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***AGENCIES, BOARDS AND COMMISSIONS***  
***THE ADMINISTRATIVE JUSTICE SYSTEM IN NOVA SCOTIA***

**Law Reform Commission of Nova Scotia**

February 1996

# **DISCUSSION PAPER**

***AGENCIES, BOARDS AND COMMISSIONS  
THE ADMINISTRATIVE JUSTICE SYSTEM IN NOVA SCOTIA***

**Law Reform Commission of Nova Scotia  
February 1996**

## WHAT DO YOU THINK?

The Law Reform Commission is very interested in knowing what you think about the issues raised in the *Discussion Paper: Agencies, Boards and Commissions: the Administrative Justice System in Nova Scotia*.

We have attempted, as much as possible, to describe the law and the problems with the present system in a way that can be understood by people who are not lawyers and who are not familiar with the legal system. Your criticism and comments will assist us in preparing a Final Report to the Minister of Justice on how the laws and legal system providing Administrative Justice in Nova Scotia can be reformed.

This *Discussion Paper* is not a Final Report and it does not represent the final views of the Commission. It is designed to encourage discussion and public participation in the work of the Commission.

If you would like to comment on our suggestions you may:

- Fax a letter to the Commission at (902) 423-0222
- Send an e-mail to [lawrefns@fox.nstn.ca](mailto:lawrefns@fox.nstn.ca)
- Telephone the Commission at (902) 423-2633
- Write to the Commission at the address below

In order for us to fully consider what you think about these issues before we prepare our Final Report, please contact us by June 1st, 1996. You may write to us at the following address:

Agencies, Boards and Commissions Project  
Law Reform Commission of Nova Scotia  
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The Law Reform Commission of Nova Scotia was established in 1991 by the Government of Nova Scotia under an *Act to Establish an Independent Law Reform Commission*.

The Commissioners are:

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Dr. Moira McConnell is Executive Director of the Commission. Anne Jackman, LL.B., LL.M., and Professor Philip Girard are Legal Research Counsel for the Commission. Legal research assistance and advice in this project was also provided by Karen Hollett, LL.B., Nathalie Bernard, LL.B., LL.M. and Randall P.H. Balcome, LL.B., LL.M. In addition, this project has benefitted from research regarding human rights law in Nova Scotia provided by Toni Gore, Aileen J. MacIsaac, LL.B, and Rodney Mapp, LL.B. and funded in part by the Federal Department of Justice under its Human Rights Research funding.

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## **AGENCIES, BOARDS AND COMMISSIONS THE ADMINISTRATIVE JUSTICE SYSTEM IN NOVA SCOTIA**

### **SUMMARY**

The Minister of Justice for Nova Scotia has requested (by a formal letter of Reference) that the Law Reform Commission of Nova Scotia undertake a project to:

".... consider the state of administrative law in the Province and in particular, to develop draft legislation that:

- (a) standardizes the powers and procedures of administrative tribunals;
- (b) guarantees parties appearing before the tribunals basic procedural rights and safeguards;
- (c) simplifies administrative law, particularly with regard to judicial review and appeal; and
- (d) ensures the requisite degree of independence when a tribunal is required to act in a judicial fashion."

ABCs (Agencies, Boards, Commissions/Crown Corporations) are also sometimes called "public authorities". They are administrative organizations created by a law to act on behalf of the Legislature or a Minister. They can consist of many people or only one person, and have been described simply as another way of organizing and carrying out the functions of Government. An administrative agency exercises power over individuals or activities because it has been given the legal responsibility to do so. During this project the Commission identified approximately 380 ABCs authorized by law in Nova Scotia. This includes a range of ABCs such as occupational associations: (i.e., Registered Nurses Association, Land Surveyors, Veterinarians Association) which have responsibility for licensing and perhaps also disciplining or receiving public complaints about members; agencies responsible for operating public facilities such as hospitals and libraries; as well as agencies responsible for making decisions in particular areas such as employment, health, benefits, and rights.

The Reference to the Law Reform Commission is a request to specifically consider those agencies which could be classified as "administrative tribunals". This is a phrase which is understood by the legal community to mean those agencies which are authorized by the Government through law to make decisions which can affect people's equality, property, economic, political and liberty rights and economic and social entitlements. There are, however, many decisionmaking bodies which affect people and make decisions about resources in a community which are not, strictly speaking, "tribunals". The Commission feels that the role of such decisionmaking bodies in the administrative justice system in Nova Scotia also deserves careful consideration.

The Commission has identified a number of issues of concern in the existing system:

- There is a lack of knowledge about rights, uncertainty, delay, lack of training and public perceptions of unfairness.
- Issues of efficiency and cost to individuals and to the Government in the administrative system which, like a court system, is also expected to provide "justice", are a fundamental concern. In some cases, particularly involving individual's rights or entitlements, delay in the system can result in injustice and undermines the credibility of the system as a way to achieve justice.
- There is a concern that while reform is supported, the Government, in carrying out reform, should try to avoid making decisions expensive or "court-like".
- Some decisionmakers which generally operate as one kind of agency are sometimes required to carry out another function for which they are not always prepared.
- Some occupational associations, which often determine whether a person is able to carry on a particular trade, occupation or profession in Nova Scotia, are concerned because they feel they are asked to carry out a role that is not really within their expertise (e.g., disciplinary proceedings), and their decisions are often appealed or reviewed. This is expensive and distressing to members of these associations who emphasize the need for training for those asked to carry out this function. In general, where people on agencies or Boards perceive themselves to be making decisions affecting individuals, they have developed some procedures but are concerned about possible appeals and reviews and also about perceptions by either their colleagues or the public that they are not acting fairly.
- The question of appropriate procedures often seems hard for people to understand, particularly when issues relating to appeals and judicial review are involved. The relationship between the courts and decisionmakers and between the Government and the appointed decisionmaker is not always understood.
- There appears to be an *ad hoc* approach to procedures used by ABCs making decisions. Some agencies create their own, some are governed by regulations, and others have none. This is not surprising and is probably a necessary part of administration since one of the values of an administrative system is flexibility and tailoring of the process to meet the situation.



