

Judicial Review and Procedural Fairness in Administrative Law: I

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Few areas of legal study have been subject to so much polemical debate as has the field of judicial review of administrative action. Adherents of opposing perspectives have arrogated (or been ascribed) such value-charged words as "fairness", "arbitrary", and "untrammelled discretion", a practice which has clouded the underlying issues. In recent years, a recurring controversy has revolved around the concept of judicial review for a failure of procedural due process.¹ For the past decade, the courts have hesitated over adopting a new theory of judicial review based on a concept

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¹ See, e.g., Clark, *Natural Justice: Substance and Shadow* [1975] Pub. L. 27; Evans, *Some Limits to the Scope of Natural Justice* (1973) 36 M.L.R. 439; Lord Morris of Borth-y-Gest, *Natural Justice* (1973) 26 Current Legal Prob. 1; Seepersad, *Fairness and Audi Alteram Partem* [1975] Pub. L. 242; Taylor, *Fairness and Natural Justice — Distinct Concepts or Mere Semantics* (1977) 3 Monash L. Rev. 191; Taylor, *Natural Justice — The Modern Synthesis* (1975) 1 Monash L. Rev. 258; Taylor, *The Unsystematic Approach to Natural Justice* (1973) 5 N.Z.U. L. Rev. 373; Wallington, *Natural Justice and Delegated Legislation* (1974) 33 Cambridge L.J. 26.

The debate in Canada is articulated principally in Loughlin, *Procedural Fairness: A Study of the Crisis in Administrative Law Theory* (1978) 28 U.T.L.J. 215; Mullan, *Fairness: the New Natural Justice* (1975) 25 U.T.L.J. 281 [hereinafter *Fairness*]; Mullan, *Martineau and Butters v. Matsqui Institution Inmate Disciplinary Board: Its Potential Impact on the Jurisdiction of the Trial Division of the Federal Court* (1978) 24 McGill L.J. 92 [hereinafter *Impact*]; Neville Brown & Bouchard, *Le contrôle judiciaire en droit britannique: justice naturelle ou "Fairness"?* (1977) 18 C. de D. 155. See also Grey, *The Duty to Act Fairly After Nicholson* (1980) 25 McGill L.J. 598; Mullan, *Rule-Making Hearings: A General Statute for Ontario?* (1979) [hereinafter *Hearings*]; Mullan, "Human Rights and Administrative Fairness" in Macdonald & Humphrey (eds.), *The Practice of Freedom* (1979).

of "procedural fairness".² In late 1978, however, the Supreme Court of Canada embraced the "procedural fairness" thesis,³ and its judgment has initiated a new creative period in the law of judicial review of administrative action.⁴

One of the leading advocates of the "fairness" approach is Professor David Mullan. In a series of balanced and thoughtful essays, he has argued that the courts should move towards a more flexible standard in assessing the reviewability of administrative procedures. In general, the traditional jurisprudence on the issue of "natural justice" restricted the ambit of judicial supervision of procedures to situations where the functions performed by a public authority could be classified as "judicial or quasi-judicial". Mullan thinks that the courts should enlarge their procedural review power in order to encompass "purely administrative" decisional processes (heretofore immune from implied procedural judicial supervision). By invoking a concept of "fairness" which is independent of any classification of function exercise, the judiciary would be able to impose upon every official the duty to conform to procedural formalities it thought fair in the circumstances.

According to Mullan,

fairness, if developed properly by the courts, will lead to a highly desirable simplifying of the theoretical underpinnings of the law [of procedural review] It will also lead to a situation where the right

² The "fairness" principle appears to have been adopted in *Re Lingley & Hickman* [1972] F.C. 171 (T.D.); *Lazarov v. Secretary of State* [1973] F.C. 927 (C.A.); *Ex p. Beauchamp* [1970] 3 O.R. 607 (H.C.); *Re Hogan & Director of Pollution Control* (1972) 24 D.L.R. (3d) 363, [1972] 3 W.W.R. 519 (*sub nom. Hogan v. Director of Pollution Control*) (B.C.S.C.); *Re Maurice Rollins Construction Ltd & Township of S. Fredericksburg* (1975) 11 O.R. (2d) 418 (H.C.); *Roper v. Royal Victoria Hospital* [1975] 2 S.C.R. 62. In later years, Alberta courts took the initiative in this area; see *Alta Union of Public Employees v. Alta Classification Appeal Board* (1977) 9 A.R. 462 (S.C.T.D.); *R. v. Industrial Coal & Minerals Ltd* [1977] 4 W.W.R. 35 (Alta S.C.). In *M.M.I. v. Hayardal* [1978] 1 S.C.R. 470, the Supreme Court of Canada seemed to countenance the possibility of a "fairness" doctrine. See also the cases cited by Mullan, *Fairness, supra*, note 1; and *Impact, supra*, note 1.

³ *Re Nicholson & Haldimand-Norfolk Regional Board of Commissioners of Police* [1979] 1 S.C.R. 311 *per* Laskin C.J.C., Ritchie, Spence, Dickson and Estey JJ. concurring; Martland, Pigeon, Beetz and Pratte JJ. dissenting.

⁴ See *Inuit Tapirisat v. Governor-in-Council* [1979] 1 F.C. 710 (C.A.), *rev'g* [1979] 1 F.C. 213 (T.D.); *Re Downing & Graydon* (1978) 21 O.R. (2d) 293 (C.A.); *Re S & M Laboratories Ltd & The Queen* (1978) 21 O.R. (2d) 777 (Div. Ct), *rev'd*, (1979) 24 O.R. (2d) 732 (C.A.); *Re Webb & Ontario Housing Corp.* (1978) 22 O.R. (2d) 257 (C.A.); *Re Peterson & Atkinson* (1978) 23 O.R. (2d) 266 (Div. Ct); *Harvie v. Calgary Regional Planning Commission* (1978) 12 A.R. 505 (S.C. App. Div.).

question is at long last being asked: what procedural protections, if any, are necessary for this particular decision-making process?⁵

This approach to (and justification for) judicial review of administrative procedures was expressly adopted by the Supreme Court of Canada in the *Nicholson* case. Chief Justice Laskin there stated:

The emergence of a notion of fairness involving something less than the procedural protection of traditional natural justice has been commented on in de Smith, *Judicial Review of Administrative Action*

What rightly lies behind this emergence is the realization that the classification of statutory functions as judicial, *quasi*-judicial or administrative is often very difficult, to say the least; and to endow some with procedural protection while denying others any at all would work injustice when the results of statutory decisions raise the same serious consequences for those adversely affected, regardless of the classification of the function in question: see, generally, Mullan, "Fairness: The New Natural Justice"⁶

Although the language of the Chief Justice suggests that the adoption of the "fairness" thesis involves little more than a minor expansion of the judicial review jurisdiction, one commentator has already argued that it represents a theoretical revolution in the field of administrative law.⁷ This speculative essay examines this issue more closely and explores several implications of the judiciary's recent adoption of the doctrine of "procedural fairness". Four distinct themes will be addressed, in two Parts.

In Part I, Section I will review the historical and intellectual underpinnings of implied procedural supervision of statutory decision-makers by the courts. The early history of procedural judicial review will be traced in order to uncover the development of and rationale for the rules of natural justice. The twentieth century developments in procedural supervision will then be considered. This section will conclude with an analysis of the various justifications which may be offered to support the court's implicit power to review decision-makers on procedural grounds.

Section II will examine the potential application of the fairness doctrine across a wide variety of administrative procedures. In particular, the connection between the availability of the writ of *certiorari* and the applicability of the rules of natural justice in near-adjudicative functions will be scrutinized. Next, the relationship between implied procedural review and consolidating adminis-

⁵ Mullan, *Fairness*, *supra*, note 1, 315.

⁶ *Supra*, note 3, 324 and 325.

⁷ Loughlin, *supra*, note 1.

trative procedures statutes will be evaluated. Finally, this section will appraise the impact of a theory of procedural fairness upon the sophisticated statutory schemes which are becoming increasingly common in administrative law.

The second Part⁸ will be devoted to a prescriptive analysis of the future development of procedural review. The apprehensions created by the adoption of the fairness principle will be analysed with reference to the distinctive characteristics of procedural review. From this examination, the fundamental elements of an alternative concept of procedural fairness will be deduced. The essay will conclude with the formulation of a theory of procedural review of administrative action and of an institutional model which exploits the possibilities of the emerging doctrine of "fairness".

I. The historical and intellectual background of judicial review on procedural grounds

The concept of "fairness" articulated by Laskin C.J.C. reveals five distinctive characteristics: it is a theory of judicial review; it is a theory which is censorial in orientation; it is a theory of review on implied grounds; it is a theory the applicability of which is not limited to judicial or quasi-judicial decision-making processes; lastly, it is a theory which is informalist, in that the standards of review are neither fixed nor capable of specific *a priori* articulation. The last two features represent a significant departure from earlier theories of due process review; previously, procedural supervision had been limited to "judicial" functions and, as the epithet suggests, the "rules" of natural justice were relatively formalized. Some advocates of fairness, however, fail to see any fundamental differences between the concept of fairness and that of natural justice, and they suggest that the adoption of the new doctrine will require no major reworking of the underlying theory of judicial review. The extent to which this claim is valid can only be evaluated after surveying the historical and intellectual bases of implied procedural supervision, and after relating fairness to its antecedents in the rules of natural justice.

A. *The early history of procedural judicial review*

In common law countries, justifications for judicial review of the activities of the State or its delegates often have been traced to

⁸ See Macdonald, *Judicial Review and Procedural Fairness in Administrative Law: II* (1980) 26 McGill L.J. 1.

the late sixteenth and early seventeenth centuries.⁹ In the ensuing four hundred years, the theory of judicial review has evolved on the basis of three concepts: the sovereignty of Parliament, the rule of law, and the notion of jurisdiction.¹⁰ The principle of Parliamentary sovereignty was invoked to support the delegation of the powers of administration, investigation, legislation, and decision to autonomous bodies; inferior tribunals (jurisdictions) could be created by ordinary statutory instrument, and their valid determinations assumed the conclusiveness of Parliamentary legislation.¹¹ The concept of the rule of law, although not articulated in any systematic way until formulated by Dicey,¹² provided the theoretical justification for superintendence by "ordinary" courts of "extraordinary" decision-makers; the common law courts, in applying the common law (the foundation of the legal system), possessed a reforming, reinterpreting, and reintegrating power which compelled the subsumption of special jurisdictions within the judicial hierarchy.¹³ The notion of jurisdiction sustained the beliefs that the act or determination of a delegated decision-maker could be but contingently valid, and therefore open to collateral challenge; that immunity from civil liability for judicial acts could only be claimed by those exercising a valid jurisdiction; and that only the superior common law courts were possessed of inherent or unlimited jurisdiction.¹⁴

The notion of judicial review implied by these three concepts meshed well with the developing political theory of liberalism. Moreover, the tripartite division of government into executive, legislative, and judiciary — under which the judiciary assumes the role of constitutional arbiter — legitimized the tentative assertions by common lawyers and judges of the judicial supervisory function.¹⁵ Nevertheless, the historical remedies available to a party aggrieved

⁹ See de Smith, *Judicial Review of Administrative Action* 3d ed. (1973), ch. 1 and App. 1; Henderson, *Foundations of English Administrative Law* (1963), Introduction and ch. 1; Rubinstein, *Jurisdiction and Illegality* (1965), ch. 4 [hereinafter *Jurisdiction*]; Rubinstein, *On the origins of judicial review* (1964) 2 U.B.C. L. Rev. 1 [hereinafter *Origins*]; Wade, *Administrative Law* 4th ed. (1978), chs. 1 and 2.

¹⁰ See de Smith, *supra*, note 9, 1-56; *Ontario Royal Commission Inquiry Into Civil Rights* (1968), 1-65 [hereinafter *McRuer Report*].

¹¹ Henderson, *supra*, note 9, 1-77.

¹² See Dicey, *Introduction to the Study of the Law of the Constitution* (1885).

¹³ See the excellent article by Arthurs, *Rethinking Administrative Law: A Slightly Dicey Business* (1979) 17 Osgoode Hall L.J. 1.

¹⁴ Rubinstein, *Jurisdiction*, *supra*, note 9, ch. 4.

¹⁵ See Allen, *Law and Orders* 3d ed. (1965), 1-23.

by "unlawful" state activity did not reflect a coherent theory of judicial review; rather, the availability of supervision by the Court of King's Bench was linked to the peculiarities of the recourse sought.

Following the elaboration of the concept of jurisdiction in the *Case of the Marshalsea*,¹⁶ and the later extension of this concept to courts not of record,¹⁷ review through direct attack began to supersede collateral attack by way of actions in tort or the writ of error in the supervision of the activity of inferior tribunals.¹⁸ Such direct review was generally accomplished by way of prerogative writ; the most common writs were *habeas corpus ad subiiciendum*, *certiorari*, prohibition and *mandamus*.¹⁹ While *habeas corpus* served only to order the deliverance of a detainee (and his release, should the warrant of detention prove defective), the other writs evolved into more general remedies against officials.

Prohibition, originally used almost exclusively in ecclesiastical matters,²⁰ became a weapon in disputes between the courts of Chancery and King's Bench,²¹ and ultimately issued against any court of limited jurisdiction,²² even those which might today be characterized as superior courts.²³ It was generally directed towards restraining excesses of jurisdiction *rationes materiae* and to resolving jurisdictional disputes between various decision-making bodies.

As a prerogative writ, *mandamus* had a rather more subtle origin; several early judicial orders reflected the nomenclature of the writ. By the late sixteenth century, the writ was being employed to order restitution to office,²⁴ and by 1700, it issued to compel the exercise of a jurisdiction;²⁵ nevertheless, the law of *mandamus* remained inchoate until the mid-eighteenth century. Because of the

¹⁶ (1612) 10 Co. Rep. 68b, 77 E.R. 1027.

