

NATURAL JUSTICE IN CANADA

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THE CONTENT OF FAIR PROCEDURE

“[A]lthough the question of whether the principles of natural justice have been complied with in any given case is an issue of law, nevertheless it rests in each instance on the particular facts.”

Mr. Justice Gale, 1966

Common to every formulation of the content of natural justice is the desire to weigh administrative efficiency against the seriousness of the consequences to the individual. Factors such as urgency, secrecy, national security, the number of people affected, and so on, are relevant on the “administrative efficiency” side of the equation. The factors affecting the seriousness of the consequences to the individual are more difficult to enumerate, though “rights” to property, liberty, livelihood and good reputation have been rigorously protected in the past. However, no matter how complete the enumeration of relevant factors, no matter how comprehensive the taxonomy adopted by the courts, the appropriate content of natural justice is and will remain an issue for subjective assessment on the facts of each individual case. For the lawyer or administrator attempting to determine in advance of litigation the standard of procedure which the common law will apply in any given case this provides a disconcertingly imprecise standard. Nevertheless, a knowledge of the factors which are considered important by the courts, coupled to a familiarity with the spirit in which they approach natural justice problems provides guidance in the administrative law area which is equal to that provided by common law tests used in other fields.

The present chapter will attempt to demonstrate how the “balancing test” is used by the courts to determine the appropriate content of natural justice in any given case. In his casebook, *The Administrative Process*,² Professor F.A. Laux has distilled ten “rights” which form part and parcel of the right to be heard by a disinterested judge: the rights to notice, to examine reports and other secret evidence, to particulars, to adjournment, to cross-examination, to counsel, to open court, to be heard by the person who decides, to know reasons for the decision, and to have a disinterested

² *Posluns v. Toronto Stock Exchange* (1964), 46 D.L.R. (2d) 210 at 319 (Ont. H.C.).
(1978, 4th ed.) Edmonton: The University of Alberta.

and unbiased judge. These will be considered in turn in order to illustrate the circumstances which the courts consider significant in deciding the appropriate content of natural justice involved in any particular case. The "right" to an oral hearing will also be discussed.

1. NOTICE

Audi alteram partem imports a duty which is greater than merely a requirement that administrators must hear any interested parties who may happen to present themselves before the decision-maker. A positive onus lies upon persons exercising powers affecting others. They must take reasonable steps to ensure that those affected are aware of both the issues raised, and when and where they may present their side of the case. The right to notice is seen as an essential part of natural justice without which there cannot truly be said to be any opportunity to be heard at all.

In *Re Child Welfare Act; Walters v. Phillips*, Adamson C.J.M. was of the view that: "The right of the subject to notice, and the right to be heard before his liberty, property rights, or family rights are disposed of by judicial proceedings, is fundamental to our jurisprudence. On this right the reign of law is founded. Under our system there can be no adjudication between parties without notice of the proceedings." "Notice" in this context really refers to two rights: a right to know the time, date, and place of the hearing (or the means by which representations might be made) and a right to know the case to be met. In one recent case, Moir J.A. of the Alberta Court of Appeal expressed the view that the respondents "were entitled to notice of the hearing, to have the precise offence with which they were charged set out..." There is, however, no absolute standard either with regard to the amount of advance warning or as to how precisely the case against must be outlined: "All that is required is that reasonable notice be given, with the grounds of complaint, and that a reasonable opportunity to answer the allegations against him be afforded."⁵

Exactly what is reasonable notice will depend upon the circumstances of the particular case and will vary according to the seriousness of the issue, the number of persons affected and the degree of their sophistication, the complexity of the issues, the amount of time reasonably required to prepare an argument, the sensitivity of the matter, the need to protect sources, and so on. In *Richelieu and Ontario Navigation Co. v. Commercial Union Assurance Co.*, the Quebec Queen's Bench annulled an insurance

⁵ (1955) 15 W.W.R. 104 at 109 (Man. C.A.), approved by Kirby J. in Chambers in *Comiac Exploration Ltd. v. Oil and Gas Conservation Board of Alberta* (1964), 47 W.W.R. 81 at 85 (Alta. S.C.).

⁶ *Youngberg v. Discipline Committee of the Alberta Teachers' Association* (1977), 8 A.R. 36 at 47 (Alta. S.C.A.D.).

⁷ *Klymchuk v. Cowan* (1964), 47 W.W.R. 467 at 480, per Smith J. (Man. Q.B.).

arbitration decision on the basis that the appellants had not been given a reasonable time to prepare their case. Lacoste J.C., expressed the principle applicable as follows: "Si donc une cour de justice arrive à la conclusion qu'une des parties a été prise par surprise et n'a pas pu faire valoir ses prétentions, et que les arbitres n'ont pas adjugé en connaissance de cause, il me semble alors du devoir des juges de mettre de côté la sentence arbitrale. Agir autrement serait consacrer un déni de justice."⁶ The amount of notice given in this case was clearly inadequate on the facts: a complex question of valuation was involved which *could not* be resolved without hearing the parties, there was no great urgency such as would justify the haste, and a considerable sum of money was involved.

The notice given must be reasonable not only in the sense that enough time must be provided in which to prepare a case, but also in the sense that every possible step must be taken to ensure that the party affected is in fact aware that a decision is to be made on the particular issue and that he may make representations. In *Beaverbrook Ltd. v. Highway Traffic and Motor Transport Board*⁷ the Manitoba Queen's Bench emphasized that there are circumstances in which notice must be specifically given to individuals affected even though a statute may contain no such provision. Acting under the Manitoba Highways Protection Act, 1966, the Motor Transport Board issued a control order affecting certain land owned by the plaintiffs. The order was made only after holding the public hearing required by statute and after publishing notice of the hearing as required by s.15(3) of the Act:

The subsection goes on to provide for specific notice to the Minister of Urban Development and Municipal Affairs, the traffic authority for the highway, the municipality in which the highway is situated, and notice in a newspaper of general circulation and in the Manitoba Gazette. Nowhere is it specifically stated that notice should be given to "all persons who own, or have an interest in, land situated".⁸

Nevertheless, Mr. Justice Hunt was of the view that there had been a breach of natural justice and that there had therefore been no legal hearing at all: "Under all the circumstances of this case, I must find that the Traffic Board, not having given effective notice, therefore failed to hold a public hearing at which 'all persons who own, or have an interest in, land' were

⁸ [1894] Q.R. 410 at 413 (Q.Q.B.). The headnote offers a translation of this passage: "Where it appears to the court that one of the parties to the arbitration was taken by surprise and had no opportunity of supporting his pretensions, more especially in a case where the arbitrators were not in a position to arrive at a correct estimate of the amount which should be awarded without hearing the parties and their proofs, the award will be annulled."

⁷ [1973] 4 W.W.R. 473 (Man. Q.B.).

⁸ *ibid* at 477.

we wish you to give now to include you and your children in such deportation order". He also asked her if she wished to secure counsel "before giving evidence". He then proceeded to question her.

However, at no point was she told she had the right to an opportunity to establish that she should not be included in the order. I do not regard the mere reading of s.37(1) to her, when she was on the stand as a witness, followed by questioning by the Special Inquiry Officer, as constituting the giving of such an opportunity.¹⁴

The notice given must be adequate not only in the sense that it must seek to actually draw the attention of persons to their opportunities to be heard and in the sense that it must be given in a reasonable time before the scheduled time of the hearing, but also in the sense that it must be sufficiently precise as to the case to be met. So far as is possible nothing is to be left to guess-work. This was emphasized in *Forest v. La Caisse Populaire du Saint-Boniface Credit Union Society Ltd.* where Freedman J.A., for the Manitoba Court of Appeal, said that: "Notice here means adequate notice. It should be clear and definite, so that its recipient will know precisely what he has to meet. Certainly, where expulsion is contemplated the notice should so state, and leave nothing to guess-work."¹⁵ Moreover, his Lordship did not feel that it was at all relevant that the plaintiff in fact knew what he had done. He quoted with approval Professor Dennis Lloyd's observation that "it seems hardly adequate that the accused member should be left to guess what is to be alleged against him even though his guess may well turn out to be correct".¹⁶

The decision-making body need not make known every detail of the case to be met. The question — as always — is of what is reasonable in all the circumstances. In *Selvarajan v. Race Relations Board*, Lord Denning M.R. had this to say:

that which fairness requires depends on the nature of the investigation and the consequences which it may have on persons affected by it. The fundamental rule is that, if a person may be subjected to pains or penalties, or be exposed to prosecution or proceedings, or deprived of remedies or redress, or in some such way adversely affected by the investigation and report, then he should be told the case made against him and be afforded a fair

¹⁴ *ibid* at 891-892.

¹⁵ (1963), 41 W.W.R. 48 at 54 (Man. C.A.).

¹⁶ *ibid* at 55; quoting Professor Dennis Lloyd, "Judicial Review of Expulsion by a Domestic Tribunal" (1952), 15 M.L.R. 413 at 418.

permitted to appear and make submissions. How can one do so unless one has effective notice of such a hearing?"⁹

In coming to his conclusion that the board had not complied with the common law requirements of notice, his Lordship laid considerable emphasis on three matters:

1. It would have been "a simple administrative task to obtain the names of those persons or corporations with a registered interest in lands... and given them particular notice".¹⁰

2. The effect on the individual was drastic: "such an order amounts substantially to expropriation of the effective use of the land concerned. It destroys its usefulness to the owner while leaving the owner in possession of the legal title and still liable for payment of taxes..."¹¹

3. "To expect people who are owners of such lands to obtain, read, consult, and act on the sort of notice given in the Manitoba Gazette and in the newspaper advertising which we have here is unrealistic."¹²

*Moshos v. Minister of Manpower and Immigration*¹³ is another case illustrating that notice must be adequate. It is not enough that some action which may by some technical argument amount to notice has been taken. In that case a Deportation Order was made against a non-immigrant who had taken employment without permission and against his wife and children. The relevant provisions were s.37(1) of the Immigration Act and s.11 of the Immigration Inquiries Regulation. At an inquiry into the status of Mr. Moshos his wife appeared as a witness. The Special Inquiry Officer read s.37(1) to her: "Where a deportation order is made against the head of the family, all dependent members of the family may be included in such order and deported under it." He also advised her that it might be desirable to retain counsel. The question arose as to whether this satisfied the requirement of s.11 of the Immigration Inquiries Regulations: "11. No person shall, pursuant to subsection (1) of section 37 of the Act, be included in a deportation order unless the person has first been given an opportunity of establishing to an immigration officer that he should not be so included." Martland, J., for the Supreme Court felt that this provision had not been complied with:

It is true that the Special Inquiry Officer read the provisions of s.37(1) to her and told her that "in view of this section of the Regulations (sic), in the event a deportation order is issued against your husband it may be necessary on the basis of the evidence that

⁹ *ibid* at 480.

