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Judicial Review and Procedural Fairness in Administrative Law: II

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Abstract

The recent Canadian embrace of the doctrine of procedural fairness has led to a small flood of litigation and to a serious revaluation of the law of implied procedural review. In Part I of this essay† several themes were explored. An analysis of the historical foundations of due process supervision revealed that, unlike jurisdictional control and review for errors of law, it does not rest on a constitutional theory about the role of the judiciary. Rather, it is founded on a particular theory of adjudication (adversarial adjudication), and it developed from the desire by the Court of King's Bench to impose its model of dispute settlement on inferior jurisdictions exercising functions similar to those of the Court. Moreover, an examination of the intellectual context of procedural review indicated that, contrary to common assumption, implied procedural review was not extended in the past, in any systematic fashion, to parliamentary delegates not exercising adjudicative functions. As a result, the justification for procedural supervision in non-judicial contexts must lie in some theory of procedural justice. Little specific guidance can be found in traditional literature on this topic, but some legal writing indicates that such a theory could be grounded on the democratic values of participation and consent. Neither of these values compels judicial procedural supervision, an adversarial paradigm for due process review, or the belief that procedural fairness can be objectified in individual circumstances.

A detailed review of the actual and potential applications of the new fairness doctrine revealed the possibilities for such a theory in a range of decision-making processes and in respect of informal, semi-formal and highly formalized statutory schemes. This review indicated that, even

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† (1980) 25 McGill L.J. 520.

when statutory procedural guidelines are promulgated in substantial detail, a role for implied procedural supervision could be justified. Exploration of the potential impact of fairness thus seemed to reinforce the arguments its proponents advanced as to the need for wide-ranging procedural review.

This Part will attempt a prescriptive analysis of the future of procedural review by examining its distinctive characteristics. 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 an institutional model which exploits the possibilities of the emerging doctrine of fairness.

I. Towards a theory of implied procedural review

The law of procedural review in Canada has not developed markedly since the Supreme Court of Canada gave judgement in the *Nicholson* case,[1] and in many respects subsequent judgements have followed a pattern established in England.[2] The vocabulary of procedural review may have changed but the concerns which produced the quasi-judicial/administrative dichotomy remain; deci-

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[1] *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. See Grey, *The Duty to Act Fairly after Nicholson* (1980) 25 McGill L.J. 598. This is not to say that the courts have ignored the doctrine: see, *e.g.*, *R.* v. *Saikaly* (1979) 27 Chitty's L.J. 98 (Ont. Div. Ct), *aff'd* 27 Chitty's L.J. 174 (Ont. C.A.); *M.N.R.* v. *Coopers & Lybrand* [1979] 1 S.C.R. 495; *Re Webb & Ontario Housing Corp.* (1978) 22 O.R. (2d) 257 (C.A.); *Harvie* v. *Calgary Regional Planning Commission* (1978) 12 A.R. 505 (S.C. App. Div.); *Inuit Tapirisat* v. *Governor-in-Council* [1979] 1 F.C. 710 (C.A.); *Martineau & Butters* v. *Matsqui Institution Inmate Disciplinary Board (No. 2)* (1979) 30 N.R. 119, 13 C.R. (3d) 1 (S.C.C.); *Re Abel & Director, Penetanguishene Mental Health Centre* (1979) 24 O.R. (2d) 279 (Div. Ct); *Re Island Protection Society & The Queen* (1979) 98 D.L.R. (3d) 504 (B.C.S.C.); *Bruce & Meadley* v. *Reynett* [1979] 2 F.C. 697 (T.D.); *Re Rozander & Energy Resources Conservation Board (No. 2)* (1979) 93 D.L.R. (3d) 284 (Alta S.C. App. Div.); *Re Proctor* (1979) 24 O.R. (2d) 715 (C.A.); *Re S & M Laboratories Ltd & The Queen* (1979) 24 O.R. (2d) 732 (C.A.); *Re Men's Clothing Manufacturing Association & Arthurs* (1979) 26 O.R. (2d) 20 (Div. Ct); *Re Gillingham & Metropolitan Toronto Board of Commissioners of Police* (1979) 26 O.R. (2d) 77 (Div. Ct); *Re Downing & Graydon* (1978) 21 O.R. (2d) 292 (C.A.); *Re Peterson & Atkinson* (1978) 23 O.R. (2d) 292 (C.A.); *Re Brown & Waterloo Police Commissioners* (1979) 26 O.R. (2d) 746 (Div. Ct).

[2] See Loughlin, *Procedural Fairness: A Study of the Crisis in Administrative Law Theory* (1978) 28 U.T.L.J. 215, 226-30 and cases such as *Pearlberg* v. *Varty* [1972] 1 W.L.R. 534 (H.L.); *Bates* v. *Lord Hailsham* [1972] 1 W.L.R. 1373 (Ch.); *Selvarajan* v. *Race Relations Board* [1976] 1 All E.R. 12 (C.A.). *Cf.* Denning, *The Discipline of Law* (1979), 88-96.

sions such as *Coopers & Lybrand* seem to retreat from the implications of *Nicholson* by tying questions of procedural supervision to a classification of function approach.[3] While recognizing the concept of fairness (and indeed asserting the possibility of procedural control over processes which previously would not have been characterized as judicial), courts have not sanctioned and followed a flexible approach to the supervision of due process, but have relied on a modified classification of function framework to structure the process by which procedural formalities are implied.

Loughlin attempts to explain this conservatism by way of the traditional "rule of law" thesis which he feels underlies the common law system. He argues that the theory of procedural fairness requires courts to engage in a purposive balancing of interests which runs counter to the assumptions of classical adjudication:

> the court would increasingly be tied to notions of instrumental rationality which, because that tends to destroy the idea of rule-governed behaviour, would then tend to destroy the basis for certainty, the distinctive nature of the adjudicative process, and thus destroy the symmetry of the traditional model.[4]

In Loughlin's view, judges appreciate that activism in applying a theory of fairness would vest them with power to determine how bureaucratic decisions should be taken.[5] Since these determinations cannot be characterized as judicial decisions, in so far as they do not involve the invocation of a pre-existing normative structure, judges are loath to make them. Hence, by resisting what Loughlin describes as an informalist approach to implied review, the courts maintain the distinctiveness and moral force of decision-making institutions such as adjudication, and avoid administrative chaos by over-judicialization of decisional processes. Loughlin concedes that an *ad hoc* approach to fairness in situations which closely resemble classical adjudication may improve certain aspects of the administrative process, provided that this does not imply the projection of adjudicative assumptions into non-adjudicative processes, and that the standards of procedural fairness, although flexibly applied, are known and agreed.[6]

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[3] An excellent summary of the relationship between *Nicholson* and *Coopers & Lybrand* is contained in Mullan, *Administrative Law* (1980) 1 Supreme Ct L. Rev. 1, 2-20.

[4] *Supra*, note 2, 237. For a more complete analysis of this theme see Arthurs, *Rethinking Administrative Law: A Slightly Dicey Business* (1979) 17 Osgoode Hall L.J. 1.

[5] See *Re Downing & Graydon, supra*, note 1; *Re Peterson & Atkinson, supra*, note 1; *Re Proctor, supra*, note 1. But *cf. Re Abel & Penetanguishene Mental Health Centre, supra*, note 1; *Re Gillingham, supra*, note 1.

[6] See *supra*, note 2, 240-1.

In view of this caution, advocates of an activist judicial approach to fairness are compelled to address the following question: is there any way to preserve the two main benefits which flow from adoption of the fairness doctrine, namely, the exposure of all administrative decision-making to review on procedural grounds, and the abandonment of a rigid bifurcation of statutory powers into judicial and administrative categories for the purposes of determining the content of procedural review, without compromising the integrity of adjudication or the efficacy of administration? Investigation of this question may begin with an enumeration of the components of the fairness theory. Although the concept has been widely discussed in academic literature, few authors have identified the ends to which fairness should be invoked. Mullan, however, suggests:

> [i]n some instances ... it will mean nothing more than acting in good faith .... [W]hen the decision in question can be seen as much closer to the policy-oriented, traditionally "administrative" decision, the emphasis is going to be on informality with written "hearings" the order of the day and no more than the gist of the relevant information available to affected parties .... Beyond this ... the courts will encounter the traditional kind of natural justice arguments and little will be changed here where the issues are matters such as representation by counsel, right to cross-examination, advance access to every scrap of relevant and marginally relevant paper, precision of issues, and the like.[7]

In other words, it appears that the concept of fairness is directed to what may broadly be identified as participation in decision-making.[8] As a result, the conditions under which any form of participation should be permitted, the precise nature of such participation in individual cases, and the constraints placed on decision-makers in order to guarantee the effectiveness of this participation are the fundamental elements of a theory of procedural fairness.

But fairness is also a theory of *implied* due process review; consequently it will be invoked subsidiarily in the interstices of a statutory procedural framework. Review for fairness, like review for natural justice, represents a distinctive kind of judicial supervision, which does not share the same attributes as review on jurisdictional grounds. Therefore, proponents of this theory must first ask how fairness coheres with the general concept of implied procedural review in the Canadian legal system.

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[7] Mullan, *Fairness: The New Natural Justice?* (1975) 25 U.T.L.J. 281, 314-5.

[8] The doctrine of fairness therefore should not be seen as involving any substantive element (*cf.* Grey, *supra*, note 1, 601-2), although it may well involve several elements not directly related to a "hearing" in the traditional sense of that term.

A. *The distinctive character of implied procedural review*

What are the salient characteristics of implied procedural review, and on what basis should this form of due process review be sustained in individual cases? In answering these questions one may emphasize three main themes. First, on no other ground of judicial review are the immediate interests of the disputing parties so connected to bureaucratic, non-legal concerns. *Ultra vires* review protects citizens from unauthorized exercises of governmental power, and review for errors of law controls the substantive legal framework of decision in particular instances; both usually have no long-term effect on the internal management of bureaucracies. By contrast, implied procedural review speaks neither to the statutory limits of a decision-maker's power, nor to the pre-existing law he must apply, but, theoretically, only to the institutional procedures by which decisions are made.[9] Although these may not have a strictly logical connection with the substantive result reached in a given case, they reveal at least an ethical or aesthetic connection.[10] Consequently, the overwhelming majority of implied procedural review cases, while phrased in the narrow legal language of a *lis inter partes*, manifest a larger institutional problem.

As has been noted, the revocation of parole without granting a hearing reflects not only a substantive injustice in an individual case but an abuse of decisional power within the National Parole Board;[11] the refusal to indicate what is defective in an applicant's request for citizenship may reveal both the existence of prejudice against a particular person and a bureaucratic snag in the Ministry concerned;[12] and the failure to entertain the possibility of attitudinal bias in a Royal Commissioner probably has more to do with a theoretical misconception of the role of inquiries than an attempt to defeat the interests of the applicant.[13] In each example, statutory

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[9] Of course, review for procedural *ultra vires* is more akin to review for formal *ultra vires*. In both these cases, one is challenging administrative activity on the grounds that statutory provisions have not been followed.

[10] See Macdonald, *Judicial Review and Procedural Fairness in Administrative Law: I* (1980) 25 McGill L.J. 520, 536-42; Fuller, *A Reply to Professors Cohen and Dworkin* (1965) 10 Villanova L. Rev. 655, 665-6.

[11] See *Howarth* v. *National Parole Board* [1976] 1 S.C.R. 453, and the comment by Price, *Doing Justice to Corrections? Prisoners, Parolees and the Canadian Courts* (1977) 3 Queen's L.J. 214.

