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Procedural Fairness in Administrative Decision-Making
L'équité procédurale dans la prise de décision administrative

DUTY OF FAIRNESS AND STATUTORY ADMINISTRATIVE PROCEDURES

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Duty of Fairness and Statutory Administrative Procedures[1]

By contrast to the common law approach of dealing with each issue as it arises, some attempts have been made to articulate comprehensive statutory codes governing the procedures to be used during the exercise of decision-making powers.

All of administrative law is very sensitive to the context in which the particular power in question is being exercised. This is particularly true in determining whether a particular procedure is "fair" (that is, whether the principles of natural justice and procedural fairness have been complied with, or breached). Is it possible *ex ante* to create a comprehensive procedural code which will adequately determine whether procedural fairness has been achieved in all the possible myriad of statutory schemes?

1. What statutory procedural codes do we have?

(a) Alberta: *Administrative Procedures Act*[2]

- Earliest attempt at codifying various aspects of procedures to be used by decision-makers.

- Applies in full force to only a very few bodies.

  (i) under the *Authorities Designation Regulation*,[3] only 7 authorities are governed under the Act:

  - Alberta Agricultural Products Marketing Council (but only when acting under s. 37 of the *Marketing of Agricultural Products Act*).

  - the Surface Rights Board.

  - the Alberta Transportation Safety Board.

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1. I gratefully acknowledge the very capable assistance of Richard Bruyer, LL.B. from our office in the preparation of this paper.

2. R.S.A. 2000, c. A-3, originally enacted in 1966 (S.A. 1966, c. 1). As amended by Bill 23, this will become the *Administrative Procedures and Jurisdiction Act*. The amendments relate primarily to the ability of statutory delegates to determine constitutional/Charter decisions as a result of the SCC decisions in *Paul, Martin*/*Laseur*]

3. AR 64/2003 (which repeals the only other regulation passed under the Act (AR 135/80)).

- the Irrigation Council.

- the Energy Resources Conservation Board (now the Energy and Utilities Board).

- the Public Utilities Board except when it is imposing assessments, interest, penalties or costs under section 22, 24, 25 or 68(2) of the *Public Utilities Board Act*) (now the Energy and Utilities Board).

- the Natural Resources Conservation Board.

- The *APA* is not nearly as detailed or comprehensive as the subsequent Ontario *SPPA*.

(b) Ontario: *Statutory Powers Procedure Act*[4]

- First enacted in 1971 as a result of the McRuer Commission Report (by former Chief Justice of Ontario).

- *SPPA* governs 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 proceeding an opportunity for a hearing before making a decision": s. 3(1).

  - Section 1 of the *SPPA* includes the following definitions:

    "statutory power of decision" means a power or right, conferred by or under a statute, to make a decision deciding or prescribing,

    "tribunal" means one or more persons, whether or not incorporated and however described, upon which a statutory power of decision is conferred by or under a statute.

  - Although this appears broad, what about administrative domestic tribunals where the authority is not conferred by statute? Or a power exercised pursuant to the Royal Prerogative?

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4. S.O. 1990, c. S.22 (as amended).

- What does "otherwise by law" mean? Does that mean that where the common law would require a hearing, then the *SPPA* applies?

- Despite its seemingly broad application, Mullan notes that "as of the end of 2002, there were approximately 50 statutory provisions explicitly excluding the Act's operation entirely (as opposed to modifying it).[5]

- The content of the procedural requirements of the *SPPA* are quite detailed.

(c) Quebec: *Administrative Justice Act*[6]

- Established the Administrative Tribunal of Quebec.

- Also contains some procedural requirements for the exercise of administrative powers.

(d) British Columbia: *Administrative Tribunals Act*[7]

- Is broad, but limited in application. For example, it does not apply to the following bodies:[8] the Environmental Appeal Board, Forest Appeals Commission, Coroners' Service, Financial Institutions Commission, Fire Commissioner, Health Care Practitioners Special Committee for Audit, Medical Services Commission, and the Oil and Gas Commission.

- Comprehensive content.

(e) Still-born legislative attempts:

- 1995: Proposed *Federal Administrative Hearings Powers and Procedures Act*.

- 1999 proposal by the Alberta Law Reform Institute, Final Report No. 79.

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5. Mullan, *Administrative Law*, 5th ed. (Toronto: Emond Montgomery Publications Ltd, 2003) at p. 327.