¹⁷ See *Phillips v. Bury* (1692) Holt K. B. 715, 90 E.R. 1294. The theory was ultimately applied to all persons exercising a limited jurisdiction: see *Doswell v. Imper* (1823) 1 B. & C. 163, 107 E.R. 61.

¹⁸ See Rubinstein, *Jurisdiction*, *supra*, note 9, ch. 4; Henderson, *supra*, note 9, chs. 2 and 3.

¹⁹ See de Smith, *supra*, note 9, App. 1.

²⁰ Adams, *The Writ of Prohibition to Court Christian* (1936) 20 Minn. L. Rev. 272.

²¹ For a statement of the superintending power of the Court of King's Bench, see *Case of the Company de Horners in London* (1625) 2 Rolle 471, 81 E.R. 923.

²² *Warner v. Suckerman* (1615) 3 Bulst. 119, 81 E.R. 101.

²³ See, e.g., *Williams v. Lister* (1667) Hardr. 475, 145 E.R. 555.

²⁴ *Middleton's Case* (1573) 3 Dyer 332b, 73 E.R. 752.

²⁵ *Groenvelt v. Burwell* (1700) 1 Ld Raym. 454, 91 E.R. 1202.

proximity of jurisdictional and legal questions in a multi-jurisdictional system, the writ ultimately evolved into a residual remedy which could be invoked when no other judicial recourse was available.²⁶ While illegalities reviewable upon an application for prohibition tended to remain linked to the concept of jurisdiction *rationes materiae*, *mandamus* seemed to break free from this restriction and would lie to compel a body to hear and determine a matter according to law.²⁷

The most important of the early writs was *certiorari*. Although de Smith traces the writ back to the late thirteenth century,²⁸ it appears to have served a rather limited purpose until the mid-seventeenth century; the supervision of inferior courts of limited jurisdiction, the collection of information for administrative purposes, the removal of coroners' inquisitions to the Court of King's Bench, and the transfer to the common law courts and to the Court of Chancery of a variety of judicial records and other formal documents seem to have been its chief uses.²⁹ A remarkable expansion of its scope attended the increase in statutory delegation during the Stuart years. From its first use to remove matters from inferior tribunals in 1642,³⁰ *certiorari* to quash evolved rapidly; by 1700, Holt C.J. could proclaim that "[w]here any court is erected by statute, a *certiorari* lies to it".³¹

Throughout the seventeenth century the writ lay for both jurisdictional and non-jurisdictional error.³² The writs of error and *certiorari* closely resembled each other,³³ and in some judgments the two were confused.³⁴ However, by 1733, the use of *certiorari* to review errors of law on the face of the record was explicitly recognized.³⁵ Since inferior tribunals were obliged to state their statutory jurisdiction and the facts supporting this jurisdiction in the record of their proceedings, any defect — of form, procedure, jurisdiction, or law — could potentially lead to quashing by way of *certiorari*.

²⁶ Compare *Le Parish de S. Balaunce in Kent* (1619) Palmer 51, 81 E.R. 973 with *R. v. Barker* (1762) 1 Wm Bl. 352, 96 E.R. 196.

²⁷ Compare *Peat's Case* (1704) 6 Mod. 229, 87 E.R. 979 with *R. v. Local Gov't Bd* (1882) 10 Q.B.D. 309.

²⁸ See de Smith, *supra*, note 9, 511. See also Henderson, *supra*, note 9, 83-89.

²⁹ *Ibid.*, 510-12.

³⁰ *Commins v. Massam* (1642) March N.R. 197, 82 E.R. 473.

³¹ *Groenvelt v. Burwell*, *supra*, note 25, 1212.

³² See Henderson, *supra*, note 9, 143-59.

³³ See *Bushell's Case* (1674) 1 Mod. 119, 86 E.R. 777.

³⁴ *Terry v. Huntingdon* (1668) Hardr. 480, 145 E.R. 557.

³⁵ *R. v. Inhabitants of Woodsterton* (1733) 2 Barn. K.B. 207, 94 E.R. 452.

As the Court of King's Bench began to assert comprehensive control over inferior tribunals, Parliament attempted to restrict the Court's review power through a succession of legislative devices such as finality clauses and no-*certiorari* clauses.³⁶ In an effort to dilute the impact of these clauses and to protect the scope of its powers of review, the Court emphasized the jurisdictional nature of *certiorari*³⁷ and many of the error-like characteristics of the writ disappeared.

Certiorari was also invoked to supervise certain procedures of inferior tribunals. Early cases of procedural supervision often involved the deprivation of an office or the destitution of a function without notice or hearing;³⁸ however, until the early eighteenth century, restoration to office by way of *mandamus* was the appropriate remedy to correct such procedural deficiencies.³⁹ In other cases of procedural supervision, such as those involving a failure to summon to summary proceedings,⁴⁰ *certiorari* began to assert itself, and by the mid-nineteenth century the writ had completely superseded *mandamus* for this purpose.⁴¹ At the same time that *certiorari* was undergoing this metamorphosis, its scope and applicability were also evolving. From its original confinement to Courts of Record, *certiorari* had been extended by the early nineteenth century to lie against inferior courts, quasi-courts, and other statutory bodies, and had ceased to be granted against Courts of Record.⁴² Since *certiorari* issued out of the Court of King's Bench, the role of that court as envisioned by Coke⁴³ gradually assumed the status of orthodoxy. After the reforms occasioned by the *Judicature Acts*,⁴⁴ that Court confidently declared:

³⁶ The earliest of these clauses came before the Court in *R. v. Plowright* (1686) 3 Mod. 94, 87 E.R. 60.

³⁷ See *R. v. Morely* (1760) 2 Burr. 1041, 97 E.R. 696.

³⁸ *Bagg's Case* (1615) 11 Co. Rep. 93b, 77 E.R. 1271; *Protector v. Town of Colchester* (1655) Style 447, 82 E.R. 850.

³⁹ *R. v. Chancellor of the University of Cambridge* (1723) 1 Str. 557, 93 E.R. 698.

⁴⁰ *R. v. Dyer* (1703) 1 Salle 181, 91 E.R. 165.

⁴¹ See de Smith, *supra*, note 9, 134-39.

⁴² *Edwards v. Bowen* (1826) 5 B. & C. 206, 108 E.R. 77.

⁴³ *Bagg's Case*, *supra*, note 38: "And in this case, first, it was resolved, that to this Court of King's Bench belongs ... authority, not only to correct errors in judicial proceedings, but other errors and misdemeanors extrajudicial, tending to the breach of the peace ... so that no wrong or injury, either public or private, can be done but that it shall be (here) reformed or punished by due course of law".

⁴⁴ *Supreme Court of Judicature Act*, 36-37 Vict., c. 66 (U.K.); *Supreme Court of Judicature (Commencement) Act*, 37-38 Vict., c. 83 (U.K.); *Supreme Court*

Wherever the legislature entrusts to any body of persons other than to the superior Courts the power of imposing an obligation upon individuals, the Courts ought to exercise as widely as they can the power of controlling those bodies⁴⁵

As in other areas of the common law, the development of substantive law was conditioned by the technicalities and particularities of the available remedies and by the jurisdictional conflicts of competing courts.⁴⁶ To sum up, the early writ of *certiorari* resembled that of error and lay for all mistakes of law or fact by Courts of Record. *Mandamus* was directed towards general superintendence of inferior tribunals whenever no other remedy lay. Prohibition always revealed a formal jurisdictional aspect, which was also assumed by the later writ of *certiorari* in response to legislative privative clauses. The grounds for invoking these remedies became relatively stable during the early nineteenth century, when jurisdictional control by *certiorari* became pre-eminent; by the time of the *Judicature Acts*, a coherent law of judicial review could be said to have emerged.⁴⁷

What conclusions regarding review on implied procedural grounds may be drawn from this brief survey? First, one should not be misled by the close relationship between the superintending power of the Court of King's Bench and its use of the writ of *certiorari*. There are, and always have been, basic differences between the theory upholding jurisdictional control and that underlying procedural review. When the principal grounds for review by way of *certiorari* — jurisdictional defect, error of law on the face of the record, and breach of natural justice — are catalogued, the essence of the supervisory jurisdiction of the Court of King's Bench becomes clear. Error of law on the face of the record presupposes a record — a set of written documents assembled by a court or body charged with adjudicating on the basis of evidentiary submissions and pre-existing law. The rules of natural justice, *nemo iudex in causa sua* and *audi alteram partem*, presuppose adjudicative proceedings — an impartial decision-maker listening to and evaluating competing claims. While jurisdictional control *rationes materiae* might have derived from the desire of the Court of King's Bench to protect its power to determine matters affecting personal liberty or property rights, implied procedural control seems to rest

of *Judicature Act*, 38-39 Vict., c. 77 (U.K.); *Supreme Court of Judicature Act*, 44-45 Vict., c. 68 (U.K.).

⁴⁵ *R. v. Local Gov't Bd*, *supra*, note 27, 321.

⁴⁶ Rubinstein, *Origins*, *supra*, note 9.

⁴⁷ See Dicey, *supra*, note 12.

on a narrower premise, that of overseeing adjudications. *Certiorari* became the device by which the King's Bench Division assumed and maintained ultimate control, especially with respect to the adjudicative procedures to be followed, over all "judicial" proceedings not conducted by a competing superior court.⁴⁸

Secondly, procedural control by way of the rules of natural justice does not owe its elaboration and justification either to great philosophical concepts or to fundamental principles of the constitution.⁴⁹ While the overriding concept of *ius naturale* and the theory of supremacy of the common law⁵⁰ may have justified the Court of King's Bench in asserting an implied substantive and procedural supervisory power over inferior jurisdictions and over Parliament itself, common law courts in the late nineteenth century no longer claimed such an unlimited power.⁵¹ The motivation for procedural supervision flowed less from natural law theory than from the desire of the Court of King's Bench to impose its own procedures upon bodies subject to its control.⁵²

The recognition of these two aspects of judicial review for breach of the principles of natural justice is crucial to an understanding of the course of procedural review during the last century. If supervisory control of procedures is divorced from the theory of jurisdiction *rationes materiae* and linked instead to the process of adversarial adjudication which evolved in the Court of King's Bench, an alternative intellectual justification for the concept of implied procedural review must be developed. The recent evolution

⁴⁸ *E.g.*, admiralty, Chancery, mercantile, and ecclesiastical courts. See Rubinstein, *Jurisdiction*, *supra*, note 9, 82-94; Jackson, *Natural Justice* (1973), ch. 1.

⁴⁹ See de Smith, *supra*, note 9, 135-36: "The term [natural justice] expresses the close relationship between the common law and moral principles, and it has an impressive ancestry. That no man is to be judged unheard was a precept known to the Greeks, inscribed in ancient times upon images in places where justice was administered, proclaimed in Seneca's *Medea*, enshrined in the scriptures, mentioned by St. Augustine, embodied in Germanic as well as African proverbs, ascribed in the Year Books to the law of nature, asserted by Coke to be a principle of divine justice, and traced by an eighteenth-century judge to the events in the Garden of Eden". Yet de Smith concludes that these historical and philosophical foundations of the concept of natural justice are rather insecure.

⁵⁰ See *Dr Bonham's Case* (1610) 8 Co. Rep. 107a, 118a, 77 E.R. 638, 652.

⁵¹ See Loughlin, *supra*, note 1, 217.

⁵² Cf. Pollock, *The Genius of the Common Law* (1912). The ordinary procedures in the Court of Chancery often offended both rules of natural justice: see Potter, *Historical Introduction to English Law and its Institutions* 4th ed. (1958), Kiralfy (ed.), Part IV [hereinafter Kiralfy].

in the scope of procedural supervision is too complex to be explained solely in terms of variations in judicial deference to legislative will. While judicial review on jurisdictional grounds may be adequately founded on principles of Parliamentary sovereignty, the rule of law, and the constitutional function of the judiciary, these concepts do not provide sufficient justification for judicial review on implied procedural grounds.

B. *Modern developments in procedural review*

The relative formalization of judicial review by the Court of King's Bench which accompanied the passage of the *Judicature Acts*⁵³ has been well documented.⁵⁴ Many of the leading cases on implied procedural review can be traced to this period,⁵⁵ and modern constitutional theories upholding judicial supervision of administrative action were articulated at the end of the nineteenth century.⁵⁶ Developments both political and philosophical shaped the prevailing jurisprudence. The enfranchising of steadily larger segments of the population began to change the character of the House of Commons, which led to the increasing isolation of the House of Lords from the social priorities existing in the Commons — an isolation which manifested itself as resistance to much legislation designed to control important aspects of the economy. The courts, accustomed to applying the rules of an individualistic common law which served the upper classes, and to exercising little control over Parliamentary law, failed to respond quickly to the evolving bureaucratic state, and neither enlarged the scope of the "implied" review power nor created a new theory of judicial supervision.⁵⁷ The changing legislative priorities in the House of Commons produced much legislation unthinkable even a generation earlier; in particular, the grant to statutory bodies of subordinate legislative powers and powers of administration usually reserved to top civil servants meant that most independent officials were no longer exercising powers roughly analogous to those of adjudicative bodies.⁵⁸ It became necessary to distinguish between powers resembling those previously review-

⁵³ See *supra*, note 44.

⁵⁴ See Wade, *supra*, note 9.

⁵⁵ Most notably *Cooper v. Board of Works for the Wandsworth District* (1863) 14 C.B. (N.S.) 180, 143 E.R. 414.

⁵⁶ E.g., those of Dicey, *supra*, note 12.

⁵⁷ On this point, see Arthurs, *supra*, note 13, 1-22; Suzman, *Administrative Law in England* (1933) 18 Iowa L. Rev. 160, 162-67.