[12] Compare *Lazarov* v. *Secretary of State* [1973] F.C. 927 (C.A.) and *Prata* v. *M.M.I.* [1976] 1 S.C.R. 376.

[13] *Re Copeland & McDonald* [1978] 2 F.C. 815 (T.D.), and the article by Macdonald, *The Commission of Inquiry in the Perspective of Administrative Law* (1980) 18 Alta L. Rev. No. 3 (forthcoming).

procedures were followed, yet one could claim that procedural defects afflicted the manner in which decisions were taken. The aggrieved parties did not argue that decisions were substantively *ultra vires*, but that the processes of decision were inappropriate to the decision at hand. Hence, in cases involving the allegation of procedural impropriety, the usual rationale for permitting individuals to seek judicial review, which is to supervise the legality of specific administrative acts so as to redress legitimate grievances when necessary, is generally no more cogent than the subsidiary rationale, that is, to review the structures and processes employed by statutory decision-makers to ensure that agency policy is developed in an orderly and reasonable fashion.

A second distinctive characteristic of implied procedural review may be described as its integrative function. Review on grounds of jurisdiction functions principally in the same manner as an appeal: it protects individuals from unjustified interference and reproaches pretenders to power. Jurisdictional review also provides a second, but more limited, opportunity for dissatisfied persons to advance substantive claims. By contrast, procedural review does not check power, but structures its exercise: it aids in redefining administrative decision-making in conformity with traditional concepts of judicial decision-making. Administration may be characterized as the management of specified tasks and problems in order to achieve a determined policy; legal rules of jurisdiction and procedure only limit the framework within which activity is undertaken, and are peripheral concerns of the bureaucrat. To the judge or lawyer, however, questions of policy are peripheral; ambivalent to the needs and constraints of bureaucracy, the Bench and Bar tend to be preoccupied with the outer limits of administrative power and decision-making.[14]

Recourse to implied procedural review may thus harmonize major decision-making institutions of government: bureaucratic attention can be directed to means as well as ends, while judicial attention must be directed to ends as well as means. Just as judges must be sensitive to problems of administration when they act as *personae designatae* under various statutes, or when they are called upon to monitor complex injunctive decrees, the bureaucracy must concern itself with questions of legality if it is subject to review for unfairness in the exercise of its powers of decision. Of course, the benefits of procedural review will only be realized if the re-

[14]Wilson, *"Discretion" in the Analysis of Administrative Process* (1972) 10 Osgoode Hall L.J. 117, 133-9 gives an excellent summary of this distinction.

viewing agency is aware of institutional limitations within which bureaucracies must function.[15]

Implied due process review possesses a third main feature, namely, that it serves the political function of enfranchisement. While judicial review on jurisdictional grounds is concerned with protection of the substantive rights of those who are party to a decisional process, procedural review is by its nature directed to guaranteeing the effective participation of persons likely to be affected by administrative decisions. In one sense, an essential element of freedom is "the opportunity to participate in decision-making processes".[16] When judicial review is sought on procedural grounds, the applicant is in fact claiming to be enfranchised; the argument advanced is not that a decision was itself unlawful, but that one has a right to participate in a certain manner in that decision.

From this perspective, questions of procedural fairness and standing are linked: the latter regulates claims that the value one personifies ought to be within the contemplation of the decision-maker, and hence one ought to be permitted to challenge a decision;[17] the former assumes the function of structuring, in individual cases, the nature of the participation which the law of standing ensures. Procedural review consequently serves an important purpose in constitutional theory, that is, to stimulate and guarantee creative and meaningful democratic participation in administrative government. While *ultra vires* review protects fundamental concepts of legality in any system of law, procedural review enshrines a theory of participation in political institutions which is peculiar to liberal democratic systems.[18]

Thus, implied procedural review constitutes a distinctive aspect of judicial review of administrative action. For the bureaucratic decision-maker being reviewed, it can be more instructive than *ultra vires* review. If prospective, directed to institutional difficul-

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[15] Arthurs, *supra,* note 4, 41-2 is skeptical of the judiciairy's capacity to exploit the integrative possibilities of review. See also Wexler, *Non-judicial Decision-making* (1975) 13 Osgoode Hall L.J. 841.

[16] Fuller, *Freedom as a Problem of Allocating Choice* (1968) 112 Proc. Am. Phil. Soc'y 101, 103.

[17] This metaphorical elaboration of standing is taken from Vining, *Legal Identity: The Coming of Age of Public Law* (1978).

[18] See Rostow, *The Democratic Character of Judicial Review* (1952) 66 Harv. L. Rev. 193; *cf.* Mace, *The Anti-Democratic Character of Judicial Review* (1972) 60 Cal. L. Rev. 1140. Both these articles examine constitutional judicial review in the United States, but their respective theses may be applied to administrative judicial review in Canada.

ties, and structured so as to provide guidelines for future conduct, it may improve the processes of public administration. From the standpoint of the reviewing agency, implied due process review may be a more effective integrative tool than jurisdictional review. Since the special concerns and abilities of legal decision-makers are often procedural, it permits the reviewing agency to express these concerns without having to impugn substantive agency policy. From the perspective of the person seeking review, procedural control fulfils a more fundamental political function than *ultra vires* review. Constitutional principles such as the rule of law are most meaningful in contexts where the right to participate in government is guaranteed; procedural review is directed towards evaluating the nature and conditions of participation accorded to individual citizens.

These three features confirm in principle the desirability of exposing all acts of statutory decision-makers to implied due process supervision by courts. Although such a perspective is attractive, the benefits achieved must be weighed against the negative aspects of increased review. The late Professor Abel enumerated several of these, including problems relating to status, ripeness, delay, cost, cognitive dissonance and unpredictability.[19] Consequently, an evaluation of the desirability of adopting the fairness concept compels the following specific queries: at whose behest, at what time, by whom, in what format and on what grounds should procedural review be permitted? These questions may be restated in three general themes:

(i) is a law of *judicial* procedural review to be encouraged?

(ii) is review on procedural grounds most effective when it involves the elaboration and implementation of a structure of rules, or when it results in the creation of something akin to a role morality?

(iii) should an adversarial, adjudicative paradigm, as opposed to a consensual, mediational model of decision, be adopted as the structure for review?

B. *The agency of procedural review*

Normally, analyses of the review of administrative action do not focus on what agency is the most appropriate body to undertake such review; in fact, the very term "judicial review" seems to preclude this discussion. But in view of the distinctive characteristics of procedural review, and the fact that traditional rule-of-law arguments supporting review on jurisdictional grounds are not

[19] Abel, *Appeals Against Administrative Decisions* (1962) 5 Can. Pub. Admin. 65, *passim.*

directly applicable to implied due process supervision, it is appropriate to consider whether judicial review is the most desirable mechanism for controlling or superintending decision-making procedures. There are two separate facets to this inquiry: first, do the institutional constraints of judicial review compromise the utility of due process control, and, second, are legally trained individuals who hold judicial appointments necessarily the best equipped to effect the guidance contemplated by implied procedural control?

The institution of judicial review is often confused with the appellate function of courts. Even judges and lawyers who can list salient differences between the two mechanisms often permit the assumptions of one judicial function to permeate others.[20] In principle, a motion for judicial review involves the allegation of a lack of jurisdiction (error of law on the face of the record excepted), which is to say that it involves an indirect attack on the substance of decision, through a direct challenge to the power of the decision-maker to act as he did. Unlike appeals, review implies that for some formal reason the decision-maker had no authority to decide, not that his decision was wrong on its merits.[21]

While the blurring of the distinction between appellate and review functions may not be totally inappropriate in cases involving formal *ultra vires* review,[22] it is nefarious in cases of implied procedural review. In the latter instances the original decision-maker will invariably be faced again with the same issue, and the reviewing agency must therefore be prepared to provide guidelines as to the manner of decision-making that can be applied consistently and impartially. Hence the remedial assumptions underlying judicial appellate review do not necessarily apply to implied due process review.

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[20] See Pépin & Ouellette, *Principes de contentieux administratif* (1979), 338-44 for a brief summary of the major legal differences between statutory appeals and judicial review in administrative law.

[21] It is not being suggested that certain decisions (especially those involving so-called abuses of discretionary power) do not reflect some degree of confusion of jurisdiction and merits. See, *e.g.*, *Metropolitan Life Insurance Co.* v. *International Union of Operating Engineers* [1970] S.C.R. 425. Nevertheless, there is a theoretical difference between appeals and review which should be maintained if the legal function of each is to be preserved.

[22] In both cases the original decision-maker is permanently disseized of the dispute, and in both cases a substantive determination is being made. Review for abuse of discretion is a hybrid in that the original decision-maker may continue to have jurisdiction to decide even after his first determination is annulled. Yet this is similar to an appellate court referring a matter back to a trial court for disposition.

Moreover, there are several reasons why vesting review jurisdiction in the courts may not be a preferable solution to the problem of which agency should control breaches of procedural propriety on implied grounds. First, implying procedural formalities is an essentially legislative rather than adjudicative activity. The failure of courts to develop a test for determining when a hearing is required attests to this fact. Much of the moderate critique of judicial review on procedural grounds has centered on the fact that unwarranted effort is devoted to the classification of functions, rather than on developing guidelines relating to the situations where the right to a hearing will be implied.[23] As a result, rarely do review decisions offer criteria for assessing specific procedural formalities. Because judicial review on implied procedural grounds occurs in the context of ordinary judicial proceedings, it necessarily shares the retrospective characteristics of all adjudication upon questions where no fixed standards are present.[24]

A second deficiency in judicial review can be traced to the fact that it is seen primarily as litigational and remedial. Because of this orientation, the specific grounds on which review is granted are usually stated as general principles, but not principles that are readily understood by non-lawyers. A failure to relate the procedural requirements being imposed to the dynamics of the decision-making process under review makes extrapolation of these requirements to other contexts almost impossible. Hence, one may find an allegation that the wrong evidentiary standard was applied, but no guidance as to when one or another standard will be appropriate. Similarly, with respect to judicial notice, usually little elaboration is provided as to what does or does not fall within the tribunal's specialized knowledge, and why. Accordingly, while judicial review judgements may explain why certain procedures are inappropriate, because they are written for lawyers, they rarely provide the same insight for the statutory decision-makers who are expected to abide by them.

A third characteristic of procedural review by courts which is open to criticism is that control on due process grounds is effected by holding the tribunal's conduct up to a standard, ascertaining that the standard has not been met, and annulling the re-

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[23] See, *e.g.*, Reid & David, *Administrative Law and Practice*, 2d ed. (1978), chs. 1 and 4.

[24] For an attempted justification of such an adjudicative model in the common law, see Fuller, *Anatomy of the Law* (1968), Pt II. From Fuller's comments it is clear that implied procedural review falls into the category of decisions having the strongest retrospective flavour.

sulting decision. But, implied due process review is founded not so much on a framework of rules as on an underlying paradigm of decision-making which colours the application of the rules by which impropriety is gauged. When a reviewing court asserts that a lawyer should have been present, or that a hearing should not have been held *in camera*, it is tempting to view such a decision as being derived from the procedural requirements associated with ordinary civil litigation. Yet neither of these two requirements is commonly found in judicature acts or rules of practice. In effect, the court's ability to individuate such requirements derives from its understanding of adversarial adjudication as an operative paradigm. Nevertheless, judicial review judgements usually state that some procedural requirement has been breached; rarely do they concentrate on exploring and illustrating the decision-making structure which underlies the requirement being imposed.

