19.

182. R.S.B.C. 1960, c. 6, s. 30.

183. R.S.B.C. 1960, c. 16, ss. 4350.

2. The second type of proceedings falls into the category of "public inquiries" to hear representations by affected persons on proposed expropriations, or landuse planning orders, leading to a report to an ultimate deciding authority. This type of procedure is common under English landuse planning legislation. It is less common in Canada, but has been introduced in various forms federally, and in several provinces, by recent changes in expropriation law. There appear to be no true examples of this procedure in the British Columbia statutes, although the hearing requirements on agricultural land reserve plans under the *Land Commission Act,* are similar.

In both types of proceedings the investigative process is really the first step in a larger process leading to an order or decision that may have serious effects on individuals whose conduct or property is the subject of the inquiry. It may be in reality a single process, a possibility which is made clearer when it is noted that in many cases the subordinate investigator may be the decisionmaker as well, with the responsible Minister signing the order drafted by the investigator and his staff.

2. Statutory Procedural Requirements

Statutory procedural safeguards in the conduct of investigative proceedings vary from tribunal to tribunal and from statute to statute, and a comparison of various types of disciplinary proceedings conducted under the authority of statute is instructive. These proceedings all relate to the enforcement of standards of conduct among the members of professional bodies, and may lead to a revocation of a licence to practice within that profession. Under the *Agrologists Act* notice requirements are set out, and there is a right of crossexamination, but there is no specific right to counsel. Under the *Architectural Profession Act* there are rights to notice (including details of the charge and the time and place of the hearing), to counsel and to crossexamination. There is, however, no indication whether the legal rules of evidence apply to the investigatory hearing or whether the architect being investigated is entitled to written reasons for the decision of the Inquiry Committee. Under the *Chiropractic Act*

185. *Ibid*. s. 6(f).

186. N. 181 *supra*.

187. R.S.B.C. 1960, c. 53, s. 10, as amended.

188. N. 181 *supra*.

189. R.S.B.C. 1960, c. 214, ss. 4348, as amended.

190. S.B.C. 1970, c. 4, s. 24.

191 *See* the definitions of "rule" in the U.S. *Administrative Procedure Act,* 5 U.S.C. s. 551(4), and the *Model State Administrative Procedure Act*.

there is merely an authorization to the Board of Chiropractors, with the approval of the LieutenantGovernor in Council, to make regulations "for the investigation of any complaint that a registered chiropractor has been guilty of misconduct." The Act lays down no requirements for a disciplinary procedure or procedural guarantees. Some statutes, like the *Agrologists Act* and the *Podiatry Act,* place both investigatory and decisionmaking power in the same tribunal, while others like the *Architectural Profession Act* and the *Legal Professions Act,* provide for an investigatory or inquiry committee at an initial stage. Still others, like the *British Columbia Professional Foresters Act,* do not make it clear whether it is the inquiry committee or the governing body of the profession which must accord the procedural safeguards specified.

E. Rulemaking

Rulemaking refers to the processes by which tribunals make formal regulations and bylaws, and less formal procedural rules and policy guidelines. This would include, for example, published policy guidelines, handbooks, or objectives that are not in themselves legally enforceable, but in fact form the basis for decisions in all but a small number of exceptional cases. Some British Columbia examples of "rules" of this type are the Service Policy and Procedures Manual, and the Departmental Directives, of the Department of Human Resources, and the Pollution Control objectives

194. *See Wiswell* v. *Metropolitan Corporation of Greater Winnipeg,* [1965] S.C.R. 512.

195. *Ibid*.

196. (1968), 70 D.L.R. (2d) 38 (B.C.C.A.). published by the Pollution Control Branch.

1. Application of the Rules of Natural Justice

The common law procedural rules of natural justice have not, as a general rule, been held to apply to the rulemaking process. Accordingly, no advance notice of an intention to make a rule need be given to persons who may be affected by the rule, nor is there any requirement that they should have an opportunity to make representations with respect to a proposed rule. In addition, there is no common law requirement that publicity be given to rules or regulations *before* they are promulgated.

There are very few reported Canadian decisions on this issue, but two relatively recent decisions *Wiswell* v. *Metropolitan Corporation of Greater Winnipeg* and *Re McMartin and City of Vancouver,* illustrate the judicial approach.

In the *Wiswell* case a declaration was sought that a bylaw passed by the Council of the Metropolitan Corporation of Greater Winnipeg was invalid. The bylaw authorized the rezoning of two particular parcels of land from single family to multiple family use. The plaintiffs were members of an unincorporated homeowners association, the objective of which was to maintain the area as a single family dwelling zone. The association claimed that it had no notice of the application to rezone, despite previous correspondence with the planning department, and consequently had no opportunity to oppose the application. The Metropolitan Corporation of Greater Winnipeg argued that in passing the zoning bylaw it exercised a "legislative" and not a quasi-judicial function, and that therefore the rules of natural justice were not applicable. It was not required to notify interested parties and was entitled to proceed notwithstanding failure to comply with one of its own procedural resolutions requiring notice to be advertised and posted.

The Supreme Court of Canada held that the bylaw was invalid by reason of the failure to give adequate notice to the plaintiff homeowners. The enactment of the zoning bylaw was characterized as a judicial function, because it related to a specific parcel of land and in reality determined a dispute as to zoning between two "parties" the developer and the district residents. In these circumstances to characterize the enactment as legislative was said to be unrealistic.

The *McMartin* case involved an application by area residents to quash part of a City of Vancouver by-law purporting to reduce the permitted size of lots within an area of the city. The residents argued that though notice had been given, and a hearing held as required by the *Vancouver Charter,* the bylaw ought to be quashed on the basis of certain procedural irregularities.

The British Columbia Court of Appeal held that in passing the zoning bylaw amendment the Vancouver Council exercised a legislative function. The *Wiswell* case was distinguished on the ground that the amending bylaw in question was of general application, and not an enactment relating to specific land and a specific dispute.

199. *See Re Lloyd and Superintendent of Motor Vehicles* (1971), 20 D.L.R. (3d) 181 (B.C.C.A.). *Cf. Re Lamoureux and Registrar of Motor Vehicles,* [1973] 2 O.R. 28.

200. *See Re Lloyd and Superintendent of Motor Vehicles* n. 198 *supra; R.* v. *the Port of London Authorities, ex parte Kynoch,* [1919] 1 K.B. 176 (C.A.); *Jackson* v. *Beaudry* (1969), 70 W.W.R. 572 (Sask. Q.B.); H. L. Molot, "Selfcreated Rule of Policy and Other Ways of Exercising Administrative Discretion," (1973) 18 McGill L.J. 310.

While both the *Wiswell and MaMartin cases* concerned the making of bylaws by municipal authorities and do not directly apply to the making of rules or regulations by agencies of senior governments, the cases highlight the issues raised in this section. First, the courts have made a clear distinction between a rule of limited application (in which case the rules of natural justice are said to apply) and a rule of more general application (in which case the rules of natural justice do not apply).

Accordingly, even if it could be said that the *Wiswell* case is equally applicable to rules or regulations made by agencies exercising power under the authority of provincial legislation and as part of the executive branch of government, the rules of natural justice, minimal though they might be, would still not be applicable to the making of rules or regulations of general application by such agencies. In addition, the facts of the *Wiswell* case may properly be regarded as unusual and as less likely to repeat themselves and to concern the public than those circumstances in which rules or regulations of more general application are enacted.