⁵⁸ See Dickinson, *Administrative Justice and the Supremacy of Law* (1927), ch. 1.

able on *certiorari* (that is, those the exercise of which required a hearing and a record) and powers reflecting some other aspect of the governmental enterprise.⁵⁹ Once the superintending court acknowledged that other than adjudicative powers (and more significantly, that other than judicial tribunals) were being created, a difficult choice arose: the court could either assert that all powers must be exercised judicially — a view which it failed to apply to its own rule-making power — or it could overtly characterize various delegated powers as judicial or non-judicial, and preserve the integrity of its own processes by reviewing only “judicial” powers.

The prevailing jurisprudential theories also contributed to the shaping of procedural review on implied grounds.⁶⁰ Analytical legal positivism led to a restrictive view of the judicial function. Disciples of Bentham, such as Austin, Holland, and Pollock, were preaching the supremacy of legislation, the separation of law and morals, and the interstitial character of judicial creativity.⁶¹ Changing perceptions of the function of the state produced modes of implementing government policy other than the traditional ones of prerogative, legislation, and adjudication. The law, previously seen as a body of rules governing relations between individuals, was ascribed the additional function of implementing government policy. The courts began to invoke such doctrines as ministerial responsibility in order to maintain the role which positivist legal philosophy assigned to them.⁶²

The development of the scientific method and its first applications to law⁶³ then provided the epistemological justification for adopting a literalist approach to language, a distrust of *a priori* controlling principles (such as *ius naturale*), and a faith in the perfectibility of society through legislation.⁶⁴ Each of these attitudes nurtured a judicial approach to procedural review which was both inactive and formalistic.⁶⁵

⁵⁹ *R. v. Electricity Commissioners* [1924] 1 K.B. 171 (C.A.).

⁶⁰ See Gilmore, *The Ages of American Law* (1976); Fuller, *The Law in Quest of Itself* (1940); White, *Patterns of American Legal Thought* (1978).

⁶¹ Representative of this perspective is Holland, *Elements of Jurisprudence* 13th ed. (1924).

⁶² The extreme view is that of Kelsen, *Pure Theory of Law* (1967), Knight (trans.).

⁶³ Pound, *A Theory of Social Interests* (1921) 15 Papers & Proceedings of the American Sociological Society 21.

⁶⁴ Compare Frank, *Law and the Modern Mind* (1931) and *If Men Were Angels* (1942) with Arnold, *The Symbols of Government* (1935).

⁶⁵ This characterization derives from Loughlin, *supra*, note 1, 220-21, who classifies theories of judicial review as activist formalist, activist informalist,

Hence, while the law of judicial review rested on writs having a long and varied history, the basic presuppositions of administrative law were those of the late nineteenth century. As a consequence, by the early twentieth century, the courts had clearly stated that the rules of natural justice would only apply to administrative functions which could be classified as judicial in nature. Although some essayists⁶⁶ have claimed that procedural supervision of all administrative functions historically was vested in the courts, the limited nature of Parliamentary delegation prior to this century offers no direct support for this view, and the above observations challenge it.⁶⁷ Equally, some early *dicta*, such as those of Lord Loreburn in *Board of Education v. Rice*,⁶⁸ have been read both as evidence of and as a prescription for unrestricted implied procedural supervision; however, such an interpretation is similarly open to question. Since supervisory control of procedures was not historically linked to the general theory of jurisdiction under which the Court of King's Bench reviewed inferior tribunals, *dicta* such as those found in *R. v. Local Government Board*⁶⁹ should not be read as applying to implied procedural intervention. Again, the justification for review on the grounds of natural justice was linked to an evolving concept of adversarial adjudication in the Court of King's Bench, and hence the early nineteenth century cases involving licensing boards and sewer tribunals cannot be said to support a theory of unlimited procedural review. Finally, the political situation, the restructured judiciary, and academic thought at the turn of the twentieth century held judicial activism to a minimum: between 1820 and 1920, almost no exercise of implied procedural supervision occurred over functions which failed to meet the *Electricity Commissioners' test*⁷⁰ of a judicial function.⁷¹ Courts continued for fifty years to refuse to review procedurally any administrative activity which could not be characterized as "judicial".

or inactive formalist. To complete the typography, one should of course add inactive informalist. The formalist/informalist criterion relates to the paradigm of adjudication; if review is formalist, all proceedings would be evaluated against an adjudicative backdrop; if informalist, a variety of procedural models could be contemplated. See Part II of this essay, *supra*, note 8.

⁶⁶ Notably de Smith, *supra*, note 9, 124-61.

⁶⁷ See also Loughlin, *supra*, note 1, 218-19.

⁶⁸ [1911] A.C. 179 (H.L.).

⁶⁹ *Supra*, note 27.

⁷⁰ *Supra*, note 59.

⁷¹ See the cases cited in de Smith, *supra*, note 9, 124-42; and Wade, *supra*, note 9, 421-39.

Socio-economic and political events in this century led to the judiciary's adoption of a very inactivist stance in *all* aspects of judicial review. (English decisions such as *Errington v. Minister of Health*,⁷² *Franklin v. Minister of Town & Country Planning*,⁷³ and *Nakkuda Ali v. Jayaratne*⁷⁴ can be better explained in terms of these socio-economic factors than as evidence of the twilight of procedural control.⁷⁵) At the same time as judicial review generally was on the wane, the test for determining when state activity could be subject to implied procedural control was undergoing an erratic development. Through the addition of the qualifying prefix "quasi", courts were able to extend procedural supervisory control to a range of decision-making processes which required that some judgment be made on the basis of evidentiary facts.⁷⁶ Processes were thus often characterized as hybrid — consisting of both judicial and non-judicial elements. The former were reviewed on grounds of natural justice, the latter escaped procedural control.⁷⁷ The post-Depression period saw the erosion of procedural control as an increasing number of statutory delegations were couched in terms of policy implementation,⁷⁸ ministerial discretion,⁷⁹ or privilege (benefit conferral).⁸⁰ Thus, while the label "quasi" at first expanded the scope of the judicial function, it later was used to exclude review in many cases. Three types of near-adjudicative function which did not attract review for breach of natural justice became more frequent and more obvious: those where substantive policy reasons militated against the concept of a strict decision upon the record; those where the source of the power lay in prerogative rather than statute; and those where the interest affected could not be classified as a strict legal right.

These near adjudications were the subject of considerable controversy during the fifties as commentators called not only for

⁷² [1935] 1 K.B. 249 (C.A.).

⁷³ [1948] A.C. 87 (H.L.).

⁷⁴ [1951] A.C. 66 (H.L.).

⁷⁵ Cf. *Liversidge v. Anderson* [1942] A.C. 206 (H.L.). See Wade, *The Twilight of Natural Justice?* (1951) 67 L.Q.R. 103 for a comment on the *Nakkuda Ali* case.

⁷⁶ See, e.g., *Horn v. Minister of Health* [1937] 1 K.B. 164 (C.A.); *Urban Housing Co. v. Oxford City Council* [1940] Ch. 70 (C.A.); *B. Johnson & Co. v. Minister of Health* [1947] 2 All E.R. 395 (C.A.).

⁷⁷ See the planning cases cited in Wade, *supra*, note 9, 434-39.

⁷⁸ *Re the Trunk Roads Act 1936*, [1939] 2 K.B. 515.

⁷⁹ *Howell v. Addison* [1943] 1 All E.R. 29 (C.A.).

⁸⁰ *R. v. Metropolitan Police Commissioner, Ex p. Parker* [1953] 1 W.L.R. 1150 (Q.B.D.).

greater judicial activism in reviewing statutory discretion,⁸¹ but also for an end to formalistic judicial abstinence in matters of procedural review.⁸² As a result, a reformulation of the test for determining the vulnerability of a statutory function to the requirements of natural justice occurred in the early sixties. In *Ridge v. Baldwin*,⁸³ Lord Reid denied that a "duty to act judicially" needed to be expressly imposed by statute, and asserted that such a duty could be inferred from the nature of the power exercised.

Although the courts remained outwardly formalistic towards the availability of procedural review,⁸⁴ by the mid-sixties they were reviewing for breach of natural justice whenever they could classify a decision-making process as judicial on the basis of functional criteria.⁸⁵ In the Supreme Court, this trend can be seen from the majority and dissenting judgments in *Howarth v. National Parole Board*.⁸⁶ To sum up, even though the scope of procedural review has varied substantially during the past sixty years, it has always proceeded on the assumption that the rules of natural justice would only apply if an inferior jurisdiction were acting "judicially" (however liberally or restrictively that expression was defined).⁸⁷

However, as if encouraged by favourable commentary, the judiciary in the last fifteen years seems to have enlarged its rôle in procedural review, often by reinterpreting previous authorities. By 1970, a new theory of review had replaced the concept of natural

⁸¹ See de Smith, *Judicial Review of Administrative Action* (1959).

⁸² See Wade, *Administrative Law* 3d ed. (1971), 186-204.

⁸³ [1964] A.C. 40 (H.L.).

⁸⁴ Wade, *supra*, note 9, 76 and 444-47 reads later cases into Lord Reid's judgment and concludes that *Ridge v. Baldwin* abolished formalism in review matters. Lord Reid's language, however, simply does not support such a proposition; see *supra*, note 83, 76 where his Lordship states, quoting Atkin L.J., that "[one must infer] ... the judicial character of the duty from the nature of the duty itself". In other words, the rules of natural justice continued to apply only when a function could be characterized as judicial.

⁸⁵ See *Durayappah v. Fernando* [1967] 2 A.C. 337 (P.C.).

⁸⁶ [1976] 1 S.C.R. 453. See also the later decisions in *Saulnier v. Quebec Police Commission* [1976] 1 S.C.R. 572; *Martineau & Butters v. Matsqui Institution Inmate Disciplinary Board* [1978] 1 S.C.R. 118. Complicating the analysis of these cases is the fact that linguistic differences in s. 28 of the *Federal Court Act*, R.S.C. 1970 (2d Supp.), c. 10 — English: "not required by law"; French: "légalement prévu" — seem to support both minority and majority positions. Compare *M.N.R. v. Coopers & Lybrand* [1979] 1 S.C.R. 495.

⁸⁷ See the case comments on *Ridge v. Baldwin* in Good Hart, *Ridge v. Baldwin: Administration and Natural Justice* (1964) 80 L.Q.R. 105; Bradley, *A Failure of Justice and Defect of Police* [1964] Cambridge L.J. 83.

justice. Lord Denning M.R. stated: "At one time it was said the principles [of due process review] only apply to judicial proceedings and not to administrative proceedings. That heresy was scotched in *Ridge v. Baldwin*".⁸⁸ The new theory, heralded as the doctrine of "fairness", derived from a 1967 decision of the English Court of Appeal, in which Lord Parker C.J. said: "That is not, as I see it, a question of acting or being required to act judicially, but of being required to act fairly".⁸⁹ Wade summarizes the current state of judicial control of procedural due process as follows:

The result is that the courts now have two strings to their bow. An administrative act may be held to be subject to the requirements of natural justice either because it affects rights or interests and therefore involves a duty to act judicially ... or it may simply be held that it automatically involves a duty to act fairly ...⁹⁰

The development (and articulation) of this new theory of implied procedural supervision represents a radical reformation of the law of judicial review in at least two respects. First, the preliminary exercise of classification of function is no longer necessary; courts are claiming that implied procedural supervision inheres in the review function. The theory of fairness thus seems to rest on the historically inaccurate assumption that the justifications for judicial review on jurisdictional grounds are equally valid when applied to the notion of implied procedural review. No independent justification for universal due process supervision is offered, and, as the judgment of Laskin C.J.C. in *Nicholson* indicates, none is thought necessary.⁹¹ Secondly, the theory of fairness presupposes that questions of procedural propriety in non-adjudicative contexts can be addressed meaningfully by the courts even in the absence of a framework of fixed rules and standards. Judges faced with natural justice applications were able to evaluate administrative proceedings on the basis of the two rules *audi alteram partem* and *nemo iudex in causa sua*; no such framework can be invoked in other decisional contexts.⁹² It is precisely this absence of structure

⁸⁸ *R. v. Gaming Board* [1970] 2 Q.B. 417, 430 (C.A.).

⁸⁹ *Re H.K.* [1967] 2 Q.B. 617, 630 (C.A.).

⁹⁰ *Supra*, note 9, 447. Wade was paraphrasing the words of Megarry J. in *Bates v. Lord Hailsham* [1972] 1 W.L.R. 1373, 1378 (Ch.): "In the sphere of the so-called quasi-judicial the rules of natural justice run, and ... in the administrative or executive field there is a general duty of fairness".

⁹¹ *Supra*, note 3, 325.

⁹² For a predictable judicial response to the lack of prescriptive standards, see *Re Abel & Director, Penetanguishine Mental Health Centre* (1979) 24 O.R. (2d) 279 (Div. Ct). See also *Re Webb & Ontario Housing Corp.*, *supra*, note 4, 266, where MacKinnon A.C.J.O. stated: "[I]t may be that what constitutes fairness is, like beauty, to be found in the eye of the beholder".

which has been identified as the cause of the crisis in administrative law theory.⁹³ The possible resolution of this crisis and its effect on the future of procedural supervision can only be addressed after the justifications of procedural review are examined.

C. *The justification of implied procedural review*

There are two fundamental questions to consider in developing a justification of implied procedural review: how and why did the judiciary come to be vested with this task? and what is the purpose of procedural supervision?