6. S.Q. 1996, c. 54.

7. S.B.C. 2004, c. 45.

8. See T. Murray Rankin, Q.C., paper entitled *The Administrative Tribunals Act: Evaluating Reforms to the Standard of Review and Tribunals' Jurisdiction over Constitutional Issues*.

(f) Constitutional documents having an impact on procedural issues

- *Canadian Charter of Rights and Freedoms*, particularly section 7 ("fundamental justice"): see *Singh v. Canada (Minister of Employment & Immigration)*.[9]

- Quebec *Charter of Rights and Freedoms*: see *Régie*.[10]

These were used as the foundation for a series of cases about structural independence and impartiality of administrative decision-makers (*Régie*, *Matsqui*) until effectively reversed by *Ocean Port*,[11] and *Bell Canada*.[12]

2. What type of issues would likely be covered by a procedural code?

(a) Constitutional/*Charter* questions

- Why?: *Paul v. British Columbia (Forest Appeals Commission)*,[13] and *Martin v. Nova Scotia (WCB)*; *Laseur v. Nova Scotia (WCB)*.[14]

- Effectively reversing the previous jurisprudence,[15] Justice Gonthier in *Martin* states the current approach as follows:

> ¶ 48 The current, restated approach to the jurisdiction of administrative tribunals to subject legislative provisions to *Charter* scrutiny can be summarized as follows: (1) The first question is whether the

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9. [1985] 1 S.C.R. 177, 12 Admin. L.R. 137 (SCC).

10. *2747-3174 Québec Inc. v. Québec (Régie des permis d'alcool)*, [1996] 3 S.C.R. 919, 42 Admin. L.R. (2d) 1 (SCC).

11. [2001] 2 S.C.R. 781, 34 Admin. L.R. (3d) 1.

12. [2003] 1 S.C.R. 884, 3 Admin. L.R. (4th) 163.

13. [2003] 2 S.C.R. 585, 5 Admin. L.R. (4th) 161.

14. [2003] 2 S.C.R. 504, 4 Admin. L.R. (4th) 1.

15. *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570; *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991] 2 S.C.R. 5; *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22; *Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854.

> administrative tribunal has jurisdiction, explicit or implied, to decide questions of law arising under the challenged provision. (2)(a) Explicit jurisdiction must be found in the terms of the statutory grant of authority. (b) Implied jurisdiction must be discerned by looking at the statute as a whole. Relevant factors will include the statutory mandate of the tribunal in issue and whether deciding questions of law is necessary to fulfilling this mandate effectively; the interaction of the tribunal in question with other elements of the administrative system; whether the tribunal is adjudicative in nature; and practical considerations, including the tribunal's capacity to consider questions of law. Practical considerations, however, cannot override a clear implication from the statute itself. (3) If the tribunal is found to have jurisdiction to decide questions of law arising under a legislative provision, this power will be presumed to include jurisdiction to determine the constitutional validity of that provision under the *Charter*. (4) The party alleging that the tribunal lacks jurisdiction to apply the *Charter* may rebut the presumption by (a) pointing to an explicit withdrawal of authority to consider the *Charter*; or (b) convincing the court that an examination of the statutory scheme clearly leads to the conclusion that the legislature intended to exclude the *Charter* (or a category of questions that would include the *Charter*, such as constitutional questions generally) from the scope of the questions of law to be addressed by the tribunal. Such an implication should generally arise from the statute itself, rather than from external considerations.

- Sections 44, 45, 46 of B.C.'s *Administrative Tribunals Act*.[16] As a result, two B.C. tribunals will have authority to decide all constitutional (including *Charter*) issues;[17] three tribunals will have authority to decide non-*Charter* constitutional issues;[18] and all the rest will have no authority to deal with any constitutional (including *Charter*) issues.

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16. See Deborah K. Lovett, Q.C., "Administrative Tribunal Jurisdiction over Constitutional Issues and the new *Administrative Tribunals Act*" (forthcoming in (2005) 63 *Advocate*). The author appreciates having seen this in a pre-publication accepted format, which may differ somewhat from the published version. See also Hon. Lynn Smith, "Administrative Tribunals as Constitutional Decision-Makers", (2004) 17 C.J.A.L.P. 113.

17. The Securities Commission and the Labour Relations Board.

18. The Human Rights Tribunal, the Employment Standards Tribunal, and the Farm Industry Review Board.

- Sections 10 through 15 of Part 2 of the *Administrative Procedures and Jurisdiction Act* (when proclaimed; formerly Bill 23—*Administrative Procedures Amendment Act*).

- It remains to be seen if and how other provinces and the federal government will deal with this issue.