Another issue in the area arises when an agency which is authorized by statute to decide certain matters according to its discretion, decides these matters according to pre-established policy guidelines. At first glance it appears that the administrators are prejudging particular cases. In fact, however, the administrators are generally acting in good faith, and have simply used the policy guideline technique to increase efficiency and consistency in agency decision making. An example is the "point system" used by the Superintendent of Motor Vehicles in determining whether to suspend drivers' licences under the *Motor Vehicle Act*. The case law suggests that decisions made

in this way will be void for lack of jurisdiction, on the ground that the decisionmaker has failed to address his mind to the facts of the particular case before him. He will have failed to carry out the function that the statute requires that is, exercise his discretion in relation to the particular matter.

The result in some cases has been unfortunate. It is clearly desirable that all significant factors in each case should be carefully considered in the exercise of a statutory discretion. Yet the judicial decisions have made it potentially hazardous for some tribunals to lay down policy for their own guidance, and for the information and guidance of affected parties.

The difficulty can sometimes be circumvented by promulgating the guidelines in the form of regulations. But this has the disadvantage of removing the tribunal's flexibility to deal with anomalous cases without seeking amendment to the regulations, which is the reason that the statutory discretion was granted to the tribunal in the first place. Rulemaking hearing requirements for informal guidelines may provide part of the answer. Participation by the potentially affected public in the formulation of guidelines might go some way towards ensuring that the guidelines were responsive to public needs, and to clarify the tribunal's general approach, and inform the public of criteria likely to be applied in future decisions.

2. *Statutory Procedural Requirements*

At present there are virtually no statutory requirements for notice and hearing or other form of opportunity for public comment in British Columbia rulemaking. One of the few statutes requiring, as opposed to merely authorizing, a hearing on rules is the recent *Land Commission Act*.

202. R.S.B.C. 1960, c. 155, s. 703.

203. S.B.C. 1953, c. 55 as amended, s. 566.

204. *See* Pollution Control Branch Water Resources Service, Department of Lands, Forests, and Water Resources, *Pollution Control Objectives for the Forest Industry* (1972); *Pollution Control Objectives for the Mineral Industry* (1973). Public inquiries have also been held into discharges by the chemical and petroleum industries, municipalities, and food and beverage processing and miscellaneous industrial sources. Section 8 requires that municipalities or regional districts hold public hearings on agricultural land reserve plans before submitting the plans to the Commission for approval. If the municipality or regional district holds no hearing, then the Commission itself is required to do so. In approving agricultural land reserve plans, the Commission is exercising a zoning function, and therefore the hearing requirement is consistent with the wellestablished requirement for hearings on proposed amendments to zoning bylaws contained in the *Municipal Act* and the *Vancouver Charter.* In fact, the *Land Commission Act* incorporates the hearing requirements of section 703 of the *Municipal Act*.

Several other provincial tribunals have recently held rulemaking hearings when authorized, but not required, by statute to do so.

One of the best developed of the rulemaking procedures is that adopted by the Pollution Control Branch. Five public inquiries have been held into technical questions related to pollution by different classes of waste discharges. The Branch acted under section 14 of the *Pollution Control Act* which provides that:

> Whenever it appears to the Board or the Director that the proper determination of any matter within its jurisdiction necessitates a public or other inquiry, the Board or Director may hold an inquiry, and for that purpose the Chairman of the Board or the Director, as the case may be, has all the powers and jurisdiction of a Justice of the Peace under the *Summary Convictions Act*.

Other major voluntary rulemaking processes are those of the Energy Commission on matters relating to the natural gas industry, and several of the hearings held by the Environment and Land Use Committee,

207. S.B.C. 1971, c. 17, s. 4. under the *Environment and Land Use Act*. In addition, the Workers' Compensation Board holds hearings on proposed new safety regulations.

To summarize, some provincial agencies have recently begun to experiment with rulemaking hearings. The practice, however, is limited to a few agencies, acting under discretionary powers. With the exception of zoning hearings (and the analogous procedure under the *Land Commission Act)* there are no statutory requirements for hearings on rules. Thus, at present there are almost no mandatory statutory requirements for public participation in rulemaking. Nor does the common law insist on notice to, or an opportunity to be heard for, persons likely to be affected by tribunal rules. Yet it seems clear that rules may often affect individuals just as seriously as decisions in adjudications, and the numbers of persons affected are significantly larger.

CHAPTER III THE COMMISSION'S PROPOSAL

A. Introduction

In the preceding portion of this Report we have pointed out what we believe to be the unsatisfactory state of the law relating to the procedures to be adopted by agencies when they are charged with the responsibility of deciding upon aspects of the personal and property rights of individuals. The requirements of the common law are imprecise and fortuitous in their application, and the standards imposed by statute vary from agency to agency without justification according to any immediately apparent set of consistent principles.

The questions which pose themselves therefore are, first, how a degree of rationality and consistency may be introduced into the law and, second, what factors ought to be taken into account in arriving at a decision on what constitutes that required degree of rationality and consistency.

Opinions may differ sharply either on what constitutes a proper standard of procedural fairness for each agency and its individual functions, or on the general philosophical approach which ought to be adopted in resolving the question. Underlying the debate is an almost ideological conflict involving the relative merits of procedural justice and effective government what have been called "lawyers' values and civil servants' values."

2. K.C. Davis, "Administrative Law Treatise" s. 7. 16 (Supp. 1970). In crude terms there are those who believe that there are certain procedural rules by which all agencies ought to abide when they are deciding questions involving the personal and property rights of individuals, at whatever cost to the actual process of government, and then those who believe that observance of the basic rules of fairness, as defined by lawyers, will simply result in the paralysis of public administration. It is said that if on every occasion upon which an agency must decide a question involving individual rights it must also grant notice, information, oral hearings, the right to counsel and crossexamination, and a written decision with reasons, then there will be little effective government and some danger to public security and welfare.

It is the view of the Commission that there is undoubtedly a middle ground between these two opposing points of view. One of the most informed commentators on contemporary American administrative law has said:

> When facts are in issue and a question arises as to whether a party is entitled to opportunity to be heard, must we always choose between giving the party the full panoply of procedural rights through a trialtype hearing and holding that he is not entitled to any hearing at all? Does our legal system need some creative thinking about a procedural system that will provide a relatively summary factfinding but will still provide some fundamental protection against unfairness? Even if our AngloAmerican system of trial procedure provides better protection than any other system in the world, as it may, do we nevertheless need to explore the possibilities for stripping down the protections to a few fundamental ones in order that some governmental tasks may be more quickly and more efficiently performed? The question in one

aspect is whether we should sometimes increase the procedural protections we now provide, for when we are limited to choosing between all and none, we sometimes choose none; if we had a choice among all, some, and none, we might sometimes choose some instead of none.

B. Approaches to Reform

In the Introduction to this Report we referred very briefly to various modern attempts at reform in the law of administrative procedure in the common law world. There are, broadly speaking, two approaches. The one is to enact a code embodying a number of principles of procedural fairness which apply, with certain crucial exemptions, to all agencies exercising certain kinds of powers. This approach has been used in Alberta, Ontario and the United States, both at the federal and state level. The other approach is to make no abstract decision on the merits of principles of procedural fairness, but to examine each agency and its various functions with a view to testing which, if any, of the principles can be applied without an unreasonable disruption in the governmental process. This, by and large, has been the preferred approach in England, Australia and New Zealand and, as far as we know, it has been adopted in principle by the Law Reform Commission of Canada in relation to federal agencies.

In point of fact, the distinctions between the two approaches are not as clear-cut as might at first appear, as the code approach in Alberta and Ontario has been modified by machinery for dispensation from the codes after an examination of individual agencies and their various functions.