An evaluation of which agency should be vested with powers of review on implied procedural grounds also requires an investigation of the aptitudes of the individuals who staff the reviewing body. One must ask whether the priorities and perspectives of the legally trained militate against the development of procedural review across the wide range of functions contemplated by the fairness doctrine.[25] From the beginning it must be remembered that not every exercise of state power is arbitrary, unjust, discriminatory or unreasonable. Poor decisions are as likely to result from understaffing, overwork, lack of training, and other managerial difficulties, all of which presuppose good faith on the part of the decision-maker. However, many lawyers wish to erect elaborate legal controls over the exercise of public power because they fear any exercise of administrative discretion. From this perspective even the possibility of unrestricted exercises of state power is a serious abuse of civil liberties. In commenting on the McRuer Report, Willis noted:

> We are told a great deal about the dreadful things that, as the law now stands, civil servants might do to the citizen but are given no actual instances of them actually having done so.[26]

This is to say that the legally trained desire to structure narrowly

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[25] See Hehner, *The Public Servant and the Legalistic Mentality* (1970) 13 Can. Pub. Admin. 324. I am not suggesting in the following paragraphs that the legalistic perspective is inappropriate in general: these comments are directed only to the suitability of such an approach in the sphere of implied procedural review.

[26] Willis, *The McRuer Report: Lawyer's Values and Civil Servant's Values* (1968) 18 U.T.L.J. 351, 352.

the range of statutory discretions granted to "arbitrary" administrators.[27]

Individuals who are legally trained tend to be pre-occupied with the adversarial adjucative model of decision-making. The lawyer not only claims that third-party review is a necessary component of a legal system, but he asserts that only control by judicial institutions is a guarantee of the reviewing agency's independence. The adversary model of adjudication is, however, not a decisional structure well suited to the development of procedural norms: the psychology of confrontation, delay and "winner-take-all" inherent in this system should have no place in a procedural review process. Due process supervision before a tribunal whose procedures are adversarial and adjudicative rests on the assumption that one can find a permanency and immutability of structures and standards, as well as a fixed criterion by which the circumstances of their invocation can be determined. Yet this assumption cannot be sustained, as the recent history of the classification of function exercise has revealed.

One may identify another aspect of the lawyer's perspective. In reference to the non-adjudicative model of the *Conseil d'Etat*, Willis said that the McRuer Commission rejected it simply because it was a

> "strange new thing"; ... the Commission [was preoccupied] with protecting individual rights, and the [influence of] the traditions of the legal profession.[28]

In other words, Willis recoguized that the greatest impediment to the adoption of such a structure lay in the attitudes of lawyers to processes of the law, the very processes which are themselves unsuited to procedural due process supervision. The legal profession is particularly concerned with tradition and precedent, with formalism and settled ways of acting. Undoubtedly, the development of new criteria of procedural fairness for non-adjudicative processes puts a premium on inventiveness, flexibility and experimentation.

This brief consideration of certain institutional deficiencies of judicial review on grounds of implied due process requirements, as well as of the intellectual perspectives of the legally trained,

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[27] Such a view is paradoxical, given the acceptance of wide judicial discretion in evidentiary matters, causation, division of family assets, dependent's relief, injunctions, specific performance, and so on. One may only conclude that it is not discretion which is the object of apprehension, but non-judicial discretion.

[28] Willis, *Foreign Borrowings* (1970) 20 U.T.L.J. 274, 279.

suggests that opponents of the judicialization of administrative procedures are advancing a more subtle critique than is usually recognized. The argument is not simply one of parliamentary supremacy, or even that the administrative process is different from the judicial process. Rather, commentators claim that the institution of judicial review is inappropriate both because it is *judicial* and because it is *review*: the legally trained tend to assume the superiority of the common-law adjudicative process, including an emphasis on rules and the adversary system; the nature of review in judicial institutions is remedial, censorial and oriented principally to the invocation of rules. As a consequence one may conclude that the special character of implied review suggests a reconsideration of both the procedures of, and the forum in which, due process supervision is effected.

C. *Rules and roles in implied procedural review*

A second question must be addressed before a theory of procedural review can be elaborated. Are the benefits of implied review guaranteed only through the adoption of a framework of rules, or is it also necessary that review have an educational component for decision-makers? This, of course, raises one of the fundamental issues of legal philosophy: to what extent is human conduct governable by rules, and to what extent can rules provide a structure within which responsible decision-making can take place?

As legal thought and practice in Canada are generally positivistic in orientation, these questions may be otiose. Since rules are seen by positivists as self-executing, it follows that human conduct not only can, but can most efficaciously, be subjected to governance by rules. The existence of a legal rule, not its application, is paramount, and the task of deciding when the legal rule is applicable becomes *quasi*-automatic. *Who* is deciding, consequently, is of minor significance in the process of decision-making; moreover, the interpretation and application of law are seen as involving no intellectual process which is external to the language of the legal rule itself.[29]

Yet the positivistic view of legal decision-making is being challenged. First, lawyers are coming to believe that rules can operate only as guides to decision. A consequence of the latent ambiguity of language is that both the meaning of a rule and its practical applica-

[29] Although this caricature of the positivist position is presented without subtlety, it does reflect the main tenets of this school of legal philosophy. For the most coherent treatment see Hart, *The Concept of Law* (1961), chs. 6-9. A more detailed critique than that presented below may be found in Wexler, *Discretion: The Unacknowledged Side of Law* (1975) 25 U.T.L.J. 120.

tion in a concrete case are the product of judgement on the part of decision-makers. Even in the presence of a relatively straightforward linguistic formulation of a legal rule, a decision-maker must himself become implicated in the process of decision.[30] Lawyers and judges now acknowledge that legal rules operate in a broader context. Not only do other normative systems condition the meaning of legal rules, but the common lawyer's concept of a legal rule is *a posteriori*, in that it is descriptive of a past decision or series of past decisions, and only secondarily prescriptive.[31] A final attack on the positivist model is that what is truly distinctive about the legal system is not the structure and contents of its rules, but the expectations and assumptions shared by participants committed to the legal process. It is argued that what permits lawyers to take various human situations, reformulate these into an issue which can be disputed, argue these with conviction before a judge, and understand a decision is not a system of legal rules but rather the learned process of thinking like a lawyer.[32]

The implications of this alternative theoretical attitude for implied procedural review are quite significant, so far as they show that due process rules for decision-makers will not alone promote procedural fairness. First, these rules must be capable of integration into other normative systems affecting the decision-maker; second, they must cohere within a system of beliefs about decision-making which is capable of explanation by the reviewing agency; finally, the rules set out must be addressed to the kinds of perceptions a statutory decision-maker is likely to share. In other words, procedural review must consist of more than the establishment of rules to be followed by administrative decision-makers; it must perform an educative function, encouraging the development of certain paradigms of decision and engendering commitment to them.

The most common process by which such commitments are inculcated is through what sociologists call a "role morality". Lawyers and other professionals often fail to appreciate how much of their conduct is conditioned by attitudes, approaches and perspectives, rather than rules. Confronted with a piece of legislation or the judgement of a court, lawyers react differently from most

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[30] See Fuller, *Positivism and Fidelity to Law — A Reply to Professor Hart* (1958) 71 Harv. L. Rev. 630, 661-9.

[31] See, *e.g.*, Harari, *The Place of Negligence in the Law of Torts* (1962), 1-18; Fuller, "Some Unexplored Social Dimensions of the Law" in Sutherland, *The Path of the Law from 1967* (1968), 57.

[32] See Shklar, *Legalism* (1964), 1-18.

citizens, so far as their training leads them to see certain relationships, and not others, to read limitations into certain terms, and not into others, and to formulate problems in particular ways. Legal training usually permits lawyers to interpret written rules coherently: their ability to work with a system of rules derives not so much from the rules themselves as from adopted concepts of role.[33] It follows that when an application for judicial review founded on implied procedural grounds results in a general rule respecting appropriate procedures, this rule has a meaning for lawyers which may not be grasped by other statutory decision-makers. Procedural rules about adjudication, developed and promulgated by experienced adjudicators, will only have an impact in the restructuring of decision-making when they are directed to those who are familiar with the idea of procedural rules and with the basic assumptions of adjudication. In any other context they will be much less meaningful because those for whom they are intended will not share the role morality necessary for understanding and implementing them. As Felix Cohen once stated:

> The ancient wisdom of our common law recognizes that men are bound to differ in their views of fact and law, not because some are honest and others dishonest, but because each of us operates in a value-charged field which gives shape and colour to whatever we see.[34]

While it is clear that the simple invocation of rules may in the short term improve the procedural fairness of all administrative decision-making (especially where the process under review is adjudicative in nature), the long-range effectiveness of due process supervision is contingent on two other factors: any rules promulgated must be capable of integration into an appropriate role morality which can be understood by the administrative decision-maker, and the reviewing agency must attempt to involve the decision-maker under review in the creation of this role morality.

D. *Adversarial adjudication and implied procedural review*

In an earlier section, it was suggested that judicial review on due process grounds might be inappropriate, partly because the forum of review was adversarial in nature. In this section, another aspect of judicial review will be addressed, namely, its potentially limiting effect on the creation and invocation of non-adjudicative paradigms of administrative decision-making. A further question to be addressed in developing a theory of procedural review is thus whether all statutory processes should be evaluated against a back-

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[33] Bishin & Stone, *Law, Language and Ethics* (1972), ch. 13.

[34] Cohen, *Field Theory and Judicial Logic* (1959) 59 Yale L.J. 238, 242.

drop of adjudication, or whether a variety of decisional paradigms should be created to reflect the procedures by which administrators effect public policy.

It is one of the distinctive characteristics of the common law that almost all decisional processes that involve the judiciary are adjudicative. Of course, the promulgation of rules of practice involves the exercise of legislative powers; the assignment of judges to certain cases is an administrative act; proceedings in contempt are essentially inquisitorial; reference cases are recommendatory and certain *parens patriae* procedures are mediational; but the bulk of judicial work is adjudicative. The functions of statutory delegates are more diverse, both in theory and practice. Consequently, one may ask whether the paradigm of adversarial adjudication should set the framework for rules of fair procedure in non-adjudicative contexts.

A first step is to consider the concept of adjudication itself. Lawyers can readily identify its major elements. Over the past quarter-century perhaps the most sophisticated work in this area has been that of Lon Fuller.[35] He claims that adjudication is a distinctive form of social ordering whose identifying characteristic may be found in the mode of participation granted to affected parties. While others have suggested certain refinements to this thesis,[36] it is indisputable that adjudication "confers on the affected party a peculiar form of participation in the decision, that of presenting proofs and reasoned arguments for a decision in his favour".[37] From this claim, three underlying norms of adjudication may be derived:

(i) the adjudicator should *attend* to what the parties have to say;

(ii) the adjudicator should *explain* his decision in a manner that provides a substantive reply to what the parties have to say;

(iii) the decision should be *strongly responsive* to the parties' proofs and arguments in the sense that it should proceed from and be contingent with those proofs and arguments.[38]

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[5] See Fuller, *Adjudication and the Rule of Law* (1960) 54 Proc. Am. Soc'y Int'l L. 1; *Collective Bargaining and the Arbitrator* [1963] Wis. L. Rev. 3; *The Forms and Limits of Adjudication* (1978) 92 Harv. L. Rev. 353.

[36] *E.g.*, Eisenberg, *Participation, Responsiveness and the Consultative Process* (1978) 92 Harv. L. Rev. 410 suggests that one must also consider the degree to which the decision-maker must respond to the arguments of litigants.