The Commission found that the administrative justice system in Nova Scotia has not developed on the basis of a well-planned design but rather, has tended to expand in various directions in response to particular needs and ideas as they arise. This is no longer a workable approach. In terms of justice values, the lack of design results in concerns about fairness and leads to a lack of public confidence in the system.

This *Discussion Paper* outlines the administrative justice system and some general concepts and principles for reform, including the need for education of the public and agency appointees. There is also a need to carefully structure agencies and the appointment process to ensure and maintain independence and expertise. The Commission believes that the institutions providing administrative justice should be reformed to better serve public and Government needs. In particular the Commission suggests that, aside from training and more considered structuring of agencies, there should be one Administrative Appeal Board for all administrative appeals in Nova Scotia. The Commission also suggests that there should be a new *Administrative Justice Act* for Nova Scotia establishing minimum procedures and practices that should be followed by decisionmakers making the kinds of decisions which might characterize them as a "tribunal".

The Commission identified some public and Government objectives which should be achieved by an administrative justice system and also be reflected in decisionmaking procedures. These objectives include:

- Independence
- Accessibility/Openness
- Expertise
- Representativeness
- Efficiency
- Accountability

The attainment of these objectives by an administrative system will create an environment in which the principles of natural justice can operate and, in fact, many of these objectives are integral to natural justice or fairness. It must be realized that these objectives may have different meanings for different situations. For example, accountability and efficiency may be understood differently depending on whether the person evaluating a system is in the Government or a member of the public. Ultimately, however, since ABCs are generally affecting public matters and resources, the two overall interests are the same.

The Commission has the following preliminary suggestions and seeks public commentary to assist it in developing a new law and in making a Final Report to the Government of Nova Scotia:

- There should be reform of the administrative justice system in Nova Scotia in order to better ensure independence, accessibility/openness, expertise, representativeness, efficiency and accountability.
- The relationship between the administrative structure of an ABC, the operation of an ABC and natural justice concerns must be fully recognized in any new law and in the system creating administrative agencies.
- Any reforms must include education of the public and members of the public acting as decisionmakers and must take account of the need to provide simple access to information about administrative procedures.
- Although ABCs can come in many different forms, all ABCs should, in their role, structure and personnel, reflect an analysis of the degree to which independence, expertise, efficiency, accessibility, representativeness and accountability are required to achieve the mandate of the ABC.
- Each Government department responsible for an ABC must have as part of its legal mandate a requirement that it carry out an assessment of the specific structural and personnel needs for all agencies it administers. Departments must specifically outline the needs of each ABC and develop criteria for appointments in accordance with those needs. Although it should not be a basis for an appeal of a decision of the ABC, unless bias is established, a new law should say that the appointment process should be transparent and accountable.
- There should be a new *Administrative Justice Act*, which sets out a number of minimum rights, powers and procedures that could be expected of most ABCs when making decisions that affect others. The *Act* and the administrative justice system must be simple and as accessible as possible for members of the public.
- The *Act* should say it covers all decisionmakers including those carrying out deliberations and providing recommendations to another agency unless their statute specifically excludes operation of the *Act*. This *Act* would cover all self-governing agencies which are specially created by statute.
- The Commission suggests that all final decisions of ABCs, including reasons for the decision, should be filed in a central public office easily accessible to the public.
- Agencies should be required by the *Administrative Justice Act* to develop and to communicate standardized rules of procedure for making decisions affecting rights and entitlements. The standardized rules should reflect minimum procedural rights including traditional natural justice rights and emerging fairness rights such as the

rights to access to justice, information, expedition, efficiency and resolution as well as substantive rights to written reasons within a reasonable time and to a decision based on principles of evidence.

- The enactment of a new law should be combined with the implementation of a training program and the adoption of comprehensive guidelines (which are not law) to assist decisionmakers in each agency to develop and interpret the requirements of natural justice, fairness, human rights law and modern caseflow management practices.
- An administrative tribunal should be able to control its own process, subject to the rights of people who are affected by its decisions and subject to the supervisory power of the courts through judicial review. There should be minimum standard powers provided in an *Administrative Justice Act* for all administrative tribunals which can be adjusted by the Government in the law creating the agency, if appropriate.
- The law relating to judicial review should remain as it is currently operating with some amendments to the Civil Procedure Rules regarding a time limit.
- The Government should create a single consolidated Administrative Appeal Board for all administrative appeals in Nova Scotia, which would play a role similar to that currently played by the Utility and Review Board. This Board should have standardized times for appeals and a standardized basis of appeal. The Administrative Appeal Board should have full and part-time people appointed to it who can meet the public need for expedition, informality and expertise combined with sufficient training to ensure principles of natural justice and fairness are complied with.
- The appointment process for members of any agency which is making decisions and particularly to the Administrative Appeal Board should ensure, where independence from Government and from any particular interest is important to the agency mandate and to fairness, that appointments reflect this requirement. Appointees must be trained to ensure an understanding of the meaning of conflict of interest and procedures must be developed for ensuring that this is respected. In cases where institutional bias may suggest that otherwise independent decisionmakers are biased, then there should be a clear separation from Government and provisions for tenure or other mechanisms of accountability, including stated terms of appointment and secondment of staff whose primary obligation is to the agency in question. In addition, the rights to information and respect for fairness, particularly where the same agency might carry out several roles including investigation and hearings, are paramount.