In Alberta the *Administrative Procedures Act*

4. *Ibid*. *s*. 2(a).

5. *Ibid*. *s*. 2(c). applies to an authority exercising a statutory power, and a statutory power is defined as:

> ... an administrative, quasijudicial or judicial power conferred by statute, other than a power conferred on a court of record or civil or criminal jurisdiction or a power to make regulations ...

From a practical point of view, however, perhaps the most crucial part of the Act is section 3, which provides that:

> The Lieutenant Governor in Council may, by order,
>
> (a) designate any authority as an authority to which this Act applies in whole or in part,
>
> (b) designate the statutory power of the authority in respect of which this Act applies in whole or in part, and
>
> © designate the provisions of this Act which are applicable to the authority in the exercise of that statutory power, and the extent to which they apply,
>
> and this Act only applies to any authority to the extent ordered under this section. [emphasis added]

The Act has been applied only to a small number of authorities.

The limitations of the *Ontario Act* are set out with somewhat more complexity. Section 3(1) states that the Act:

7. *Ibid*. s. l(d).

8 S.O. 1971, c. 50.

> ... 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 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. [emphasis added]

Section 3(2) exempts from the operation of the Act a number of agencies and functions, in particular:

> (g) ... 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 or advice 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) ... a tribunal empowered to make regulations, rules or bylaws in so far as its power to make regulations, rules or bylaws is concerned.

Thus, investigative and rulemaking functions are not subject to the Act's prescriptions of procedural fairness.

Those agencies which are subject to the Act are, at first glance, those exercising "a statutory power of decision," which is defined as:

> ... a power or right, conferred by or under 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.

There is, however, an even more significant limitation, and that is that the Act applies only to those agencies exercising a statutory power of decision which are required by law to hold a hearing. The Commission thinks it important to point out that at the time of passage of *The Statutory Powers Procedure Act, 1971, The Civil Rights Statute Law Amendment Act, 1971*

10. S.O. 1971, c. 47, s. 26.

11. *Ibid. s.* 27(a).

12. *Ibid. s.* 28.

was also enacted. This latter Act deals with some ninety agencies in Ontario and prescribes which of them is required to hold a hearing when exercising certain of their functions. It was the result of an agencybyagency examination by the Royal Commission Inquiry into Civil Rights for the implied purpose of determining whether the requirements of procedural fairness set out in *The Statutory Powers Procedure Act, 1971* which are invoked by the necessity to hold a hearing, would unduly inhibit the governmental process. It is worth quoting at length from the relevant portion of a commentary on the two Ontario statutes.

> The application of the [minimum] rules [of procedure] where a hearing is required "otherwise by law" [by section 3(1) of *The Statutory Powers Procedure Act, 1971*] 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 ...
>
> In the course of reviewing the statutes it became apparent that additional rules for certain tribunals should be enacted and that the Minimum Rules should be varied in their application to certain tribunals to meet special circumstances. Amendments to these statutes therefore, in addition to specifying that a hearing is required, in many instances also enact provisions imposing on some tribunals additional procedural requirements or overriding for some tribunals certain of the Minimum Rules. [emphasis added]

In addition the *Ontario Act* provides that a Statutory Powers Procedure Rules Committee should be set up, among one of whose duties is that of maintaining "under continuous review the practice and procedure in proceedings to which the Act applies." Similarly, agencies are prohibited from making rules of procedure pursuant to the Act unless there has been consultation with the Committee.

The Commission has concluded that the qualifications and limitations which have been placed on the applicability of the Alberta and Ontario statutes relating to procedural fairness reveal a fundamental flaw in the approach of enacting a code of fairness before an examination on an agencybyagency basis of the effect of the code.

C. The Flaw in the Code Approach

In various portions of this Report we have made reference to the possibility that a full measure of procedural fairness, as lawyers understand the term, may not be appropriate for all functions which agencies may discharge. Some examples may serve to illustrate the point.

The *Contagious Diseases (Animals) Act*

14. *Ibid. s.* 3.

15. R.S.B.C. 1960, c. 148, s. 4.

provides for the appointment of Inspectors to carry out duties under the Act. Section 8 provides that:

> An Inspector may at once seize and detain any diseased animal and, pending notice to the owner, cause the animal to be kept, at the expense of the owner, in some place where it will not be brought into contact with or be in danger of transmitting the disease to other animals.

Section 4 provides that:

> An Inspector ... has power to enter in or upon any premises or any vehicle in the performance of any duty under this Act or regulation thereunder.

In applying the criteria of procedural fairness the right to notice, disclosure, a hearing with counsel and crossexamination, and a written decision with reasons to the right under section 8 to seize diseased animals, it seems fair to ask whether the purpose of the legislation to avoid the spread of contagious disease would not be defeated if each of these timeconsuming procedural steps had to be complied with. If the criteria are applied to the powers of entry under section 4, it may well be that in nonemergency situations the procedural steps could be complied with without immediate harm to the community, but it seems also fair to ask whether the community could, or ought to be asked to, bear the added cost in terms of time, money and extra staff which would be required for compliance.

The *Fire Marshal Act* provides that there shall be a Fire Marshal for the province, and that he shall perform the duties imposed on him by the Act. Section 17 of the Act provides that:

> (1) Upon complaint of any person interested or, if deemed advisable without complaint, the Fire Marshal, his deputy, his Investigators, Inspectors, or Instructors, may at all reasonable hours enter into any building or premises anywhere in the Province for the purpose of inspecting the same and ascertaining whether or not
>
> (a) in case the building or premises are in a state of disrepair, fire starting therein might spread so rapidly as to endanger life or other buildings or property;
>
> (b) the building or premises are so used or occupied that fire would endanger life or property;
>
> © combustible or explosive material is so kept or such other inflammable conditions exist in or about the building or premises as to endanger life or property;
>
> (d) any special fire hazard exists in or about the building or premises.

(2) After an inspection the Fire Marshal or, with the authority of the Fire Marshal, his investigator, inspector or instructor may in writing order that within a reasonable time, to be fixed by the order,

(a) in cases under clause (a) of subsection (1) the owner shall remove or destroy the building or premises, or the owner or occupier shall repair the building or premises;

(b) in cases under clause (b) of subsection (1) the owner or occupier shall alter the use or occupancy of the building or premises;

© in cases under clause © of subsection (1) the occupier shall remove or keep securely the combustible or explosive material or remedy the inflammable conditions;

(d) in cases under clause (d) of subsection (1) the owner or occupier shall remove or take proper precautions against the special fire hazard.

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.

The *Health Act* provides that:

> The Minister [of Health] or any member of any Local Board [of Health], and any Medical Health Officer or Public Health Inspector, may at all reasonable times, inspect any animal, carcass, meat, poultry, game, flesh, fish, fruit, vegetables, grain, bread, flour, milk, candies, or other eatables exposed for sale or deposited in any place for the purpose of sale, or for preparation for sale, and intended for food for man; land if any such ... upon such inspection, appears to the person inspecting the same to be diseased, or unsound, or unwholesome, or unfit food for man, it may be forthwith seized and carried away destroyed or so disposed of as to prevent it from being exposed for sale or used for food for man.

In this situation, too, it seems that the issue ought to be confronted whether compliance with the rules of procedural fairness in the case of a proposed inspection or seizure of food would not create such a potential hazard to the health of the community that it might not be objectively said that the community's claim to a speedy means of ensuring its health outweighs the claim of the individual vendor of foodstuffs to procedural fairness.