Some authors have seen the development of "natural justice" review by the courts in terms of the historical supremacy of the common law. Since much early legislation was at best elliptical⁹⁴ and was often enacted to remedy a specific perceived defect in the common law, the concept of Parliament as an autonomous source of legal rules was late in developing. The law remained in essence the common law, and legislative instruments were always to be interpreted within that context.⁹⁵ As a result, it was natural for judges to speak of "supply[ing] the omission of the legislature"⁹⁶ by invoking implied procedural rules. All statutes were to be read subject to the procedures of the common law unless these were expressly excluded.

Others have explained the rise of "natural justice" review by the political evolution during the seventeenth century. The imposition of procedural safeguards stemmed from the attempt by the common law courts to assert supremacy over the Crown.⁹⁷ By subjecting Crown officers to the judicial procedures of the Court of King's Bench, a check on the royal prerogative could be maintained. Moreover, part of the competition between the common law courts and the prerogative courts involved the question of which procedures would prevail.⁹⁸ On this view, the assertion of implied procedural control over inferior bodies is seen to result from the desire of the Court of King's Bench to impose its view of procedural due process on all other decision-makers.

A third theory holds that judicial supervision of administrative procedures was a product of the adversary system, which became

⁹³ Loughlin, *supra*, note 1, 236-38.

⁹⁴ E.g., the *Statute of Frauds*, 1677, 29 Car. II, c. 3; the *Statute of Uses*, 1535, 27 Hen. VIII, c. 10.

⁹⁵ *Heydon's Case* (1584) 3 Co. Rep. 7a, 76 E.R. 637.

⁹⁶ *Cooper v. Wandsworth Board of Works*, *supra*, note 55, 420.

⁹⁷ *Case of Proclamations* (1611) 12 Co. Rep. 74, 77 E.R. 1352.

⁹⁸ Kiralfy, *supra*, note 52, 100-71.

dominant in the late nineteenth century.⁹⁹ The rules of natural justice developed out of the court's own procedural evolution; the emergence of natural justice represented not merely a legal phenomenon, nor a political event, but also an attempt by the Court of King's Bench to extract by logical implication the essence of its own adjudicative model.¹⁰⁰ As the courts began to understand the forms, functions, and limitations of adjudication (which occurred with remarkable rapidity following the *Judicature Acts*¹⁰¹), they constructed a theory which would determine when the adjudicative procedures of the common law should be invoked.

While all these theses about the development of "natural justice" review by the courts may be valid explanations of how the Court of King's Bench came to assert a power of procedural review over inferior jurisdictions, they do not explain why procedural review should be permitted at all or why it should be effected by the judiciary. Logically, implied procedural review may be justified on the ground that procedural justice entails substantive justice, or on the ground that procedural justice is good in itself. It is necessary in both cases to establish the criteria to be employed in deriving a theory of procedural justice.¹⁰²

The traditional attitude of lawyers and judges to procedural review is succinctly stated in the famous epigram of Jackson J. of the United States Supreme Court: "Procedural fairness and regularity are of the indispensable essence of liberty. Severe substantive laws can be endured if they are fairly and impartially applied".¹⁰³ In other words, the law does not see any special relationship existing between procedural and substantive justice; the reasons for insisting on fair procedure seem to be essentially programmatic within an adjudicative context. As Shklar has pointed out, this perspective is characteristic of the ethical attitude which she labels "legalism"; lawyers are preoccupied with the instrumentalities, rather than with the content, of obligations.¹⁰⁴ Even consti-

⁹⁹ On the emergence of the adversary system, see Neef & Nagel, *The Adversary Nature of the American Legal System from a Historical Perspective* (1974) 20 New York Law Forum 123, 128-47.

¹⁰⁰ Allen, *Law in the Making* 7th ed. (1964), 187-235.

¹⁰¹ Kiralfy, *supra*, note 52, ch. 10.

¹⁰² Cf. Verkuil, *The Emerging Concept of Administrative Procedure* (1978) 78 Columbia L. Rev. 258; Verkuil, *A Study of Informal Adjudication Procedures* (1976) 43 U. Chi. L. Rev. 739.

¹⁰³ *Shaughnessy v. U.S.* 345 U.S. 206, 224 (1953) *per* Jackson J. (dissenting).

¹⁰⁴ Shklar, *Legalism* (1964). See also Bickel, *The Morality of Consent* (1975), 123: "[T]he highest morality almost always is the morality of process".

tutional theory is dominated by this conception; in the words of Frankfurter J., "the history of liberty has largely been the history of the observance of procedural safeguards".¹⁰⁶ Given this basic orientation, it is not surprising that few modern lawyers attempt to link the virtues of procedural justice with the achievement of substantive justice. Nor has this issue been among the principal concerns of modern legal philosophy; few contemporary writers have examined it in detail.¹⁰⁸

Probably the most influential theories of justice in the Western legal tradition are utilitarianism and contractarianism.¹⁰⁷ Under the contractarian theory, substantive justice is formulated in terms of the voluntary assumption of general principles in order to achieve a just society. As Rawls states:

Justice as fairness begins, as I have said, with one of the most general of all choices which persons might make together, namely, with the choice of the first principles of a conception of justice which is to regulate all subsequent criticism and reform of institutions.¹⁰⁸

Utilitarianism, on the other hand, views justice from a market perspective. While there may be a concept of procedural justice in classical utilitarianism,¹⁰⁹ the major claim of this moral theory is that the "felicity calculus" provides the criterion for determining when substantive justice has been achieved.¹¹⁰ Hence, in Bentham's words:

The happiness of the individuals, of whom a community is composed, that is their pleasures and their security, is the end and the sole end which the legislator ought to have in view ...¹¹¹

In neither case are the principles of substantive justice directly related to rules about the procedures by means of which these substantive principles are to be made manifest. Both contracta-

¹⁰⁶ *McNabb v. U.S.* 318 U.S. 332, 347 (1943).

¹⁰⁶ Works of the past twenty years have been concerned primarily with problems of distributive justice: see, e.g., Perelman, *The Idea of Justice and the Problem of Argument* (1963), Petrie (trans.); Ross, *On Law and Justice* (1959); Barry, *Political Argument* (1965); Rawls, *A Theory of Justice* (1971); Nozick, *Anarchy, state and utopia* (1974). See also Lucas, *The Principles of Politics* (1966), 106-32.

¹⁰⁷ Other theories can be characterized as intuitive, egalitarian, or Marxist.

¹⁰⁸ Rawls, *supra*, note 106, 13.

¹⁰⁹ Bedau, *Justice and Classical Utilitarianism* (1963) 6 *Nomos* 284.

¹¹⁰ Conklin, *The Utilitarian Theory of Equality Before the Law* (1976) 8 *Ottawa L. Rev.* 485.

¹¹¹ Bentham, *An Introduction to the Principles of Morals and Legislation* (1970), Burns & Hart (eds.), 34.

rian¹¹² and utilitarian¹¹³ theories of justice fail to pay sufficient attention to means.

Even as eminent a jurisprudential writer as Hart is content to articulate a "formalist" theory of procedural justice with only two parts: "a uniform or constant feature, summarized in the precept 'Treat like cases alike' and a shifting or varying criterion used in determining when, for any given purpose, cases are alike or different".¹¹⁴ Decisional procedures play no role in this theory, nor does it offer an independent justification for any particular procedural model. Hart concludes that the maxims *audi alteram partem* and *nemo iudex in causa sua* are justified simply "because they are guarantees of impartiality or objectivity, designed to secure that the law is applied to all those and only to those who are alike in the relevant respect marked out by the law itself".¹¹⁵

This view clearly does not account for the application of procedural principles in instances where *no* rules are being applied. Thus, it assumes not only the substantive justice of any rules being applied but also the existence of pre-existing rules applicable to fixed factual situations. Hart's justification for procedural justice is again linked to a theory of adjudication and fails to provide a rationale for procedural supervision in non-adjudicative contexts.¹¹⁶ On the other hand, Hart's view does indicate a justification of general due process review insofar as it relates the derivation of procedural norms to a precept of formal justice within a given institutional framework.

Two legal writers seemed to realize that "treat like cases alike" could support a general theory of procedural justice. Both Lon

¹¹² See Wolff, *A Refutation of Rawls' Theorem on Justice* (1966) 63 J. Phil. 179.

¹¹³ See Fuller, *The Morality of Law* 2d ed. (1969), 197.

¹¹⁴ Hart, *The Concept of Law* (1961), 156 [hereinafter *Concept*]. See also Hart, *Between Utility and Rights* (1979) 79 Columbia L. Rev. 828.

¹¹⁵ *Ibid.*

¹¹⁶ In view of these brief observations on legalism and classical conceptions of justice, administrative lawyers cannot be criticized too heavily for their failure to inquire into the value of procedural propriety and to ask how procedural due process is linked to substantive justice. Wade, *supra*, note 9, 393, seems to echo the traditional legalistic claim: "As government powers continually grow more drastic, it is only by procedural fairness that they are rendered tolerable". De Smith, *supra*, note 9, 134-36, states only that the *audi alteram partem* rule has had a long and venerable history. Neither Reid & David, *Administrative Law and Practice* 2d ed. (1978) nor Kavanagh, *A Guide to Judicial Review* (1978) even attempt to provide a justification for implied procedural review.

Fuller and Alexander Bickel developed theoretical frameworks which linked the concepts of procedural review with those of substantive justice, though only Fuller directly addressed the issues explored in this essay.¹¹⁷ Fuller was concerned to uncover what he labelled the "inner morality" of the law and various legal institutions.¹¹⁸ He attempted to derive procedural principles from the instrumental rationality of the decision-making institution (adjudication, negotiation, mediation, legislation) itself. He believed that these institutions imposed upon decision-makers duties which could be characterized as role morality. Hence he concluded:

When I speak of legal morality, I mean just that. I mean that special morality that attaches to the office of law-giver and law-applier, that keeps the occupant of that office, not from murdering people, but from undermining the integrity of the law itself.¹¹⁹

While Fuller's writing was primarily directed to the elucidation of the special duties of rule-makers, it also deals with the analysis of other decisional processes. Implicit in Fuller's evaluation of legal institutions is the belief that the distinguishing feature of each institution is the mode of participation it affords to the affected party.¹²⁰ Fuller thus linked the procedural requirements of a decisional model to the distinctive characteristics of that model. Hart saw in the two rules of natural justice a guarantee of the minimum conditions of impartial adjudication; Fuller extended this process of purposive implication across the entire range of legal decision-making.

Fuller's procedural thesis can be summed up as follows: (1) there are several distinctive decisional processes in modern society; (2) each is possessed of a unique instrumental rationality which entails certain procedural attributes and functional limitations if its moral authority and integrity are to be preserved; and (3) the criterion by which these processes are to be distinguished relates not to the

¹¹⁷ See Fuller, *supra*, note 113; Bickel, *supra*, note 104.

¹¹⁸ See, e.g., the following works of Fuller: *Anatomy of the Law* (1968); *Two Principles of Human Association* (1969) 11 *Nomos* 3; *Human Interaction and the Law* (1969) 14 *Am. J. Juris.* 3; *Mediation: Its Forms and Functions* (1971) 44 *S. Cal. L. Rev.* 305; *Collective Bargaining and the Arbitrator* [1963] *Wisc. L. Rev.* 3; *The Forms and Limits of Adjudication* (1978) 92 *Harv. L. Rev.* 353.

¹¹⁹ Fuller, *A Reply to Professors Cohen and Dworkin* (1965) 10 *Villanova L. Rev.* 655, 660.

¹²⁰ Fuller, *The Forms and Limits of Adjudication* (1978) 92 *Harv. L. Rev.* 353, 363; Eisenberg, *Participation, Responsiveness, and the Consultative Process* (1978) 92 *Harv. L. Rev.* 410. This view leads to an examination of democratic theory. See Dahl, *A Preface to Democratic Theory* (1956).

office of the decision-maker nor to the kinds of decisions to be taken, but rather to the nature of participation afforded to affected parties.¹²¹ If accepted (and no other theory of procedural justice heretofore advanced can account for the imposition of due process requirements in non-adjudicative processes), this thesis would clarify many problems of procedural review.

In the first place, Fuller's justification for review is based on the principle that institutions have an "inner morality" which is coherent with and productive of substantive justice.¹²² The theory of procedural fairness thus rests on two grounds: it guarantees the integrity of various legal decision-making processes; and it has an affinity with substantive justice.¹²³

Fuller's thesis also democratizes the choice of decision-making institutions. Since participation is the criterion by which various decisional processes are differentiated, fairness demands that the affected parties be permitted to participate in the selection of the paradigm institution by which the procedural rights which they may later invoke are to be determined.¹²⁴ Thus, because the instrumental rationality of an institution defines "participation" once the appropriate decisional process is determined, procedural fairness requires that the individual affected be given the opportunity to participate in the selection of the institution in question. In the absence of a formal legislative direction respecting the decision-making procedure to be followed, the concept of fair procedure must permit participants to select the paradigm against the demands of which the decisional process under review will be measured. This is because legislative procedural rules presumably rest on popular consent as manifested through the democratic process; in the absence of such rules, democratic theory requires that the procedures adopted rest on the direct consent of the affected parties.

Finally, Fuller's ideas give meaningful content to the formal injunction "treat like cases alike". If procedural review across a wide range of decision-making processes were to be based solely on the adjudicative paradigm, the maxim "treat like cases alike" would have little meaning for a reviewing panel. In effect, a monolithic

¹²¹ Fuller & Eisenberg, *Basic Contract Law* 3d ed. (1972), 89-103. See also Summers, *Professor Fuller's Jurisprudence and America's Dominant Philosophy of Law* (1978) 92 Harv. L. Rev. 433.

¹²² Fuller, *supra*, note 119; Fuller, *Irrigation and Tyranny* (1965) 17 Stan. L. Rev. 1021.

¹²³ Fuller & Eisenberg, *supra*, note 121, 93-99.