¹⁰ *ibid* at 480.

¹¹ *ibid* at 476.

¹² *ibid* at 480.

¹³ [1969] S.C.R. 886.

opportunity of answering it. The investigating body is, however, the master of its own procedure. . . . It need not put every detail of the case against a man. Suffice it if the broad grounds are given. It need not name its informants. It can give the substance only.¹⁷

This passage has been expressly approved in Alberta in *McCarthy v. Board of Trustees*¹⁸ and in the Supreme Court of Canada in *Re Nicholson*.¹⁹

2. EXAMINATION OF REPORTS AND SECRET EVIDENCE

It was said above that the requirement of notice involved informing the person of the case he has to meet in as much detail as is necessary to permit the adequate preparation of argument. With regard to internal reports and secret evidence considered by the decision-maker this will impose duties that are variable according to the circumstances. Four main principles guide the approach of the courts to such questions.

The normal rule is that persons whose interests will be affected by administrative decisions have a right to see all evidence that is available to the decision-maker. Thus, in *Hofer v. Communal Property Control Board*,²⁰ it was held that there had been a breach of natural justice where a property control board refused to reveal to the applicants copies of submissions and representations made by opponents. Similarly, in *Re Fairfield Modern Dairy Ltd. and Milk Control Board of Ontario*,²¹ it was said that no hearing had been conducted in accordance with the governing statute where a dairy licence was suspended without disclosing the evidence upon which the charge was based.

A corollary of this is that a tribunal cannot rely on information obtained after the hearing has been held unless the new evidence is disclosed and an opportunity to meet it is given.²² There may, however, be an exception in some cases if the additional material considered is obtained from publicly

¹⁷ [1976] 1 All E.R. 12 at 19 (D.C.).

¹⁸ [1979] 4 W.W.R. 725 at 738 (Alta. S.C.T.D.).

¹⁹ (1978), 88 D.L.R. (3d) 671 at 682 (S.C.C.). For further discussions relating to the adequacy of notice, see *McCarthy v. Attorney General of Canada*, unreported, 27 June 1980 (F.C.A.); *Hopper v. Municipal District of Foothills No. 31*, [1975] 2 W.W.R. 337 (Alta. S.C.T.D.).

²⁰ (1967), 60 W.W.R. 559 (Alta. D.C.).

²¹ [1942] O.W.N. 579 (Ont. H.C.); see also *Hoyda v. City of Edmonton* (1979), 18 A.R. 215 (Alta. D.C.); *Re David Wai Keung Bau and Minister of Employment and Immigration*, unreported, 16 September 1980 (F.C.A.); *Cypress Disposal Ltd. v. Service Employees International Union, Local No. 224*, [1975] 2 W.W.R. 663 (B.C.C.A.); *McGregor-Thompson Line Construction Ltd. v. International Brotherhood of Electrical Workers, Local 2085*, [1979] 4 W.W.R. 661 (Man. Q.B.).

²² *Pfizer Co. Ltd. v. Deputy Minister of National Revenue* (1975), 68 D.L.R. (3d) 9 (S.C.C.).

known governmental sources. In *R. v. Schiff; ex parte Trustees of Ottawa Civic Hospital*,²³ the board complained to the parties of the fragmentary nature of the material they had supplied. Following the hearing, and on its own initiative, the board resorted to information provided by public governmental sources to complete the picture. This information was "entirely supplemental in its nature and kind to the very material the parties themselves supplied to the board".²⁴ In holding that this did not constitute a breach of natural justice, Aylesworth J.A. emphasized the unique set of circumstances which influenced his decision:

The board complained of the fragmentary nature of the material supplied by the parties which was in the nature of statistics, collective bargaining agreements with other hospitals and the like, and it was natural that the board should look to such further material, and should be expected to look to it in view of that expressed dissatisfaction made known to the parties and in view of the board's intention expressed to them that it was going to seek further data of its own volition. Having regard to the highly informal method of procedure adopted by the parties in the hearing before the board of arbitration and, as I have said, to the nature of the material and the kind of presentation made with respect to that material as well as to the nature of the public material resorted to by the board, we fail to perceive any failure to afford natural justice to the trustees in what the board did in that respect.

... what the board did with respect to getting the kind of material it did get after the hearing, and with respect to the use to which the board put it, really was very much akin to what frequently is resorted to in the regular courts of law wherein those courts take judicial notice of well-known public facts, knowledge, and information. We think what has already been said illustrates that similarity and demonstrates that in fact there was no denial of natural justice.²⁵

What the board did in this case was in substance not very different from what occurs when members of an expert tribunal weigh the evidence and arguments presented to them against their own expertise accumulated through a thorough familiarity with previous cases of similar nature.

If the decision-maker's standard procedure involves reliance upon reports prepared for it by inspectors the plaintiff will normally have no right to see

²³ [1970] 3 O.R. 476 (Ont. C.A.).

²⁴ *ibid* at 479.

²⁵ *ibid* at 479-480.

such reports. It is permissible for a tribunal to "hear" through its inspectors. This is the result of the House of Lords decision in *Local Government Board v. Arlidge*,²⁶ where the appellant asked both to see the report which was made following a full public hearing and thereafter to be heard again on the whole case. Viscount Haldane L.C. was of the view that there is no such right "[p]rovided that the work is done judicially and fairly".²⁷ To hold otherwise would be to force the wheels of state to grind to a halt:

The Minister at the head of the board is directly responsible to Parliament like other Ministers. He is responsible, not only for what he himself does, but for all that is done in his department. The volume of work entrusted to him is very great and he cannot do the great bulk of it himself. He is expected to obtain his materials vicariously through his officials, and he has discharged his duty if he sees that they obtain these materials for him properly. To try to extend his duty beyond this and to insist that he and other members of the board should do everything personally would be to impair his efficiency. Unlike a judge in a court he is not only at liberty but is compelled to rely on the assistance of his staff.²⁸

In such cases it may be that the decision-maker is not obliged to hear as a matter of practicality. Or, it may be that the courts tacitly recognize the fact that in many circumstances the formal decision is no more than a formality, the effective conclusion having been reached by the "inspector".

If, however, the inspector conducts his inquiry in a manner that is in breach of natural justice there will normally be a right to know the substance of the report and to be heard by the ultimate decision-maker: "if the purported 'advice' is bad, then any decision which takes that advice into account is tainted by the illegality".²⁹ This is one possible explanation of *Knapman v. Board of Health for Salfleet Township*³⁰ where an inspector's adverse report resulted in an order being issued to vacate certain cottages owned by the plaintiff. *Certiorari* was granted to set aside the closing order because neither the inspector nor the Board of Health permitted Knapman to know the nature of the case against him or to make representations before the order was issued. Gale J. approved the following dictum:

It is not consistent with natural justice that the mind of the tribunal should be swayed by statements which are not communicated to the

²⁶ [1915] A.C. 120 (H.L.).

²⁷ *ibid* at 133.

²⁸ *ibid*.

²⁹ A. Beavan, "Comment on *R. v. Secretary of State, ex parte Hosenball*" (1977), P.L. 201 at 204.

³⁰ [1954] 3 D.L.R. 760 (Ont. H.C.), *affid.* (1956) 6 D.L.R. (2d) 81 (S.C.C.).

appellant, and with which he is given no opportunity to deal, and which are either (a) a summary of, or an expression of, the result of the evidence given before the inspector, or (b) statements of fact made by the inspector as the result of his inspection. An order cannot justly be made against any man upon evidence not disclosed to him so that he may rebut it if he can.³¹

In many such cases the "inspector" is in effect a prosecutor, gathering evidence and mustering arguments against an individual, rather than the impartial investigator of the *Arlidge* type. In any situation where the inspector's role is of this nature there is clearly a very strong case to be made that the person whose interests are to be affected should both know the content of the report and be given an opportunity to answer to it before the ultimate decision-maker. The right to know the contents of a prejudicial report in such circumstances has been upheld in cases involving (amongst others) a steward's report to the Ontario Racing Commission,³² a police report to the Secretary of State on an application for citizenship,³³ a police regulations officer's report to the Alberta Rent Regulation Appeal Board,³⁴ and the report of an investigating committee of a municipal council hearing a charge of damage to crops.³⁵

The normal rule that a person is entitled to know all of the evidence against him before being heard may be modified for reasons of public policy.³⁶ This will occur, for example, where matters of national security are at issue³⁷ or where there is a real danger of strong-arm tactics being used against informants.³⁸ In a case involving the control of gambling in the United Kingdom, Lord Denning M.R. expressed the view that the Gaming Board

³¹ [1954] 3 D.L.R. 760 at 772 (Ont. H.C.), quoting *Local Government Board v. Arlidge*, [1914] 1 K.B. 160 at 188, *per* Buckley L.J. The House of Lords decision in *Arlidge* can however be supported because the facts of *Knapman* and *Arlidge* are distinguishable. In the latter case a full public hearing at which all sides were heard was conducted by the inspector before submitting his report, whereas no equivalent attempt to hear was made in *Knapman's* case.

³² *R. v. Ontario Racing Commission; ex parte Taylor*, [1971] 1 O.R. 400 (Ont. C.A.).

³³ *Lazarov v. Secretary of State of Canada*, [1973] F.C. 927 (F.C.A.).

³⁴ *Madison Development Corporation Ltd. v. Rent Regulation Appeal Board* (1977), 7 A.R. 360 (Alta. S.C.T.D.).

³⁵ *Re Poffenroth Application* (1954), 13 W.W.R. 617 (Alta. S.C.T.D.).