The *Social Assistance Act*

18. *Ibid*. s. 13(f)

19. S.B.C. 1973, c. 4, s. 3(1).

provides that there shall be a Director of Rehabilitation and Social Improvement, and one of his responsibilities is that he may

> ... grant social assistance to any person in any local area who is eligible under this Act where there is reason to believe the withholding of such assistance might cause unreasonable distress ...

The problem of procedural fairness and social assistance is a particularly vexed one. If all procedural rules had to be complied with on every application for social assistance, there is the possibility that the applicant himself might be

put at a disadvantage by the delay involved, as well as other applicants who would be obliged to wait their turn for a hearing. On the other hand it might be said that the need for rules of procedural fairness in the context of social assistance is particularly important. Whatever the answer to this problem may be, however, it does not seem to the Commission that it lies in the simple imposition of a code of procedural fairness of the Alberta or Ontario type.

So far in this list of examples of agency decisionmaking we have concentrated on situations where the requirements of procedural fairness might be said to impose too great a burden on the community. There are, of course, situations in which the point may be much more arguable.

Under the *Ambulance Service Act,* for example, the Minister responsible for the administration of the Act may require that every person who operates a prescribed type of ambulance service be licensed. The Act does not set out a procedure for the granting of licences, although the factors which the Minister ought to take into account in reaching a decision are set out in section 4. This Commission is not in a position to determine conclusively whether or not there is any overriding public interest which would be subverted if the licensing process were to be conducted in conformity with rules of procedural fairness, but on the face of it no such interest is apparent, unless it be simply one of cost to the taxpayer.

The *Ambulance Service Act* also raises another issue that of the desirability of applying rules of procedural fairness to rulemaking. The Act provides in section 8 that:

> For the purpose of carrying out the provisions of this Act ... the Lieutenant-Governor in Council ... may make regulations establishing
>
> (a) standards of construction and maintenance required for an ambulance, or any type of ambulance specified in the regulation; and
>
> (b) the standard of equipment and supplies to be carried in an ambulance while it is being used, or held out as being available for use as an ambulance; and
>
> © the standard of training and qualification required of any person who assists in the operation of any ambulance; and
>
> (d) the records to be maintained by an operator of an ambulance service, and the records that he is required to submit to the minister; and
>
> (e) the type of warning lights and sound producing devices required on an ambulance, and the circumstances under which these devices may be used.

Although the *Alberta* and *Ontario Acts* do not apply rules of procedural fairness to rulemaking, the *Administrative Procedure Act* of the United States does so,

21. S. 1(2).

22. R.S.B.C. 1960, C. 54. as does the *Model State Administrative Procedure Act,* which provides that:

> "rule" means every regulation, standard, or statement of policy or interpretation of general application and future effect, including the amendment or repeal thereof, adopted by any agency, whether with or without prior hearing, to implement or make specific the law enforced or administered by it or to govern its organization or procedure, but does not include regulations concerning only the internal management of the agency and not directly affecting the rights of or procedures available to the public.

It has been suggested to us that a code of procedural fairness should apply to the making of all rules by agencies in British Columbia. Leaving aside for the time being the constitutional difficulty posed by the fact that most

such rules are issued in the name of the LieutenantGovernor in Council or of a particular Minister, there remains the issue whether it is appropriate, worthwhile or even physically possible for the canons of procedural fairness to be applied to all rulemaking.

To take the *Ambulance Service Act* as an example, it may be suggested that operators of ambulances and others should be given an opportunity to make formal submissions on the standards of construction of ambulances, or the training required to operate them, but in the view of the Commission this is a decision which can only be taken after detailed scrutiny and evaluation of the practical difficulty of such a requirement. We do not believe that it would be responsible to take an a *priori* decision that rules of procedural fairness should apply to all rulemaking, regardless of the relative importance or unimportance of the effect of the rulemaking or its potential for controversy.

It has also been suggested to us that a code of procedural fairness should be made applicable to investigative processes of agencies, as well as their rulemaking and adjudicative processes.

Section 6(l)(f) of the *Chiropractic Act* provides, for example, that:

> The Board of Chiropractors, with the approval of the LieutenantGovernor in Council ... may make regulations ...
>
> (f) for the investigation of any complaint that a registered chiropractor has been guilty of misconduct or displayed such ignorance or incompetence as to render it desirable in the public interest that his registration should be cancelled or suspended.

Section 48A(l)(a) of the *Medical Act*
24. R.S.C. 1970, c. J3. provides that:

> The Council [of the College of Physicians and Surgeons of British Columbia] or the executive committee [of the Council], or any person appointed for the purposes of this section by the Council or the executive committee, may
>
> (a) investigate whether or not a member of the College is bringing to his practice of medicine or surgery adequate skill and knowledge ...

It may be that there are no valid reasons in the public interest why these investigative powers should not be exercised in accordance with rules of procedural fairness, or it may be that there are compelling reasons for the absence of such rules, related perhaps to the possible need for confidentiality if the investigation is to be effective. It does not seem to us to be appropriate to impose a code of procedural fairness on all investigative proceedings without once again, detailed scrutiny and evaluation of each agency and function for the purpose of determining whether procedural fairness would inhibit or prevent effective discharge of the function by the agency.

It will have become apparent by this stage that the Commission perceives the flaw in the code approach to be the canonisation of rules of procedural fairness into a set of imperatives in the face of which all other considerations must be discounted. We agree that each of the codes which we have studied has, in its own way, solved or attempted to solve the practical difficulty of imposing abstract statements of principle on fundamentally diverse institutions whose only common denominator is that their powers to take decisions are granted by statute; we cannot, however, defend on any informed or rational basis the thesis upon which the codes are constructed namely that rules of procedural fairness are presumptively entitled to greater consideration than any other governmental purpose without any attempt at weighing the merits of those other purposes on a casebycase basis.

We do not, of course, intend to minimise the inherent merits of rules of procedural fairness. The rules speak for themselves in providing assurances of informed and balanced decisionmaking by agencies. We draw, however,

an analogy with the inroads made on one of the principles set out in the *Canadian Bill of Rights*. Section 2 provides, among other things, that:

> ... no law of Canada shall be construed or applied so as to ...
>
> (f) deprive a person charged with a criminal offence of the fight to be presumed innocent until proved guilty according to law in a fair and public hearing by an independent and impartial tribunal,.... [emphasis added]

Yet section 12 of the *Juvenile Delinquents Act* provides that:

> (1) The trials of children shall take place without publicity ...
>
> (2) Such trials may be held in the private office of the judge or in some other private room in the courthouse or municipal building or in the detention home ...
>
> (3) No report of a delinquency committed, by a child, or of the trial or other disposition of charge against a child ... in which the identity of the child is ... indicated, shall without the special leave of the court, be published in any newspaper or other publication.

Few would deny the essential merit of publicity in criminal trials, but equally few, in our opinion, would deny that in the trials of juveniles there is another, equally important, interest to he served the desirability of anonymity for young offenders which justifies secrecy in that particular instance.

The Commission's essential position is, therefore, that as a general proposition it is desirable that there be rules of procedural fairness in agency decisionmaking, but that no fixed position can be taken on the application of all, some or any of those rules to any particular agency or function until the purposes of the agency or function have been weighed.

The Commission proposes, therefore, that a special inquiry body be constituted to examine all government agencies in British Columbia, and their functions, on an individual basis, with the limited purpose of reaching rational conclusions on whether rules of procedural fairness can or ought to be applied to them.

D. An Inquiry Body

The Commission acknowledges that it may seem unusual for its sole substantive recommendation in this Report to be the setting up of a separate inquiry body. Nonetheless, our analysis of the topic has led us to the conclusion that an inquiry is necessary if the issues are to be confronted in a realistic way, and we think it best to state frankly our view that our constitution limits our capability to conduct the inquiry properly.