¹²⁴ In this sense Fuller's model seems to rest on a contractarian view of substantive justice similar to that advanced by Rawls, *supra*, note 106.

institutional structure within which inheres a single principle of differentiation would control widely dissimilar decision-making processes. That affected parties contribute to the selection of the institutional process by the instrumental rationality of which the fairness of procedures will be judged is coherent with the "treat like cases alike" principle because it involves participants in the determination of the criterion of comparison.¹²⁵

In summary, a justification of implied procedural review is crucial to an understanding of the proper form and nature of such review. The two rules of natural justice can be seen to derive from the formal maxim "treat like cases alike" as applied to the adjudicative process, yet they do not appear directly relevant to other decisional processes now envisioned by the theory of "procedural fairness".¹²⁶ If one extends the reasons supporting the derivation of these two maxims to other institutional processes, it becomes apparent that the justification for procedural review must be linked to two underlying themes: the concept of institutional rationality, which engenders a commitment to the integrity of all varieties of decisional processes; and the participation by affected parties in the selection of the institutions which determine the criteria to be applied in order to achieve procedural justice.

D. Conclusion

This review of the historical and intellectual background of implied procedural supervision and the possible justification for such review has served two functions. First, it has shown that the adoption of "fairness" involves a fundamental reorientation in the law of judicial review. Secondly, it has revealed that the existing justifications for due process supervision are inadequate when applied to the fairness model.

A brief survey of the history of the early judicial review remedies illustrated that the concept of jurisdictional control rests on principles entirely different from those supporting the concept of implied due process supervision. While the characterization of

¹²⁵ Compare the suggestions in Northrop, *The Mediatonal Approval Theory of Law in American Legal Realism* (1958) 44 Va L. Rev. 347.

¹²⁶ The traditional legal approach to procedural review — natural justice — does not permit of a justification of implied review through a concept of fairness; the natural justice approach is linked to the concept of a pre-existing rule, rarely present in decisional processes to which "fairness" is likely to be applied. See Hart, *supra*, note 114, ch. 8; Bodenheimer, *Treatise on Justice* (1967).

function may have been irrelevant in ensuring that "inferior jurisdictions" acted lawfully, it is crucial to the invocation of the rules of natural justice. Until the adoption of the theory of fairness, the control of procedures by the Court of King's Bench was linked to the writ of *certiorari* and hence to the process of adjudication. The justification for implied due process control was found principally in the desire of the Court of King's Bench to ensure a basic uniformity in adjudicative procedures. When an attempt to justify the fairness concept was undertaken, it became clear that the purely legal reasons which sustained the invocation of the two rules of natural justice could not be extended to non-judicial decisions — the substantive content of the rules of natural justice is justifiable only in adjudicative contexts.

A short examination of basic theories of justice revealed that moral and legal philosophers have treated procedural justice as deriving from the maxim "treat like cases alike". In practice, the specific requirements of this precept also seem to be linked to the concept of adjudication. However, the idea of "institutional rationality" provides a mechanism for extending the maxim to a wide variety of decisional processes.

The doctrine of "procedural fairness" is more than an expanded version of the theory of "natural justice". It involves criteria far removed from the norms of classical adjudication and it is necessarily informalist in nature. These differences indicate that an entirely new model of implied due process control will have to be articulated if the goal of procedural justice in all administrative decision-making is to be achieved.

II. Potential applications of the fairness doctrine

If the courts adopt fairness as a basis for implied procedural supervision, the procedural failings of any administrative process would become subject to correction by judicial review. The statutory directions governing the performance of particular decision-making tasks no longer can be taken as exhaustive of the procedural formalities which must be followed in non-adjudicative situations. In order to appreciate fully the relationship between implied due process review and judicial supervision generally, it is necessary to evaluate the impact which a concept of procedural fairness is likely to have on various administrative processes. This evaluation could be unlimited in scope, given the variety of tasks routinely delegated to statutory bodies. Nevertheless, there are four general issues which initially must be addressed: the significance of fairness

with respect to processes which closely resemble traditional adjudications but which are not subjected by specific legislation to procedural formalities; the invocation of fairness to control administrative processes which do not resemble adjudications; the compatibility of fairness with statutory consolidations of administrative procedures; and the relationship between fairness and sophisticated statutory procedural schemes which establish a comprehensive framework of decision-making. These inquiries should indicate whether fairness will flourish as an independent principle of implied procedural review or become merely a watered-down version of natural justice.¹²⁷

A. *Fairness and near-adjudicative decisional procedures*

In almost every case in which the doctrine of fairness heretofore has been invoked successfully, the decision-making procedure under review, although it could not be classified as judicial or quasi-judicial, closely resembled classical adjudication.¹²⁸ The *Nicholson* case itself represents one of these border-line situations.¹²⁹ An investigation of fairness logically begins with the cases which fail to meet the restrictive test for quasi-judicial function adopted in *Nakkuda Ali v. Jayaratne*¹³⁰ but would be included by the liberal test propounded in *Ridge v. Baldwin*.¹³¹ In these cases, the adoption of the judicial function as a procedural paradigm would impair neither the efficient functioning of the administrative process nor the integrity of individual exercises of statutory power. To require an oral hearing in circumstances such as those obtaining in the cases of *Mitchell v. The Queen*,¹³² *Howarth v. National Parole Board*,¹³³ *Martineau & Butters v. Matsqui*,¹³⁴ or *M.M.I. v. Hayardal*¹³⁵ would slow down the disposition of administrative cases only marginally and would not involve a radical restructuring of the institutional

¹²⁷ See Grey, *supra*, note 1. Already there is evidence that the courts would prefer to see fairness as watered-down natural justice. See *Re Webb*, *supra*, note 4; *Re Abel*, *supra*, note 92; *Re C.P. Express & Ontario Hwy Transport Bd* (1979) 26 O.R. (2d) 193 (Div. Ct). On the other hand, there are some cases where "fairness" is given a substantive rather than a procedural content: see *Re S & M Laboratories*, *supra*, note 4 (C.A.), 736.

¹²⁸ See the discussion in the articles by Mullan, *supra*, note 1, and that in Loughlin, *supra*, note 1, 223-37.

¹²⁹ See Grey, *supra*, note 1.

¹³⁰ *Supra*, note 74.

¹³¹ *Supra*, note 83.

¹³² [1976] 2 S.C.R. 570.

¹³³ *Supra*, note 86.

¹³⁴ *Supra*, note 86.

¹³⁵ *Supra*, note 2.

process by which decisions are reached. In each of the above cases, a decision had to be made on the basis of pre-existing law, applied to a discrete set of facts capable of demonstration by proof and argument. The consequences of a finding upon these facts were predetermined (at least as to their extreme limits), and the administrative process in question was not initiated by the affected party; that is, he was cast as an accused or defendant, rather than as an applicant or a plaintiff. Finally, in each case, the individuals affected were limited in number, and policy issues, though present, were never the subject of dispute. To the extent that the adoption of procedural fairness will subject such decisions as these to review, the doctrine will have the salutary effect of eliminating the artificial classification exercise.

A second border-line area occurs in cases where the decisional function performed is adjudicative in form but the writ of *certiorari* will not lie because the decision is made by a Minister, the Cabinet, or the Crown, acting under the royal prerogative.¹³⁶ Though it must be conceded that there are few truly adjudicative functions performed under the royal prerogative, in these situations no substantial inconvenience would be occasioned by giving the concerned party some direct input into the decision. There is no functional reason why a Minister acting in a quasi-judicial manner pursuant to statute (for example, as *persona designata*) should be procedurally reviewable while a Minister so acting pursuant to prerogative should not. Equally, many statutory appeals to a Minister or to the Cabinet from lower level tribunals,¹³⁷ although not purely adjudicative, parallel parole revocation in form and consequence; therefore, the invocation of procedural review ought logically to be permitted. These considerations seem to sustain the Federal Court of Appeal decision in *Inuit Tapirisat v. Governor-in-Council*,¹³⁸ an appeal taken under the *National Transportation Act*.¹³⁹

A third marginal case arises in two-stage and hybrid processes where the final administrative decision involves a significant policy input. Again, the efficiency of administration is not compromised by affording an opportunity for input to affected parties. The fact that the policy determination is partially based on an evidentiary

¹³⁶ Although logically there is no necessary connection between the availability of the remedy of *certiorari* and the applicability of rules of natural justice, the courts for the most part have treated the issues as inseparably linked. On this point, see Grey, *supra*, note 1, pt IV.

¹³⁷ E.g., under the *Extradition Act*, R.S.C. 1970, c. E-21, s. 22.

¹³⁸ *Supra*, note 4.

¹³⁹ R.S.C. 1970, c. N-17, s. 64(1).

record buttresses the argument for permitting review of the process by which that record is assembled. In some earlier cases, notably *Re Cloverdale Shopping Centre Ltd.*¹⁴⁰ the courts attempted to ensure some degree of procedural supervision by bifurcating the decision. They would apply the rules of natural justice at the fact-finding stage but decline to do so at the final policy-invocation stage. Nevertheless, a judicial conclusion that a matter was ultimately a question of policy usually served to insulate the entire process from procedural review.¹⁴¹ However, the fact that a decision is not made solely on the basis of a record, although it renders inappropriate review for error of law on the face of the record, need not immunize the adjudicative elements of the decision from review on the grounds of procedural impropriety.

These three examples reveal that the doctrine of fairness may be useful in overcoming the limitations on procedural review which flow from a restrictive view of the judicial function. They also raise the issue of the nature of the procedural requirements envisioned by the fairness doctrine. In *Nicholson*, the Court, following de Smith and Mullan, decided that fairness is a "half-way house . . . between the observance of natural justice aforesaid and arbitrary removal".¹⁴² This opinion also is shared by Grey, who cites the later judgment of the Supreme Court in *M.N.R. v. Coopers & Lybrand*¹⁴³ in support of the proposition that fairness applies to a range of decisions and requires procedural formalities somewhat less rigid than those of natural justice.¹⁴⁴

Although the Court in *Nicholson* held that the applicant should have been given notice, reasons, and an opportunity to make representations, it appears that in the future the exact content of fairness will be determined on a case-by-case basis.¹⁴⁵ Fairness as diluted natural justice may be an appropriate model in border-line adjudicative situations,¹⁴⁶ but it is unclear whether such a concept will serve in all instances.

¹⁴⁰ *Re Cloverdale Shopping Centre Ltd & Township of Etobicoke* (1966) 57 D.L.R. (2d) 206 (Ont. C.A.).

¹⁴¹ See, e.g., *Calgary Power Ltd v. Copithorne* [1959] S.C.R. 24; *Voyager Explorations Ltd v. Ontario Securities Commission* [1970] 1 O.R. 237 (H.C.).

¹⁴² *Supra*, note 3, 322.

¹⁴³ *Supra*, note 86.

¹⁴⁴ Grey, *supra*, note 1, pt III. See also *Re Abel*, *supra*, note 92.

¹⁴⁵ Grey, *ibid.* This is precisely the cause of the crisis in administrative law theory envisioned by Loughlin, *supra*, note 1.

¹⁴⁶ See, e.g., *Scott v. Rent Review Commission* (1977) 23 N.S.R. (2d) 504, (*sub nom. Re Scott & Rent Review Commission*) 81 D.L.R. (3d) 530 (S.C. App. Div.). Loughlin, *supra*, note 1, 240-41 seems to accept this view.

B. *Fairness in administrative and legislative processes*

The concept of procedural fairness need not be restricted in application to near-adjudicative processes. The Chief Justice suggested in *Nicholson* that the fairness doctrine would apply to the exercise of all statutory powers, however characterized;¹⁴⁷ this opinion finds support in the *Inuit Tapirisat* case¹⁴⁸ as well as in Dickson J.'s statement in *M.N.R. v. Coopers & Lybrand*:

Administrative decision does not lend itself to rigid classification of function. Instead, one finds realistically a continuum. As paradigms, at one end of the spectrum are rent tribunals, labour boards and the like, the decisions of which are eligible for judicial review. At the other end are such matters as the appointment of the head of a Crown corporation, or the decision to purchase a battleship, determinations inappropriate to judicial intervention. The examples at either end of the spectrum are easy to resolve, but as one approaches the middle the task becomes less so.¹⁴⁹

The continuum envisioned by the Court presupposes the existence of some act characterizable as a decision. It runs from pure adjudications at one end through pure policy determinations at the other. This unidimensional model does not completely do justice to the potential of the concept of procedural fairness.¹⁵⁰ In order to avoid the classification of function, procedural review must extend to all statutory functions, including legislative acts, normally not labelled as decisions. Moreover, the distinction between adjudication and policy decision is itself untenable;¹⁵¹ procedural review must focus on the nature of the process, not on the supposed degree to which a decision is impregnated with policy considerations.

To date only the exercise of the legislative function has been subjected to formalized general procedural principles.¹⁵² *The Regulations Act*¹⁵³ of Ontario, for example, establishes a code respecting the filing, publication, and scrutiny of many legislative instruments. Federally, the *Statutory Instruments Act*¹⁵⁴ sets out similar

¹⁴⁷ *Supra*, note 3, 324-28.

¹⁴⁸ *Supra*, note 4.

¹⁴⁹ *Supra*, note 86, 505. The context makes it clear that Dickson J.'s remarks refer to procedural supervision.

¹⁵⁰ Elsewhere in the judgment there is evidence that Dickson J. did not intend his remarks to be read restrictively: *ibid.*, 506 *et seq.*

¹⁵¹ See Macdonald, *Speedy Justice for the Litigant: Sound Jurisprudence for the Province?* (1978) 16 Osgoode Hall L. J. 601.

¹⁵² Individual statutes have occasionally imposed procedural formalities upon the exercise of administrative functions: see, e.g., *The Municipal Act*, R.S.O. 1970, c. 284, s. 14.