[37] Fuller, *The Forms and Limits of Adjudication, supra,* note 35, 364.

[38] Eisenberg, *supra,* note 36, 411-2. See also Summers, *Two Types of Substantive Reasons: the Core of a Theory of Common-law Justification* (1978) 63 Cornell L. Rev. 707.

One may then derive all the particularized rules associated with judicial proceedings and relate them to the goals of ensuring attention, explanation and strong responsiveness, which preserve the integrity of participation in the process of adjudication. For example, rules respecting bias and openness enhance participation; those respecting notice ensure that such an opportunity genuinely exists; those relating to evidence, cross-examination, counsel and transcripts define the form and content of participation; those touching reasons and appeals guarantee responsiveness to argument.[39] Quite evidently, an understanding of the decisional process of adjudication permits the derivation of particular rules, their invocation in particular situations, and the appreciation of why they are essential to procedural due process.[40]

Each of these specific procedural rules has no intrinsic validity, except with respect to the decisional paradigm which requires its

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[39] A list of subjects normally seen as characteristic of adjudicative due process follows. It is derived from Levinson, *Elements of the Administrative Process* (1977) 26 Am. U. L. Rev. 872, 932-3, n. 336.

(i) preliminary inquiries and discovery
(ii) preliminary determinations and settlements
(iii) formal notice
(iv) remands and adjournment
(v) subpoena for witnesses
(vi) production of documents
(vii) rules of evidence
(viii) pleadings
(ix) access to adverse evidence
(x) cross-examination
(xi) argument
(xii) access to counsel
(xiii) interlocutory motions
(xiv) impartial decision-maker
(xv) he who decides must hear
(xvi) record and transcripts
(xvii) reasons
xviii) open proceedings
(xix) public access
(xx) publication of reasons
(xxi) reconsiderations
(xxii) appeal

[40] This understanding also contributes to designing mixed and parasitic forms of adjudication (see Fuller, *The Forms and Limits of Adjudication, supra,* note 35, 405-9) as well as to distinguishing substantially similar processes (see Eisenberg, *supra,* note 36, 414-23). It must be remembered that even courts do not engage in one form of adjudication. *Cf.* the processes of small claims courts, jury trials, preliminary inquiries, appeals, *voir dires,* motions and bankruptcy petitions.

application. In other words, the requirement of notice or of cross-examination is not prerequisite to procedurally fair decision-making. While these may be absolute requirements for fair adjudication, their invocation in another decisional process should depend on whether they preserve the integrity of that process. Procedural fairness across the range of administrative activity therefore does not simply involve the application of norms appropriate to a relaxed or imperfect form of adjudication; it requires the development of independent paradigms and normative criteria for each distinctive function of administration. Consequently, each of the diverse exercises of state power must be characterized (at least in a rudimentary fashion) according to the process of social ordering it exemplifies.

Traditionally, for the purposes of implied due process supervision, administrative decision-making has been characterized as legislative, judicial or (residually) administrative. Moreover, the concept of "policy" has been a principal criterion for distinguishing when natural justice would lie and when decisions would be immune from procedural supervision: often a structurally adjudicative determination would be held not to give rise to a duty to act judicially where policy questions were significant. Such situations were identified sometimes by reference to the decisional agency (*e.g.*, the Minister or the Governor-in-Council), sometimes by reference to the fact that the problem to be solved involved the manipulation of interdependent interests in order to achieve an optimal solution (*e.g.*, the allocation of television channels),[41] and sometimes by acknowledging that it may be almost impossible to order the various criteria which should bear on a decision or to identify the weight to be attached to each standard of decision invoked (*e.g.*, the granting of political asylum or parole).[42] What distinguishes these situations from classical adjudication is the absence of a requirement that decisions be strongly responsive to arguments advanced, not the fact that participation itself is inappropriate; that is, there are fewer constraints placed on the factors a decision-maker may invoke to justify his conclusions. One may conclude therefore that certain purely administrative functions bear close resemblance to adjudication and involve a process which may be characterized as consultative.

But not all non-judicial statutory functions are similar. One can identify salient differences between the functions of legislating,

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[41] See Fuller, *The Forms and Limits of Adjudication, supra,* note 35, 405 *et seq.*

[42] See Eisenberg, *supra,* note 36, 414 *et seq.*

landowning, purchasing supplies and services, regulating, prosecuting, investigating, taxing, granting exemptions or dispensations — differences which should lead to significant variations in the procedures by which such tasks are performed and the participation which is afforded to affected parties. Of course, it should not be assumed that each different function performed by a statutory decision-maker involves a distinct procedural structure. In fact, it has been argued persuasively that all possible structures and processes for rational decision-making can be grouped into nine major categories: custom, officially declared law, adjudication, voting, managerial direction, contract, mediation, property and deliberate resort to chance.[43] Each of these, it is suggested, may have several variants, yet each possesses distinctive characteristics, which in turn bear on the participation to be afforded to parties affected by decision, and the institutional duties of decision-makers. For example, what has been characterized as the consultative process is not a parasitic form of adjudication. It is a distinctive social-ordering process with procedural features that must reflect its internal integrity. Consequently, in order to determine the precise requirements of procedural fairness, it is necessary to work out what would be an appropriate paradigm for each possible decisional process. Rather than ask what aspects of adjudicative procedures can be grafted onto this decisional process, reviewing tribunals must ask: what is the nature of the process here undertaken, what mode of participation by affected parties is envisioned by such a decisional process, and what specific procedural guidelines are necessary to ensure the efficacy of that participation and the integrity of the process under review? Fuller has suggested some answers to these questions in certain situations. For example, if contract is the relevant decisional process, he believes that negotiation is the appropriate mode of participation; in elections he asserts that participation is effected by voting.[44] But a better appreciation of the importance of developing paradigms can be gained by taking one such process and examining in detail various aspects of participation.

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[43] Fuller & Eisenberg, *Basic Contract Law*, 3d ed. (1972), 89 *et seq.*

[44] Fuller, *The Forms and Limits of Adjudication, supra,* note 35, 363. The theme is also elaborated in Fuller, *Mediation: its Forms and Functions* (1971) 44 S. Cal. L. Rev. 305 where he discusses mediation. He has also treated contract: *Basic Contract Law, supra,* note 43; custom: *Human Interaction and the Law* (1969) 13 Am. J. Juris. 1; legislation: *The Morality of Law,* 2d ed. (1969); and management: *Irrigation and Tyranny* (1965) 17 Stan. L. Rev. 1021.

Fuller has considered the paradigm of mediation at great length. He suggests that the central quality of mediation is the "capacity to reorient the parties toward each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relation, a perception that will redirect their attitudes and dispositions toward one another".[45] In other words, mediation presupposes not an impersonal "act-oriented" decisional framework, but a "person-oriented" context and an interconnection of interests of sufficient intensity to make collaboration a desired goal; it also presupposes the constant readjustment of perpectives, issues and claims. While adjudication may be seen as a formalized and structured form of decision-making, mediation is a comparatively loose decisional paradigm in which neither fact nor norm is capable of definitive proof.

What is the characteristic form of participation and the appropriate degree of responsiveness which distinguishes mediation? From Fuller's analysis we might conclude that it is the indirect presentation and reception of alternative formulations of the problem being mediated, that is, a vicarious negotiation of the norms of decision and the applicable facts.[46] If one accepts this characterization, certain features of the mediational process which complement this paradigm emerge:

(i) the mediator must listen to and facilitate the presentation of argument between parties;

(ii) the mediator should explain counter-proposals in a manner that emphasizes commonality;

(iii) the mediator must maintain sufficient aloofness from the process so as not to prejudge proofs and arguments notwithstanding that he feels one party to be wrong.

Here it is apparent that participation is institutionally guaranteed only as to its existence, not as to its content. In addition, the criterion of responsiveness is unspecified: the other party need not respond directly to counter-argument, and the mediator himself is not restricted to presenting or explaining argument as a formal reply to counter-argument. Finally, there are no constraints against the mediator to justify himself because he decides nothing. The decision, if there is one, rests on the consent of affected parties. Hence, while the norms of adjudication emphasize the purely formal aspects of a third-party decisional process, the norms of

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[45] Fuller, *Mediation: its Forms and Functions, supra,* note 44, 327.

[46] For a slightly different formulation, see Eisenberg, *Private Ordering Through Negotiation, Dispute Settlement and Rule-Making* (1976) 89 Harv. L. Rev. 637.

mediation highlight the substance of a consensual decisional process.

What specific rules of fair procedure (analogous to natural justice in adjudication) are appropriate to mediation? What rules ensure the integrity of the participation and responsiveness necessary to mediation? Some of these may be: notice, adjournment, assistance of counsel, private proceedings, opportunity to present argument, access to counter-proposals, impartial mediator, equal access to mediator, and opportunity for direct negotiation. Of course, many of these items appear on a list of rules of fair procedure appropriate to adjudication. But, given the distinctive character of mediation, it would be incorrect to view this process as an adaptation of classical adjudication. While several procedural features of mediation and adjudication may be similar, their conditions of application, as well as their specific impact in concrete cases, may vary greatly. As we have seen, it is the paradigm, not the specific rule, which constitutes the essence of procedural fairness.

As the above paragraphs have shown in a summary fashion, the diversity of functions performed by administrative decision-makers has two significant consequences for a theory of procedural fairness: not only must diverse decision-making paradigms, each possessed of its own institutional integrity, be adopted, but the specific normative prescriptions which they imply must be evaluated against that paradigm. Adversarial adjudication is but one of these possible models. Simply because specific procedural requirements which are similar to those of adjudication flow from a given process is no reason to assume that that process should be subject to a participation/responsiveness paradigm of adjudication or *quasi*-adjudication.[47]

E. *Conclusion*

As courts begin to realize the potential scope of the fairness doctrine, they tend to retreat from a full embrace of its implications. This reticence to assume an activist posture of implied supervision across all decision-making functions is direct evidence of

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[47] Eisenberg, *supra*, note 36, 426-32 addresses this point. It is not here being suggested that each of the nine principles are of equal importance. By far the most common will be third-party decision processes such as adjudication, officially declared law and managerial direction. It is precisely these three processes which are most similar, and hence one can appreciate why certain fairness judgements are characterized as "watered-down" natural justice.

what Loughlin calls the crisis in administrative law theory. Like all reformations in public law, fairness has engendered a great deal of uncertainty as courts slowly cast off the incidents, restrictions and formalities of the discarded theory. Certain developments are immediately foreseeable as the theory of implied procedural review again breaks free of the theory of jurisdiction to which courts and writers have attempted to tie it during the past century.

In this liberating process the distinctive character of implied due process supervision will emerge, and three important consequences will follow. First, it will be noticed that, despite their historical concern with matters of fair procedure, lawyers and judges operating within the adversarial system of judicial review may not be appropriate guarantors of procedural fairness in administrative law matters. Second, the theory of implied review will break free of positivistic constraints, and new jurisprudential currents will produce a shift in focus of procedural review away from a unique concern with the *rules* of fair procedure towards a general concern with the institutions of decision and the role morality of decision-makers who must follow such rules. Finally, as more administrative processes are challenged on applications for procedural review, the diversity and distinctiveness of statutory functions so challenged will impress on reviewing tribunals that, if the rules of procedural fairness are derived solely from a model of adversarial adjudication, the institutionalization of fair procedures for all functions is bound to fail.