(b) Institutional bias/Structural Independence

- Why?: *Ruffo v. Québec (Conseil de la magistrature)*,[19] *Ocean Port*; *Consolidated Bathurst*,[20]; *Ellis-Don*;[21] *Retired Judges*[22] and *Bell Canada v. Canadian Telephone Employees Association*.[23]

- In *Ocean Port*, the Supreme Court of Canada unequivocally held that legislatures could, with clear language, oust the three components of the principles of natural justice which would otherwise guarantee the structural independence of adjudicative decision-makers (namely, security of tenure, financial security, and institutional independence):

> [20] ... It is well-established that, absent constitutional constraints, the degree of independence required of a particular government decision-maker or tribunal is determined by its enabling statute. It is the legislature or Parliament that determines the degree of independence required of tribunal members. The statute must be construed as a whole to determine the degree of independence the legislature intended.
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> [21] Confronted with silent or ambiguous legislation, courts generally infer that Parliament or the legislature intended the tribunal's process to comport with the principles of natural justice.... Indeed, courts will not lightly assume that legislators intended to enact procedures that run contrary to this principle, although the precise standard of independence required will depend "on all the circumstances, and in particular on the language of the statute under which the agency acts, the nature of the task it performs and the type of decision it is required to make": *Régie*, *supra* at para. 39.

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19. [1995] 4 S.C.R. 267, 35 Admin. L.R. (2d) 1.

20. [1990) 1 S.C.R. 282, 42 Admin. L.R. 1.

21. *Ellis-Don v. OLRB*, [2001] 1 S.C.R. 221.

22. [2003] 1 S.C.R. 539, (2003) 50 Admin. L.R. (3d) 1 (the *Retired Judges Case*).

23. [2003] 2 S.C.R. 585, 5 Admin. L.R. (4th) 161.

> [22] However, like all principles of natural justice, the degree of independence required of tribunal members may be ousted by express statutory language or necessary implication.... Ultimately it is Parliament or the legislature that determines the nature of a tribunal's relationship to the executive. It is not open to a court to apply a common law rule in the face of clear statutory direction. Courts engaged in judicial review of administrative decisions must defer to the legislator's intention in assessing the degree of independence required of the tribunal in question....
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> [27] In my view, the legislature's intention that Board members should serve at pleasure, as expressed through s. 30(2)(a) of the Act, is unequivocal. As such, it does not permit the argument that the statute is ambiguous and hence should be read as imposing a higher degree of independence to meet the requirements of natural justice, if indeed a higher standard is required. It is easy to imagine more exacting safeguards of independence—longer, fixed-term appointments; full-time appointments; a panel selection process for appointing members to panels instead of the Chair's discretion. However, in each case one must face the question: "Is this what the legislature intended?" Given the legislature's willingness to countenance "at pleasure" appointments with full knowledge of the processes and penalties involved, it is impossible to answer this question in the affirmative. Huddart J.A. concluded that the tenure enjoyed by Board members was "no better than an appointment at pleasure" (p. 91). However, this is precisely the standard of independence required by the Act. Where the intention of the legislature, as here, is unequivocal, there is no room to import common law doctrines of independence, "however inviting it may be for a Court to do so": *Re W.D. Latimer Co. and Bray* (1974), 6 O.R. (2d) 129 (C.A.), at p. 137.
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> [Emphasis added.]

- Although many observers were surprised that the Supreme Court of Canada decided to hear the *Bell Canada* case after its decision in *Ocean Port*, the Supreme Court of Canada put an end to Bell Canada's long-standing attack on the independence and impartiality of the Tribunal under the *Canadian Human Rights Act* in the pay equity case.

- The Supreme Court of Canada noted that the concepts of independence and impartiality are both part of the Rule Against Bias but are not identical:

> ¶ 17 The requirements of independence and impartiality at common law are related. Both are components of the rule against bias, *nemo debet esse judex in propria sua causa*. Both seek to uphold public confidence in the fairness of administrative agencies and their decision-making procedures. It follows that the legal tests for independence and impartiality appeal to the perceptions of the reasonable, well-informed member of the public. Both tests

> require us to ask: what would an informed person, viewing the matter realistically and practically, and having thought the matter through, conclude? (See *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369, at p. 394, *per* de Grandpré J., dissenting.)
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> ¶ 18 The requirements of independence and impartiality are not, however, identical. As Le Dain J. wrote in *Valente v. The Queen*, [1985] 2 S.C.R. 673, at p. 685 (cited by Gonthier J. in *2747-3174 Québec Inc. v. Quebec (Régie des permis d'alcool)*, [1996] 3 S.C.R. 919, at para. 41):
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> > Although there is obviously a close relationship between independence and impartiality, they are nevertheless separate and distinct values or requirements. Impartiality refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case. The word "impartial" ... connotes absence of bias, actual or perceived. The word "independent" in s. 11(d) reflects or embodies the traditional constitutional value of judicial independence. As such, it connotes not merely a state of mind or attitude in the actual exercise of judicial functions, but a status or relationship to others, particularly to the executive branch of government, that rests on objective conditions or guarantees.