³⁶ or simply because secrecy is expressly permitted by the terms of the governing statute: *R. v. Manitoba Labour Board; ex parte Bakery and Confectionary Workers, Local 389* (1967), 62 D.L.R. (2d) 219 at 225 (Man. Q.B.). See also *Re Abel and Director, Penelanguishene Mental Health Centre* (1979), 97 D.L.R. (3d) 304 (Ont. D.C.); *Re Bombardier Ltd. and Restrictive Trade Practices Commission* (1980), 4 A.C.W.S. (2d) 173 (F.C.T.D.).

³⁷ *R. v. Secretary of State for Home Affairs; ex parte Hosenball*, [1977] 1 W.L.R. 766 (C.A.).

³⁸ *R. v. Gaming Board for Great Britain; ex parte Benaim and Khaida*, [1970] 2 Q.B. 417 (C.A.).

can and should receive information from the police in this country or abroad who know something of them. They can, and should, receive information from any other reliable source. Much of it will be confidential. But that does not mean that the applicants are not to be given a chance of answering it. They must be given a chance of answering it. They must be given the chance, subject to this qualification: I do not think they need tell the appellant the source of their information, if that would put their informant in peril or otherwise be contrary to the public interest. . . . Likewise with the details of the information. If the board were bound to disclose every detail, that might itself give the informer away and put him in peril. But, without disclosing every detail, I should have thought that the board ought in every case to be able to give the applicant sufficient indication of the objections raised against him such as to enable him to answer them. That is only fair. And the board must at all costs be fair.³⁹

As in other areas, the standard here would seem to be the maximum degree of fair play that is consistent with the effective functioning of the tribunal. Natural justice requires only what is reasonable after all relevant considerations have been weighed. Confidentiality, and the reasons for it, is one such consideration to be taken account of.

3. PARTICULARS

It will be recalled that in *Forest v. La Caisse Populaire Freedman J.A.* expressed the view that the requirement of adequate notice is only met where it is "clear and definite, so that its recipient will know precisely what he has to meet".⁴⁰ Although this statement is to be understood in a limited sense in cases involving state security or a confidentiality that must be protected for public policy reasons, it undoubtedly holds true in all situations in which there are no compelling reasons why the precise case to be met should not be revealed.

In *Re Wilson and Law Society of British Columbia*,⁴¹ a barrister and solicitor was served with a citation informing her that the Disciplinary Committee would be holding a hearing to determine if she had committed any of the offences set out in s.48 of British Columbia's Legal Professions

³⁹ *ibid* at 431, approved by Thurlow J. in *Lazarov v. Secretary of State of Canada*, [1973] F.C. 927 at 936 (F.C.A.).

⁴⁰ (1962), 41 W.W.R. 48 at 54 (Man. C.A.); see also *Youngberg v. Discipline Committee of the Alberta Teachers' Association* (1977), 8 A.R. 36 (Alta. S.C.A.D.); *Pollock v. Alberta Union of Provincial Employees* (1978), 12 A.R. 398 at 408 (Alta. S.C.T.D.).

⁴¹ (1974), 47 D.L.R. (3d) 760 (B.C.S.C.).

Act. Mr. Justice Toy took the view that this did not constitute adequate notice, having regard to all the circumstances:

[T]o notify the member that the disciplinary committee will determine if she has been guilty of *any* of the offences set out in s.48 is a much too all-encompassing expression to conceivably be construed as adequate notice of the accusation or accusations made against the member.

. . . Such a description encompasses every conceivable dereliction that a member could be reprimanded, fined, penalized for costs, suspended, or disbarred for. In all conscience how could a member be asked whether or not she is prepared to *admit* or deny such a complaint?

Notice and appropriate notice, in my respectful view, are principles of natural justice that persons subject to proceedings of this nature are entitled to as a fundamental right.⁴²

At the very least, a person should know the issues raised before the tribunal. In any case, whether the legal duty of disclosure has been fulfilled will depend on all the circumstances of the case and on the particulars which were in fact revealed to him.⁴³

Again, it should be noted that there may be situations in which it will be said that natural justice has been complied with even though the particulars provided were not in fact sufficient to permit the person concerned to adequately prepare argument. The issues here are essentially the same as are involved where secret evidence is obtained by the tribunal and similar principles govern.⁴⁴

⁴² *ibid* at 761-762.

⁴³ see Cartwright J. (dissenting) in *Labour Relations Board v. Trader's Service Ltd.*, [1958] S.C.R. 672 at 691.

⁴⁴ see e.g. *Ex parte Hosenball*, supra, note 37. It is submitted that similar considerations were in the minds of the majority of the Canadian Supreme Court in deciding *Mitchell v. R.* (1975), 61 D.L.R. (3d) 77. If this is not the case, the views of the minority in that case and of Toy J. in *Wilson's case* (supra, note 41) are clearly preferable to the non-sense reasons given by the majority (quoting the headnote at p. 78): "the requirements of s.2(c)(i) [of the Canadian Bill of Rights] guaranteeing the right to be informed promptly of the reason for one's arrest or detention were met. The reason was the suspension of the accused's parole, of which fact the accused was aware. His real complaint was merely that he had not been informed of the reasons why parole was suspended and later revoked, but the Canadian Bill of Rights does not require the board to disclose its reasons for its decisions."

4. ORAL HEARING

The right to be heard does not necessarily involve a right to an oral hearing. It means only that an adequate opportunity must be given to present a case. What is adequate will depend on all the circumstances surrounding the exercise of the particular power in issue. At one extreme, simple written submissions will suffice, while at the other (for example, where veracity is a key issue), a full oral hearing may be required. In a number of circumstances, the right may involve less than would be required to allow for an adequate presentation; for example, if there is a need for a quick decision or if the range is so great as to make the granting of an oral hearing to everyone whose interests might be affected manifestly impossible.

The governing principle in this area is the freedom of administrative tribunals to determine their own procedure, provided only that they do not select a course which is unfair: "They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view".⁴⁵ The necessity of an oral hearing was specifically considered in the recent Privy Council decision in *Jeffs v. New Zealand Dairy Production and Marketing Board*, where Viscount Dilhorne said:

In the discharge of its duty to act judicially, it was the board's duty to "hear" interested parties. In *R. v. Local Government Board*; *ex parte Arlidge*, Hamilton L.J. said: "In my opinion, the question whether the deciding officer 'hears' the appellant audibly addressing him or 'hears' him only through the medium of his written statement is, in a matter of this kind, one of pure procedure."⁴⁶

Viscount Dilhorne emphasized that the procedure used was within the discretion of the decision-maker and that an oral hearing could have been dispensed with on the facts. It may, however, be a necessary component of fairness if the credibility of witnesses is involved.⁴⁷

These decisions have been approved by the Canadian Supreme Court on at least two occasions⁴⁸ and the position is the same here as in the United Kingdom or New Zealand:

⁴⁵ *Board of Education v. Rice*, [1911] A.C. 179 at 182, *per Lord Loreburn* (H.L.), approved by Viscount Haldane L.C. in *Local Government Board v. Arlidge*, [1915] A.C. 120 at 133 (H.L.).

⁴⁶ [1967] 1 A.C. 551 at 566-567 (P.C.).

⁴⁷ *ibid* at 568.

⁴⁸ *R. v. Quebec Labour Relations Board*; *ex parte Komo Construction Inc.* (1967), 1 D.L.R. (3d) 125 (S.C.C.); *Quebec Labour Relations Board v. Canadian Ingersoll Rand Co. Ltd.* (1968), 1 D.L.R. (3d) 417 (S.C.C.).

It has been stated that "an administrative tribunal is not bound to hold oral hearings if they give the parties the chance to state their case in writing".⁴⁹ This is a fair generalization of the general view: such tribunals as are required by statute, or by the common law, to allow interested persons to present or dispute a case, may choose either oral or written submissions so long as the means chosen afford such persons an adequate opportunity to do either.⁵⁰

5. ADJOURNMENT

In some situations it may be necessary to delay proceedings in order to provide a person with a reasonable opportunity of meeting the case against him.⁵¹ A tribunal does not, however, have to grant every adjournment that is requested by the parties. The test is one of reasonableness and the party making the request must not seek adjournment merely to compensate for his own haphazard approach to preparation of his case.⁵² Reid and David have suggested that two main elements are relevant in determining whether a refusal of adjournment will amount to breach of natural justice in any given case: "Failure to grant an adjournment, or a sufficient adjournment, may amount to a denial of natural justice, provided it deprived a person of a reasonable opportunity to answer the case against him, and provided further that he showed a good reason for his request".⁵³

The decision whether to adjourn or to proceed immediately is a matter for the tribunal's discretion. In *R. v. Botting*, Laskin J.A. (as he then was), said that where a magistrate is hearing a preliminary inquiry "[a] discretion is vested in him to grant or refuse an adjournment; and in my opinion, even if he is unwise to refuse an adjournment, he does not either lose or exceed his jurisdiction".⁵⁴ Nevertheless, this discretion is not unlimited. It must be correctly exercised. According to Culliton C.J.S., "when there has been a wrongful refusal to grant an adjournment, resulting in the denial of natural justice, *certiorari* may lie to quash the order and directions of the board . . .

⁴⁹ *Vernon v. Public Utilities Commission* (1953), 9 W.W.R. 63 at 65 (B.C.C.A.).

⁵⁰ Robert F. Reid and Hillel David, *Administrative Law and Practice* (1978, 2nd ed.) Toronto: Butterworth & Co. (Canada) Ltd. at 95.

⁵¹ e.g. *Burnbrae Farms Ltd. v. Canadian Egg Marketing Agency* (1976), 65 D.L.R. (3d) 705 (F.C.A.); *Re Sreedhar and Outlook Union Hospital Board* (1972), 32 D.L.R. (3d) 491 (Sask. C.A.).

⁵² *R. v. Ontario Labour Relations Board*; *ex parte Nick Masney Hotels Ltd.* (1969), 13 D.L.R. (3d) 289 at 293-294 (Ont. C.A.); *Re Crux and Leoville Union Hospital Board (No. 2)* (1972), 32 D.L.R. (3d) 373 (Sask. Q.B.), *affd.* 35 D.L.R. (3d) 619 (Sask. C.A.).