Nevertheless, a recognition that these three elements of implied due process review must be at the foundation of a post-*Nicholson* approach to fairness will not itself resolve the problems which this new doctrine is likely to create. Nor will it lead to a law of procedural review which meets the expectation of various proponents of fairness. In the absence of an institutional model which will enhance implied procedural review, yet not impair the efficacy of administration, the reformation initiated by *Nicholson* will be of short duration.

II. An institutional model of implied procedural review

To this point in our inquiry various implications of the doctrine of procedural fairness in administrative law have been considered. A review of the historical and intellectual justifications for due process supervision has demonstrated that implied procedural review cannot be justified by appeal to the principles of jurisdictional judicial review. Tracing in detail the possible impact of this new theory in diverse instances of delegated decision-making, and

comparing it with other developments in the field of due process review, revealed the extensive scope of the doctrine. Isolation of the salient features of procedural supervision permitted the derivation of attributes which any comprehensive theory of implied procedural review must possess. It is now possible to deduce rudimentary elements of an institutional model of procedural review and explore the implicit characteristics thereof.

A coherent framework for implied due process supervision of all delegated decision-making functions must acknowledge six principles. First, given the principal philosophical justifications for procedural review, both the structure and composition of the reviewing agency, as well as the paradigm and norms of review, must have a consensual basis. Second, in view of the variety of administrative decision-making bodies, statutory decisional structures and bureaucratic functions performed within these structures, a monolithic structure of implied review would be inappropriate. Third, due to the difficulties of subjecting human conduct to written rules, procedural review must consist of an implied element. Fourth, the underlying goals of procedural review mean that the judicial process of adversarial adjudication is probably unsuited to this task. Fifth, given the basic nature of all human decision-making, procedural review should not focus exclusively on the promulgation of a system of rules. Sixth, because administrative functions are so diverse, procedural review can only be meaningful when based on a decision-making paradigm compatible with the process under scrutiny. In other words, the elucidation of a model of implied procedural review which fully exploits the avenues opened up by the *Nicholson* case requires nothing less then a fundamental re-examination of the premises of such review. In the following pages we shall propose a model which respects these six principles, and then review it in light of criticisms that are likely to be directed against it.

A. *The model in outline*

Any complete model of implied procedural review must encompass four principal elements: the structure of the reviewing agency, its personnel and its powers must be determined; the grounds for and the manner of invoking review must be stipulated; the procedures to be followed by the reviewing panel will require clarification; and the focus and purposes of review must be elucidated.

1. The agency of review

The agency of review proposed here would be a multi-member panel staffed by legally trained and non-legally trained personnel. Each member of the panel would be chosen because he is expert in the management of tasks normally performed within one or more of the nine processes of social ordering identified earlier. Hence, the panel would consist of trained and experienced adjudicators, mediators, electoral experts, negotiators, legislators, persons familiar with management, custom and statistics, and, finally, individuals appreciating the social ordering function of property. In other words, rather than an agency composed entirely of those whose predominant experience and expertise lies in adjudication, the proposed panel would draw on a diverse group which collectively would have experience and expertise in all principal processes of social ordering in modern Canadian society.

Finding those with expertise in mediation, arbitration, negotiation, developing legislative guidelines or the operation of custom, would not be a particularly onerous task; within the legal community itself are experts in each of these processes. Moreover, experienced professionals in the design of elections or in the development of models that ensure fair results when resort is deliberately had to chance are also numerous. Of course, many are not likely to be found in the legal community but among sociologists, mathematicians, actuaries and political scientists. An almost inexhaustible pool of those with knowledge about management can be drawn from business or labour. Property as an ordering device presents greater difficulties, although philosophers, economists and lawyers have contributed to our practical appreciation of this concept.

A review panel so staffed would consist of those who have studied the theoretical forms and limits of each of these processes of social ordering — processes which are invoked daily in administrative decision-making throughout Canada. Moreover, each would have substantial experience with one of these basic processes, as a participant or decision-maker. Finally, the panel as a whole would not be dominated by the notion that adversarial adjudication is the epitome of procedural fairness for all situations. Hence, the same motives which impel the assignment of particular judges to preside over certain cases, in order to ensure the requisite degree of expertise, can be invoked with respect to this panel at a procedural level.

In so far as other aspects of the review panel are concerned, there is no reason to suppose that appropriate mechanisms, based

on current judicial practice, cannot be adopted. Provisions relating to qualification, nomination, appointment, confirmation, tenure, removal, salary, and training, which today promote the independence of the judiciary, should be enacted with respect to this tribunal. That is, much of the structure relevant to the constitution of an appellate court may be easily adapted to the new panel. Of course, as is the case with the judicial system, the fundamental guarantee of justice is the selection of the most qualified candidates.

2. Grounds for and manner of invoking review

Given the vast number of procedural disputes which arise in the normal course of administration, some mechanism for structuring the grounds of review, and for formalizing the manner of invoking review, must be developed. There is no reason why initiative in seeking review should not remain in the hands of aggrieved parties. Any inconveniences resulting from the fact that an administrative decision might be open to review on implied procedural grounds[48] are more than off-set by the violence to common law principles of legality that would result from removing carriage of a dispute from litigants. Moreover, the courts have developed a sophisticated array of doctrines to control abuses of the judicial review process. Theories of standing, ripeness, exhaustion, primary jurisdiction, laches, mootness, and the like, can still be invoked in order to control frivolous litigation.[49]

Not only should initiative in seeking review be left to aggrieved parties, but so should the precise make-up of the forum of review. Given the unwieldiness of multi-member tribunals, it would be unrealistic to structure the process so that an expert in each of the principal forms of social ordering participates in every application for review. Rather, each party should be permitted to select one member of the reviewing panel.[50] In other words, each disputant

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[48] Though the question of privative clauses is not addressed in this essay, the author sees no reason for excluding access to the review panel. Many of the traditional justifications for privative clauses (expertise, efficiency, finality) are simply inapplicable to review by the proposed tribunal.

[49] On standing, see Vining, *supra*, note 17, ch. 10; on ripeness, see his article, *Direct Judicial Review and the Doctrine of Ripeness in Administrative Law* (1971) 69 Mich. L. Rev. 1443.

[50] It is, of course, important to determine who the parties to a dispute are. For example, in certification procedures before a Labour Board are the parties, say, the employer and the Board (or the union and the Board) *or* the employer and the union? In many cases the precise issue over which unfairness is being alleged will be that of who are properly parties. No attempt will be made to resolve this question here, although, presumably, the principles currently invoked in review proceedings may reflect the difficulties noted with respect to other aspects of procedural review.

would be entitled to require that one member of the tribunal have expertise in a decisional process which the applicant selects. This proposals has two elements which are immediately apparent: first, review would be accomplished by two-man panels, and, second, while the specific members of each panel would be assigned by the secretariat, each party would be permitted to select the decisional paradigm from which that member is drawn. Many advantages for the development of a detailed law of procedural review flow from these characteristics. A two-man format compels the unanimous disposition of review applications.[51] It also makes explicit the tacit accommodations which now go for the most part unnoticed in appellate decision-making. Finally, two-man panels are eminently suitable for mediation of competing claims. Since the entire framework of procedural review under this proposed model is intended to be non-adversarial, a three-man panel based on the labour arbitration model would not be an appropriate institutional form.[52]

The second aspect of the proposal, selection by each party of the paradigm of review, also offers several advantages. This mechanism permits parties to advance competing perspectives as to the *nature* of the decisional process. Rather than constraining the participation by affected parties to argument about the applicability of specific rules, this model also permits them to debate the framework of decision; this framework is, of course, a principal determinant of the procedural rules thought to be appropriate.[53] Permitting such choice also compels each party to justify why a particular decisional model, or variant thereof, should be preferred. The principal review question becomes explicit, not tacit; one no longer argues for a *quasi*-judicial function as a means to an end, but on the contrary, the paradigm sought becomes one of the ends of a review proceeding. It is also apparent that paradigm selection by affected parties encourages the sophistication of generalized models of administrative processes for application to specific cases. A more subtle law of procedural fairness will result from tempering decisional paradigms by permutations of panel membership. Rather than a model that compels a single panel, the court, to choose between adjudication or non-adjudication, the proposal would

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[51] See Llewellyn, *The Common Law Tradition* (1960), 316-7.

[52] See subsection 3, *infra*, for a discussion of this point. On the adjudicative nature of three-man panels, see Fuller, *Collective Bargaining and the Arbitrator, supra*, note 35, 36-42.

[53] On the role of paradigms in thought, see Polanyi, *Personal Knowledge* (1958), chs. 5-7.

permit as many as forty-five different panels to choose one of nine paradigms; rather than compelling parties to argue a given perspective before a panel whose presuppositions are only adjudicative, this model encourages the presentation of problems before a panel, at least one member of which is known to have insight and expertise in the decisional process advocated by each party.

With respect to grounds for review, the model contemplates certain deviations from established and recently proposed models. Traditionally, there have been two aspects of procedural review in administrative law, review for procedural *ultra vires* and implied procedural review. Modern proposals include these two grounds in addition to review for procedural unfairness and for certain abuses of discretion of a procedural nature.[54] However, the institutional model of review suggested here does not envision all "procedural" grounds. It is established to consider only implied procedural matters, natural justice, fairness and implied limits on discretionary procedures, which operate where legislation is silent or obscure. Formal *ultra vires* control of administrative procedures would remain with the courts. Not only would parties to a dispute have the power to choose the nature of the decisional paradigm against which their claim would be evaluated, but they would also have the power, in certain cases, to elect whether to make a statutory procedural claim or an implied procedural claim.

3. The procedures of review

An important corollary of permitting affected parties to participate in the selection of the grounds of review and the composition of the review panel is their direct involvement in the development of the reviewing agency's decision. In normal judicial review applications, which, by the fact that they are brought before courts, must proceed on adjudicative assumptions, complaining parties attempt to invoke a normative standard, present facts demonstrating the applicability of the standard, and ask the court to take a censorial decision on whether the standard was attained. The judicial decision is theoretically that of the judge alone and is based on existing standards. However, under the proposed model the procedures of review are non-adjudicative. Since one is disputing implied procedural norms, it is clear that these cannot be antecedent in the sense required by the adjudicative model; and since the facts in issue are fluid and not determinative of the merits, it is difficult

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[54] See *Report of the Commonwealth Administrative Review Committee* (1971); Mullan, *The Federal Court Act* (1978), 61-74.

to see how they could be evaluated by a judge. In such circumstances, a mediational approach to decision must be followed.[55]

The evaluation of procedural impropriety on implied grounds, therefore, cannot be based on considerations relating to the requirements of rules: within the confines of statutory powers the determining element cannot be an authoritarian, externally-imposed vision of due process, but must be found in the negotiated consent of those subject to it. It has already been shown that in the absence of procedural standards which flow from legislation, the components of fair procedure can only be developed by the parties themselves. A model for reviewing implied procedural requirements should permit parties to engage in a reciprocal adjustment of their procedural expectations. The proposed structure achieves this goal at two levels. First, parties are required through the nomination of one member of the panel to decide what procedural paradigm is most appropriate to the process being reviewed. Second, permitting the review panel to participate actively in working out the elements of fair procedure and to share the decisional task with parties will encourage compromise, accommodation and flexibility in expectations.