- Although the concepts are different, the same test applies to both impartiality and independence (from *Bell Canada*):

> ¶ 25 We turn now to impartiality. <u>The same test applies to the issue of impartiality as applies to independence</u> (*R. v. Lippé*, [1991] 2 S.C.R. 114, at p. 143, *per* Lamer C.J., citing *Valente*, *supra*, at pp. 684 and 689). Whether the Tribunal is impartial depends upon whether it meets the test set out by de Grandpré J. in *Committee for Justice and Liberty*, *supra*, at p. 394: would a well-informed person, viewing the matter realistically and practically, have a reasonable apprehension of bias in a substantial number of cases? As Lamer C.J. stated in *Lippé*, *supra*, allegations of institutional bias can be brought only where the impugned factor will give a fully informed person a reasonable apprehension of bias in a substantial number of cases (at p. 144).

- The *Retired Judges* case raised a number of interesting issues about independence and impartiality with respect to both the Minister and the

appointed arbitrators, even though the Supreme Court of Canada ultimately held that these common law concepts of administrative law had been ousted by the specific, clear and unequivocal language of the statute.

(c) Exclusive Jurisdiction/Multiple Forums

- Why?: *Weber v. Ontario Hydro*,[24] *Parry Sound*,[25] *Québec Human Rights Com'n v. Québec*,[26] and *Canada (House of Commons) v. Vaid*.[27]

- Although *Weber* dealt with the suppression of the *courts'* jurisdiction to deal with matters arising out of the unionized employment context, it did not expressly address two related issues:

  (i) To what extent may labour arbitrators apply human rights concepts in interpreting collective agreements (even, if necessary, invalidating parts of the collective agreement which conflict with human rights legislation)? In 2003, the majority of the Supreme Court of Canada in *Parry Sound* held that rights and obligations under human rights legislation is imported into and incorporated into collective agreements, and that an arbitrator must take account of those rights and obligations when interpreting or applying the collective agreement under which he or she is appointed.

  (ii) The Ontario Human Rights Commission intervened in *Parry Sound* to ensure that *its* jurisdiction was not ousted because the aggrieved employee was a party to a collective agreement over which the arbitration board had jurisdiction. Although the Commission submitted that it had concurrent jurisdiction with respect to the matter, Justice Iacobucci specifically made no holding about whether the jurisdiction of the Commission was ousted by that of the arbitration board.

- This latter issue arose squarely in *Quebec Human Rights Commission v. Quebec (Attorney General)*. In reinstating the Human Rights Tribunal's

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24. [1995] 2 S.C.R. 929.

25. *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, [2003] 2 S.C.R. 157, (2004) 7 Admin. L.R. (4th) 177.

26. [2004] 2 S.C.R. 223.

27. 2005 SCC 30.

assertion of jurisdiction to deal with a complaint, Chief Justice McLachlin, for the majority, applied a two-step approach:

> ¶ 15 This question suggests two related steps. The first step is to look at the relevant legislation and what it says about the arbitrator's jurisdiction. The second step is to look at the nature of the dispute, and see whether the legislation suggests it falls exclusively to the arbitrator. The second step is logically necessary since the question is whether the legislative mandate applies to the particular dispute at issue. It facilitates a better fit between the tribunal and the dispute and helps "to ensure that jurisdictional issues are decided in a manner that is consistent with the statutory schemes governing the parties", according to the underlying rationale of *Weber, supra*; see *Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners*, [2000] 1 S.C.R. 360, 2000 SCC 14, at para. 39.