¹⁵³ R.S.O. 1970, c. 410, as am.

¹⁵⁴ S.C. 1970-71-72, c. 38, as am.

requirements. However, neither of these statutes provides for rule-making hearings at which interested persons can present evidence, argue policy, and participate in the assembly of a record which would serve as the basis of decisions.¹⁵⁵ Several specific regulatory statutes¹⁵⁶ do institutionalize pre-enactment "notice and comment" procedures. Multi-faceted administrative procedure statutes have been adopted in other countries,¹⁵⁷ and proposed for Canada.¹⁵⁸ In order to determine the role of fairness in rule-making hearings, a taxonomy of legislative powers must be developed.

Mullan has divided rule-making powers into three main categories: orders-in-council; ordinary regulations; and executive or administrative rules, orders, policy statements, and interpretations.¹⁵⁹ With respect to orders-in-council, Mullan notes the almost complete lack of authority supporting procedural supervision of legislative orders.¹⁶⁰ Prior to the *Inuit Tapirisat* case¹⁶¹ (which did not involve a legislative act), there was no judicial decision which suggests that any order-in-council is subject to implied procedural supervision. Ordinary regulations have, in the past, occasionally been subject to procedural review. In the *Wiswell* case,¹⁶² the Supreme Court held that the valid enactment of a by-law could, in certain cases, be conditional upon the holding of a hearing;¹⁶³ however, procedural supervision was linked to the characterization of the function as judicial. Executive or administrative rules traditionally have not been thought to require antecedent procedural formalities,¹⁶⁴ although in one recent Supreme Court decision, it was suggested that the validity of informal guidelines may in some measure be dependent on prior consultation.¹⁶⁵ In general, then,

¹⁵⁵ See Arthurs, *Regulation-Making: The Creative Opportunities of the Inevitable* (1970) 8 Alta L. Rev. 315; Mullan, *Hearings*, *supra*, note 1.

¹⁵⁶ E.g., the *National Transportation Act*, R.S.C. 1970, c. N-17; the *Broadcasting Act*, R.S.C. 1970, c. B-11; the *Pilotage Act*, S.C. 1970-71-72, c. 52.

¹⁵⁷ See, e.g., *Administrative Procedure Act*, 5 U.S.C. § 551 (1976).

¹⁵⁸ See Janisch, *Policy Making in Regulation* (1979) 17 Osgoode Hall L.J. 46; Mullan, *Hearings*, *supra*, note 1.

¹⁵⁹ Mullan, *Hearings*, *supra*, note 1, 36-59.

¹⁶⁰ Mullan cites *Berryland Canning Co. v. The Queen* [1974] 1 F.C. 91 (T.D.) as the only case in which this possibility was ever canvassed: *ibid.*, 38-39.

¹⁶¹ *Supra*, note 4.

¹⁶² *Wiswell v. Metropolitan Corp. of Greater Winnipeg* [1965] S.C.R. 512.

¹⁶³ See also *Re Herschoran & City of Windsor* (1973) 1 O.R. (2d) 291 (Div. Ct); *Re Bourque & Township of Richmond* (1978) 87 D.L.R. (3d) 349 (B.C.C.A.).

¹⁶⁴ *Rothman's of Pall Mall Canada Ltd v. M.N.R. (No. 1)* [1976] 2 F.C. 500 (C.A.).

¹⁶⁵ *Capital Cities Communications Inc. v. C.R.T.C.* [1978] 2 S.C.R. 141, 171. But see the specific provisions of the *Broadcasting Act*, R.S.C. 1970, c. B-11.

unless the function performed is characterized as judicial, no antecedent procedural requirements have been imposed with respect to the making of legislative instruments. Immanently, fairness is likely to be invoked for this purpose.

Eisenberg, in a recent article, has dealt in detail with the rule-making hearing.¹⁶⁶ He distinguishes various types of decisional paradigms which guarantee the participation of affected parties, and he develops a model of the "consultative process", offering a non-adjudicative paradigm for the pre-enactment rule-making hearing. His theory suggests some ways in which fairness may relate to the rule-making function and addresses the issues of notice, reasons, format of participation, evidentiary weight of submissions, and criteria of policy evaluation.¹⁶⁷

The doctrine of fairness could also supplement the provisions of *The Regulations Act*¹⁶⁸ or the *Statutory Instruments Act*¹⁶⁹ in other fields. For example, a regulation might be denied retroactive effect when the procedures attending its adoption were improper. An unpublished regulation might not be enforced in individual cases, even if legislatively exempt from publication, if some antecedent input was deemed necessary. Additional publication requirements, such as a requirement of direct notice to individual parties where their number is small and easily ascertainable, might be imposed. Thus, fairness potentially provides the intellectual foundation for substantial control over the entire rule-making process of any administrative body.¹⁷⁰

The scope of fairness need not be restricted to rule-making; every exercise of delegated statutory power — investigating, prosecuting, contracting, mediating/conciliating, licensing, litigating, negotiating, land-owning, expropriating, taxing, benefit distributing — can fall within its ambit. As suggested by Dickson J. in the *Coopers & Lybrand* case, a complete inventory would likely run to hundreds of activities.¹⁷¹ It is unnecessary at this time to set out

¹⁶⁶ Eisenberg, *supra*, note 120.

¹⁶⁷ In some cases, the courts have been willing, if a statute requires a consultative hearing, to specify the particular requirements of the hearing: see *Re C.R.T.C. & London Cable TV Ltd* [1976] 2 F.C. 621 (C.A.).

¹⁶⁸ R.S.O. 1970, c. 410 as am.

¹⁶⁹ S.C. 1970-71-72, c. 38 as am.

¹⁷⁰ See Mullan, *Hearings, supra*, note 1, 60-66.

¹⁷¹ *Supra*, note 86, 500-1. See recent decisions such as *Re Dagg & Ontario Human Rights Commission* (1979) 26 O.R. (2d) 100 (Div. Ct) (fairness and investigations); *Langlois v. Township of Malden* (1979) 26 O.R. (2d) 33 (H.C.) (fairness and interim orders).

an inventory of the requirements of procedural fairness in each of these areas; rather, it is sufficient to note the potentially unlimited scope for procedural review (and the potentially infinite variety of procedural requirements which such review may spawn) once a theory of fairness is adopted. These considerations illustrate that the concept of fairness as merely diluted natural justice is inappropriate.

C. *Fairness and administrative procedure acts*

Any assessment of the parameters of fairness must relate it to statutory enactments which are designed to codify, create, or limit the procedures to be followed by administrative agencies.¹⁷² Two specific issues arise: (1) whether a procedural consolidation in respect of a defined class of administrative acts should exclude implied procedural review in circumstances where the statute does *not* apply; and (2) whether such legislation should be taken to be exhaustive of the procedural formalities to be followed in situations where the statute *does* apply. For the purposes of the following discussion, the SPPA (the procedural consolidation adopted in Ontario) will be used as a model.

1. SPPA inapplicable

Until recently, it was arguable that the existence of the SPPA indicated the legislature's intention to formalize administrative procedures in all instances where formality was thought desirable. Three aspects of the statute supported this view. The use of the term "minimum rules" of procedure¹⁷³ indicates that the Act designates the irreducible core of procedural formality; hence, where the statute is inapplicable, no formal procedures are contemplated. The exemption of certain tribunals by the Act itself or by other legislation which specifically overrules the Act¹⁷⁴ is evidence that no further procedural requirements are envisioned for such bodies.¹⁷⁵ Finally, the provision that the Act may apply where a hearing is required by statute or "otherwise by law"¹⁷⁶ may indicate that any expansion of the scope of procedural formalities must be

¹⁷² To date, only Alberta and Ontario have enacted such legislation: see *The Administrative Procedures Act*, R.S.A. 1970, c. 2, and *The Statutory Powers Procedure Act, 1971*, S.O. 1971, c. 47 [hereinafter SPPA].

¹⁷³ See S.O. 1971, c. 47, title of Pt I.

¹⁷⁴ *Ibid.*, s. 3(2).

¹⁷⁵ See Atkey, *The Statutory Powers Procedure Act, 1971* (1972) 10 Osgoode Hall L.J. 155, 158-62.

¹⁷⁶ SPPA, s. 3(1).

limited to cases where the common law would require a hearing (that is, to judicial functions).¹⁷⁷

It is now clear that the doctrine of fairness may be invoked in situations not contemplated by the *SPPA*. In the *Nicholson* case, which originated in Ontario, the *SPPA* was not mentioned in any of the judgments, and throughout counsel appear to have assumed that the statute did not apply.¹⁷⁸ The Ontario Court of Appeal expressly addressed this issue in *Re Webb & Ontario Housing Corp.*¹⁷⁹ It found that the *SPPA* clearly did not apply,¹⁸⁰ but that

the appellant has succeeded in establishing, on the facts of this case, that there was an obligation on O.H.C. to treat her "fairly" in the conduct of its investigation and before terminating her lease.¹⁸¹

It thus appears that the courts will not treat the *SPPA* and similar consolidations as excluding procedural review on the grounds of fairness where these statutes do not apply.¹⁸² Since the provisions of the *SPPA* appear to envision only trial-type adjudications — a very limited section of the delegated decision-making spectrum — a conclusion to the contrary would effectively eliminate this complementary role of fairness in jurisdictions which have promulgated such general procedural consolidations.¹⁸³

¹⁷⁷ This point is adverted to in Mullan, *Reform of Judicial Review of Administrative Action — The Ontario Way* (1974) 12 Osgoode Hall L. J. 125, 166-69, especially n. 164.

¹⁷⁸ *Re Nicholson* (1975) 9 O.R. (2d) 481 (Div. Ct); *rev'd* (1976) 12 O.R. (2d) 337 (C.A.); *rev'd* [1979] 1 S.C.R. 311.

¹⁷⁹ *Supra*, note 4.

¹⁸⁰ *Ibid.*, 260, 263-66.

¹⁸¹ *Ibid.*, 268.

¹⁸² This viewpoint is also supported in *Re Downing & Graydon*, *supra*, note 4, 308, where Blair J.A. stated: "The exclusion of the *Statutory Powers Procedure Act, 1971*, does not by itself affect the employee's common law right to be heard. An express and unmistakable statement by the Legislature would be required before the exclusion of such a fundamental and deeply rooted concept as the right to be heard could be presumed. The *Statutory Powers Procedure Act, 1971* merely provides rules for the conduct of hearings which are more rigid and formal than the general and more flexible prescriptions of the common law. There is nothing in the Act which expressly or by necessary implication excludes or is repugnant to the continued operation of the *audi alteram partem* rule in cases where the *Statutory Powers Procedure Act, 1971*, does not apply". For a suggestion that a procedural code should be more broadly drawn, see Mullan, *Hearings*, *supra*, note 1. See also *Re Men's Clothing Manufacturers Ass'n & Arthurs* (1979) 26 O.R. (2d) 20 (Div. Ct). A similar conclusion respecting the powers of the Ontario Ombudsman was reached in *Re Ombudsman & Health Disciplines Bd* (1979) 26 O.R. (2d) 105 (C.A.).

¹⁸³ This holds true whether the non-applicability of the consolidation results from the nature of the function performed, or from an express exclusion of the statute.

2. SPPA applicable

Nor should the courts feel constrained to treat the rules of the *SPPA* as exhaustive of the procedural protections to which statutory decision-makers must adhere. In *Re Herschoran & City of Windsor*, Hughes J. noted:

The word "minimum", used in connection with the rules provided under Part I, is significant as evidence of an intention not to deprive subjects of any residual rights they may have under the existing law¹⁸⁴

Hughes J. expressly dissociated the procedural provisions imposed by statute from those implied requirements which may be developed by the courts. The differing definitions of "statutory power of decision" which appear in the *SPPA* and the *Judicial Review Procedure Act*¹⁸⁵ also indicate that the *SPPA* is not intended to be exhaustive. In the *SPPA*, a "statutory power of decision" is defined as

a power or right conferred by or under a statute to make a decision deciding or prescribing

- (i) the legal rights, powers, privileges, immunities, duties or liabilities of any person or party, or
- (ii) the eligibility of any person or party to receive, or to the continuation of, a benefit or licence, whether he is legally entitled thereto or not.¹⁸⁶

Under the *JRPA*, the definition of "statutory power of decision" duplicates the *SPPA* definition and appends "and includes the powers of an inferior court".¹⁸⁷ If the powers of an inferior court are included in the definition of "statutory power of decision" for the purposes of judicial review but are not included in the definition for the purposes of applying minimum rules of procedure, one can conclude that some bodies exercising adjudicative functions will be subject to procedural norms other than those set out in the *SPPA*.

Thus, even when the *SPPA* applies to a decision-making process, the common law of implied procedural supervision is not suppressed;¹⁸⁸ fairness might be invoked in cases where the *SPPA* applies but fails to provide sufficient procedural guarantees to ensure a fair hearing. Such occasions may arise because the *SPPA* is a monolithic statute which subjects a wide variety of decision-making pro-

¹⁸⁴ *Supra*, note 163, 311.

¹⁸⁵ S.O. 1971, c. 48 [hereinafter *JRPA*].

¹⁸⁶ S.O. 1971, c. 47, s. 1(d).

¹⁸⁷ S.O. 1971, c. 48, s. 1(f).