In addition to general comments on all its suggestions, the Commission specifically seeks comment on whether ABCs should be able to award costs; whether ABCs should be able to

re-hear cases and the appropriate balance to be struck between values of privacy and the right to view materials being considered by a decisionmaker.

# I INTRODUCTION

## 1. *The administrative justice project*

*Every year 200,000 Canadians make decisions that affect every one of us. The role they play has an impact on more than 3,700 health care facilities, nearly 14,000 educational institutions, many thousands of charities and social service providers. They direct 4,000 cities and towns, and federal and provincial Governments. They affect a multitude of corporations and about 100 professions.<sup>1</sup>*

Organizations known by a variety of names such as Agencies, Boards, Commissions, Councils, Societies, Committees and even Corporations (called ABCs in this *Discussion Paper*) make many important decisions every day. These organizations are usually made up of members of the public who are appointed, either on a part-time or a term basis by Governments or selected by the organization itself. Sometimes, people in these positions are employed full-time but more frequently they are purely volunteer or are paid an honorarium for their time.<sup>2</sup> Their activities can include providing advice to Government, advocating on behalf of particular issues (ie., Status of Women; Disabled Persons Commission) and making decisions about policies, money, rights, property or other interests. In all of the roles, but particularly in the decisionmaking role, these organizations profoundly affect the lives of all Nova Scotians.<sup>3</sup> It has been said that in terms of the number of people affected, the influence of some decisionmakers, such as human rights tribunals, labour boards, workers compensation boards, social benefits boards, and disciplinary or licensing committees for a number of occupations, is far greater than that of the courts.<sup>4</sup> Despite the influence of ABCs, in 1991 a Task Force reviewing the court structure in Nova Scotia found that:

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<sup>1</sup> P. Trueman, see comments in video script for "*In Search of Effective Governance*" produced by the Canadian Comprehensive Auditing Foundation 1994.

<sup>2</sup> For example, the Office of the Ombudsman of Nova Scotia is a full-time official (and an agency) appointed by the government specifically to ensure Nova Scotians receive fair treatment from their government and government agencies. The amount paid varies from agency to agency, however, amounts such as \$50-\$150 per board meeting plus any direct expenses incurred are fairly standard in Nova Scotia for part-time appointees.

<sup>3</sup> Concerns about the role of ABCs, and their impact on peoples lives is not new nor is it confined to Nova Scotia. As noted by one authority over ten years ago: "Reform of administrative procedure has been sought for a long time", R. Dussault, L. Borgeat, *Administrative Law A Treatise* Vol 1 (2d ed) (Carswells: 1985) 125 at note 309.

<sup>4</sup> Ratushny Task Force on Appointments to Federal Administrative Tribunals, *Independence of Administrative Tribunals* presented to the Canadian Bar Association meeting, Montreal, August 1988, 3 (on file).

*Little is written about Nova Scotia's administrative tribunals. We were unable to find anyone who knows exactly how many there are. The cursory review that we undertook found more than 300 in Nova Scotia of which approximately 130 might hold hearings at least occasionally. They range from the Fences Arbitration Committee of the District of Clare through the Residential Tenancies Boards to the Public Utilities Board. We know quite a bit about one or two of the major tribunals but not much about the mass of them.*<sup>5</sup>

In the course of its hearings, the Court Structure Task Force did, however, find that:

*There are no uniform powers and practices for administrative tribunals or minimum protections for parties except as are provided by the common law. The members of these agencies are often part-time, untrained and unfamiliar with the practices required by administrative law. Few of them have access to independent legal counsel. Few tribunals publish rules of practice. The Task Force was told that decisions of some tribunals are difficult to find. Certainly there is no central repository for rules, decisions and other directives issued by agencies. This view has been echoed by many others in other provinces.*<sup>6</sup>

In response to these concerns, the Minister of Justice on behalf of the Government of Nova Scotia, requested (by a formal letter of Reference) that the Law Reform Commission of Nova Scotia undertake a project to:

".... consider the state of administrative law in the Province and in particular, to develop draft legislation that:

- (a) standardizes the powers and procedures of administrative tribunals;
- (b) guarantees parties appearing before the tribunals basic procedural rights and safeguards;
- (c) simplifies administrative law, particularly with regard to judicial review and appeal; and
- (d) ensures the requisite degree of independence when a tribunal is required to act in a judicial fashion".

The Reference to the Law Reform Commission was a specific request to consider those agencies which could be classified as "administrative tribunals". This is a phrase which is

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<sup>5</sup> *Report of the Nova Scotia Task Force on Court Structure*, March 1991, 236.

<sup>6</sup> *Report*, 240.

understood by the legal community to mean agencies or officials authorized by the Government to make final decisions which can affect people's equality, property and political rights and their liberty and their economic and social entitlements.<sup>7</sup> There are, however, many decisionmaking bodies which affect policy and make decisions about resources and other matters in a community which are not, strictly speaking, "tribunals" (i.e., Crown (Government) Corporations; health care facility boards). The Commission feels their role, although not the specific focus of this project, is a matter which also deserves consideration.

The suggestions in this *Discussion Paper* are based on research regarding agencies and administrative practices in Nova Scotia and elsewhere. This *Discussion Paper* sets out the Commission's preliminary proposals for the reform of administrative law and the administrative justice system in Nova Scotia.

This *Discussion Paper* outlines the administrative justice system in Nova Scotia and some general concepts and principles for reform, including the need for education of both the public appearing before ABCs and members of the public appointed to ABCs, as well as the need to carefully structure agencies and the appointment process to maintain independence and expertise. As requested by the Government, it contains suggestions for practices that should be followed by decisionmakers when they are making decisions which might characterize them as a "tribunal". It also provides suggestions as to reform of the law and system governing judicial review and statutory appeals.