- Unlike the Court's decision in *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929, where the Court concluded that the dispute fell within the *exclusive* jurisdiction of the arbitrator because it was essentially over the collective agreement—sick leave—but encumbered with an incidental tort claim, Chief Justice McLachlin in *Quebec Human Rights Commission* concluded that the Human Rights Tribunal has jurisdiction over this dispute because it is essentially a discrimination claim encumbered with a collective agreement:

> ¶ 24 Viewed in its factual matrix, this is not a dispute over which the arbitrator has exclusive jurisdiction. It does not arise out of the operation of the collective agreement, so much as out of the pre-contractual negotiation of that agreement. This Court has recognized that disputes that arise out of prior contracts or the formation of the collective agreement itself may raise issues that do not fall within the scope of arbitration; see, for example, *Goudie, supra*; *Weber*, para. 52 ; see also *Wainwright v. Vancouver Shipyards Co.* (1987), 38 D.L.R. (4th) 760 (B.C.C.A.); *Johnston v. Dresser Industries Canada Ltd.* (1990), 75 O.R. (2d) 609 (C.A.). Everyone agrees on how the agreement, if valid, should be interpreted and applied. The only question is whether the process leading to the adoption of the alleged discriminatory clause and the inclusion of that clause in the agreement violates the Quebec *Charter*, rendering it unenforceable.

(d) Disclosure

- Why?: *R. v. Stinchcombe*;[28] *Pritchard v. Ontario (Human Rights Commission*,[29] *Deloitte & Touche v. Ont. Securities Com'n*.[30]

- In *Deloitte & Touche*, the Supreme Court of Canada did apply the pragmatic and functional approach to determine that reasonableness was the standard applicable to a decision by the Ontario Securities Commission to disclose various documents, and that its decision to do so was indeed reasonable. Justice Iacobucci, for the Court, concluded that the OSC had considered all relevant factors necessary for it to determine what was "in the public interest",[31] and that its use of the relevance principle (from *Stinchcombe*) to determine which documents to disclose was reasonable.[32]

(e) Reasons

- Why?: *Baker v. Canada (Minister of Citizenship & Immigration)*,[33] *Jehovah's Witness* (*Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village).*[34]

- In *Baker*, the Supreme Court of Canada indicated that there may now be a generalized duty for a statutory delegate to give reasons. Indeed, the failure to give any (or any intelligible) reasons will likely mean that the statutory delegate's decision will not be able to succeed in meeting the reasonableness *simpliciter* standard of review (if that is the applicable standard). L'Heureux-Dubé J. states:

> ¶ 43 In my opinion, it is now appropriate to recognize that, in certain circumstances, the duty of procedural fairness will require the provision of

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28. [1991] 3 S.C.R. 326.

29. [2004] 1 S.C.R. 809, 12 Admin. L.R. (4th) 171.

30. [2003] 2 S.C.R. 713, 13 Admin. L.R. (4th) 1.

31. *Ibid.* at para. 24.

32. *Ibid.* at para. 26.

33. [1999] 2 S.C.R. 817, 14 Admin. L.R. (3d) 173.

34. [2004] 2 S.C.R. 650, 17 Admin. L.R. (4th) 165.

> a written explanation for a decision. The strong arguments demonstrating the advantages of written reasons suggest that, in cases such as this where the decision has important significance for the individual, when there is a statutory right of appeal, or in other circumstances, some form of reasons should be required. This requirement has been developing in the common law elsewhere. The circumstances of the case at bar, in my opinion, constitute one of the situations where reasons are necessary. The profound importance of an H & C decision to those affected, as with those at issue in Orlowski, Cunningham, and Doody, militates in favour of a requirement that reasons be provided. It would be unfair for a person subject to a decision such as this one which is so critical to their future not to be told why the result was reached.

- In *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*, the Supreme Court of Canada held that a municipality's failure to give reasons for refusing to rezone some commercial land for a church building constituted a breach of procedural fairness.

(f) Others Procedural Issues

- Standing?

  Three relatively recent cases on standing deserve notice:

  - The decision of Veit J. in the Alberta Court of Queen's Bench in *Alberta v. Alberta (Labour Relations Board)*,[35] which strongly criticized the standing and role taken by counsel to the Board. See the excellent case comment by Laverne A. Jacobs and Thomas S. Kuttner entitled "*Alberta v. Alberta (Labour Relations Board)*: The Quagmire of Tribunal Standing".[36]

  - The decision by Robertson J.A. in *Bransen Construction Ltd. v. C.J.A. Local 1386*,[37] which discusses whether an administrative agency which has been served with notice of an application for judicial review but has not been named as a party to that proceeding automatically has standing, when it is appropriate for the court to grant such an agency

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35. (1998) 30 Admin. L.R. (3d) 24, (1998) 226 A.R. 314, [1998] A.J. No. 936 (Alta. Q.B.). The issue of the Board's standing is not referred to in the Court of Appeal's judgment: (2002) 40 Admin. L.R. 115.