⁵³ Reid and David, *supra*, note 50 at 220. See *Wigby v. Pearson*, [1977] 2 W.W.R. 654 (Y.T.S.C.).

⁵⁴ (1966), 56 D.L.R. (2d) 25 at 42 (Ont. C.A.). See also *R. v. Manhas* (1980), 32 N.R. 8 (S.C.C.); *R. v. Gilberg*, [1975] 2 W.W.R. 171 (Alta. S.C.A.D.).

Whether or not there has been a wrongful refusal to grant an adjournment must be determined in light of the facts in each case.⁵⁵ In each case the tribunal must balance the complexity and seriousness of the issue against the desirability of reaching a conclusion as soon as possible. Previous cases have recognized the legitimate concern of a party to seek adjournment in order to retain counsel (where that is otherwise necessary),⁵⁶ where the notice has been inadequate,⁵⁷ where it has been impossible to secure the attendance of essential witnesses,⁵⁸ and so on.

An adjournment need not be granted, however, if the applicant does not attempt to show why it is needed or if the sole reason is his own fault: "it is in general always for an applicant to show good reason not attributable to his own fault for obtaining an adjournment".⁵⁹ Thus, in *Re Piggott Construction Ltd.* the complainant was unable to establish a right to adjournment because it "did not act reasonably".⁶⁰ It knew of the unsuitability of the date proposed one month in advance, but didn't notify the board until the actual time of the hearing. The result was that the board and the opposing parties were greatly inconvenienced for no other reason than the company's lack of courtesy in not objecting to the date at an earlier time. The company "never at any time, although there was ample opportunity to do so, advised the board that the date of April 4th was not a satisfactory one for a hearing. Had it done so, the board might have arranged for a date mutually agreeable to both parties. The board was not given an opportunity to do so."⁶¹

Where, however, the complainant has acted with all reasonable haste, seeking delay only where it is truly necessary for him to present his case, and requesting an extension as soon as he became aware of the need for it, adjournment should normally be granted.⁶²

⁵⁵ *Re Piggott Construction Ltd. and United Brotherhood of Carpenters and Joiners of America, Local 1990* (1973), 39 D.L.R. (3d) 311 at 312 (Sask. C.A.). See also *Morgan v. Association of Ontario Land Surveyors* (1980), 2 A.C.W.S. (2d) 298 (Ont. D.C.).

⁵⁶ *R. v. Halchuk*, [1928] 1 D.L.R. 731 (Man. K.B.); *R. v. Johnson*, [1973] 3 W.W.R. 513 (B.C.C.A.).

⁵⁷ *Re Sreedhar and Outlook Union Hospital Board*, (1972), 32 D.L.R. (3d) 491 (Sask. C.A.).

⁵⁸ *Re Bass* (1959), 19 D.L.R. (2d) 484 (B.C.S.C.).

⁵⁹ *R. v. Medical Appeal Tribunal (Midland Region)*, *ex parte Carrarini*, [1966] 1 W.L.R. 883 at 888 (Q.B.D.). See also *R. v. Konagarajah*, unreported, 25 July 1980 (S.C.C.); *Re Cruz and Leoville Union Hospital Board* (No. 2), *supra*, note 52.

⁶⁰ *supra*, note 55 at 317.

⁶¹ *ibid.* Cf. *Camac v. Oil and Gas Conservation Board of Alberta* (1964), 43 D.L.R. (2d) 755 (Alta. S.C.). See also *Murray v. Council of the Municipal District of Rockyview No. 44* (1980), 21 A.R. 512 at 528 (Alta. C.A.), where it was said (applying *Re County of Strathcona No. 20 and MacIab Enterprises Ltd.*, [1971] 3 W.W.R. 461 (Alta. S.C.A.D.)) that, while there is no right to cross-examine *per se*, the obligation to permit it will usually arise "where the evidence is in relation to a vital issue which will have a direct bearing on the board's decision and, more particularly so, where the person giving the evidence purports to be knowledgeable in that area".

⁶² *Re Sreedhar and Outlook Union Hospital Board*, *supra*, note 57.

6. CROSS-EXAMINATION

The importance of cross-examination in the ordinary courts of the common law nations can scarcely be over-emphasized and it has often been asserted that the right to cross-examination is as essential to ensure justice before administrative tribunals as it is in the ordinary courts. In a case involving an investigation by the Superintendent of Insurance of a complaint that a company had discriminated in its automobile insurance rates, the Ontario Court of Appeal expressed its view that by refusing to allow cross-examination, the Superintendent

violated every principle of fair-play, of natural justice. No doubt, he thought he was obtaining the actual facts from the witnesses: but every judge and most lawyers know that it constantly happens that witnesses telling a plausible story with apparent candour are shown by cross-examination to be utterly unreliable — that a perfectly honest and competent witness may give a wrong impression which may be corrected by a question or two — that a perfectly honest and competent witness may be mistaken.⁶³

The right of cross-examination has been characterized as "a fundamental and important part of the privilege of self-defence"⁶⁴ and a crucial component of natural justice.

Nevertheless, in a number of cases it was said that the requirements of natural justice had been met even though cross-examination had not been permitted. In *St. John v. Fraser*,⁶⁵ the appellant argued that natural justice had been denied because he had not been allowed to cross-examine every witness who was heard by the investigator. In the Supreme Court of Canada Davis J. said:

The right was asserted as a right to which every witness against whom a finding might possibly be made was entitled. I do not think any such right exists at common law. . . . It is natural, as Lord Shaw said in the *Arledge* case [at p.138], that lawyers should favour lawyer-like methods but it is not for the judiciary to impose its own methods on administrative or executive officers.⁶⁶

⁶³ *Re General Accident Assurance Co. of Canada* (1926), 58 O.L.R. 470 at 479, *per Riddell J.A.* (Ont. C.A.).

⁶⁴ *Re Sanderson's Certiorari Application* (1965), 53 W.W.R. 638 at 640, *per Milvain J.* (Alta. S.C.T.D.); see also *Youngberg v. Discipline Committee of the Alberta Teachers' Association* (1977), 8 A.R. 36 (Alta. S.C.A.D.); *Pollock v. Alberta Union of Provincial Employees* (1978), 12 A.R. 398 (Alta. S.C.T.D.).

⁶⁵ [1935] S.C.R. 441.

⁶⁶ *ibid.* at 453-454.

A fundamental principle of administrative law is that administrative bodies are masters of their own procedure, provided only that they are fair: "They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view."⁶⁷

Whether or not a right to cross-examine exists will depend on the particular circumstances of each case.⁶⁸ Generally, the question is whether it would serve any useful purpose. Even if it would, however, the tribunal is entitled to consider the convenience to all parties in deciding whether the general utility is better served by permitting or by denying cross-examination. In *Bushell v. Secretary of State for the Environment*,⁶⁹ Lord Diplock emphasized that there are other ways of obtaining accurate information and pointed out that an inquisitorial system works to general satisfaction in European courts of justice. No argument can be heard that such a system is *per se* unfair:

Whether fairness required an inspector to permit a person who had made statements on matters of fact or opinion, expert or otherwise, to be cross-examined by a party who wished to dispute a particular statement must depend on all the circumstances. In the instant case the question arose in connection with expert opinion on a technical matter. The most important consideration was the inspector's own view whether the cross-examination would be likely to enable him to make a more useful report to the minister in reaching his decision, and was sufficient to justify any expense and inconvenience to other parties to the inquiry by prolonging it.⁷⁰

A person has no "right" to cross-examination as such. What he does have is a right to rebut opposing evidence and to correct or contradict prejudicial statements,⁷¹ and in some circumstances this may only be possible by means of cross-examination. Thus, in *Toronto Newspaper Guild v. Globe Printing Co.*, the Ontario Labour Relations Board's decision not to allow cross-examination as to facts relevant to certification of a bargaining agent was held to be a jurisdictional error:

⁶⁷ *Board of Education v. Rice*, [1911] A.C. 179 at 182, *per* Lord Loreburn (H.L.).

⁶⁸ *see Re County of Strathcona No. 20 and MacLab Enterprises Ltd.*, (1971), 20 D.L.R. (3d) 200 at 203-204 (Alta. S.C.A.D.); *Re Elliott and Governors of the University of Alberta* (1973), 37 D.L.R. (3d) 197 (Alta. S.C.T.D.); *Re Hepplewhite and Criminal Injuries Compensation Board*, unreported, 22 November 1972 (Ont. D.C.).

⁶⁹ 12 February 1980, *The Times*.

⁷⁰ *ibid.*

⁷¹ *see Korylko v. City of Calgary* (1963), 46 W.W.R. 273 at 285, *per* Kirby J. (Alta. S.C.T.D.).

The board here in question, having refused to permit the respondent to examine the documentary evidence filed by the appellant and having by its regulations and the interpretation which it had given them, prohibited the employer from himself inquiring among his employees with respect to union membership, effectively removed from the respondent by its ruling with respect to the proposed cross-examination its only remaining means of knowing what the case of the appellant was.⁷²

This passage was considered by McRuer C.J.H.C. in the Ontario case *Re Jackson and Ontario Labour Relations Board* where his Lordship emphasized that the *Globe* case did not establish any general right to cross-examination, but turned rather narrowly on its peculiar facts: "I do not think it was the procedure the board followed that was the vital part of the case, but it was the fact that it did not attempt to investigate the reliability of the information that was before it. True, cross-examination would have been a very obvious way to test it but not necessarily the only way . . ."⁷³

Although cross-examination may be a particularly useful means of resolving disputes as to fact, the line between fact and opinion may be extremely difficult to draw in certain cases,⁷⁴ and such a distinction cannot serve as a valid basis for deciding whether cross-examination should be permitted or not. On the whole, the courts will be reluctant to over-judicialize the administrative process and "[i]f there are other ways in which a party's case might have been adequately presented then there is no right to cross-examine. On the other hand, if cross-examination was the only effective means of presenting a material point it may well be a reversible error to preclude it".⁷⁵ Even if it is the only possible means of making a material point, however, the courts may hold that cross-examination is not necessary if it would impose an inconvenience greater than the seriousness of the issue to be determined by the tribunal would warrant.⁷⁶

7. COUNSEL

It has on occasion been asserted that natural justice can never impose a requirement that legal counsel be permitted to appear before an

⁷² [1953] 2 S.C.R. 18 at 36.