A mediational approach to review also enhances acceptance, by both parties, of the solution proposed. They are given the opportunity to shape the issue. Both are encouraged to advance arguments based on the constraints under which they work, such as time, cost, manpower and case-load. Both are permitted to suggest modifications to proposals of the review panel in order to make the disposition more satisfactory to their individual needs. Finally, a mediational theory of implied procedural review is beneficial for administrative law generally: solutions achieved are likely to be more appropriate because they are directed to specific problems of specific agencies, not to generalizations based on some assumed equivalence of processes across a variety of tribunals and powers. In addition, as the French have demonstrated in many areas of review, mediation removes the censorial focus of decisions that take statutory decision-makers to task, thereby encouraging compliance with solutions proposed.[56]

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[55] See Northrop, *The Epistemology of Legal Judgments* (1962) Nw. U. L. Rev. 732; Neef & Nagel, *The Adversary Nature of the American Legal System from a Historical Perspective* (1974) 20 N.Y.L.F. 123, 154-63.

[56] See Brown & Garner, *French Administrative Law*, 2d ed. (1973); *cf.* Angus, *The Individual and the Bureaucrocy: Judicial Review — Do We Need It?* (1974) 20 McGill L.J. 177.

4. The focus of review

Because implied procedural review is particularly concerned with institutional failings, rather than with individual deviations from the jurisdiction contemplated by an empowering statute, the focus of review must be essentially prospective.[57] In other words, the traditional concept of a bipolar, retrospective and self-contained model of review is not appropriate in these situations. Review must not be simply reproachful: it must be educational. Those who find their determinations subject to review on procedural grounds may be individuals at any level of the bureaucracy; often, it may be an entire process of decision *and* appeal that is challenged. In such circumstances, review on procedural grounds can be considered successful only if those subject to it actually modify procedures so as to institute fair decisional procedures.

Much recent writing about judicial review does not explicitly acknowledge this factor. In a recent study, Mullan concludes that a reviewing court should have:

(a) a power to set aside
(b) a power to refer back for reconsideration
(c) a power to prevent an authority from proceeding further
(d) a power to compel the making of a decision or order to perform a legal duty, including the following of correct procedures in making a decision
(e) a power to issue a declaration of right, including a declaration with respect to the possibilities in (a) to (d) and referable to all the codified grounds of review.[58]

Each of these powers, however, focuses on the traditional adversarial model of review and does not allow for the peculiar characteristics of implied procedural supervision.

Adopting what Chayes calls the "public law model" of adjudication,[59] the focus of review and the powers exercisable should include first the usual power to correct and remit. Second, the review panel must have the power to supervise the implementation of its mediated decrees. Much like judicial competence in injunctive proceedings in the United States, which presupposes a continuing supervision of the terms of the decree,[60] the review panel must have all necessary power to ensure the efficacy of its order. Third, jurisdiction to investigate and recommend with respect to matters beyond those remitted to it should also be granted. If a particular

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[57] Chayes, *The Role of the Judge in Public Law Litigation* (1976) 86 Harv. L. Rev. 1281, 1281-4.

[58] Mullan, *supra*, note 54, 71.

[59] See Chayes, *supra*, note 57.

[60] See Fiss, *The Civil Rights Injunction* (1978), *passim.*

difficulty appears to be symptomatic of a larger problem, the panel should be permitted, on its own initiative, to study the larger problem. Implied procedural review acknowledges that the disputes presented are neither self-contained episodes nor entirely party-controlled, and should not be considered as affecting only private rights.[61] Finally, given the significance of role morality in evaluating questions of procedural propriety, the panel must have the power to recommend educational programs that will redress failures in institutional training or practice.[62] If due process review is to enhance the development, maintenance and application of sophisticated procedures for the exercise of delegated powers, its enfranchising, exemplary and educational functions become paramount.[63]

5. Summary

The model proposed is based on the premise that, within the confines of statutory rules, what constitutes fair procedure is a matter of agreement and must rest on a notion of consent. It assumes that, although the specific contents of a fair procedure are variable, this notion will always involve a permutation of basic social-ordering mechanisms. Hence, while adjudication alone is a reductionist paradigm for procedural fairness, there are a limited number of alternatives which, if invoked, would not purchase uniformity at the expense of subtlety. The model also rests on the belief that an adversarial procedure militates against effective development of fair procedural paradigms, and that a mediational theory of review proceedings is more consistent with what is emerging as the public-law model of litigation.[64] Again, it presupposes that prospective review, comprising educational, supervisory and preventative elements should be the goal of procedural supervision. It also requires that parties to an application adopt a posture of other-directedness. Finally, the model assumes that the review panel would be composed of persons experienced in and critical of the forms and limits of various social institutions. The same level of insight which judges express about adjudication must be expected of other panel members in their areas of expertise.

Of course, this model reflects a substantial departure from traditional beliefs about judicial review of administrative action.

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[61] See Vining, *supra*, note 17, chs. 9-11.

[62] See Wilson, *supra*, note 14, 125-39.

[63] See Ryle, "Knowing How and Knowing That" in *The Concept of Mind* (1949), 27-49; Holt, *How Children Fail* (1964), 104-7.

[64] But see Thibault & Walker, *Procedural Justice: A Psychological Analysis* (1975).

Its premises may appear vulnerable to attack by defenders of the Diceyan concept of the rule of law.[65] Yet the difficulties experienced by courts in applying the fairness doctrine should be taken as evidence that administrative law in Canada is on the verge of a fundamental reorientation in which many new proposals for implied review are apt to be considered. Nevertheless, it is certain that this model will be subject to various challenges; to the extent these may be anticipated, they must be addressed.

B. *Possible objections to the model*

Earlier sections of this essay have been devoted to establishing the validity of the assumptions sustaining the model outlined above. Yet, in themselves, these presuppositions do not justify the specific proposal presented. Moreover, the utility of the model must be argued in both theoretical and practical terms. Since any statutory reform involves substantial change-over costs and engenders resistance from those who must make the system work, it must be shown that pragmatic criticisms of the proposal are unfounded. In principle, two basic kinds of counter-argument may be advanced, those relating to fundamental constitutional issues and those relating to difficulties of implementation.

1. Constitutional problems

Canadian administrative lawyers will immediately see two major problems with the proposed model. It will be suggested that a provincially created review panel would be unconstitutional by virtue of section 96 of the *British North America Act, 1867*[66] if its members were provincially appointed;[67] or, even if the agency were constitutional, its decisions could not be insulated from judicial review, a needed protection if the panel is to make legally conclusive determinations. Either of these objections, if valid, would severely compromise the proposal as a model for implied procedural review in Canada.

Recent jurisprudence of the Supreme Court of Canada on the scope of section 96 of the *B.N.A. Act* gives cause for some concern as to constitutionality. While decisions such as *Tomko* v. *Labour*

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[65] See Arthurs, *supra,* note 4.

[66] 30 & 31 Vict., c. 3 (U.K.) as am.

[67] The problem of s. 96 and judicial review was also addressed by the McRuer *Royal Commission Inquiry Into Civil Rights* (1968-70), 1465-6, which considered the constitutional issue an insurmountable obstacle to the adoption of a *Conseil d'Etat* model. But see Willis, *supra,* note 28.

Relations Board (N.S.),[68] *Jones* v. *Board of Trustees of Edmonton Catholic School District No. 7*[69] and *City of Mississauga* v. *The Regional Municipality of Peel*[70] seem to suggest a more liberal approach to provincial attempts to vest tribunals with a panoply of powers, the important judgement in *Farrah* v. *Attorney-General of the Province of Quebec*[71] appears to reflect an opposite trend. In the *Jones* case, the Court held that the mere "fact that a provincial tribunal is required to exercise a judicial function does not, of itself, involve a conflict with s. 96."[72] Moreover, in *Tomko* it stated that "it is not the detached jurisdiction or power alone that is to be considered but rather its setting in the institutional arrangements in which it appears and is exercisable under the provincial legislation."[73] In other words, a provincial government may establish a body which performs section 96 functions if these are closely integrated with, incidental to and necessary for the carrying out of valid provincial purposes. But, of course, a review panel of the nature suggested is not part of an integrated institutional arrangement touching a *bona fide* provincial power; it is a *quasi*-appellate body exercising a general supervisory jurisdiction over the form, not the substance, of administrative decision.

In this context, both *Jones* and *Tomko* are of less relevance than *Farrah*, a judgement which directly involved the constitutionality of a *quasi*-appellate review body. The import of this latter case is particularly difficult to ascertain, however, because two distinct lines of reasoning won support in the Supreme Court. If one adopts the reasoning of Laskin C.J., it would seem that whenever a province attempts to devolve a purely judicial function on a tribunal, divorced from a substantive validating context, section 96 powers are being usurped. The Chief Justice stated:

> The difficulty in the present case is that the Transport Tribunal has not been constituted as simply a tribunal of appeal within the administrative structure of the *Transport Act*, empowered to hear appeals from decisions of the Transport Commission and to decide questions of law in the course of a general appellate authority. It is constituted as an appeal agency which, under s. 58(a), is primarily concerned with questions of law.[74]

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[68] [1977] 1 S.C.R. 112.
[69] [1977] 2 S.C.R. 872.
[70] [1979] 2 S.C.R. 244.
[71] [1978] 2 S.C.R. 638. See the comment by Pépin, (1978) 38 R. du B. 818; see also Lemieux, *Supervisory Judicial Control of Federal and Provincial Public Authorities in Quebec* (1979) 17 Osgoode Hall L.J. 133, 146-8.
[72] *Supra*, note 69, 893.
[73] *Supra*, note 68, 120.
[74] *Supra*, note 71, 643-4.

From the perspective of the Chief Justice, if questions of implied procedural review determined by the proposed panel are characterized as questions of law to be decided by an appellate tribunal, the model may run afoul of section 96 of the *B.N.A. Act*.

On the other hand, according to Pratte J., the unconstitutionality of the Transport Tribunal at issue in *Farrah* arose from the fact that it exercises part of the supervisory jurisdiction over questions of law, within or outside jurisdiction, vested exclusively in superior courts. He suggested that non-jurisdictional review may be suppressed by an appropriately worded privative clause, but he held that it cannot be transferred to a non-section 96 court:

> The net combined effect of s. 58(a) and of the privative clause (ss. 24 and 72 of the *Transport Act*) is therefore to transfer to the Transport Tribunal part of the inherent supervisory authority that was vested in the Superior Court at the time of Confederation.[75]

Adopting this reasoning, it would seem that, if implied procedural review is characterized as part of the inherent jurisdiction of the superior court at Confederation, then it cannot be transferred to a non-section 96 body.

How does the proposed review panel square with the reasons for judgement in *Farrah?* For the Chief Justice, the criterion to be satisfied is whether implied due process questions are questions of law. Throughout his judgement Laskin C.J. refers only to questions of jurisdiction or of statutory interpretation as questions of law. In fact, his insistence on the importance of the Transport Tribunal's power to "confirm, vary or quash" a decision on the merits suggests that only statutory provisions are to be considered as law.[76] Hence, while questions of interpretation arising from statutory procedural provisions may be questions of law, his judgement in *Farrah* does not directly suggest that issues of implied review constitute questions of law. In other Supreme Court decisions there are suggestions that such questions are not questions of law.[77] Nevertheless, it is doubtful whether the Court would treat implied review, even in a mediational setting, as a non-section 96 function.[78]

In so far as the judgement of Pratte J. is concerned, a different problem arises, namely, was implied procedural review inherent in the powers of a superior court at Confederation? Certainly this

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[75] *Ibid.*, 656.

[76] *Ibid.*, 646. This, of course, conflicts with his dissenting opinion in *Re Martineau (No. 1)* [1978] 1 S.C.R. 118.

[77] *Re Martineau (No. 1), ibid.; Harelkin* v. *University of Saskatchewan* (1979) 96 D.L.R. (3d) 14 (S.C.C.).