First, the nature of the inquiry obviously transcends the application of legal principles. What is required is an ability to weigh legal principle against the broader purposes which agencies may serve, and the financial and administrative cost which compliance with all or some of the rules of procedural fairness would involve for an agency. It does not seem appropriate to us that a Commission composed exclusively of lawyers should embark upon a task which demands a wider area of competence than lawyers may be thought to have.

Secondly, the inquiry demands the sustained and undivided attention of a group which, for a period of time, has no other responsibility. It will need to work closely with a wide range of government officials and became familiar with a wide range of government activities. This Commission has a number of commitments to other projects of law reform which would have to be put in abeyance if we were to attempt the task we have outlined.

While we have no wish to dictate the actual composition of the inquiry group we have suggested, it is our view that it ought to comprehend not only those with legal training but also those with senior administrative experience in the public service, each preferably having had previous exposure to the other's field of endeavour. The inquiry would also be well served, in our view, by someone who has made a special study of administrative law as a subject.

If the inquiry is to proceed with any degree of efficiency and speed it ought not to be excessively formal, but to provide for situations where it may be necessary to compel the attendance of witnesses or subpoena documents, we would suggest that a Commission issue under the *Public Inquiries Act*.

26. Report No. 1, 362.

27. R.S.A. 1970, c. 2, s. *2(c)*. *See* Appendix A.

28. R.S.A. 1970, c. 318.

This would also provide an aspect of independence.

E. The Scope of the Inquiry

It is not possible to define with any precision the scope of the proposed inquiry in terms of the institutions and their functions which ought to be studied, as the large task of identifying them is one which the Commission has not had the resources to undertake.

Essentially, however, what we have in mind is a study of those provincial and municipal agencies which, in the discharge of adjudicative, rulemaking and investigative functions have the power to affect the personal and property rights of individuals.

A study on a broad front of the application of rules of procedural fairness to rulemaking is, we concede, a comparatively new step in the Canadian context. The Ontario Royal Commission Inquiry, for example, did not accept the need for it, on the basis that:

> Although there is no legal requirement for consultation with persons who will be affected, extensive consultations usually take place. In general only matters of high government policy which must be kept confidential are not subject to some consultation.

The Alberta statute specifically exempts "a power to make regulations" from the application of the statute's requirements of procedural fairness, although arguably a rule which is not promulgated as a regulation under the *Regulations Act* might be defined as a "statutory power" under section 2(c)(v) which provides that:

> "statutory power" means an administrative, quasijudicial or judicial power conferred by statute ...
>
> (v) to declare or establish a right or duty of a person under a statute, whether in a dispute with another person or otherwise ...

Why is it appropriate to take into account the possibility of procedural safeguards for rulemaking? The traditional view of rules and regulations has been that since they are of general rather than particular application, it cannot be said that they affect the personal and property rights of individuals, and that therefore procedural safeguards are not required.

Yet in contemporary circumstances it seems that this traditional view may be misleading. many rules and regulations do apply quite specifically to small areas or classes of persons. This situation the distinction between orders and rules becomes blurred. Increasingly, changes in rules or regulations can be traced to issues involving

small numbers of regulated individuals. The effect on these individuals may be the same as if a specific, judicially enforceable order had been made against them by the agency.

Even in the case of rules of general application, effects on individuals may be significant. It is argued, however, that in this case a legislative process is involved. Rules are formulated by responsible elected officials and promulgated by orderincouncil, departmental directive, or other means. If there is to be public influence at all, it is said, this should be achieved informally through elected representatives. In other words, if a citizen has a complaint about a proposed rule or regulation, he should communicate with his Member of the Legislative Assembly.

Unfortunately, practice may not always support the theory. Rules and regulations are generally developed by appointed officials within government departments and other agencies, and their deliberations are not normally public. If outside consultation does take place, it is almost always selective. Some affected interests may be informally consulted. Other interests which are not considered to be directly affected, or which are not easy to identify, are unlikely to be consulted. Rules or regulations are then produced for approval by the agency, the responsible Minister, or more usually by the LieutenantGovernor in Council. But this is normally formal approval only. Proposed rules or regulations are rarely studied and debated as bills are in the course of passage through the Legislature, and affected members of the public sometimes discover a rule or regulation only after it has been formally issued as an orderincouncil, or otherwise released and published. The advantages of public participation, where practicable in the rulemaking process are apparent. It facilitates the acquisition and testing of basic information by an agency, and as agency staffs and financial resources are generally limited, it may fill many information gaps. Rulemaking hearings may also disclose hitherto unknown difficulties perceived by the public, and thereby assist a tribunal in future policy development and implementation.

There is also an educational benefit in allowing public participation in the rulemaking process. Participants will obtain a better understanding of the proposed rules and of the reasons for making the rules and the general policy objectives involved.

We realize, of course, the constitutional difficulty imposed by the fact that in British Columbia most rulemaking powers are formally invested not in an agency itself, but in the LieutenantGovernor in Council. We believe, however, that the proposed inquiry will reveal two broad situations in which the LieutenantGovernor in Council functions. The one is that in which the LieutenantGovernor in Council is a vehicle for the execution of policy specifically decided by the Cabinet and their advisors. Here it would be contrary to constitutional and political doctrine for any external procedural constraints to be imposed. The other situation is that in which the LieutenantGovernor in Council in issuing ordersincouncil is merely giving the force of law to matters which have been decided by agencies. Here it is not, in our view, inconsistent with any theories of political responsibility to consider the practicability of public consultation by agencies in the development of rules or regulations that are required by statute to be issued in the form of ordersincouncil.

A comprehensive study of the possible application of rules of procedural fairness to the investigative functions

31. In *Bell* v. *Ontario Human Rights Commission, [1971]* S.C.R. 756, the facts reveal that the appellant's solicitor requested that the Minister of Labour consent to a prosecution under *The Ontario Human Rights Code* rather than appoint a Board of Inquiry to investigate the complaint made against the appellant that he had infringed the Code.

32. S.O. 1971, c. 47. *See* Appendix B. of agencies is more novel than that involving rulemaking functions, and one which the Commission found it more difficult to accept. Our consultants, however, urged it upon us for the following reasons.

1. When disciplinary proceedings following an investigation are taken, much of the evidence likely to be in the minds of the members of the decisionmaking body (whether a formal hearing is granted at the second stage or not) is that received by the investigative body.

2. In many cases the investigator is in fact the decisionmaker, with the superior body simply giving formal approval to a recommendation of the investigator.

3. Even where an investigation is not followed by formal proceedings, the result may be that damage will be done to the reputation of an individual investigated simply because the investigation was undertaken and the facts never fully disclosed.

Because of these arguments, we suggest that the proposed inquiry body canvass situations in which investigations are carried out by agencies. The purpose would be to evaluate whether the application of rules of procedural fairness would in fact destroy the effectiveness of the investigations, although there are doubtless some investigative agencies, such as the police, which the inquiry body might think it inappropriate to consider.

F. The Rules of Procedural Fairness

Up to this point we have referred only in summary fashion to the accepted rules of procedural fairness. What follows is an attempt to describe their content more fully.

(1) ___*Notice*

Section 6 of *The Statutory Powers Procedure Act, 1971* of Ontario provides that:

> (a) The parties to any proceedings shall be given reasonable notice of the hearing by the tribunal.
>
> (b) A notice of hearing shall include,
>
> (i) a statement of the time, place and purpose of the hearing;
>
> (ii) reference to the statutory authority under which the hearing will be held; and
>
> (iii) a statement that if the party notified does not attend at the hearing, the tribunal may proceed in his absence and he will not be entitled to any further notice in the proceedings.