⁷³ [1955] O.R. 83 at 99 (Ont. H.C.); approved in *Canada Labour Relations Board v. Transair Ltd.*, [1977] 1 S.C.R. 722.

⁷⁴ *see* Lord Edmund-Davies' dissent in *Bushell v. Secretary of State for the Environment*, 12 February 1980, *The Times*.

⁷⁵ F.A. Laux, *The Administrative Process* (1978, 4th ed.).

⁷⁶ *see* Lord Diplock's judgment in *Bushell*, *supra*, note 74. Note, however, that the ratio common to the majority would appear to be that "cross-examination would not have served any useful purpose" (*per* Viscount Dilhorne).

administrative tribunal. In *Byrne v. Kinematograph Renters Society Ltd.*,⁷⁷ Harman J. expressed the view that natural justice required nothing beyond knowing the nature of the accusation made, having an opportunity to state the answering case, and that the tribunal act in good faith. This led Lyell J. in *Pett v. Greyhound Racing Association Ltd.* (No. 2) to conclude that a "right" to legal representation formed no part of natural justice: "I find it difficult to say that legal representation before a tribunal is an elementary feature of the fair dispensation of justice. It seems to me that it arises only in a society which has reached some degree of sophistication in its affairs."⁷⁸ Such a view cannot, however, be sustained. If the dicta of Harman J. is read as meaning that a person must have an *adequate* opportunity to present his case, it is clear that there may be occasions when legal counsel will be required.

The *Pett* case is somewhat unusual in that Lyell J.'s statement was issued in trial of a matter which had already gone to appeal on interlocutory proceedings. His Lordship's view on a right to legal representation was directly contradictory of the view which had been expressed by the Court of Appeal in *Pett* (No. 1).⁷⁹ The issue in the case was whether the Greyhound Racing Association could exclude counsel from a hearing investigating the alleged drugging of a racing dog. The Association defended its course of action in an affidavit which said that: "If legal representation were allowed as of right, the delay and complications that this would cause would largely frustrate the stewards' intention to conduct their meetings expeditiously and with complete fairness."⁸⁰ Lord Denning M.R. disagreed. In a judgment the result of which was concurred in by Davies and Russell L.J.J. his Lordship emphasized the seriousness of the charge and the effect that it would have on a man's reputation and livelihood. While the general right to appear by agent might be excluded in inquiries dealing with minor matters this could not be permitted where a tribunal's decision was "of serious import":

Once it is seen that a man has a right to appear by an agent, then I see no reason why that agent should not be a lawyer. It is not every man who has the ability to defend himself on his own. He cannot bring out the points in his own favour or the weaknesses in the other side. He may be tongue-tied or nervous, confused or wanting in intelligence. He cannot examine or cross-examine witnesses. We see it every day. A magistrate says to a man: "You can ask any questions you like"; whereupon the man immediately starts to

⁷⁷ [1958] 1 W.L.R. 762 (Ch.D.), approved in *University of Ceylon v. Fernando*, [1960] 1 W.L.R. 223 (P.C.).

⁷⁸ [1969] 2 All E.R. 221 at 231G (Q.B.D.).

⁷⁹ *Pett v. Greyhound Racing Association Ltd.* (No. 1), [1968] 2 All E.R. 545 (C.A.).

⁸⁰ *ibid* at 549B.

make a speech. If justice is to be done, he ought to have the help of someone to speak for him; and who better than a lawyer who has been trained for the task? I should have thought, therefore, that when a man's reputation or livelihood is at stake, he not only has a right to speak by his own mouth. He has also a right to speak by counsel or solicitor.⁸¹

In *Bachinsky and Cantelon v. Sawyer*,⁸² the Alberta Supreme Court accepted the arguments of Lord Denning. Shannon J. was of the view that the right to counsel was an issue that could be resolved in each case by reference to one question: "Can it be said that the applicants are being deprived of the opportunity to make full answer and defence and that there is therefore a denial of natural justice?"⁸³ His Lordship considered four matters⁸⁴ to be of crucial importance in concluding that natural justice required representation by counsel on the facts of the case before him:

1. the charge was very serious (unlawful or unnecessary use of police authority) and the effect of an adverse finding on a man's reputation and livelihood would be drastic, the maximum penalty being dismissal from the force;
2. the proceedings were of a formal and technical nature, similar to the proceedings of a criminal court;
3. the provisions for representation by another member of the force were inadequate to ensure that fairness was done; and
4. an internal appeal, at which counsel would be allowed, could not be curative in light of the fact that the appellate body would be limited to considering the record of the proceedings before the lower tribunal.

The approach taken by Mr. Justice Shannon demonstrates that in each case the right to counsel will turn on the court's view of the particular circumstances. This desire to mould the requirements of natural justice to meet the needs of the particular applicant and the particular tribunal has

⁸¹ *ibid* at 549E. It should be noted, however, that legal aid will not generally provide for counsel before administrative tribunals. Against Denning's approach it may be said that permitting representation by counsel or solicitor replaces one inequity with another. The proceeding's "in-built bias" shifts from favouring the educated, intelligent and articulate to favouring those who by labour, luck, or legacy can afford the better lawyers.

⁸² [1974] 1 W.W.R. 295 (Alta. S.C.T.D.).

⁸³ *ibid* at 300, noted by D.P. Jones, "Natural Justice Prevails: A Comment on *Bachinsky and Cantelon v. Sawyer*" (1975), 21 McGill L.J. 156.

⁸⁴ *supra*, note 82 at 300-304.

also been emphasized in the British Columbia Supreme Court. In *Chisholm v. Jamieson*, Mr. Justice Andrews reviewed a number of authorities dealing with legal representation before administrative tribunals and concluded: "I find only one consistency in all of these references, namely, that 'the requirements of the principles of natural justice must depend on the circumstances at hand'." His Lordship approved Shannon J.'s view that

the trend in our law is towards enlargement and entrenchment of the right to counsel. However that right is not yet absolute with respect to proceedings before quasi-judicial tribunals. The common law position is that it must be considered in the larger context of natural justice. Therefore, I must consider the facts and circumstances of the individual case and decide whether or not there will be a denial of natural justice if the applicants are not permitted to have their counsel represent them at the hearing. . . .⁸⁵

As was the case in *Pett* and in *Bachinsky*, the court was much influenced by the fact that a man's livelihood and reputation were at stake.

It would, however, be going too far to say that there is a right to be legally represented whenever a serious matter is to be determined by an administrative tribunal. The courts are jealous to protect their own authority and will not impose lawyers upon a tribunal when the only purpose they would serve would be to aid the tribunal in deciding matters that would be better left to the ordinary courts. This is the result of *Enderby Town Football Club Ltd. v. Football Association Ltd.*, where Lord Denning M.R. said:

I am of opinion that the court should not insist on legal representation before the tribunal of the F.A. The points which the club wishes to raise are points of law which should be decided by the courts and not by the tribunal. The club is at liberty to bring these points before the courts at once and have them decided with the aid of skilled advocates. If they choose not to bring them before the courts, but prefer to put them before a lay tribunal, they must put up with the imperfections of that tribunal and must abide by their ruling that there be no legal representation.⁸⁷

Moreover, the courts will not allow a man to ignore a set of rules to which he has subscribed unless a very strong case is made out. Although a club must not fetter its discretion by saying that it will never permit counsel to be

⁸⁵ (1974), 47 D.L.R. (3d) 754 at 759 (B.C.S.C.).

⁸⁶ *ibid.*

⁸⁷ [1971] 1 Ch. 591 at 607 (C.A.); see also Cairns L.J. at 609.

present,⁸⁸ it will be permissible to exclude legal representation in a great variety of circumstances. Thus, on the facts of the *Enderby Town Football Club* case, Fenton Atkinson L.J. was of the view that the rule promoted speed and saved heavy legal fees, while doing nothing to exclude "the right of either party to challenge a decision in the courts if the lay tribunal goes wrong in law".⁸⁹ Cairns L.J. simply pointed out that neither administrative convenience nor justice was furthered by having lawyers present!⁹⁰

It has, further, been suggested that there will be no right to legal representation where disciplinary powers are being exercised.⁹¹ The judgments of the English Court of Appeal in *Fraser v. Mudge* reveal, however, that the so-called discipline exception applies only in circumstances where delay would be prejudicial to the general good; where "[i]t is of the first importance that the cases should be decided quickly".⁹² In any event, it is submitted that the notion that discipline cases are a category apart cannot survive the Supreme Court of Canada's decision in *Martineau (No.2)*.⁹³

As is the case regarding the other "rights" which form part of natural justice, the inclusion or exclusion of a right to legal representation will vary with the circumstances. While the cases discussed here give some indication of the factors which are considered by the courts and the arguments that will weigh heavily with them, the conclusion must in the end be subjective. Little objection can be raised to de Smith's conclusion

that, in general, legal representation of the right quality before statutory tribunals is desirable, and that a person threatened with social or financial ruin by disciplinary proceedings in a purely domestic forum may be gravely prejudiced if he is denied legal representation. . . . Development of the case law on implied rights to legal representation in non-statutory environments should be guided by a realistic appraisal of the interests of the person claiming it, as well as of the interests of the organization to which he belongs.⁹⁴

⁸⁸ *ibid* at 605F, 607D, per Lord Denning M.R. Cf. 609D, per Cairns L.J.

⁸⁹ *ibid* at 608H.

⁹⁰ *ibid* at 609E-F.

⁹¹ e.g. *Re McLeod and Maksymowich* (1973), 12 C.C.C. (2d) 353 at 364, per Morrow J. (N.W.T.T.C.); cf. *Maynard v. Osmond*, [1977] Q.B. 240 (C.A.), which, however, turned on the particular statutory regime involved; noted by W.A. McKean in "Representation before a Police Tribunal" (1977), C.L.J. 205.

⁹² [1975] 3 All E.R. 78 at 79G, per Lord Denning M.R. (C.A.).

⁹³ (1979), 30 N.R. 119 (S.C.C.). See also *Morgan v. Association of Ontario Land Surveyors* (1980), 2 A.C.W.S. (2d) 298 (Ont. D.C.).