A Final Report will be published after the Commission has received, and taken into consideration, public commentary on these suggestions.

## **2. Language**

This *Discussion Paper* attempts to present legal information as clearly as possible so that people who do not have legal training can understand and provide comments on the Commission's suggestions for change. There are still some situations where the language relates to specific legal concepts and the words used will not be familiar to everyone. The following words in this *Discussion Paper* mean:

<b>appeal</b>	this is a process provided for by law which allows a person to obtain a second decision from another agency, a court, an official, or a Minister if he or she does not agree with the initial decision of an administrative agency or an official. There is no right of appeal unless provided in the law authorizing the original administrative decision. An appeal is not the same thing
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<sup>7</sup> Entitlements can include various kinds of licences or benefits such as workers compensation benefits or eligibility for health care plans.

in law as judicial review. The legal distinction can be confusing because in Nova Scotia there are many cases where there is an appeal process involving an appeal to a judge of the Supreme Court

- certiorari*** a Latin word describing a legal process which is used when a court reviews the decision of an administrative decisionmaker to "certify" the record of the decision to ensure there is no error
- common law** this is sometimes called case law. It is the law which is made by judges and is found in cases and decisions rather than laws passed by legislators. Much of administrative law is common law
- habeas corpus*** a Latin phrase describing an order of the Court used to require an agency to deliver a person or "present the body"
- intervenor** this is a term used to refer to a person or a group who is not one of the parties to the proceeding, but who may be given limited rights to participation because they may be affected by the outcome. For example, often citizens or a group representing a public interest might seek to intervene in a decision on the grounds that the decision might affect a broader community of people whose views should be considered (ie., a decision on granting a licence or increasing utility rates)
- judicial review** this is an application to the court to review the decision of an administrative decisionmaker to see if it was made within its authority, fairly, and without bias or apparent error on the record. It is not the same process as an appeal in that judicial review in Nova Scotia is not created by legislation but is a process of the common law created and developed by the courts. In some provinces, the common law has been replaced by a law codifying judicial review
- jurisdiction** this is the term used to describe the range of issues over which decisionmakers or courts have legal authority. For example, a person on a rent review tribunal would not have jurisdiction to decide whether a licence to carry out an occupation should be suspended. It is also sometimes used to describe a geographic region (ie., a province)
- legislation** another word for a written laws made by elected members of the Legislature (or Parliament). This is sometimes called statute law
- mandamus*** a Latin word describing a court order requiring a person or an agency to



carry out a public duty

**parties** this is the phrase used to describe the people or groups directly involved in a proceeding

**prerogative writs** this is the term used to describe an historical form of legal action and order used by the courts to regulate the behaviour of other lesser or "inferior" courts. These forms of legal action are still in use today in the process of judicial review of administrative decisionmakers although many of the rules governing when they could be used have been changed to make them more flexible. There were a number of these writs at one time, but the ones which are still primarily used today are *habeas corpus*, *certiorari*, prohibition and *mandamus*. In some provinces, all of these forms of court orders have been replaced by a law giving a statute based form of judicial review where decisions of administrative agencies can be questioned

**prohibition** a court order sought to prohibit a person or agency from carrying out an action on the basis that the proposed action would be beyond its legal authority

**regulations** these are rules authorized by and made in conjunction with statute law (legislation). They are usually more detailed than the statute and deal with more specific situations. Regulations are more easily changed than statutes because they do not need to be formally changed by political representatives in the Legislature

**standing** this is used to mean the legally recognized right of a person to have a say or present a position in a case. Usually, it means that the person or group has established or has been recognized in the legislation as having a particular interest in the outcome of a proceeding

**statute** another word used to refer to law that is created by political representatives in the legislature. The word legislation is also used to mean this form of written law

**subpoena** a Latin word used to describe a legal document ordering a person to appear before a court or tribunal

**tribunal** this is the word used to refer to the person or agency making a decision in judging a case. It can include a court, although in this *Discussion Paper* it is used to refer to administrative decisionmakers such as the

Workers Compensation Board, the Labour Relations Board, the Utility and Review Board or occupational or other licensing boards

## II THE LAW IN NOVA SCOTIA

### 1. Background

#### **What are ABCs?**

ABCs (Agencies,<sup>8</sup> Boards, Commissions/Crown Corporations/Councils) are also sometimes called "public authorities". They are administrative organizations or positions created by a law to act on behalf of the Legislature or a Minister. They can consist of many people or only one person, and can be described simply as another way of organizing and carrying out the functions of Government. An administrative agency exercises power over other people and over an activity because it has been given the legal responsibility and authority to do so. It is, in effect, another arm of Government which can, and often does, engage in all the traditional functions of Government. One textbook on administrative law identifies the following twelve "products" of ABCs which overlap to some extent with courts and Government departments:

1. adjudicating (e.g., making decisions on issues such as claims to workers compensation, utility rates, siting of facilities);
2. rule-making (e.g., by-laws, regulations);
3. policy-making (through information statements);
4. prosecuting;
5. spending money;
6. providing services;
7. investigating;
8. researching;
9. advising;
10. educating;
11. persuading; and
12. supervising.<sup>9</sup>

Many people in Government departments also make administrative decisions; however, these administrative decisionmakers are not seen as an extra arm of Government. The idea that the ABC or the individual decisionmaker is "independent" of Government is usually

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<sup>8</sup> Although "administrative agency" is a term often used to cover all forms of administrative organizations, the label "agency" does not necessarily determine whether it is an administrative agency of the sort being dealt with by this project. For example, in Nova Scotia the Economic Renewal Agency is the name given to a department of the government which is not an "agency" in this sense.