The *Alberta Act* more simply states in section 4 that:

34. *Ibid*.

35. S.O. 1971, c. 47. *See* Appendix B. *See also Robertson* v. *Deputy Superintendent of Brokers,* [1973] 3 W.W.R. 643 (B.C. Sup. Ct.); reversed by B.C. Court of Appeal on a ground unrelated to the requirement of disclosure, (1974), 42 D.L.R. (3d) 135.

> Where
>
> (a) an application is made to an authority, or
>
> (b) an authority on its own initiative proposes,
>
> to exercise a statutory power, the authority shall give to all parties adequate notice of the application which it has before it or of the power which it intends to exercise.

The matter of the giving of notice to persons to be affected by a proposed agency adjudication, rulemaking or investigation is one of the most fundamental concerns of procedural fairness. It ought, therefore, to be given consideration by the proposed inquiry body in its evaluation of the functions of agencies in the province.

Assuming that it will be found practicable to impose a noticegiving requirement on at least some agencies, the form and content of notice will obviously vary from agency to agency and function to function. What is reasonable in one context may not be appropriate for another. In an adjudication situation, involving, say, only two parties, individual notices would be feasible. In a rulemaking situation, by contrast, individual notices would almost certainly be impracticable, unless the range of potentially affected parties were very narrow, and more generalized forms of notice, such as newspaper advertisements, might have to be adopted.

(2) *Information*

In Chapter 2 of this Report it was pointed out that one of the rules of "natural justice" at common law is that an agency involved in an adjudicative function is required to ensure that parties have sufficient information to enable them to represent their positions adequately at the hearing. Section 5 of the *Alberta Act* confirms this right, but section 8 of the *Ontario Act* merely requires "reasonable information of any allegations" to be furnished to parties prior to a hearing only where the "good character, propriety of conduct or competence of a party is in issue in any proceedings."

Ideally, all parties to a proceeding before an agency would be given access to all documentary or written evidence to be produced to the agency in the course of the decisionmaking process.

This, however, is indeed a statement of ideal. There will obviously be a series of instances where considerations of cost, efficiency, public security and personal privacy will outweigh the value to be placed on the full disclosure of material which is in an agency's possession.

37. S.O. 1971, c. 47, s. *10*. *See* Appendix B.

38. R.S.A. 1970, c. 2, s. 7. *See* Appendix A.

39. S.O. 1971, c. 47. *See* Appendix B.

We merely suggest, therefore, that the proposed inquiry body evaluate the consequences for each agency of a requirement that there be disclosure of all or some written or documentary information which may be relevant in the decisionmaking process.

(3) *Oral hearings*

As was pointed out in Chapter 2, the rules of natural justice do not always require an oral hearing, even in adjudicative situations. Neither the *Alberta Act* nor the *Ontario Act* specifically require oral hearings, although the *Ontario Act* does guarantee the right of a party "to call and examine witnesses and present his arguments and submissions" when a hearing is required under another statute. The *Alberta Act* states that oral representations or representations by counsel need not be permitted if a tribunal affords a party an adequate opportunity to make representations in writing.

It is one of the fundamental convictions of most lawyers, however that in adversary situations in particular, facts may best be established by the presentation of oral evidence, subjected to testing by cross-examination.

We would suggest that the proposed inquiry body examine the feasibility of oral hearings on an agencybyagency and functionbyfunction basis.

(4) *Public hearings*

If it is concluded that an oral hearing should be required in a particular situation, consideration should be given to the question whether the hearing should be public.

Although the *Alberta Act* has nothing to say on whether hearings should be public, the *Ontario Act* provides in section 9 that:

> (1) A hearing shall be open to the public except where the tribunal is of the opinion that,
>
> (a) matters involving public security may be disclosed; or
>
> (b) intimate financial or personal matters or other matters may be disclosed at the hearing of such a nature, having regard to the circumstances, that the desirability of avoiding disclosure thereof in the interests of any person affected or in the public interest outweighs the desirability of adhering to the principle that hearings be open to the public.

It has been suggested to us, however, as a gloss on the Ontario position, that an agency should not be able to close a hearing on the basis that an open hearing might invade a party's right to privacy unless the affected party requests the closure. Similarly it has been suggested that a hearing should not be closed for its duration where only a small portion of the proceedings involves one of considerations listed in section 9 of the *Ontario Act*.

(5) ___*Representation by counsel*

That affected persons should be entitled to be represented by counsel at agency hearings is a principle which has received widespread endorsement.

It was recommended by the Ontario Royal Commission Inquiry,
41. S.O. 1971, c. 47, s. *10(a)*. *See* Appendix B.

42. *Report of the Committee on Administrative Tribunals and Inquiries*, para. 87 (1957 Cmnd. 218).

43. 5 U.S.C. s. 6(a).

44. *See Elcock, Administrative Justice* 6264 (1969).

45. *See* Lucas and Moore, "The Utah Controversy: A Case Study of Public Participation in Pollution Control," (1973) 13 Natural Resources Journal 36. and incorporated in *The Statutory Powers Procedure Act, 1971*. It was also recommended by the Franks Committee in England and is given legislative recognition in the U.S. federal *Administrative Procedure Act*. The principle is founded on the basis that representation by experienced counsel is likely to ensure that the case of the uninformed or inarticulate party is effectively presented to the agency.

Where the right to counsel is granted, however, it has been suggested that it should not necessarily be restricted to representation by a lawyer. Representation by a skilled agent who has experience with the agency and its procedures may in some cases be more effective than legal representation,
47. *See* R.G. Dickson, "The Welfare State and Mass Justice: A Warning From the Social Security Program," (1972) Duke L.J. 681.

48. *Ibid*. at 741. the representation of workers by experienced union business agents before the Workers' Compensation Board being a possible case in point. Where technical matters are involved, an engineer or scientist with the appropriate background may be more competent than a lawyer who lacks technical training.

If, however, the principle of representation by nonlawyers is accepted, an agency ought to be empowered to exclude agents who are incompetent or who fail to act in the best interests of the affected party.

The *Ontario Act*, in section 11(1), provides that a "witness at a hearing is entitled to be advised by his counsel or agent as to his rights but such counsel or agent may take no other part in the hearing without leave of the tribunal." We endorse this principle, reinforced as it is by section 14 of the *Ontario Act*, which provides that:

(1) A witness at a hearing shall be deemed to have objected to answer any question asked him upon the ground that his answer may tend to criminate him or may tend to establish his liability to civil proceedings at the instance of the Crown, or of any person, and no answer given by a witness at a hearing shall be used or receivable in evidence against him in any trial or other proceedings against him thereafter taking place other than a prosecution for perjury in giving such evidence.

(2) A witness shall be informed by the tribunal of his right to object to answer any question under section 5 of the *Canada Evidence Act*.

In the present context of an examination of the right to counsel, and in the wider context of the right to be heard, we pause to consider two suggestions made to us in the course of our study.

(i) ___Public counsel

One type of decisionmaking process was cited to our consultants by practically all administrators interviewed as an example of a situation in which formal minimum rules of procedure would not work. This is the process involving a large number of relatively routine decisions, usually made by a comparatively large staff of firstlevel administrators. Perhaps the most obvious examples are determinations of eligibility for benefits under social welfare programmes (such as welfare assistance) or compensation programmes (such as workers' compensation). The problem has been characterized by some writers as one of providing "mass justice."