⁹⁴ de Smith, *Judicial Review of Administrative Action* (1973, 3rd ed.) at 188.

While there may be a trend "towards enlargement and entrenchment of the right to counsel",⁹⁵ potential litigants would do well to take heed of the warning implied in Jackson's observation that, in England, the courts "have emphasised the importance of a right to legal representation in hearings before tribunals, although in every case the applicant concerned failed to establish his right".⁹⁶

8. OPEN COURT

The "right" to open court is one which, uniquely among the procedural rights associated with natural justice, is more frequently imposed by administrative tribunals than desired by the parties appearing before them. The "right" is one which is enforced by the courts as a matter of political principle and is founded on the belief that procedures observed and decisions made in the open are more likely to be just and impartial than those made in secret meetings behind closed doors.

In the ordinary courts of law there are very few exceptions to the rule that judicial proceedings must be open to the public. The requirement of open court is seen as part and parcel of the common law's preference of freedom under the law over the arbitrary exercise of power: "In courts of law and justice, that is the courts of the land in the true sense, the rule is open court. Open court is the palladium of liberty."⁹⁷ A judge has no individual discretion to opt for proceedings *in camera* (except in a limited number of fields established by precedent and statute⁹⁸), and the parties cannot by consent confer such power upon him.

Administrative tribunals are not however bound by the same rules. In the absence of statutory prescriptions, they are masters of their own procedure and have a discretion to opt for either open or private proceedings, as they see fit. In *Re Millward and Public Service Commission*, Cattanaach J. said:

⁹⁵ *supra*, note 86. In *Re Pollard and Young* (1980), 26 Nfld. & P.E.I.R. 410 (Nfld. S.C.T.D.), it was held that *certiorari* was available where a decision-maker merely implied that counsel were not permitted.

⁹⁶ Paul Jackson, *Natural Justice* (1979, 2nd ed.) at 74. Applicants have, of course, done somewhat better in Canada: *Bachinsky and Camielon v. Sawyer*, [1974] 1 W.W.R. 295 (Alta. S.C.T.D.); *Chisholm v. Jamieson* (1974), 47 D.L.R. (3d) 754 (B.C.S.C.). See also *Whyte v. Pearson*, [1977] 2 W.W.R. 654 (Y.T.S.C.); *Chisholm v. Jamieson*, [1974] 6 W.W.R. 169 (B.C.S.C.). In the area of criminal trials, see *R. v. Fairview Management Ltd.*, [1978] 6 W.W.R. 488 (B.C.S.C.); cf. *R. v. Ewing*, [1974] 1 W.W.R. 57 (B.C.S.C.). It should be noted too that under the Canadian Bill of Rights, s.2(c), (d), the right to counsel is protected in some circumstances.

⁹⁷ *Re Millward and Public Service Commission* (1974), 49 D.L.R. (3d) 295 at 303 (F.C.T.D.).
⁹⁸ *ibid* at 303-304.

While it behoves a non-judicial body exercising judicial functions to conform to the practice prevailing in courts of law, in so far as the purpose for which those bodies were set up permits, there is no requirement, nor have I found any case and none was cited to me, that a body of this nature need sit in public in the absence of statutory direction to the contrary.

... where a statute directs that an inquiry shall be held but is silent as to the manner in which it shall be conducted, then, in such a case, it follows that the matter is left to the discretion of the particular tribunal.⁹⁹

Normally, where a matter of procedure is left to the discretion of a tribunal, the only legal requirement is that the procedure actually adopted must be as fair as is possible in all the circumstances. This is not quite the case with regard to the requirement of open court, for the judges have clearly expressed their preference that administrative tribunals make their proceedings open to the public. This is implicit in the opening part of Cattanaach's statement quoted above. In *R. v. Tarnopolsky; ex parte Bell*, Laskin J.A. for the Ontario Court of Appeal went so far as to say: "If there is any general rule applicable where the statute is silent, it is that the proceedings of a statutory tribunal should be conducted in public unless there be good reason to hold them *in camera*."¹⁰⁰ If a "good reason" is presented, however, the tribunal must consider it seriously. They must consider the arguments on both sides in coming to their conclusion. While it would seem proper for the tribunal to approach the question with a predisposition to holding an open inquiry, to have a firm and inflexible policy would seem to infringe the rule against the fettering of discretion. Moreover, if the case for a private inquiry is strong enough, the courts will take whatever steps may be necessary to prevent the proceedings from continuing in public.

Under s.17 of the Industrial Assurance Act, 1923, in effect in the United Kingdom in 1930, the Industrial Assurance Commissioner was entitled to hold an inspection of the affairs of a company if, in his opinion, "any collecting society or industrial assurance company" had committed or was likely to commit an offence against any three enumerated statutes. In *Hearts of Oak Assurance Company Ltd. v. Attorney-General*,¹⁰¹ the plaintiff objected to an inquiry ordered under the Act being held in public and with reporters present. Upholding his arguments Lords Thankerton and Macmillan stressed that the inquiry was held purely in order to inform the Commissioner of the relevant facts so that he could decide whether to

⁹⁹ *ibid* at 304.

¹⁰⁰ [1970] 2 O.R. 672 at 680 (Ont. C.A.). See, however, *R. ex rel. Penner v. Board of Trustees of Edmonton School District No. 7*, [1974] 1 W.W.R. 762 (Alta. S.C.A.D.).

¹⁰¹ [1932] A.C. 392 (H.L.).

carry the matter further. Thus, Lord Macmillan laid considerable emphasis on the fact that

the inspection is intended to be a proceeding of a purely preliminary character. It is obviously appropriate to conduct in private an investigation of such a character, designed as it is to inform the mind of a responsible official so that he may be able to decide whether he should or should not take any overt action, especially when the investigation may be initiated merely on reasonable suspicion of the probability of some irregularity having occurred.¹⁰²

Their Lordships were alive also to the effect that unsubstantiated rumours sparked by the inquiry might have on a company's reputation. Lord Macmillan thought that administrative efficiency should be balanced against fair treatment, and that both, on occasion, may work together to demand that the hearing be held *in camera*:

[T]here are two main considerations to be kept in mind. On the one hand it is important to secure that the efficiency of the procedure for the purpose in view is not impaired. On the other hand it is not less important to ensure that fair treatment is accorded to all concerned. I am satisfied that both these ends can best be attained by the holding of such inspections in private. I can well imagine that irreparable harm might unjustly be done to the reputation of a company and much anxiety unnecessarily occasioned to its policy-holders by giving publicity to such preliminary investigations.¹⁰³

It would seem reasonably clear, therefore, that where preliminary inquiries are being made into a matter which, if proved, would have a serious adverse effect upon the legal person appearing before a tribunal, private proceedings are appropriate. However, it is for the person seeking an *in camera* inquiry to protest,¹⁰⁴ and if he cannot obtain the consent of the opposing party¹⁰⁵ he must show good reason for not proceeding in open court.¹⁰⁶ Even then, if the tribunal decides to proceed in public, the complainant will have to comply with the tribunal's ruling and participate fully in the hearing.¹⁰⁷

¹⁰² *ibid* at 401-402. Lord Thankerton, at 396-397, speaks to similar effect.

¹⁰³ *ibid* at 403.

¹⁰⁴ *Re Millward and Public Service Commission* (1974), 49 D.L.R. (3d) 295 (F.C.T.D.).

¹⁰⁵ see *Hearts of Oak Assurance Co. Ltd. v. Attorney-General*, [1931] 2 Ch. 370 at 393, *per* Lord Hanworth M.R. (C.A.).

¹⁰⁶ *supra*, note 104.

¹⁰⁷ *ibid*.

9. HEARING BY THE DECISION-MAKER

It has been observed that the word "hearing" receives a very special interpretation with regard to natural justice. In some circumstances a decision-maker will be said to have fairly "heard" both sides when he sees or hears only an inspector's report.¹⁰⁸ "The collecting of evidence may be delegated, subject of course to the rules, statutory or contractual, governing a particular tribunal".¹⁰⁹ The basic rule is that the decision-maker must inform himself of the relevant evidence, but that the way in which he does this is largely a matter for his own discretion.

Cases turning on the issue of "who" has heard have come to the courts in two main types of fact situations. In the first, there is a committee of persons who are charged with the duty of hearing and deciding on a particular matter and the membership of (or attendance at) that committee varies during the course of the proceedings. In the second, a decision-maker delegates the task of gathering evidence to another party.¹¹⁰

In *R. v. Huntingdon Confirming Authority*; *ex parte George and Stamford Hotels Ltd.*,¹¹¹ the English Court of Appeal considered the first situation. Quashing an order of the Confirming Authority, Lord Hanworth M.R. said:

We think that the confirming authority ought to be composed in the same way on both occasions: that new justices who have not heard the evidence given ought not to attend. It is quite possible that all the justices who heard the case and the evidence on April 25 may not be able to attend on any further hearing, but however that may be, those justices who did hear the case must not be joined by other justices who had not heard the case for the purpose of reaching a decision, on this question of confirmation.¹¹²

The courts are concerned that in such situations a persuasive or eloquent person may be able to affect the outcome of the vote even in situations where his own ballot was not a tie-breaker,¹¹³ and his very presence will be

¹⁰⁸ *supra*, Chapter 4, section 2.

¹⁰⁹ Jackson, *Natural Justice* (1979, 2nd ed.) at 79.

¹¹⁰ It is clear, however, that he must not attempt to delegate his power to decide (see J. Willis, "Delegatus Non Potest Delegare" (1943), 21 C.B.R. 257), unless this is permitted by the statute. In *Minister of National Revenue v. Wright's Canadian Ropes Ltd.*, [1947] A.C. 109 (P.C.) the court demonstrated a willingness to read statutes so as to permit a power of delegation where that was necessary for the efficient functioning of the statutory scheme.

¹¹¹ [1929] 1 K.B. 698 (K.B.D.).

¹¹² *ibid* at 714. Cf. *Re Civil Service Association of Alberta and Farran* (No.2) (1979), 98 D.L.R. (3d) 282 (Alta. S.C.A.D.).