<sup>9</sup> J. Evans, H. Janisch, D. Mullan, R. Risk, *Administrative Law Cases, Text and Materials* (Emond- Montgomery: 1980) 9-10.

seen as the factor which distinguishes ABCs from Government departments.

Although they are technically capable of performing all the traditional functions of Government by making rules, administering and judging cases or making decisions (adjudication), as well as performing other functions such as advising, most ABCs engage in only one or two of these functions on a day-to-day basis. For example, the Law Reform Commission and the Advisory Council on the Status of Women have an advisory function in that they research issues and make law and policy recommendations to Government but do not make decisions or rules which directly affect the rights of individuals. By contrast, other agencies such as the Human Rights Commission have a number of roles including education, advocacy, rule-making and enforcing the law by investigating and deciding cases.

Many ABCs are created by Government to carry out a legislative policy or program and are delegated by law the authority to elaborate and implement that policy. In the course of so doing, they exercise a considerable amount of discretion. They "legislate" by developing rules and policies to be followed in the day-to-day work of carrying out legislative policy and they apply the rules they have generated in the course of implementing and enforcing that policy. Other ABCs have functions that are primarily legislative in that they create policy and develop regulations and rules. A few, such as the Labour Relations Board or the Human Rights Commission, when it organizes hearings about particular complaints, act very much like a court. Some Crown corporations and hospital boards primarily operate facilities, while others both administer and regulate private activity within a special or particular subject area. Finally, some ABCs, such as self-governing professional associations, are almost totally separate from Government. Their only connection with the administrative system is that they are often given the power to affect a person's rights or entitlements (e.g., licensing a person to carry out his or her trade, occupation or profession) by statute and, in those cases, are making use of delegated governmental authority. These self-governing agencies are also, when playing this role, expected to represent the public interest in the issue. An example of this would be a discipline committee of an occupational association which responds to consumer complaints about practices as well as licenses people to carry out the occupation. Some examples of these in Nova Scotia are the Veterinarian Association, the Barristers' Society, the College of Physicians and Surgeons, Nova Scotia Land Surveyors, the Nursing Association, the Dental Board, and the Association of Professional Engineers, to name a few.

### ***Why were ABCs created?***

It is generally agreed that ABCs were not created as part of a well defined approach to Government. They were not part of a grand design, but instead were created in an *ad hoc* way because of a need to respond to specific problems. For example, one of the first modern ABCs was the Board of Railway Commissioners which was created to handle problems

associated with the new railway industry.<sup>10</sup> Two world wars, a world-wide depression and several recessions all served to demonstrate the need for the Government to control and regulate a wide range of activities. Economic and social pressures, as well as technological change, have resulted in the expansion of Government intervention into almost all aspects of life. In Canada, there is also a great deal of Government involvement in social and economic life through programs intended to redress inequalities and to seek to ensure minimum standards of health and social security.

*As a result, it [the administrative system] plays a predominant role in political economic and social life, so much so that it constitutes the main reality of State power for the majority of citizens. This shift in the balance of power in favour of the Administration has not occurred without arousing reactions...[A] new evolution has begun [and] critics [claim] that the very essence of the democratic system is at stake...<sup>11</sup>*

While many would argue that this development has created a costly and ineffective system, in some cases it has also provided an opportunity for the participation of individuals in developing and administering Government policy in their communities by contributing their expertise, often on a part-time, voluntary or on a nominal compensation basis.

A variety of reasons for creating these bodies have been suggested<sup>12</sup>, including:

- Legislators need to concentrate on long-range social and economic planning and the creation of macro policies to implement long range goals. They do not have the time to monitor on a day-by-day or regular basis all of these policies and to implement them at the local level working through a normal Government department. There is a need for some external body to deal with repetitive detail on a case-by-case basis utilizing experts.
- If such external agencies are not created, Ministries or Departments would have to grow in size or there would have to be more of them if they are required to monitor and implement a wide range of specific policies at the local level. Larger staff, composed to some extent of experts in various fields, would be needed with the possibility that these experts might be employed

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<sup>10</sup> The evolution of administrative tribunals including a description of the various theories about them is outlined very thoroughly in R.W. Macaulay, J. Sprague, *Practice and Procedure Before Administrative Tribunals*, Vol. 1 (Carswell: 1988) Chapter 1.

<sup>11</sup> R. Dussault, L. Borgeat, *Administrative Law A Treatise*, Vol 1 (2d ed) (Carswell: 1985) 9.

<sup>12</sup> See generally, R.W. Macaulay, J. Sprague, *Practice and Procedure Before Administrative Tribunals*, Vol 1 (Carswell: 1988) Chapters 1 and 2.

only to be needed part of the time.

- Ministries or Government departments are unsuitable as a vehicle for public participation or the representation of the views of various interested and affected groups. Public participation, in this sense, is to be distinguished from organized advocacy as it is currently carried out in connection with senior civil servants or Government Ministers.
- From the Government's point of view, it is easier to overturn, if necessary, the decision of an agency rather than that of a Ministry or Department without questioning the integrity and wisdom of the Ministry or Minister involved.
- There is a perceived need to relieve the courts from having to provide decisions in a substantial number of cases involving similar facts. There is also the need to have decisions made where the deciding tribunal could take broader policy and the public's interest into account more than a court could and would do. Also, administrative agencies present a less costly alternative for people with problems that fall within the administrative area.
- Technological developments, such as atomic energy, and social problems, such as environmental pollution, require special expertise.
- From the Government's point of view, there is much to be said for diverting responsibility for the resolution of politically sensitive areas to specialized (discrete) non-partisan Government bodies.
- There is a perceived need to create bodies that can legislate, administer and adjudicate as well as fashion adequate substantive remedies in the public interest. There is a need for flexibility in the daily administration of Government operations - an opportunity to implement creative Government strategies through innovation and experimentation, rather than the more cumbersome legislative or judicial process.
- It might also be argued that there is a need for the dispersal of power in a system which would otherwise concentrate too much Government authority in a limited group of actors. It is possible that this diffusion of power via the use of administrative tribunals, may enhance democratic or participatory values in society in a way that has ceased to be possible or feasible in the more traditional representative institutions.<sup>13</sup>