¹⁸⁸ This proposition raises interesting questions of Parliamentary supremacy where the *SPPA* is excluded, not through the definition of "statutory power of decision", but by express legislative provision. To date, neither the judiciary nor the legislature appears to have been troubled by this possibility: see *Re Downing & Graydon*, *supra*, note 4, 308; *Re S & M Laboratories Ltd & The Queen*, *supra*, note 4.

cesses to approximately identical procedural requirements. A contrast between the requirements of the *SPPA* and the procedures followed in ordinary civil or criminal adjudications will demonstrate this point. The main provisions of the *SPPA* have been conveniently summarized by Atkey under eight distinct headings:

- (1) the right to reasonable notice (section 6);
- (2) the right to reasonable information of any allegations respecting good character, propriety of conduct, or competence if such matters are in issue (section 8);
- (3) the right to a public hearing unless public security or intimate financial or personal matters are involved (section 9);
- (4) the right to be represented by a lawyer or agent (paragraph 10(a));
- (5) the right to call and examine witnesses, and to cross-examine other witnesses (paragraphs 10(b) and (c));
- (6) the right to protection against self-incrimination respecting the use of evidence in any subsequent civil or criminal proceedings (as far as the province can grant that right) (section 14);
- (7) the right to reasonable adjournments of a hearing (section 21); and
- (8) the right to a written decision, with reasons upon request (section 17).¹⁸⁹

(a) *Notice*

One can identify three distinct differences between the requirements of the *SPPA* and the procedures of ordinary courts in the area of notice of proceedings. In the first place, section 6 provides an individual little opportunity to prepare specific representations unless a very liberal interpretation is given to the phrase "purpose of the hearing". There are some indications that reviewing courts may adopt such an approach¹⁹⁰ but the issue has not yet been directly raised. Secondly, section 6 is silent as to disclosure requirements where parties are confronted by a substantial amount of highly detailed or technical material, although in other jurisdictions the courts occasionally have imposed extensive disclosure requirements.¹⁹¹ Finally, although section 8 gives a right to "reasonable

¹⁸⁹ *Supra*, note 175, 163.

¹⁹⁰ See *Re Seven-Eleven Taxi Co. & City of Brampton* (1975) 10 O.R. (2d) 677 (H.C.).

¹⁹¹ See *Re Hogan & Director of Pollution Control*, *supra*, note 2, 369-70 where the Court ordered the Director to supply the applicant "with copies of all material supplied to the Director by the District of Port Hardy in support of its application for a permit and which is reasonably capable of being

information of any allegations" respecting "good character, propriety of conduct or competence", an adequate defence to a disciplinary charge can only be prepared if a party has an opportunity to assess the nature and strength of the case against him by observing, in some form of preliminary procedure, the witnesses to be called and the evidence to be presented. No such discovery procedure seems to be envisioned by the *SPPA*, with the result that disciplinary hearings often are treated by the parties simply as a preliminary proceeding.¹⁰²

(b) *Cross-examination*

The *SPPA* requirements, when compared to those of ordinary judicial proceedings, are also deficient with respect to the right of cross-examination. Section 10 restricts cross-examination of witnesses to what is "reasonably required for a full and fair disclosure of the facts in relation to which [witnesses] have given evidence". Traditionally, cross-examination has been said to serve two distinct purposes: in *Re County of Strathcona & Maclab Enterprises Ltd*, the Court stated:

One of the functions of cross-examination is "to correct or controvert any relevant statement". Its purpose can be much wider. One such use is to establish or assist in establishing, by cross-examining, the party's own case.¹⁰³

While it is unlikely that a tribunal would read section 10 as distinguishing these two purposes and as restricting cross-examination to the former only, the latter purpose may be severely compromised if a tribunal requires that all questions to witnesses be directed through it.¹⁰⁴ No provision of the *SPPA* seems to prohibit this kind of restriction on cross-examination.¹⁰⁵

copied. Such material as cannot be so copied shall be made available to the appellant at the offices of the Director. The appellant is to be given a reasonable time by the Director to prepare further submissions in support of his objection and is to be given an opportunity to present those submissions in such manner as the Director may determine". The particular statutory authority in question [*Pollution Control Act*, S.B.C. 1967, c. 34, as am.] should, however, be noted.

¹⁰² The fact that many statutory appeals in disciplinary cases take the form of a trial *de novo* encourages parties to so treat the initial hearing. An interesting case on s. 8 where particulars were refused to intervenors is *Re All Ontario Transport Ltd* (1979) 26 O.R. (2d) 202 (Div. Ct).

¹⁰³ (1971) 20 D.L.R. (3d) 200, 203 (Alta S.C., App. Div.).

¹⁰⁴ A resolution to this effect was passed by the tribunal in question, though not followed: see *ibid.*, 202.

¹⁰⁵ But see *Re Henderson & O.S.C.* (1976) 14 O.R. (2d) 498 (H.C.) on a related point. Cf. *Re Tandy Electronics Ltd* (1979) 26 O.R. (2d) 68 (Div. Ct), where the Court permitted the Labour Relations Board to refuse to allow cross-examination.

(c) *Evidence*

A third series of *SPPA* requirements which may fail in certain cases to guarantee a completely fair hearing relates to the evidence provisions in sections 15 and 16. Although in general it is reasonable for the court to take judicial notice of the decision-maker's expertise, in some administrative processes the parties should have the right to know of any point upon which notice is proposed to be taken, and, if necessary, the right to rebut it. It is only by following such procedures that instances of attitudinal bias may be detected and subjected to counter-argument.¹⁹⁶ Moreover, rigid application of the rules of evidence (relating to corroboration,¹⁹⁷ hearsay, best evidence, privilege, or any other matter¹⁹⁸) often may be required. Finally, it may be necessary to impose a higher standard of proof than balance of probabilities in disciplinary cases.¹⁹⁹ No such additional requirements currently are envisioned by the *SPPA*, although strict adherence to each may, in appropriate circumstances, be absolutely essential to the conduct of a fair hearing.

(d) *Record*

The *SPPA* also may fail to provide adequate procedural protection with respect to the contents of the record of a tribunal's proceedings. An accurate transcript is often a party's main protection against the admission of irrelevant or colourable evidence. Transcripts also are useful in recording the hasty remarks of decision-makers which demonstrate partiality, bias, or the pursuit of improper purposes. Nevertheless, a transcript may not always be available; although section 20 of the *SPPA* includes "transcript" within the list of documents forming a part of the record, the Act itself does not require the recording of a transcript.²⁰⁰ Once again, procedural formalities beyond those required by the *SPPA* may be appropriate.

¹⁹⁶ Compare on the issue of bias *R. v. Pickerskill, Ex p. Smith* (1970) 14 D.L.R. (3d) 717 (Man. Q.B.) with *Committee for Justice and Liberty v. National Energy Board* (1976) 68 D.L.R. (3d) 716 (S.C.C.).

¹⁹⁷ *Re Morris & A-G. N. B.* (1975) 63 D.L.R. (3d) 337 (N.B.S.C., App. Div.).

¹⁹⁸ For example, relevancy was an issue in *Re Royal Commission & Ashton* (1975) 64 D.L.R. (3d) 477 (Ont. Div. Ct). In *Re Caramac Travel Consultants Ltd & Labour Relations Bd* (1979) 101 D.L.R. (3d) 455 (N.S.S.C., T.D.), the Court held that a non-notarized document was admissible before the Board, notwithstanding that it emanated from outside the province.

¹⁹⁹ *Re Bernstein & College of Physicians and Surgeons* (1977) 15 O.R. (2d) 447 (Div. Ct).

²⁰⁰ It is also unclear whether the common law would ever require the keeping of a transcript: see *Blagdon v. Public Service Commission Appeals Board* [1976] 1 F.C. 615 (C.A.).

To sum up, the *SPPA* does indeed represent at best "minimum rules of procedure" which must be followed whenever a tribunal exercises a "statutory power of decision". In particular cases, other procedural requirements should be imposed in order to guarantee a fair hearing. Thus, a theory of implied procedural due process may have a salutary effect with respect to every item envisioned by the *SPPA*.²⁰¹

It is not clear that fairness need be adopted before the courts will imply additional procedural requirements; some *dicta* indicate that the flexible nature of natural justice itself permits the imposition of additional procedural requirements. In *Re Downing & Graydon*, the Court stated:

There are no rigid rules of procedure which must be followed to satisfy the requirements of natural justice The appropriate procedure depends on the provisions of the statute and the circumstances in which it has to be applied.²⁰²

Whether or not the courts assert that fairness applies to non-judicial functions and natural justice to judicial functions,²⁰³ the more flexible approach inherent in the concept of fairness is likely to encourage the courts to treat the provisions of the *SPPA* as "minimum rules" and impose other more rigorous procedural requirements in individual cases. As well, there are several situations to which the *SPPA* does apply although the common law rules of natural justice do not;²⁰⁴ in such cases, only the doctrine of fairness could be invoked to supplement the provisions of the Act.

²⁰¹ This effect may also occur with respect to claims not relating at all to the norms established by the *SPPA*: see, e.g., the plaintiff's claims in *Re Pereira & M.M.I.* (1976) 14 O.R. (2d) 355 (C.A.) and *R. v. Saikaly* (1979) 27 Chitty's L.J. 98 (Ont. Div. Ct), *aff'd* (1979) 27 Chitty's L.J. 174 (Ont. C.A.). See also *Re Stone & L.S.U.C.* (1979) 26 O.R. (2d) 166 (Div. Ct), where the issue was whether a severance of charges was necessary to a fair disciplinary hearing on each offence; *Re Gillingham & Metropolitan Toronto Bd of Commissioners of Police* (1979) 26 O.R. (2d) 77 (Div. Ct), where the issue related to the attempted withdrawal of a forced resignation in order to compel a hearing.

²⁰² *Supra*, note 4, 310. See also *Bell Canada v. Communications Workers of Canada* [1976] 1 F.C. 459, 477 (C.A.).

²⁰³ Compare *Inuit Tapirisat v. Governor-in-Council*, *supra*, note 4, 715 *per* Le Dain J.: "Whether the procedural duty of fairness is to be regarded as something different from natural justice or merely an aspect of it, the majority opinion in the *Nicholson* case seems clearly to indicate that its application is not to depend on the distinction between judicial or quasi-judicial and administrative functions" with *Re Webb & Ontario Housing Corp.*, *supra*, note 4, 261.

²⁰⁴ E.g., where a particular statute expressly makes the *SPPA* applicable to recommendatory, legislative, or non-binding arbitral proceedings: see S.O. 1971, c. 47, s. 3(2)(d), (g), (h).

The complex relationship between consolidating statutes and concepts of implied procedural review reveals both complementary and supplementary facets. To date in Canada, only adjudicative procedures — in which either fairness or natural justice may play a supplementary role — have been the subject of these consolidations. If these codifications are extended to rule-making procedures, to which the rules of natural justice are inapplicable, the supplementary role of fairness will become even more significant.

D. *Fairness and sophisticated statutory procedural schemes*

It remains only to examine the impact of fairness on particular statutory schemes which envision a continuum of powers and procedures ranging from informal investigations by minor officials through true adjudications before a formally constituted decisional panel to rule-making processes. Should implied procedural review be permitted where the legislature has stipulated precisely the administrative procedures to apply to a variety of specific functions, or should such enactments usurp or limit the common law of procedural review? For the purposes of this inquiry, Parts I and III of *The Health Disciplines Act, 1974*,²⁰⁵ (one of the most sophisticated statutory schemes) will be scrutinized.

The *HDA* is drafted so as to incorporate by reference the provisions of the *SPPA*; hence, the difficult task of integrating the provisions of the antecedent *SPPA* into the complex statutory framework of the *HDA* has been removed from the judiciary, and the two statutes interconnect to regulate the entire health disciplines field. The *HDA* also explicitly recognizes the existence of a spectrum of potential administrative activity (licensing registration, revocation, or suspension; investigation of malpractice or fitness to practice; regulation making) which demands a correlative spectrum of procedural safeguards to protect all parties within the jurisdiction of the statute. The Act thus appears to tailor individual administrative procedures to each facet of health profession regulation. Finally, the *HDA* does not expressly abrogate the common law of judicial review, with the result that further developments in the realm of implied procedural review are not precluded.²⁰⁶ Each of these points requires further elaboration.

²⁰⁵ S.O. 1974, c. 47 as am. by S.O. 1975, c. 63 [hereinafter *HDA*]. Part I is of general application to all health disciplines; Part III deals with medicine only.

²⁰⁶ Such development is expected in view of the decision in *Re Downing & Graydon*, *supra*, note 4. See, most recently, *Re Peterson & Atkinson*, *supra*, note 4. But see *McCarthy v. A-G. Canada* [1980] 1 F.C. 22 (T.D.), where the

When the *SPPA* was first enacted, some commentators suggested that section 3(1), which makes the statute applicable to the "exercise of a statutory power of decision conferred by or under an Act of the Legislature, where the tribunal is required . . . *by law* to hold or to afford to the parties to the proceedings an opportunity for a hearing" was principally a transitional provision designed to avoid undue restriction of its field of application until such time as express hearing requirements could be added to all statutes.²⁰⁷ The accuracy of this observation is borne out by the structural organization of the *HDA*, for sub-section 1(3) states categorically:

Nothing in this Act shall be construed to require a hearing to be held within the meaning of *The Statutory Powers Procedure Act, 1971* unless the holding of a hearing is specifically referred to.

In two other sections, the *HDA* makes reference to the *SPPA*, adopting or excluding certain of its provisions. Sub-section 11(5) of the *HDA* expressly incorporates the provisions of sections 15 and 16 of the *SPPA*, even though it is not clear that proceedings taken under section 11 would normally fall within the ambit of the latter Act. More importantly, the provisions of sub-sections 12(4) and 12(6) of the *HDA* (which make express reference to the *SPPA*) as well as those of sub-sections 12(2), (3), (5), and (7) (which do not) establish procedural formalities over and above those required by the *SPPA*.²⁰⁸ In many cases, then the *SPPA* will apply on its own terms to health disciplines proceedings; in other cases, the procedural code, though applicable on its own terms, will be expressly excluded; finally, in certain instances of procedures not falling within the ambit of the *SPPA*, analogous provisions are expressly instituted by the *HDA*.