¹¹³ *ibid* at 717, *per* Romer J.: "The resolution in favour of confirmation was carried by eight to two, and it is at least possible that that majority was induced to vote the way it did by the eloquence of those members who had not been present on April 25, to whom the facts were entirely unknown."

considered as potentially influential even in the absence of any evidence that he in fact took part in the deliberations.¹¹⁴ The *George and Stamford Hotels* decision has been cited and approved in a number of Canadian cases dealing with powers as diverse as trade union certification,¹¹⁵ disbarment of a lawyer,¹¹⁶ suspension of an accountant's licence,¹¹⁷ and expulsion from a trade-union,¹¹⁸ to name only a few. It is a well-established component of natural justice.

The second category was considered in *Osgood v. Nelson*¹¹⁹ by the House of Lords who agreed with the Court of Exchequer Chamber that no delegation was involved where a decision-maker simply ordered an inquiry to be made by a lower tribunal. Lord Colonsay expressed the view that:

there was no violation of the rule against delegation in this case. The mode adopted was the mode in which such inquiries are ordinarily conducted, and necessarily conducted, by such a tribunal. What was the course which Mr. Anderson stated to have been requisite? It was that after this committee had made their report, if they did make such a report, there should have been an assembling of the Common Council, there should have been a prosecutor appointed, and there should have been a new trial, with all the formalities of a criminal trial, before they could have arrived at a conclusion. But the committee appointed to inquire into this matter having made the inquiry in the ordinary way, having collected the evidence in the ordinary way, and allowed the party, who had been present at the collecting of the evidence, to state his case by counsel, I cannot conceive a more fair mode of proceeding.¹²⁰

The decision-maker must, however, make himself genuinely familiar with the evidence presented, even if only in summary form. In *Jeffer v. New Zealand Dairy Production and Marketing Board*, the Privy Council said that while, in some circumstances, "it may suffice for the board to have before it and to consider an accurate summary of the relevant evidence and

¹¹⁴ see *Hughes v. Seafarers' International Union of North America, Canadian District* (1961), 31 D.L.R. (2d) 441 at 446, per Verchere J. (B.C.S.C.).

¹¹⁵ *R. v. Labour Relations Board; ex parte Gorton-Pew (N.B.) Ltd.*, [1952] 2 D.L.R. 621 (N.B.S.C.A.D.).

¹¹⁶ *Mehr v. Law Society of Upper Canada*, [1955] S.C.R. 344.

¹¹⁷ *Re Ramm* (1957), 7 D.L.R. (2d) 378 (Ont. C.A.).

¹¹⁸ *Hughes v. Seafarers' International Union*, supra, note 114.

¹¹⁹ (1872) L.R. 5 H.L. 636 (H.L.).

¹²⁰ *ibid* at 653; see also, supra, Chapter 4, section 2. See also *Re Dagg and Ontario Human Rights Commission* (1979), 102 D.L.R. (3d) 155 (Ont. D.C.); *Gladstone Petroleum Ltd. v. Husky Oil (Alberta) Ltd.*, [1980] 3 W.W.R. 728 at 739 (Sask. Q.B.); *Attorney General of Canada v. Inuit Tapirisat of Canada*, unreported, 7 October 1980 (S.C.C.).

submissions" this is only so "if the summary adequately discloses the evidence and submissions to the board".¹²¹ It would seem, therefore, that a decision-maker cannot act solely on the basis of recommendations made by an inspector or investigating committee.¹²² On the other hand, the mere fact that the investigating body has included recommendations in its report will not constitute a breach of natural justice provided the decision-maker "has enough information to enable it to make a fair assessment of the case".¹²³

10. THE RULE AGAINST BIAS

In order that a person may have a fair hearing it is essential that the decision-maker not approach the particular problem with a predisposition to decide one way or the other: "It is necessary that a tribunal should be impartial, fearless and free from bias so as to be able to do its work without fear or favour and with an objective view of things".¹²⁴ Canadian law thus enforces the "rule against bias". Although often referred to by the maxim *nemo iudex in re sua* (which literally prohibits a person from being judge in his own cause), the prohibition extends to prevent a person from assuming the role of a judge if there is any reason whatsoever to suspect him of partiality.

The rule is properly considered one of the most fundamental elements of natural justice and it is the least flexible. It is not uncommon to see statements to the effect that *nemo iudex* is an absolute rule, not to be tampered with in any way. Unlike the other elements of natural justice this rule cannot be moulded to suit administrative convenience. Thus, the McCruer Commission reported that:

The rule against interest or bias applies without qualification (other than necessity as in the case of the courts) to judicial tribunals other than the courts. If a member of a tribunal has an interest in the subject matter, or is biased, he is disqualified from making a decision, and if he purports to do so his decision will remain unauthorized.¹²⁵

¹²¹ [1967] 1 A.C. 551 at 569A (P.C.).

¹²² To do so would be either an unlawful delegation or a fettering of discretion. This is, however, little consolation to the complainant, who will generally have no right to see the reports: see, supra, Chapter 4, section 2.

¹²³ *Selvarajan*, [1975] 1 W.L.R. 1686 at 1698, per Lawton L.J. (C.A.).

¹²⁴ M.C. Kagzi, *Indian Administrative Law* (1962) Delhi: Metropolitan Book Co. (Private) Ltd. at 105.

¹²⁵ J.C. McCruer (Chairman), *Report of the Royal Commission of Inquiry into Civil Rights* (1968) Toronto: Queens Printer. See also *Corrion v. Law Society of British Columbia*, [1980] 4 W.W.R. 638 (B.C.S.C.). "Witnesses" apparently have a disqualifying "interest": *Murray v. Council of the Municipal District of Rockyview No. 44* (1980), 21 A.R. 512 (Alta. C.A.).

In *Dimes v. Grand Junction Canal*,¹²⁶ the House of Lords emphasized that they would not consider the degree to which a person's interest might influence his judgment nor, indeed, whether actual bias has been shown. In that case Cottenham, the English Lord Chancellor, had affirmed a number of decrees made in favour of a canal company in which he was a shareholder. In reversing the decrees on account of pecuniary interest Lord Campbell said:

No one can suppose that Lord Cottenham could be, in the remotest degree, influenced by the interest that he had in this concern; but, my Lords, it is of the last importance that the maxim, that no man is to be a judge in his own cause, should be held sacred. . . . And it will have a most salutary influence on these tribunals when it is known that this high court of last resort, in a case in which the Lord Chancellor of England had an interest, considered that his decree was on that account a decree not according to law, and was set aside. This will be a lesson to all inferior tribunals to take care not only in their decrees that they are not influenced by their personal interest, but to avoid the appearance of labouring under such an influence.¹²⁷

Despite its very great breadth, there are limits to the rule: the test must be whether a reasonable person would believe there to be a real danger of bias.¹²⁸ In *Greyhound Lines of Canada Ltd. v. Motor Transport Board*,¹²⁹ the Alberta Court of Appeal applied the "reasonable apprehension of bias" test to deny an order of prohibition. The issue arose when two companies, Diversified Transportation Ltd. and Pacific Western Transportation Ltd., applied for certificates to operate public service passenger vehicles on some of the same routes then served by Greyhound Lines. Greyhound's affidavit stated:

That the applicant, Diversified, is substantially indebted to the Provincial Treasury Branch, an arm of the Provincial Government, . . . and that being so indebted, cannot apply to the Motor

¹²⁶ [1853] 3 H.L.C. 759 (H.L.).

¹²⁷ *ibid* at 793-794.

¹²⁸ There has been a rather sterile debate as to whether the test should be "real likelihood" of bias or "reasonable apprehension". There is no need to enter into this debate for "it now seems clear that the Canadian courts have established the proper test as being whether a 'reasonable apprehension of bias' exists. . . ."; F.A. Laux, *The Administrative Process* (1978, 4th ed.) at 597. In England the position is probably the same: F. Alexis, "Reasonableness in the Establishing of Bias" (1979), P.L. 152.

¹²⁹ (1977), 4 Alta. L.R. 280 (Alta. S.C.A.D.).

Transport Board, . . . and, in particular, the Minister of Highways and Transport, without raising in the mind of the public . . . a reasonable apprehension of bias.¹³⁰

Clement J.A., after investigating the board's relationship with the Provincial Government, concluded that there was no "reasonable apprehension of bias" on the facts before him:

it goes much too far to say that a board functioning as a corporation, separate from ministerial or other governmental supervision or direction, is subject to apprehension of bias towards a departmental interest merely because its members are appointed by the Lieutenant-Governor in Council for, let us assume, a limited term of office. This proposition would stretch reasonable apprehension into sheer speculation, which is not acceptable as a concomitant of reasonableness.¹³¹

The "reasonable apprehension" test has been used in a number of other cases to the advantage of administrators accused of bias. There was no reasonable apprehension of bias where the Chairman of the Anti-Dumping Tribunal, having disqualified himself because of previously acting as a consultant to the protesting Canadian industries, checked the phraseology of the Tribunal's reasons and permitted his name to appear on the decision.¹³² Nor is there a bias where a doctor is a member of both a professional disciplinary committee hearing a case of misconduct and the executive committee which had previously suspended the complainant, provided he did not in fact participate in the meeting or proceedings of the latter committee in so far as they concerned the complainant.¹³³ Any theory of predetermination by association "must be restricted to very special circumstances".¹³⁴ Moreover, "what is contemplated is not what would be regarded as a probability or a reasonable suspicion by a person who is completely ignorant of the particular decision-making process involved".¹³⁵

¹³⁰ *ibid* at 281.

¹³¹ *ibid* at 284.

¹³² *P.G. Industries Canada Ltd. v. Attorney General of Canada*, [1976] 2 S.C.R. 739.

¹³³ *Ringrose v. College of Physicians and Surgeons of the Province of Alberta (No. 1)*, [1977] 1 S.C.R. 814. See also *Merchant v. Benchers of Law Society of Saskatchewan*, [1972] 4 W.W.R. 663 (Sask. Q.B.), dealing with the question of whether members of a discipline committee participating as Benchers in Convocation when their own report was a discipline is a breach of natural justice.

¹³⁴ *Ringrose*, supra, note 133 at 824, per de Grandpré J.