[78] See particularly the recent Ontario Court of Appeal decision *Reference Re Residential Tenancies Act* (1979) 26 O.R. (2d) 609, 632-41.

could not have been the case with respect to any non-judicial power, although a more subtle response is necessary with respect to judicial powers. Since Parliament could pre-empt the implied review power of King's Bench by enacting procedural provisions, it is hard to consider this power as a necessary attribute of a superior court. Traditionally the *sine qua non* of procedural supervision was a direction from Parliament to act judicially. This could take the form of a right to a hearing, a right to counsel, a right to reasons, or to some other express threshold requirement. Although the content of implied supervision was generally free of legislative control, its existence was contingent on a legislative mandate. Again, however, it is unclear whether these factors are sufficient to indicate that procedural review was not inherent in the sense intended by Mr Justice Pratte.

Thus, the effect of section 96 on the proposed model is far from certain.[79] It would seem that as long as the review panel neither decides substantive questions of jurisdiction or law, nor decides questions of procedural *ultra vires*, it may not be found to be exercising a section 96 function; hence, its members may be validly appointed by a province. On the assumption that the proposed panel would be considered a section 96 court, the model would nevertheless not fail in so far as federal jurisdiction is concerned, nor would it fail at the provincial level if Law Society statutes were amended so as to permit non-legally trained individuals to be called to the Bar, and if co-operation between the federal and provincial governments as to appointment of these individuals could be assured.

The second constitutional consideration which may scuttle the proposed model relates to whether its decisions may be impressed with the stamp of finality. That is, is it possible to insulate both the decisions of primary tribunals and the decisions of the review panel from ordinary judicial supervision? For, if not, the very problems of adversariness and adjudication to be overcome by creation of such a model will simply manifest themselves one step later in the decisional process.

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[79] Prediction in this area is almost impossible. In a recent decision, *Procureur général du Québec* v. *Crevier* [1979] C.A. 333, a 2-1 decision purporting to apply *Farrah*, the Quebec Court of Appeal found the *Tribunal des professions* not to be exercising a s. 96 function, even though its constitution, and many of its powers, are almost identical to those of the Transport Tribunal which were at issue in *Farrah*. Moreover, it should be noted that for Pratte J. the existence of a privative clause (which is part of this proposal as well) reinforced his view that the Transport Tribunal was exercising s. 96 functions.

With respect to the determinations of primary decision-makers, the problem of insulation from implied procedural control is not of great moment. It has long been acknowledged that implied procedural control plays a suppletive role and hence may be ousted by appropriate statutory language.[80] Moreover, recent authority suggests that express prohibitory clauses,[81] as well as the tacit direction resulting from adoption of sophisticated procedural codes[82] may be effective to preclude judicial review on implied due process grounds. Furthermore, primary jurisdiction and exhaustion clauses stipulated in favour of second-level administrative tribunals have been judged effective,[83] and hence might be used to reinforce this protection from immediate judicial review. It follows, therefore, that an appropriately worded privative clause, while not necessarily excluding supervision on grounds of procedural *ultra vires*, may effectively insulate the processes of primary decision-makers from judicial review on implied procedural grounds.

Protection of the determinations of the review panel is likely to be more difficult. If the tribunal is constituted as a section 96 superior court, this problem would not arise. However, if the tribunal is considered either as a section 96 non-superior court or as an ordinary administrative agency, it is obvious that any of its decisions will be taken in the exercise of a limited statutory jurisdiction. In such cases, it seems unlikely that jurisdictional review by a superior court could ever be fully precluded,[84] although infra-jurisdictional errors may be effectively insulated from review. One may conclude therefore that, on any hypothesis, the supervisory power of superior courts over errors of law within jurisdiction and implied due process failings of the review panel itself may be precluded; only formal jurisdictional questions would be left open to review.

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[80] See de Smith, *Judicial Review of Administrative Action*, 3d ed. (1973), 161 *et seq.*; Wade, *Administrative Law*, 4th ed. (1978), 453-6.

[81] *Re Downing & Graydon, supra,* note 1. For a case where implied review was held to be ousted by contract see *Re Proctor, supra,* note 1.

[82] See, *e.g.*, *Furnell* v. *Whangarei High School Board* [1973] A.C. 660 (P.C.); *Wiseman* v. *Borneman* [1971] A.C. 297 (H.L.).

[83] See, *e.g.*, *Hnatchuk* v. *Workmen's Compensation Board* [1972] 3 W.W.R. 395 (Sask. C.A.).

[84] But see *Pringle* v. *Fraser* [1972] S.C.R. 821 and *Re Woodward Estate* [1973] S.C.R. 120 for specialized privative provisions held effective even as against jurisdictional errors. See also Hogg, *Is Judicial Review of Administrative Action Guaranteed by the B.N.A. Act?* (1976) 54 Can. Bar Rev. 716; and Lemieux, *supra,* note 71, 148-52.

Would this limited review impair the operation of the proposed panel?[85] There are three reasons for concluding that it would not. In the first place, given the consensual nature of proceedings before the review tribunal, it is unlikely that its determinations would lead to many applications for judicial review. This would be especially so in non-judicial situations, where courts have continued to show a reluctance to find procedural unfairness. Second, since the panel would not make determinations on the merits of a dispute, and since its recommendations will always fall within the interstices of statutory procedures, it is unlikely that formal jurisdictional errors relating to absence, excess or declining of jurisdiction would arise. Moreover, by their very nature, the jurisdiction and powers of the tribunal would be cast in subjective, general and wide language; this itself should reduce the scope of judicial intervention.[86] Finally, in view of judicial treatment of analogous powers in other contexts,[87] a deferential approach to determinations of the review panel is not unlikely.

Of the two constitutional objections which critics of the model may advance, the section 96 question is more serious. Problems with respect to privative clauses may be minimized or overcome and, since the concept of *judicial* review itself is not threatened, one cannot foresee a restrictive approach to the jurisdiction of the review panel. The section 96 issue may, however, significantly impede implementation of the scheme. Nevertheless, this obstacle does not arise with respect to any federal tribunal and, as illustrated, co-operation between the federal and provincial governments can ensure the proposal's success even at the provincial level.

2. Pragmatic criticisms of the proposed model

The two criticisms of a constitutional nature just reviewed can be considered as technical reproaches to the model. Of much

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[85] The word "limited" is used advisedly. Although decisions such as *Metropolitan Life Insurance Co.* v. *Int'l Union of Operating Engineers, supra,* note 21, seem to suggest an extensive inventory of jurisdictional errors capable of sustaining review in the face of a privative clause, judicial activism on grounds of abuse of discretion seems to have been on the wane during the past few years, See, *e.g., C.U.P.E. Local 963* v. *N.B. Liquor Commission* [1979] 2 S.C.R. 227. See also Grey, *Discretion in Administrative Law* (1979) 17 Osgoode Hall L.J. 107; Molot, *Administrative Discretion and Current Judicial Activism* (1979) 11 Ott. L. Rev. 337.

[86] For a review of recent Canadian jurisprudence on these indirect privative provisions see Mullan, *Administrative Law,* 2d ed. (1979), §§ 222-229.

[87] *E.g,* the Rules Committee under *The Statutory Powers Procedure Act,* S.O. 1971, c. 47.

greater concern are substantive, operational critiques. Exploring these will more thoroughly elucidate the proposal. There are five types of pragmatic criticism which may be advanced: (i) the proposal is cumbersome and unwieldy; (ii) lawyers are unlikely to develop confidence in non-judicial review; (iii) disputes between citizen and state cannot be mediated since the parties have unequal bargaining power; (iv) establishing an additional review tribunal will aggravate jurisdictional complications; (v) recruitment of tribunal personnel will be extremely difficult. Many of these objections are corollaries to criticisms advanced against the assumptions argued earlier. Nevertheless, each can be answered on a purely pragmatic basis.

Unwieldiness might be alleged on one of two grounds: either the volume of cases will prevent the panel from performing its suggested role, or the number of panel members, and the variety of their backgrounds, will inhibit development of a coherent jurisprudence. The first argument is unfounded, for there is no reason to suppose that the creation of a new review panel will lead to increased applications for judicial review.[88] Moreover, certain features of the proposal are expressly designed to facilitate the disposition of cases: the review tribunal will deal only with implied due process applications; it will be able to sit in several two-man panels at the same time; and because it will not be making determinations on the merits similar cases often could be heard together. This last point would be most applicable to mass-participation social insurance schemes such as Medicare, Unemployment Insurance, Canada Pension Plan, Workers' Compensation, and Old Age Security, whenever parties opt for similar panel structures. A final reason for doubting this critique is that the panel could employ traditional mechanisms to regulate its work. Doctrines such as mootness, ripeness, exhaustion, alternative remedy, primary jurisdiction and standing can be used, not to frustrate internal agency review, but constructively to improve control of administrative procedures.[89] Therefore, it is unlikely that the proposal will engender so many applications for procedural review that its purposes would be frustrated. Yet, the role proposed for the new tribunal

[88] See the statistics compiled on the Divisional Court (Ontario) by *The Report of the Attorney-General's Committee on the Appellate Jurisdiction of the Supreme Court of Ontario* (1977), 7-11. This report concludes that increased litigation results principally from factors other than the structure of dispute-settling institutions.

[89] See the model of the court function proposed by Stone in "Existential Humanism and the Law", reproduced in *Existential Humanistic Psychology* (1971).

will mean that each case it hears will require a longer time to settle; for it is an acknowledged benefit of classical adjudication that it expedites dispute settlement.[90] The use of technological devices, clerks, research assistants and the like will be necessary to permit the panel to perform its additional functions. Ultimately, however, the management of a burdensome case-load can be accomplished only by appointing more members to the tribunal. In an era of excessive recourse to institutional mechanisms of dispute-settlement such a necessity cannot be overlooked.[91]

This solution leads to a discussion of the second aspect of the unwieldiness criticism, that is, the observation that a large, multi-member tribunal inevitably becomes factious and unable to maintain a coherent review posture. This objection is particularly apt in the case of adjudicative panels, where ideas such as objectivity, *stare decisis* and certainty are cherished. Yet these have been revealed as illusions, even in the case of purely adjudicative tribunals. Given the underlying structure of the proposed tribunal, these ideas are simply inapplicable: decisions of the tribunal are mediated; each process of decision is acknowledged as unique; there is no pre-existing law to be applied; the administrative agency under review will ultimately have consented to the solution proposed; presumably it will eventually institute fair decisional process; and, lastly, because the goals of review are not exclusively rule-oriented, it is unlikely that similar cases (as similarity is understood in the doctrine of precedent) will arise. Hence, the objection of unwieldiness, as directed to the tribunal's jurisprudence, can be met.

A second criticism of the model may be that lawyers will be unable to adjust to non-judicial review. This objection also involves various themes. It could be claimed that lawyers do not trust any decisional body other than a court. While this may be generally true, there are numerous situations where, due to the complexity of the problems involved or the need for expertise, non-judicial decision-making is preferred by lawyers: commercial arbitration, grievance proceedings, and management by a trustee in bankruptcy are only three commonplace examples. If members of the review panel are carefully selected, and if their decisions are subsequently proven apposite, this structure will also attract the commitment of the Bar.

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[90] See Llewellyn, *supra*, note 51, 19-50.

[91] See Barton, *Behind the Legal Explosion* (1975) 27 Stan. L. Rev. 567; Carrington, *Crowded Dockets and the Court of Appeals* (1968-69) 82 Harv. L. Rev. 542.