The provisions of the *HDA* create a detailed procedural framework within which a variety of administrative acts are to be performed. The establishment of several distinct decision-making

Court suggested that implied review under the fairness doctrine might be excluded by a carefully-wrought procedural code, although it doubted that the applicant had in fact been treated unfairly.

²⁰⁷ [Emphasis added.] See Mullan, *supra*, note 177, 168-69, n. 168.

²⁰⁸ S. 12(2) permits a person being investigated to have access to written materials in advance of the hearing. S. 12(3) reproduces the general rules against bias and interest. S. 12(5) makes the recording of a transcript mandatory. S. 12(7) institutionalizes the common law requirement that at least one member of a deciding tribunal hear all the evidence. S. 12(4), which requires the hearing to be held *in camera* unless otherwise requested by the person being investigated, and s. 12(6), which states that "nothing is admissible in evidence . . . that would be inadmissible in a court in a civil case" both expressly derogate from the *SPPA*.

bodies, each with a specific function, and each obligated to follow reasonably well-defined procedural formalities, evidences a desire to break down the monolithic approach to administrative procedures found in the rules of natural justice and in the provisions of the *SPPA*. A close examination of Parts I and III of the *HDA* suggests that there are no fewer than fifteen distinct entities which perform organizational, advisory, supervisory, or decisional functions with respect to medicine.²⁰⁹ In general, the procedural formalities attendant on the performance of various functions by these entities can be grouped into five categories.²¹⁰

²⁰⁹ The following is a list of these bodies along with references to the sections of the *HDA* in which they are mentioned. I should like to thank John Zarudny, a former student at the University of Windsor, for his assistance in the compilation of this list.

1. the Lieutenant Governor in Council: ss. 3(2), 6(2), 6(5), 6(7), 50;
2. the Health Disciplines Board: ss. 7, 8, 9, 10, 11, 16;
3. the Minister of Health: ss. 2, 3(1), 4, 7(1)(b);
4. the Supreme Court of Ontario: ss. 13(1), 66(2);
5. the College of Physicians and Surgeons of Ontario (C.P.S.O.): s. 46;
6. the Council of the C.P.S.O.: ss. 48, 50, 51, 53, 65;
7. the Registrar of the C.P.S.O.: ss. 48(7), 56, 63, 64, 65;
8. the Registrar's investigator: s. 64(1);
9. a Board of Inquiry: ss. 62, 65;
10. the Executive Committee of the Council of the C.P.S.O.: ss. 54, 59, 62, 63, 64;
11. the Registration Committee of the Council of the C.P.S.O.: s. 56;
12. the Complaints Committee of the Council of the C.P.S.O.: ss. 57, 58;
13. the Discipline Committee of the Council of the C.P.S.O.: ss. 59, 60;
14. the Fitness to Practice Committee of the Council of the C.P.S.O.: ss. 61, 62, 63;
15. Faculties of Medicine in Ontario universities: s. 48.

²¹⁰ The following list indicates the principal powers of the main decisional bodies (other than the Supreme Court of Ontario, the Minister of Health, and the Lieutenant Governor in Council) and the provisions of the *HDA* which grant them.

- | | |
|--------------------------------------|--|
| 1. Health Disciplines Board | review decisions: s. 8(2)
investigate: s. 9
make recommendations: s. 10(1)(b), (c)
hear registration cases: s. 11(1)
review registration cases: s. 11(1) |
| 2. Registrar | inquire and advise: s. 62(2)
appoint investigator: s. 64(1) |
| 3. Registrar's Investigator | inquire: s. 64(2) |
| 4. Council of the C.P.S.O. | inquire: s. 3(1)(a)
make regulations: s. 50
make by-laws: s. 51 |
| 5. Registration Committee (C.P.S.O.) | determine eligibility: s. 56(2)
review decisions: s. 56(4) |

The most extensive framework of safeguards is reserved for actions by the Discipline Committee in revoking or suspending a licence. Such actions cannot be taken until a hearing has been afforded,²¹¹ and by virtue of sub-section 1(3), the *SPPA* will then apply to the proceedings. In addition, a member appearing before the Discipline Committee has a right to inspect all documents,²¹² a right to be heard by a panel that has no members who participated in the investigation of his case,²¹³ a right to a hearing *in camera* unless he requests otherwise,²¹⁴ a right to obtain a transcript of all oral evidence,²¹⁵ a right to have only judicially admissible evidence presented,²¹⁶ a right to insist that all members of the deciding panel have heard all the evidence,²¹⁷ and a right to have all proceedings kept confidential.²¹⁸

A second category consists of "hearings" by the Health Disciplines Board under section 11 and by the Fitness to Practice Committee under sections 62 and 63. The procedures to be followed in such hearings are virtually identical to those which apply to the Discipline Committee, except that in the case of the Board, sub-section 12(6) is replaced by sub-sections 11(5) (reiterating sections 15 and 16 of the *SPPA*) and 7(2) (providing for testimony from expert witnesses), while in the case of the Committee, sub-section 11(5) replaces sub-section 12(6).

In a third category (review proceedings by the Health Disciplines Board), no provision is made for the holding of a hearing unless one is requested; hence, the *SPPA* will not apply. Nevertheless, sub-

6. Complaints Committee (C.P.S.O.)	investigate and refer: s. 58(1)
7. Discipline Committee (C.P.S.O.)	hear and decide complaints: s. 60(1) hear re-applications: s. 63(2)
8. Fitness to Practice Committee (C.P.S.O.)	hear complaints: s. 62(4) hear re-applications: s. 63(2)
9. Executive Committee (C.P.S.O.)	inquire: s. 3(1)(a) make regulations: s. 50 make by-laws: s. 51 appoint Board of Inquiry: s. 62(2) suspend temporarily: s. 62(4)
10. Board of Inquiry	inquire and report: s. 62(3)

²¹¹ *HDA*, s. 60(1).

²¹² *Ibid.*, s. 12(2).

²¹³ *Ibid.*, s. 12(3).

²¹⁴ *Ibid.*, s. 12(4).

²¹⁵ *Ibid.*, s. 12(5).

²¹⁶ *Ibid.*, s. 12(6).

²¹⁷ *Ibid.*, s. 12(7).

²¹⁸ *Ibid.*, s. 65.

section 11(3) of the *HDA* sets out certain procedures which closely resemble the particular formalities applicable to the second category. Therefore, even though the *SPPA* does not apply, the functional equivalent of a hearing may sometimes result.

The fourth degree of formality concerns cases where no hearing is mandated but where some judicial procedures are institutionalized by the *HDA*. For example, a Registrar's investigator, acting under sub-section 64(2), must observe the rule of confidentiality in sub-section 65(1) as well as the requirements of section 4 and sub-sections 5(1), 5(2), 6(2), and 6(4) of *The Public Inquiries Act, 1971*.²¹⁹ Similarly, although the Complaints Committee is not required to hold a hearing, it must nevertheless respect sub-section 65(1) on confidentiality, and sub-sections 58(1) and 58(3) on giving notice to the individual being investigated and giving permission to him to make written submissions two weeks in advance of any meeting. Again, when the Executive Committee decides to appoint a Board of Inquiry, it must give notice to the member being investigated. No procedural requirement apart from that of confidentiality under sub-section 65(1) is imposed on any other body exercising administrative functions.

The power to enact rules and regulations falls within a fifth category. Under section 50, the only procedural formality attending the making of regulations — other than those set out in *The Regulations Act*²²⁰ — was the requirement that the Minister review proposed regulations and the Lieutenant Governor in Council approve them. By contrast, rules passed by the Council under section 51 are not subject to the above formalities and need only be brought to the attention of the Minister and members, and made available for inspection by the public.

This summary review of the major procedural provisions of the *HDA* suggests two further comments. First, the legislature has succeeded in overcoming the monolithic approach of the *SPPA* insofar as hearing procedures are concerned. A comparison of the *HDA* and *The Medical Act*²²¹ which the *HDA* supersedes supports this conclusion. Secondly, although certain functions under the *HDA* may entail serious consequences for a member, their performance is not attended by major procedural formalities. Among such functions are the power of the Executive Committee to suspend

²¹⁹ S.O. 1971, c. 49. This Act itself establishes certain formalities analogous to those of the *SPPA*.

²²⁰ R.S.O. 1970, c. 410 as am.

²²¹ R.S.O. 1970, c. 268.

temporarily a licence under sub-section 62(4), the powers of the Registration Committee under sub-section 56(2) and 56(4) to determine eligibility and to review decisions, the inquiry power of the Registrar under sub-section 62(2) or 64(1), and that of the Board of Inquiry under sub-section 62(3). In view of these unstructured powers, one might well wonder whether the courts should be precluded from applying fairness as a supplement to those formalities legislatively sanctioned.

The *HDA* does not expressly exclude the application of implied procedural requirements,²²² even though the application of the *SPPA* is limited by sub-section 1(3). *Prima facie*, therefore, there is no reason to conclude that fairness and natural justice are inapplicable to the procedures outlined in the *HDA*. However, the *HDA* is a specialized, sophisticated statute which tailors procedures to individual functions. How the courts will exercise their power to impose extra-statutory procedural requirements in the context of the *HDA* directly raises the issue of whether legislature or judiciary should assume principal responsibility for establishing administrative procedures. Justifications for implied procedural review such as "supplying the omission of the legislature" or "supplementation of statutory procedures"²²³ are unconvincing where legislatures have carefully wrought a detailed procedural code which covers a range of powers. In order to retain a place for implied procedural review, the reasons for and nature of the proposed intervention must be altered.

Implied procedural supervision by the courts can be linked to subtleties of adjudication — questions of burden of proof, *voir dire*, order of witnesses, interrogatories from the deciding panel and extra-curial research — which are seldom expressly acknowledged but rather tacitly assimilated in the course of a legal career. The justification for procedural supervision by the courts in the face of detailed statutes will rest on the courts' insights into the judicial role — insights which statutory decision-makers may not possess. Thus, supervision of the judicial aspects of administrative processes may be founded on the view that the increased "judicialization" of

²²² On the effect of such privative clauses, see de Smith, *supra*, note 9, 161-71. See, however, *Re Takahashi & Ontario College of Physicians & Surgeons* (1979) 26 O.R. (2d) 353 (Div. Ct), where Robins J. seemed unprepared to contemplate procedural fairness arguments if the requirements of the *SPPA* were met.

²²³ See *Wiseman v. Borneman* [1971] A.C. 297, 308 (H.L.): "For a long time the courts have, without objection from Parliament, supplemented procedure laid down in legislation where they have found that to be necessary".

procedures should be accompanied by procedural review by the experts in adjudication — the judges.

Implied procedural supervision in the face of detailed statutory requirements may be retained for another reason, one which relates to what has been labelled the “law in books/law in action” phenomenon.²²⁴ It is a truism that written normative prescriptions never have an independent existence. They are coloured by the context to which they apply; they are shaded by the predilections of those applying them; and they are molded over time by the encrustations of prior interpretation.²²⁵ Restricting procedural control to evaluating the statutory *vires* of these prescriptions does not do justice to the dynamic nature of administrative decision-making. Implied procedural review permits an independent body to consider issues such as the actual application of statutory prescriptions, the sufficiency of the procedural safeguards provided, and the necessity for strict adherence to the provisions in individual circumstances.

In summary, even in cases where legislatures have enacted sophisticated procedural schemes, an important role may remain for implied procedural review.^{225a} However, courts need not ultimately decide when administrative procedures should be judicialized, nor need review necessarily be vested in the courts. The development of an informal procedural supervision outside the adjudicative context may be an inevitable outgrowth of the fairness doctrine.

E. Conclusion

The above review of the potential impact of fairness in a variety of contexts has revealed that the question “What procedural protections, if any, are necessary for this particular decision-making process?” is an oversimplification. The question presupposes several other queries which proponents of fairness have as yet left unanswered. In the abstract, what does it mean to be fair? What various types of participation in a process are fair, given the nature

²²⁴ See Pound, *Law in Books and Law in Action* (1910) 44 Am. L. Rev. 12; Llewellyn, *The Bramble Bush* 2d ed. (1951).

²²⁵ See Macdonald, *Review: This law of ours* (1978) 2 Can. Com. L.J. 18, 21-22.

^{225a} However, in a recent judgment, *Re Proctor & Bd of Commissioners of Police* (1979) 24 O.R. (2d) 715 (C.A.), the Ontario Court of Appeal seemed to countenance that an individual contractually may waive in advance his rights to procedural review on grounds of fairness. Although this judgment, if followed, might sterilize fairness in many instances, it appears that the decision will be distinguished: see *Re Gillingham*, *supra*, note 201.

of the decision to be taken? What is the relationship between following written procedural rules and acting fairly in decision-making? What should be the respective roles of the judiciary and the legislature in developing fair procedural standards in an individual process? Does fairness require that procedural review be undertaken by courts? Upon what underlying concept of the process at hand should evaluations of procedural propriety be made in particular circumstances? These questions reveal that the nature of implied review on the grounds of procedural fairness will vary according to the process under review and the substantive area within which that process is conducted.

While the fairness doctrine has been characterized as a theory, both in academic writing and in judicial decisions,²²⁶ the discussion of fairness to date has reflected the nominalist's paradise of individual instances. If fairness is indeed to develop into more than a species of sporadic and unpredictable judicial review on implied procedural grounds, an attempt to articulate a theory of and model for such review must be undertaken. This model must not only address each of the questions just posed, but also must be grounded on an examination of the distinctive characteristics of implied procedural review. The second Part of this essay will be devoted to these tasks.²²⁷

²²⁶ Note that the court in *Re Abel*, *supra*, note 92, expressly refused to elaborate such a theory.

²²⁷ See Macdonald, *supra*, note 8.