¹³⁵ *Re Caccamo and Minister of Manpower and Immigration* (1977), 75 D.L.R. (3d) 720 at 726-727, per Jaccett C.J. (F.C.A.).

Thus, predetermination by association is not to be presumed merely because one member of a government department had made statements indicating a bias prior to an investigation being undertaken by another officer of that department.¹³⁶ The principle is further illustrated by reference to the ordinary courts of law where, according to Professor Wade:

A line must be drawn between genuine and fanciful cases. A justice of the peace is not disqualified, merely because he subscribes to a society for preventing cruelty to animals, from hearing a prosecution instituted by the society.¹³⁷ Where a county council had prosecuted a trader under the Food and Drugs Act, it was held no objection that the justices' clerk was a member of the council, upon proof that he was not a member of the council's Health Committee, which had in fact directed the prosecution.¹³⁸ The Court of Appeal protested against the tendency to impeach judicial decisions "upon the flimsiest pretexts of bias", and against "the erroneous impression that it is more important that justice should appear to be done than that it should in fact be done".¹³⁹

There will, however, be a "reasonable apprehension of bias" where a person sits on the appeal from his own decision,¹⁴⁰ and this will be so even though he in fact only answers questions put by other members of the appellate tribunal and does not attempt to influence the outcome.¹⁴¹ Similarly, a person conducting a preliminary investigation which comes to a conclusion adverse to the complainant should not normally sit at formal hearings.¹⁴² This may all be part of a larger principle that "where an adjudicator acquires special knowledge of a matter prior to adjudication, there is a reasonable possibility . . . of the risk that he might prejudice the matter".¹⁴³

¹³⁶ *ibid.*

¹³⁷ *R. v. Mayor and Justices of Deal* (1881), 45 L.T. 439 (Q.B.D.).

¹³⁸ *R. v. Camborne Justices; ex parte Pearce*, [1955] 1 Q.B. 41 (Q.B.D.).

¹³⁹ Wade, *Administrative Law* (1977, 4th ed.) at 401-402. The "reasonable apprehension" test gives way, however, to a need to show *actual bias* in situations where a statutory tribunal is specifically authorized to act: *Vlahovic v. Teamsters' Joint Council No. 36* (1979), 17 B.C.L.R. 277 (B.C.S.C.).

¹⁴⁰ *R. v. Alberta Securities Commission; ex parte Albrecht* (1962), 38 W.W.R. 430 (Alta. S.C.T.D.).

¹⁴¹ *Kane v. Board of Governors of the University of British Columbia* (1980), 31 N.R. 214 (S.C.C.); cf. *Re Elliott and Governors of the University of Alberta* (1973), 37 D.L.R. (3d) 197 (Alta. S.C.T.D.), the result of which is surely thrown in doubt by the *Kane* decision.

¹⁴² *Re McGavin Toastmaster Ltd. and Powlowski* (1973), 37 D.L.R. (3d) 100 (Man. C.A.).

¹⁴³ F. Alexis, "Reasonableness in the Establishing of Bias" (1979), P.L. 152 at 155; see *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369; on the question of institutional bias generally, see D.P. Jones, "Institutional Bias: The Applicability of the Nemo Juez Rule to Two-Tier Decisions" (1977), 23 McGill L.J. 605.

In any given case the question of whether there is "reasonable apprehension of bias" is one for the subjective assessment of the judge. Thus, while close family relations will clearly raise the likelihood of bias, there comes a stage at which the relationship is distant enough to be of no effect. Similarly, Alexis points out that while an adjudicator may be a member of the same social or sports club or of the same (or opposed) political organization as a party to the proceedings without raising a reasonable suspicion of bias, these are not totally irrelevant considerations: ". . . although none of these circumstances can by itself produce a substantial possibility of bias, in combination with others they might well have this effect, especially if membership of the organization causes the adjudicator and a party to work closely together, as committee members, for example."¹⁴⁴ Where a pecuniary interest is involved, however, a bias will be presumed regardless of how small that interest may be.¹⁴⁵ None the less, a reasonableness test is involved to a certain degree, for if the pecuniary interest is merely remote, speculative, or contingent, it will not result in disqualification.¹⁴⁶

It will be observed that in all cases the question of whether there is a "bias" such as will result in breach of natural justice is resolved by reference to a reasonableness test of one sort or another. This is so whether the bias is alleged to arise from pecuniary interest, an intermingling of functions, departmental bias, or other prejudice. Reasonableness in this context is admittedly applied somewhat differently from reasonableness in respect of the other components of natural justice. In dealing with bias the courts do not overtly balance administrative efficiency against absolute fairness. It is the area in which the common law rules of fair play are least flexible, and properly so, as there can be no degrees of bias. Even where the reasonable apprehension test is satisfied however there is no legal ground for complaint where the procedure was prescribed by statute¹⁴⁷ nor where there is no alternative to an interested party making the decision.¹⁴⁸

Finally, it should be noted that ministerial or departmental policy cannot be regarded as a disqualifying bias:

¹⁴⁴ Alexis, *supra*, note 143 at 155.

¹⁴⁵ *R. v. Gaisford*, [1892] 1 Q.B. 381 at 384, *per Mathew J.* (Q.B.D.); *R. v. Rand* (1866), L.R. 1 Q.B. 230 at 232, *per Blackburn J.*

¹⁴⁶ *R. v. Rand*, *supra*, note 145; *R. v. Mayor and Justices of Deal* (1881), 45 L.T. 439 (Q.B.D.). The pecuniary interest was sufficiently direct to satisfy the test in *Re Moskalyn-Walker and Ontario College of Pharmacy* (1975), 58 D.L.R. (3d) 665 (Ont. D.C.) where the decision to discipline the complainant would adversely affect the sale price of his business, which one of the members of the tribunal was attempting to purchase.

¹⁴⁷ *McArthur v. Council of the Municipal District of Foothills No. 31* (1977), 4 Alta. L.R. 222 (Alta. S.C.A.D.).

¹⁴⁸ see *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369; *Re Caccamo and Minister of Manpower and Immigration* (1977), 75 D.L.R. (3d) 720 (F.C.A.).

One of the commonest administrative mechanisms is to give a minister power to make or confirm an order after hearing objections to it. The procedure for the hearing of objections is subject to the rules of natural justice in so far as they require a fair hearing and fair procedure generally. But the minister's decision cannot be impugned on the ground that he has advocated the scheme or that he is known to support it as a matter of policy. The whole object of putting the power into his hands is that he may exercise it according to government policy.¹⁴⁹

11. RIGHT TO REASONS

At common law there is no general rule that tribunals must state reasons for their decisions.¹⁵⁰ This is a situation which has been severely criticized by civil libertarians. Their source of concern has been ably summarized by the English Franks committee:

We are convinced that if tribunal proceedings are to be fair to the citizen reasons should be given to the fullest practicable extent. A decision is apt to be better if the reasons for it have been properly thought out. Further, a reasoned decision is essential in order that, where there is a right of appeal, the applicant can assess whether he has good grounds of appeal and know the case he will have to meet if he decides to appeal.¹⁵¹

Legislatures have proved sensitive to such criticism and it is not unusual for statutes to provide that reasons for decisions should be given. In particular, s.8 of Alberta's Administrative Procedures Act provides:

Where an authority exercises a statutory power so as to adversely effect the rights of a party, the authority shall furnish to each party a written statement of its decision setting out

- (a) the findings of fact upon which it based its decision, and
- (b) the reasons for the decision.

¹⁴⁹ Wade, *Administrative Law* (1977, 4th ed.) at 415. See also *Campeau Corporation v. Council of the City of Calgary* (1980), 22 A.R. 572 (Alta. C.A.). Similarly, expert knowledge or mere familiarity with background information does not raise an inference of bias: see respectively *Gypsumville District Teachers' Association No. 1612 v. Consolidated School District of Gypsumville No. 2461*, [1979] 5 W.W.R. 600 (Man. Q.B.); *Camino Management Ltd. v. Manitoba Securities Commission*, [1979] 2 W.W.R. 594 (Man. Q.B.); *see e.g. R. v. Gaming Board for Great Britain, ex parte Benaim and Khaida*, [1970] 2 Q.B. 417 (C.A.); *McInnes v. Onslow Fane*, [1978] 3 All E.R. 211 (Ch.D.).

¹⁵¹ Franks Committee, *Report on Administrative Tribunals and Enquiries*, Cmnd. 218 (1957) at para. 98; see also Clement Committee, *Report of the Special Committee on Boards and Tribunals* (1965) Edmonton: Government of Alberta at 34-36.

Dealing with a similar provision in the United Kingdom's Tribunals and Inquiries Act, Megaw J. (as he then was) expressed the view that the reasons given must be "proper, adequate reasons" and that they must be intelligible and must "deal with the substantial points that have been raised".¹⁵² His Lordship would not, however, permit the requirement that reasons be given to give rise to merely vexatious litigation: "I do not say that any minor or trivial error, or failure to give reasons in relation to every particular point that has been raised at the hearing, would be sufficient ground for invoking the jurisdiction of this court."¹⁵³

These statements were expressly approved by D.C. McDonald J. in *Morin v. Provincial Planning Board* where he expressed the view that failure to comply with s.8 of the Alberta Act will render any order made a nullity.¹⁵⁴ Moreover, if the reasons given reveal that an erroneous legal approach has been followed the decision can be quashed.¹⁵⁵

It should be noted, however, that the Alberta legislation applies only to such authorities as are designated by the Lieutenant-Governor in Council (s.3) and that it can only apply to provincially authorized exercises of "a statutory power" (s.2(a)). The Act can have no application to federal boards and does not attempt to impose any requirements upon domestic tribunals. It can be confidently predicted that the latter will continue to be reluctant to give reasons which might provide ammunition for litigation.

¹⁵² *Re Poyser and Mills' Arbitration*, [1964] 2 Q.B. 467 at 478 (Q.B.D.).
¹⁵³ *ibid.*

¹⁵⁴ [1974] 6 W.W.R. 291 (Alta. S.C.T.D.). The position is not so clear in the United Kingdom: see de Smith, *Judicial Review of Administrative Action* (1973, 3rd ed.) at 130.

¹⁵⁵ see de Smith, *supra*, note 154 at 128.