It has been suggested on the basis of study of the United States Social Security Administration, that the need for reform in this type of process lies at the initial determination level, and that the instruments of minimum rules of procedure and judicial review are not likely to be particularly effective in bringing it about. One reason, it has been said, is that decisions in borderline cases of this type involve highly subjective judgments. The relatively high rate of reversal on administrative appeals in the United States Social Security Administration, and the impact of such reversals on the administration, suggest that emphasis on appeal and reviewtype procedures may overload the system.

The situation surrounding British Columbia welfare assistance is different. The number of appeals has been small and the discretionary language of the *Social Assistance Act*

51. *See Re Cowlishaw* (1971), 22 D.L.R. (3d) 588 (B.C. S.C.) and the appeal from this decision in *Re Cowlishaw* (1973), 36 D.L.R. (3d) 760 (B.C.C.A.). Following these decisions the appeal procedures of the *Social Assistance Act*, n. 51 *supra*, were amended in the *Social Assistance Amendment Act,* S.B.C. 1973, c. 81, ss. 1A, 1B. On this point generally *see* Gibson, "Freedom of Information and Canadian Welfare Law," (1973) 2 Bulletin of Canadian Welfare Law 6, 1516.

52. S.B.C. 1968, c. 59, s. 77. has largely kept these matters out of the courts. There is, therefore, no difficulty arising out of large numbers of appeal reversals.

There are, however, strong indications that the impact of even a small number of appeal reversals on the system will be substantial, and it has been suggested to us that this in turn indicates that a carefully designed appeal system is desirable. A right of appeal provides a safeguard for the individual by allowing fresh examination of his case by a different individual or body. There is, in effect, a critical review of the firstlevel administrator's decision. Appeals, it is said, can also assist the workinglevel administrators by providing guidelines for broadly similar types of cases and thereby increasing consistency.

The issue here, apparently, is that many decisions that ought to be appealed are not. Poor and poorly advised applicants who are unfamiliar with the legislation and the agency structure are unlikely to bring many issues to appeal. The basic difficulties then are (a) to ensure that administrators exercise fairness by at least fully hearing each applicant in person, and (b) to ensure that each applicant is fully informed as to eligibility criteria and procedure, including rights of appeal.

On the assumption that minimum rules of procedure may be found inappropriate for "mass justice' situations, it has been suggested to us that an official exercising the functions of a "public counsel" might be appointed. Such an official would discharge duties similar to those discharged by the compensation consultant and compensation counsellors under the *Workers' Compensation Act*. He would be available to advise agency clients of their rights before the agency and act as an independent check on the exercise of agency discretion in a situation where judicial review is unlikely to be wholly effective. It is suggested that the official need not be a lawyer, but should be thoroughly familiar with the policy and practices of the agency with which he is placed. It is also suggested that it is crucial that he retain an independent position, outside the agency structure, so that he will not be inhibited in the discharge of his function of representing agency clients.

The Commission is not in a position to evaluate fully the merits of this proposal, but it may be worthy of further consideration by the inquiry body we recommend, as an alternative means of assisting procedural fairness.

(ii) __Cost of Participation in Administrative Proceedings

Another suggestion made to us in the course of our study involves the cost of participation in agency proceedings.

The issue of cost constraints on effective representation of participation arises in administrative proceedings whether adjudicative, investigative, or rulemaking just as it does in ordinary legal proceedings in certain proceedings such as those involving welfare assistance, and to a limited extent workers' compensation, affected persons are practically by definition unable to afford legal representation. At present these proceedings are not covered by the provincial legal aid scheme. In addition it should be noted that even apart from legal representation before an agency the ultimate means of enforcing agency procedural requirements is by judicial review in the courts. Such actions are themselves relatively costly and legal aid is apparently not available.

In the rulemaking context, it is said to be in the public interest that a wide range of views should be effectively presented at rulemaking hearings, and that public funds should be made available to assist *bona fide* public interest groups in preparation for, and presentation and crossexamination at the hearings.

This thesis underlay the views of the Administrative Conference of the United States in its recent recommendations on public participation in administrative hearings. These included a recommendation that agencies be obliged to minimize transcript charges, avoid unnecessary filing requirements and provide assistance in making information available, including access to agency experts as advisors and witnesses in appropriate cases.

54. R.S.C. 1970 (1st Supp.), c. 16, s. 8(9).

55. Report of Hearing Officer Swackhammer on Hearing into Objections to Proposed Expropriations at Pickering, Ontario. (1973).

In Canada there is a statutory precedent at the federal level for payment of costs of hearing participants. The federal *Expropriation Act* provides that costs of objectors participating in hearings under section 8 of the Act shall be awarded by the hearing officer, not to exceed amounts authorized by a tariff prescribed by regulation. In fact, costs substantially higher than those provided in the tariff were recently awarded to objectors who participated in the hearings on proposed expropriation of land for Pickering Airport near Toronto. Expenses allowed by the hearing officer included fees and transportation costs of scientific and technical consultants, and liberal counsel fees for senior counsel.

57. R.S.A. 1970, c. 2, s. 6. *See* Appendix A. The Ontario Municipal Board has also on several occasions exercised its statutory discretion to award costs to public interest groups participating in hearings before it.

It has been suggested to us by our consultants; along with the suggestion concerning "public counsel," that the provincial legal aid plan should extend to representation by counsel at adjudicative hearings before statutory tribunals.

It has also been suggested that an existing or specially constituted government agency should be given the responsibility of disbursing public funds for the purpose of supporting public intervention in rulemaking proceedings.

In more detail, the proposal is that individuals and groups would make application to the designated agency for funds necessary to participate in particular hearings. Funds applied for might fall into four main categories: (1) expert assistance, (2) copying and printing of material for filing, (3) transcript charges, and (4) legal fees. Perhaps the most significant of these are items (1) and (4). In many proceedings it would be especially important that sufficient funds be available to support the engaging of scientific and technical consultants to assist in the interpretation of information and research necessary to develop and clarify positions. Items (2) and (3) could often be dealt with by agencies agreeing to waive multiple copy filing rules and providing transcripts free or at nominal cost, or making transcripts available to participants at convenient locations.

Ideally, it is suggested, little control should be exercised over specific use of the funds when granted. The granting agency should simply be satisfied that an applicant is acting in good faith and reasonably capable of organizing effective representation of an interest not otherwise likely to be represented at the hearing. Care should be taken to ensure that successful applicants represent the widest possible range of interests.

Once again, the Commission does not find itself in a position where it can make a firm recommendation concerning this proposal, but it might form the basis for further study by the inquiry body.

(6) ___*Crossexamination*

It is also one of the widely accepted canons of procedural fairness that the validity of evidence at a hearing is best guaranteed by subjecting the proponent to the process of crossexamination.

Section 10 of the *Ontario Act* provides that:

> A party to proceedings may at a hearing ...
>
> © conduct crossexamination of witnesses at a hearing reasonably required for a full and fair disclosure of the facts in relation to which they have given evidence.

There is also a provision relating to crossexamination in the *Alberta Act*.

In the adjudicative context, where a decision has been made to grant an oral hearing, the process of crossexamination should not add unduly to the cost or length of proceedings. The position in the case of rulemaking proceedings is, however, more complicated. There, with the possibility of a greater number of participants length, manageability and cost may become important and inhibiting factors.

A modification which might reduce the difficulties of length and cost would be the empowering of the agency to designate representatives of participating groups and individuals for crossexamination purposes. This might also have the desirable side effect of encouraging groups with similar interests to present a common brief through a common representative.