But the adjustment by lawyers must also be to a process which is non-adjudicative. Because current legal practice occurs almost exclusively before adjudicative panels, this may prove more difficult. Nevertheless, only a small percentage of litigation lawyers are involved in judicial review. Those who are engaged in seeking review of administrative action have already made one adjustment away from the private-law orientation of ordinary practice. Consequently, for those who will handle the bulk of the cases before the new tribunal, a further adjustment should not be unmanageable. Yet the extent to which new models and procedures of review can be successful, in view of the acknowledged conservatism of the legal profession, is of crucial importance, and the difficulties in promoting the review proposal should not be underestimated.[92]

A non-adjudicative review panel is also likely to incur criticism that disputes between citizen and state cannot be mediated. This objection is, of course, principally ideological and can be traced to Dicey's misrepresentation of French *droit administratif*.[93] Dicey felt that administrative justice would prevail only if relations between citizen and state could be converted into a *lis inter partes* capable of adjudication before the "ordinary courts". This belief rests, however, on two questionable assumptions: first, that "ordinary courts" equalize parties and, second, the state possesses superior power in arguing procedural points. To the uninitiated it may appear that procedures before ordinary courts guarantee equal justice for all, yet most lawyers recognize that the traditional model of adjudication enhances the power of the economically stronger party. Factors such as quality of counsel, availability of costly dilatory measures, extensive discovery, possibility of strategic appeals and the like, can only be seen as the prerogative of the wealthier party.[94] Dicey's first assumption that the procedures of adjudication are value-free cannot be sustained on available evidence.

As for Dicey's conclusion that the state possesses superior power in procedural matters, one must ask whether a mediational model allows the same abuses as adjudication. May it not be the case that the very conversion of public-law disputes to a format

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[92] For a more pessimistic view of the potential for reform see Mullan, *Reform of Judicial Review — Method or Madness?* (1975) 6 Fed. L. Rev. 340; Mullan, *supra*, note 54.

[93] The principal works are Dicey, *Introduction to the Study of the Law of the Constitution* (1885), and *The Development of Administrative Law in England* (1915) 31 L.Q.R. 148.

[94] See *Symposium on Judicial Administration* (1975) 3 Hofstra L. Rev. 647.

compatible with private-law presuppositions enhances state power?[95] Most of the abuses of adjudication are technical, dilatory and not directed to the merits of a dispute. In addition, adjudication assumes an umpiral view of the decision-maker which restricts his role to a more passive supervision of the review process. Finally, the zero-sum orientation of adversarial adjudication fosters procedural wrangling. By contrast, a review process which suppresses and penalizes mutual harassment and which rests on the consent of participants cannot enhance the ascendancy of the state. Experience elsewhere seems to suggest that a mediational procedure may actually limit the power of the administration to argue procedural matters.[96] Consequently, pragmatic objections to a mediational procedure for implied due process review also do not seem justified.

A fourth criticism of the proposal arises because supervision on formal or *ultra vires* grounds remains vested in the courts. The objection is simply that creation of a competing review jurisdiction will not prevent concerns similar to those which led to this proposal from manifesting themselves in ordinary judicial review applications. It is true that the formalistic exercise of classifying functions will continue to prevail in review proceedings before the courts; but this is simply to recognize that the problems heretofore resolved by reference to classification (availability of *certiorari*, right to reconsider, sub-delegation, immunity from tort liability and so forth) will continue to exist. If the negative features of classification can be avoided in one aspect of review proceedings by adoption of a new model, the fact that characterization apparently remains necessary in others should not preclude amendment.

A further aspect of the argument that a procedural review panel should not be established is that it creates a conflict of review jurisdictions, namely, between ordinary judicial review and procedural review. Apart from the general point that multiple jurisdictions are always difficult to manage in practice,[97] it may be suggested that problems of primary jurisdiction, exhaustion and conflicting determinations will be insuperable. Yet a rule such as "formal jurisdictional questions resulting from the interpretation of enabling statutes" could well be established as the criterion of differentiation. Currently, the Bar has little trouble deciding when the issue to be argued is one of natural justice rather than pro-

[95] For an argument that the law of standing has had precisely this effect see Vining, *supra*, note 17, *passim*.

[96] See generally Brown & Garner, *supra*, note 56.

[97] See Evans's unpublished comment on a paper by Mullan at a conference held at Osgoode Hall Law School on 18 February 1977.

cedural *ultra vires;* there is no reason to suspect that creation of a new panel will suddenly deprive it of this insight.[98]

A final criticism is that there are simply not enough competent individuals to staff the review tribunal. This point may be quickly dispatched: even in the most pessimistic hypothesis, the panel need have no more than twenty members. Of these one would expect about half to be selected because of expertise in adjudication, with perhaps one or two members representing other decisional paradigms. Finding and recruiting such a small number of tribunal members should not be a difficult task, as the Bar itself provides a large pool of candidates for many of the required specialities. Of course, it is necessary to train the panel for its task, to provide usual guarantees of independence, to offer adequate remuneration, to organize an efficient secretariat and to develop internal procedures and policies. Yet these are technical matters which have not proved unmanageable in analogous contexts.[99] Consequently, of the pragmatic objections which may be raised against implementing this model, only one, the readjustment of the profession to non-judicial and non-adjudicative procedural review, is significant. Yet, for the reasons given above, any resistance to the model may be overcome, and a genuine commitment to the new panel generated.

3. Summary

Briefly, both constitutional and pragmatic objections to the model proposed can, for the most part, be answered. Section 96 problems are capable of being surmounted at the provincial level, and they do not arise in the federal sphere; the efficacy of privative clauses is a minor issue. Pragmatic criticisms concerning efficiency, staffing, attitude, jurisdictional conflict and the attitude of the Bar are also not conclusive. Hence, while the model's assumptions may be challenged, other objections to a procedural review tribunal are not insurmountable.

C. *Conclusion*

The model suggested for institutionalizing procedural review of administrative decisions ultimately rests on beliefs about the nature

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[98] Nevertheless, the continuing problem of defining the jurisdiction of the Ontario Divisional Court is evidence of the difficulty of partial reform. See Evans, *Judicial Review in Ontario — Some Problems of Pouring Old Wine into New Bottles* (1977) 55 Can. Bar Rev. 148.

[99] See, *e.g.*, Issalys, *The Professions Tribunal and the Control of Ethical Conduct among Professionals* (1978) 24 McGill L.J. 588.

of implied procedural fairness and the function of supervision on that basis. The establishment of a process of conciliation, by persons expert in the forms of various mechanisms for ordering human affairs, undertaken within decisional paradigms chosen by the parties, and directed to developing and implementing better administrative procedures, as well as fostering a role morality consistent with these procedures, is the guiding purpose of this model. Although it envisions non-judicial review and non-adjudicative procedures, and although it is directed to more than the conclusive resolution of procedural complaints in individual cases, it nevertheless falls broadly within the common law tradition. The proposal capitalizes on the theoretical revolution in implied procedural review resulting from the fairness doctrine, without judicializing bureaucratic procedures or compromising the effectiveness of the administrative process.

III. Procedural fairness in perspective

Too often the field of administrative law has been characterized by disputes which produce much heat but little light. In the literature of judicial review, positions have been caricatured in the past as pro-court or pro-agency and attitudes which sustain them similarly qualified. Recent writings, however, seem to be more oriented to exploring theoretical foundations of administrative law.[100] Moreover, since courts are now assuming a more activist posture, writers are devoting greater attention to the constitutional and political implications of judicial review. Even Law Reform Commissions and other agencies are beginning to address the fundamental issues and assumptions which shape our political ideology and governmental institutions.[101] As the perennial problems of administrative law receive more sophisticated analysis, the "less illuminating disputes of the thirties"[102] are becoming less frequent.

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[100] See, *e.g.*, Wright, *The Courts and the Rule-making Process* (1974) 59 Cornell L. Rev. 375; Chayes, *supra*, note 57; Arthurs, *supra*, note 4; Stewart, *The Reformation of American Administrative Law* (1975) 88 Harv. L. Rev. 1667; Rabin, *Administrative Law in Transition: A Discipline in Search of an Organizing Principle* (1977) 72 Nw. U. L. Rev. 120; Scalia, *The ALJ Fiasco — A Reprise* (1979) 47 U. Chi. L. Rev. 57; Ginsburg, *Panel IV: Improving the Administrative Process — Time for a New A.P.A.* (1980) 32 Admin. L. Rev. 285;Vining, *supra*, note 17; Davis, *Discretionary Justice* (1969).

[101] See, *e.g.*, Law Reform Commission of Canada, *Independent Administrative Agencies* (1980); Economic Council of Canada, *Responsible Regulation* (1979).

[102] Willis, *supra*, note 26, 360.

The adoption of the doctrine of procedural fairness by the Supreme Court of Canada in the *Nicholson* case illustrates the contribution thoughtful scholarship can make to administrative law. It has already produced one careful analysis of several aspects of the theory of judicial review.[103] Yet, assuming the judiciary's continued interest in extensive implied supervision, and given the practical difficulties this interest has produced, legal writers must attempt to reconcile divergent jurisprudential themes, even when reconciliation involves substantial readjustment of traditional notions of procedural review.[104]

In law, developments which often first appear as small glosses on received doctrine eventually transform vast areas of learning. The theory of fairness is one such development. It makes explicit many recent, but implicit, challenges to shibboleths of the common law. Adjudication is no longer the optimal paradigm of due process in legal decision-making. Adversariness no longer has a claim to superiority as a means of resolving disputes. Legal rules themselves cannot pretend to absolve individuals of personal responsibility for juridical solutions. The reproach and censure associated with judicial decrees are revealed as second-best mechanisms for ensuring respect for procedural propriety. The theory of fairness embarks administrative law, and eventually all law, on a path which ends with the recognition that law is not merely a collection of signs, words and concepts having only discursive meaning. It is also symbol, a metaphor of human society.[105]

One might now say, with some degree of certainty, that the intellectual challenge of administrative law in the eighties is not to ignore the institutional difficulties created by the growing bureau-

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[103] Loughlin, *supra*, note 2.

[104] *E.g.*, Fiss, *The Forms of Justice* (1979) 93 Harv. L. Rev. 1; Katzmann, *Judicial Intervention and Organization Theory: Changing Bureaucratic Behavior and Policy* (1980) 89 Yale L.J. 513; and Tushnet, *Truth, Justice and the American Way: An Interpretation of Public Law Scholarship in the Seventies* (1979) 57 Tex. L. Rev. 1307.

[105] I am, of course, drawing heavily on Langer, *Philosophy in a New Key*, 3d ed. (1957), in these concluding remarks. See also Viming, *supra*, note 17, 181:

> Law is symbol as well as system. ... A symbol does not merely describe a thought. It is not a cipher, cool and detached. ... Law and litigation have served to separate individuals from one another, to push and keep them apart. ... Law need no longer symbolize what it has in the past. However potent a symbol is, it can change. ... Litigation can now bring home as forcefully as any religious ritual that each of us is in fact involved in mankind. Public law has come of age.

cratic state and the tentative attempts by courts to respond to this growth; rather, it is to develop and staff institutions to resolve them. Accordingly, the highest calling for administrative lawyers will be not to destroy the symbolism of the law but to transform it, in the search for new meaning in the problems of public law.[100]

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[100] I am grateful to the participants at the Canadian Conference on the History and Philosophy of Law, held at the University of Windsor, June 9, 10 and 11, 1980, for their insistence upon the philosophical importance of the emerging theory of procedural fairness. See the forthcoming proceedings of the Conference for a paper which develops this theme.