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<sup>13</sup> D. Mullan, "Administrative Tribunals: Their Evolution in Canada from 1945 to 1986" in *Regulations, Crown Corporations and Administrative Tribunals* (ed) I. Bernier and A. LaJoie (University of Toronto Press:1985) 155. Mullan reviews a number of the major studies of

It can be seen that these reasons reflect both the Government and public benefits that may be achieved by an administrative system. At the same time there may also be costs associated with such a system from both the Government and a public perspective. From the Government's perspective some these costs include:

- Lack of accountability for decisions which may affect public funds and lack of control when compared to a Government department;
- Detrimental effect on morale of departmental employees;
- Adverse effect upon the morale of agency personnel if political review of agency decisions is too extensive;
- Need for individual support staff for each agency plus costs.

From the public's perspective some of these costs include:

- The added cost of another layer or arm of Government;
- Concern with the quality and qualifications of personnel appointed to the agencies;
- Concern about the degree of independence exercised by the agencies;
- Concern about the lack of uniformity regarding procedures employed by these agencies or the lack of rules in individual agencies; and
- Lack of public information about agency procedures.

### ***What is administrative law and justice?***

The Government's Reference, which asks the Commission to "consider the state of administrative law in the province", might seem to be a project specifically targeted to a legal audience and of little interest to the general public. But, as pointed out already, it is one of the areas of law reform which touches more people in some way than any other area of law because it deals with the system which governs the relationship between Government and individuals. Courts are one way to determine matters; however, long before cases reach the court system, laws, rules and policies are applied by administrative decisionmakers. As pointed out earlier, in some cases these are Government officials. In others they are people appointed by the Government to make these decisions, and finally, in some cases, they are individuals chosen by their colleagues to make some decisions that affect them (for example, in many occupations there are licensing or registration and disciplinary processes involving members of the same occupation).

Most individuals have little or no direct contact with the court related system of justice because contact only occurs when there is a specific conflict or problem (e.g., a crime has

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administrative tribunals and the policy issues involved in their creation.

been committed or a conflict arises between two people). Despite the fact that the court system is directly encountered by a relatively small part of the population, it is a well developed system with formal practices and procedures which generally apply to all courts. By contrast, what could be called the "administrative justice system", which also deals with conflicts and problems as well as a broader range of issues, has much less well-established practices. For example, in the court-related justice system, when a decision is made by community members regarding an incident, the process for selecting those decisionmakers, (the jury), while by no means a perfect system,<sup>14</sup> is known to most participants in the process. There are formalized rules protecting the rights of the participants in the case, and the jury is instructed by a judge and lawyers on the legal information that might properly affect their discretion in making decisions. This contrasts with the administrative justice system which might also involve decisions which fundamentally affect an individual's life (for example, occupational licensing, discipline procedures, access to social assistance or zoning decisions on property). The decisionmakers in this case, will also often be members of the public. However, the process of selecting these decisionmakers, their role and the rights of all parties within this system, are not well known to most of the participants, including the people making the decisions. This does not mean that there are no rules or established principles governing this system, but knowledge about these rules is largely confined to the legal community and is found in common law concepts such as "natural justice". The main regulator of the justice components of this system are the courts, who, if asked on review, will decide if a decision has, in fact, been made properly by the administrative decisionmaker.

Not surprisingly, lack of information about the procedures and the system can give rise to a perception of unfairness or arbitrariness in the process on the part of the public and frustration on the part of the community members being asked to make these decisions. In addition, the process can have delays and be costly if incorrect or unfair decisions are made and correction always has to occur either in the courts or through an appeal process to another agency or minister.

It is important to understand that the administrative justice system is not, and has never been, intended to be the same as the court-related system of justice. In fact, it is often thought of as exactly the opposite in that use of legal rules, formality and even the involvement of lawyers, is often expressly discouraged. In general, the focus has been on making things work efficiently and when a problem arises, resolving a situation rather than making a general determination of right or wrong. The emphasis has been on individualized decisionmaking by people who have some expertise or knowledge in an area. In general, the concern of individuals is to have their particular situation or experience understood in light of the existing rules. For example, rules governing the availability of social or economic benefits may seem straightforward but, in fact, they require case-by-case determination of the

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<sup>14</sup> See comments in the Law Reform Commission of Nova Scotia Final Report on *Juries in Nova Scotia*, June 1994.



person's situation.

Equally, there is a concern that decisions should be fair and be made fairly. While fairness has a particular meaning in law, from the point of view of a member of the public, some elements of fairness might include the belief that a decision will be made on a matter reasonably quickly, that his or her point of view on an issue will be heard and considered and that he or she will be treated similarly to another person in a similar situation. It might also involve the need to have some assurance that unfair factors, such as discriminatory attitudes, or economic status or the personal likes and dislikes of the decisionmaker will not determine the outcome and that there are some criteria which can explain the decision that is made.<sup>15</sup> To give an illustration: every day, many people in Nova Scotia apply for driver's licences and would expect, if they meet the set criteria such as passing a driving test, paying a fee, establishing their address in Nova Scotia, and are of the legal age to drive and have no legal ruling prohibiting them from having a driver's licence, that they will obtain one. Generally, there is no concern that the Registrar of Motor Vehicles might, in fact, decide on the day the person applies, that no licences will be given, or that people with that person's last name should not have one or that this individual really does not deserve one. If this happened, the applicant would complain that the Registrar was making a decision unfairly and on some unauthorized basis. In this case, the basis for the decision to give a driver's licence is clearly set out in law and the procedure for applying for the licence is well known. However, the procedure, and even whether there might be a right to complain about the decision, is likely to be less clear to most people. While this avenue might be explored if a decision is not made in their favour on a complaint, it is unlikely, unless the person has some information about the options or has access to legal advice, that he or she will be in a position to seek a further review of the decision.