36. 30 Admin. L.R. (3d) 71.

37. [2002] N.B.J. No. 114 (N.B.C.A.), (2002) 39 Admin. L.R. (3d) 1, at paras. 9 through 37.

status as an intervenor, and what limits there might be on the appropriate scope of any such intervention.

- The restrictive approach taken by the B.C. Court of Appeal in *British Columbia (Securities Commission) v. Pacific International Securities Inc.*[38]

- Right to Counsel?

  In *Thomas v. Association of New Brunswick Registered Nursing Assistants*,[39] members of the Association had the right to be represented by legal counsel in disciplinary proceedings. The Association prevented a member from being represented by a union representative, because they perceived that that would constitute the illegal practice of law. The New Brunswick Court of Appeal held that the Association's decision breached procedural fairness.

- Right to an Oral Hearing?

- Right to Cross-examine?

3. Issues arising from the implementation of statutory procedural codes

(a) What is the relationship of the common law to these procedural codes?

- If the procedural code does not apply, does that mean the common law does or that there are no procedural protections? Surely the latter cannot be correct. In the context of the *SPPA*, Mullan notes that *Re Dowing and Graydon*, a decision of the Ontario Court of Appeal, decided that the non-application of the *SPPA* did not mean that there are no procedural safeguards at all.[40]

- If the Act applies but is silent about a particular procedural issue, does the common law fill the gap?

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38. (2002) 215 D.L.R. (4th) 58, at paras. 36-48. Note that this case dealt with standing in the context of a statutory appeal.

39. (2003) 6 Admin. L.R. (4th) 212.

40. Mullan, *Administrative Law*, 5th ed. (Toronto: Emond Montgomery Publications Ltd, 2003)at p. 329 citing *Re Dowing and Graydon* (1978), 92 D.L.R. (3d) 355 (Ont. C.A.).

- Does the existence of a procedural code provide a benchmark for the most frequently encountered procedural issues, with the common law supplementing those areas which the codes do not address or do not address adequately? For example, *Ellis-Don* and *Consolidated Bathurst* dealing with collegial consultations.

(b) To what extent does codifying procedures also concretize them?

- Compare the problems which arose from sections 18 and 28 of the *Federal Court Act* when it was enacted in 1971.

- Are the statutory procedures exhaustive or do they simply establish the bare minimum that a tribunal must observe?

- What about where the common law subsequently develops in a manner which the drafters of the codes could not have envisioned. Do the codes remain flexible enough to meet the development of the common law? For example, institutional bias, structural independence, and deliberative secrecy.

(c) Other issues

- Paramountcy issues—how does a procedural code interact with specific procedural provisions contained in the administrative agency's constituting statute?

- Breadth of the code's application—how detailed? What potential to accommodate future developments by the common law about the requirements of procedural fairness?

- What is the linkage (if any) between the applicability of the procedural codes and the availability of judicial review?

4. Another approach: a Council on Tribunals to supervise the procedures adopted by statutory delegates[41]

- As a result of growing concern in the 1950s about the range and diversity of tribunals, uncertainty as to the procedures they followed, and worry over the lack of cohesion and supervision, the Franks Committee was struck,

41. See generally Craig, *Administrative Law*, 5th ed. (London: Sweet & Maxwell, 2003) at pp 254-257.

culminating in the publication of the *Report of the Committee on Administrative Tribunals and Enquiries*, known as the *Franks Report* (1957, Cmnd. 218).

- The *Franks Report* made a series of recommendations as to the constitution and working of tribunals and inquiries. Many of the recommendations made in the *Franks Report* were subsequently enacted in the *Tribunals and Inquiries Act 1958*, now replaced by the *Tribunals and Inquiries Act 1992*.

- Craig notes[42] that "[i]n 1996 the Council on Tribunals was responsible for supervising over 2,000 tribunals, which fell within nearly 80 different categories".

- While the *Franks Report* recommended that the Council would formulate procedural rules for tribunals, the subsequent legislation afforded the Council only a consultative role in this regard. The Council makes general recommendations concerning the membership of the tribunals listed in the schedule and it must be consulted prior to the enactment of any new procedural rules pertaining to them. Other recommendations enacted were the right to a reasoned decision, subject to the condition that it was requested on or before the giving or notification of the decision, and the restrictive construction to be placed upon clauses which purport to exclude judicial review.[43]

42. *Ibid.* at p. 254.

43. *Ibid.* at pp. 256-257.