A further modification which has come to our attention as a possible means of alleviating the length and cost of a general right to crossexamination in rulemaking hearings is the use of panels of witnesses, thus avoiding the situation where each witness is cross-examined by each party successively. This technique is apparently adopted to good effect by the National Energy Board in its hearings.

(7) ___*The rules of evidence*

In relation to the applicability of the rules of evidence to administrative proceedings the Report of the Ontario Royal Commission Inquiry into Civil Rights has the following to say:

59. S.O. 1971, c. 47, s. 15. *See* Appendix B.

60. R.S.A. 1970, c. 2, s. *10*. *See* Appendix B.

> Unless otherwise provided in the statute conferring the power, a tribunal should have a discretion to ascertain relevant facts by such standards of proof commonly relied on by reasonably prudent men in the conduct of their own affairs. The nature of proof should go to the weight of the evidence, not to its admissibility ... The purpose of this recommendation is to permit wider latitude in the admission of evidence than is the case in ordinary court procedure. The strict hearsay rules of evidence as applied by the courts have been under severe criticism by legal scholars in Canada and other countries in recent years. Obviously strict adherence to the exclusionary hearsay rules of evidence would unduly restrict and hamper the functions of many tribunals. For example, statistical proof of road use, land values, land use, market values of farm products and matters of that sort might not be feasible if strict proof were required in all cases.

The *Ontario Act* reflects this position, allowing agencies subject to the Act to admit any relevant evidence, while giving them the power to exclude evidence that is unduly repetitious. Rules as to the authentication of documents are also relaxed. The *Alberta Act* provides that evidence need not be given under oath, and that the rules of evidence in criminal and civil cases need not be adhered to.

With the Ontario and Alberta positions we respectfully agree. Tribunals will be inhibited in implementing statutory economic and social policy if they are strictly bound by the rules of evidence, and should rather be entitled to receive and act on any evidence they consider relevant to the matters in issue. Indeed, a number of agencies in British Columbia are now by statute relieved of the necessity of abiding by the rules of evidence.

62. *See* A Englander and G. Marantz, "Required: An Administrative Procedure Act for Ontario" (196063), 2 Osgoode Hall L.J. 76, 94.

The major implication of this proposal is, of course, the loss of the rule against hearsay evidence. The argument has been made, and we concede some force to it, that the rule against hearsay should be retained, as without it a number of the advantages of crossexamination will be lost on written hearsay, for example. On balance, however, we have concluded that the advantages of giving tribunals wide power to receive relevant evidence outweigh the disadvantages of the loss of the rule against hearsay evidence.

Agencies which may be required to hold hearings should therefore be empowered to receive any relevant evidence, whether given under oath or not (although in proceedings in which the adversary process is dominant, sworn evidence may be appropriate), and tribunals should also be empowered to administer oaths and compel the attendance of witnesses.

The doctrine of evidentiary privilege should be retained before agencies, as it is in Alberta and Ontario.

(8) ___*Record of proceedings at a hearing*

In instances where the proposed inquiry body may conclude that a formal hearing by an agency in adjudicative situations is warranted and practicable, it may also wish to consider the practicability of requirement that the agency keep a record of oral proceedings before it. The justification for the keeping of such a record is that without it the effectiveness of rights of appeal or judicial review is reduced to a large extent.

We realise that this proposal also involves considerable expense, and perhaps the cheapest and most efficient method of meeting this charge is to maintain a taped record of every hearing for a specified period of time. The tape would then be available for the production of a transcript if any of the parties were to request it.

(9) *Reasons for decision*

Section 8 of the *Alberta Act* requires an authority, where it adversely affects the rights of a party, to furnish each party with a written statement of its decision, setting out the findings of fact upon which the decision was based, and the reasons for the decision. Section 17 of the *Ontario Act* requires a tribunal to give its final decision or order in writing, and to give reasons in writing if any party requests them. The *Ontario Act* also imposes a requirement that a tribunal send automatically a copy of its decision or order (and reasons, if they have been set out) to any party who took part in the proceedings.

There are a number of justifications for the giving of written reasons for agency decisions.

First, a reasoned determination enhances the effectiveness of the appeal and judicial review process.

64. In rulemaking proceedings involving large numbers of parties, however, this may be impractical, and it may be that in such cases alternative forms of dissemination of decisions and reasons, such as the use of newspapers, might be considered. The latter technique is commonly used by the Canadian Radio and Television Commission after its hearings.

65. S.O. 1971, c. 47, s. 20.

66. 5 U.S. C. s. 556 (e).

Secondly, it helps to shape and focus the principles upon which the agency operates, and in time a body of decisional law will assist parties in their perception of the factors the agency takes into account in making its determinations.

Thirdly, the availability of written reasons will help to allay any impression of arbitrariness which parties and the general public may gain from the lack of written reasons.

We suggest, therefore, that the proposed inquiry body investigate the practicability of agencies in the province giving written decisions and reasons for their decisions in appropriate circumstances. Similarly the practicability of a requirement that those decisions and reasons be sent to the parties to the proceedings might also be investigated.

(10) *The formal record*

Both the *Ontario Act* and the United States federal *Administrative Procedure Act* impose the requirement upon agencies that they compile a formal record of proceedings before them. Such a record includes all formal documents, such as applications and forms of notice, the formal order and reasons for the determination, correspondence with the parties, all documents filed in evidence, the tape or transcript of oral evidence, and any preliminary determination by the agency.

The purpose of the exercise is to make rights of appeal and judicial review as effective as possible by giving the appellate or review body a complete picture of the agency's decisionmaking process.

Considerations of the time and expense involved in compiling a record, as well as the actual importance of the decision, will obviously go into an evaluation of whether this obligation should be imposed on an agency, but it is a question which the proposed inquiry body might take into account.

CHAPTER IV CONCLUSION

Summary

In examining the issue of the procedures to be adopted by government agencies in reaching decisions affecting the personal and property rights of individuals, the Commission has concluded that the present law, probably for a mixture of historical and political reasons, is imprecise and illogical.

The question of how an attempt may be made at removing that imprecision and illogicality is much more vexed, as we have tried to demonstrate throughout the Report. The Commission has in the end been able to recommend only that the matter be placed in the hands of a specially constituted body of inquiry.

As a Law Reform Commission, with both constitutional and physical limitations, we do not believe that we are best equipped to make the detailed inquiries on a broad front which are necessary if the delicate balance between procedural fairness and effective government is to be maintained.

The complexity of the issues, involving as they do not only questions of law but also important questions of public administration, seems to us to make our recommendation the only responsible one for us. It is our conviction that while procedural fairness on the judicial model in government is highly desirable, it is not an immutable principle before which all else should fall. Neither do the intricate questions of policy which are raised throughout the entire field lend themselves to global solutions.

The Commission therefore recommends that:

An *inquiry body be set up under the* Public Inquiries Act

(i) *to identify* agencies *within the Province which adjudicative, rulemaking and investigative powers under statute,* and

(ii) *to consider their purposes and functions with a view to evaluating the effect on those purposes and functions of compliance with the rules of procedural fairness described at length in this Report.*

Acknowledgement

The Commission is grateful to Mr. Keith B. Farquhar, the Commission's Director of Research, who undertook the task of editing the materials received from our consultants and drafting, in the form of this Report, the Commission's conclusions on this subject.

LEON GETZ
Chairman

PAUL D. K. FRASER
Commissioner

R. C. BRAY
Commissioner

P. FRASER
Commissioner

ALLEN A. ZYSBLAT
Commissioner

November 18, 1974.