The driver's licence situation is exaggerated for the purposes of giving an example of a situation where the procedure for getting a decision made (an application form) and the rules for making the decision are fairly clear to everyone involved. It does serve to indicate the concern that might come up in other cases where a person or a board is required to make a decision in a matter but there may be little or no guidance as to what procedures they should go through in making the decision or what things can properly be considered in making the decision. This creates uneasiness on the part of the public and on the part of the people being asked to exercise this authority which affects other people's rights and interests. The problem is made worse when people also have concerns about the individuals who are making the decision and may feel that they are not qualified to make the decision or are unclear as to whether their case will be fairly considered by that individual.

As pointed out in the Introduction, concerns about the administrative justice system and its

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<sup>15</sup> For a discussion of the issue of discrimination see the articles collected in *Discrimination in the Law and the Administration of Justice*, Canadian Institute for the Administration of Justice, (eds) W. Tarnaplosky, J. Whitman, M. Ouellette (Les Editions Thémis: 1993).

operation are not new concerns<sup>16</sup> nor are they confined to Nova Scotia. These concerns largely reflect the problem of trying to have a system which has some flexibility to respond to a myriad of human experiences while also desiring consistency, predictability and accountability in discretionary decisionmaking by publicly appointed administrators.

## **2. The problem**

As set out above, there are both benefits and costs associated with the administrative system. To a large extent the value of any system or structure must be measured against the reasons for its creation. Has it achieved the objective it was designed to achieve? In some cases, there may be a concern that many structures or ABCs have outlived their initial role and should be restructured in a way which might operate more efficiently and better meet current needs. In the last decade there was a concern for public participation and more involvement in decisionmaking of Government, hence, the creation of numerous "Round Tables" and consultative expert/stakeholder groups and independent agencies to open up the process of Government. More recently, the costs that this approach imposes and the fiscal constraints on Government have created an interest in greater efficiency in decisionmaking and concern for accountability of independent agencies responsible for expending public resources. The point here is that attitudes, resources and the needs of society change, generating a need for reform. A current example of this type of restructuring can be seen in the amalgamation of several ABCs to create the Utility and Review Board.<sup>17</sup> In such cases there has been an estimation that a costly duplication of activities was occurring. In other cases, there may be a determination that it is unnecessary to have an ABC independent of Government carry out a task.<sup>18</sup> Governments have also begun to adopt more directly consultative roles and it is not uncommon to find departmental officials issuing consultation documents and carrying out public information and consultation sessions.<sup>19</sup> Many of these concerns which also relate to confidence in the administrative system underlie this Reference. In proposing reforms to

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<sup>16</sup> The theme of a recent Conference in Ontario organized by the Council of Canadian Administrative Tribunals, "Administrative Justice: Meeting Tomorrow's Challenges", Ottawa, April/May 1995, suggests that these concerns are still of central interest.

<sup>17</sup> The Public Utilities Board, the Expropriations Compensation Board; the Nova Scotia Municipal Board and the Nova Scotia Tax Review Board were combined to form the Utility and Review Board, S.N.S. 1992, c.11.

<sup>18</sup> A recent example of this is the movement of the initial task of assessing awards under the *Victims' Rights and Services Act* S.N.S. 1989, c.14 as amended S.N.S. 1992 c.36 from a Board or Panel to a government official in a department.

<sup>19</sup> For example, the recent process relating to the passage of the *Environmental Act* and related regulations in Nova Scotia.

existing practices and law the Law reform Commission is forced, to some extent, to take the laws which create the agencies at face value, and to assume that their particular structure and decisionmaking roles have been the result of a purposive design rather than simply a remnant of history. This *Discussion Paper* focuses specifically on issues relating to the concerns about powers, procedures, review and the independence of the people making decisions which affect others. It does no more than touch upon the need for overall redesign and reconsideration of the roles of ABCs. This is a matter for Government policy in each department.

In connection with the Reference, which focuses on procedural reforms to the existing system, probably the single largest problem identified is lack of training and information. Often people are placed in roles which require them to make decisions affecting other people's rights. They are expected to make these decisions in a way which reflects "principles of natural justice" in their specific context. Many people end up in this role because of their expertise in the particular activity or because they represent a particular perspective on the matter rather than because they have the training to make decisions affecting other people. A common example of this might be occupational associations such as that governing the medical profession where the expertise of the individuals lies in health care rather than the decisionmaking process. For many people without legal training and even for those with legal training,<sup>20</sup> despite the term "natural" in connection with "natural justice", how to make sure this occurs is often a mystery. Often ABCs making such decisions are instructed in the law creating them that they must develop their procedures for making such decisions. This means either they must employ a lawyer to give them advice or else they are forced to deal as well as they can with concerns. If a decision is made unfairly or believed to have been made unfairly, then it may be reviewed by the courts. This can create further costs and problems for many people. At the same time one of the reasons for creating administrative decisionmakers is to avoid creating "mini-courts" with overly formal legal processes. This means that people making decisions must ensure that the way they make decisions or carry out activities meets some standard of fairness but still meets the needs of efficiency and expedition. For people appearing before these decisionmakers, there are concerns about not being sure of the rules or what rights exist or that they are being dealt with fairly.

More importantly perhaps than rules there is a need for training to ensure that people who are asked to play this role understand the meaning of the principles of natural justice and how they might operate. Despite a long history of legal interpretation regarding the meaning of "principles of natural justice", there is no settled set of minimum rules which could be provided to people regarding procedures which would apply in every case. Ideas of what

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<sup>20</sup> For example, a very recent case before the Supreme Court of Canada involved a complaint by one judge that a Judicial Disciplinary Committee was biased against her and infringed her *Charter* rights: *Ruffo v. Conseil de la magistrature* (SCC) (Dec. 14, 1995) reported in *Lawyers Weekly*, Jan. 12, 1996, 10.

constitutes fairness are complex, even for people with legal training. Although there are some established legal ideas about fairness, each situation still requires a consideration of how these ideas are to apply in the particular case. Since fairness is often evaluated on a case-by-case basis, a set of rules cannot totally insulate a decisionmaker from review or appeal of his or her decision. This means that although law can provide some guidance to decisionmakers, it will still require close analysis of how to achieve "natural justice" in each case. It is for this reason that training and some support services or monitoring to assist people is as important as a new law setting out some of the procedures.

In 1993, as part of its research for this project, the Commission sent out a survey to 382 ABCs then authorized under the laws of Nova Scotia (of these 197 responded). The survey asked questions relating to the structure of the ABC as well as whether it held hearings, had procedures or had any comments on whether standard procedures would be useful. A list of the agencies identified is found at the end of this *Discussion Paper*. It is important to realize that this list is no more than a reasonably accurate snapshot of the situation at that particular time. In the current climate of restructuring and re-engineering of Government organizations, many changes have already occurred including amalgamation of municipalities. For example, many of the hospital boards, school boards and other agencies no longer exist in the same form as at the time of the survey. In addition, other organizations have been created to carry out new activities. The list does, however, serve to illustrate the very diverse range of organizations and the extent to which they play a role in public decisionmaking. Aside from indicating the range of agencies, the list serves to establish several points. First, there are a large number of agencies that carry out a range of functions. Second, many of these agencies do not have just one function but have multiple functions. For example, an ABC, such as a liquor commission, might primarily be a retailer but also have a regulatory and licensing function regarding some activities as well as dealing in its administration with some disciplinary functions and processes involving staff in the context of the collective agreement. Aside from information on the survey, the Commission has also reviewed the appeal and review procedures set out in the statutes and regulations in 1995.

On the basis of comments in the survey, discussions with an advisory group, as well as additional legal research, the Commission felt it had sufficient information to reach some preliminary views about the administrative justice system in Nova Scotia. Some of the concerns identified by the Commission include:

- There is general enthusiasm and support for this Reference. There are many committed and interested people involved in the administrative system who have some valuable insights and suggestions to contribute.
- There is a need for greater public communication about this sector. The need for proper management of the entire system is indicated. As well a needs-based assessment of specific agencies is required. The belief that the existing system is very diverse with structures being related more to the period of time

they were created or particular situational needs rather than through any overall planning was confirmed.

- Some organizations, particularly those regulating occupations, wished that Government would provide guidance on hearings.
- There should be a more standardized administrative appeal structure.
- There is some concern about the quality of appointments and many people are unaware of how the names of people had come up (this may have altered since a new system, including advertisements for appointments, was put in place after the survey). Accountability to the public and to Government and expertise in the people appointed are seen as critical. There should be a transparent and standardized process for appointments.
- Voluntarism and public participation should be evaluated. There was the need to consider in depth the requirement for expertise and the cost of obtaining this. Some people cannot afford to devote time to be on Boards as the remuneration is too small. There is a concern about exposure of people on Boards particularly where being a director may create liability (ie., statutory payments to staff, loans, environmental problems etc.)
- There are many ABCs which are not accounted for in legislation but do impose costs (ie., Task Forces, Round Tables). The administrative system is sometimes perceived to be costly in terms of direct dollars, duplication, wasted effort and time, poor or uninformed decisionmaking and also, in terms of costs which are not apparent in that they involve reimbursement for expenses rather than direct honorariums or salaries.
- There is some concern about the nature of the ABCs role in that the relationship with Government is unclear. Some may perceive that expertise and comments are sought in "principle" but not in "fact" and that they may be seen as a "rubber stamp". There may be some concern about openness and criticism of policy decisions and uncertainty as to their role. There is a need for specific examination of the relationship between Government and these agencies particularly in the context of public interest or independent ABCs.

In general, it can be concluded that the administrative justice system in Nova Scotia has not developed on a well-planned design but rather has tended to expand in various directions in response to particular needs and ideas at a particular point in time. This is no longer a workable situation as a governmental practice. In terms of justice values, the lack of design results in concerns about fairness and lack of public confidence in the system.

The impact of a lack of a systematic approach to the design of administrative agencies, particularly in the context of decision making procedures, has been noted in a recent proposal for reform of the federal administrative system:

*There is currently no common procedural structure for federal administrative decision-making. Procedural directions in statutes, where they are found at all, are vague. Agencies are required to develop procedures in an ad hoc manner. This results in unnecessary variation between procedures which are unduly particularized to each individual agency.<sup>21</sup>*

The consequences of this approach were noted in that Proposal as:

- *uncertainty, both within the agencies and outside, as to the extent of procedural rights;*
- *increased difficulty in accessing administrative justice;*
- *duplication of effort in the drafting, development and amendment of procedure;*
- *delay in the implementation of new programs;*
- *direct and indirect costs resulting from that duplication as well as in training costs;*
- *a failure to fully utilize the abilities of individuals who are not formally trained in procedures.*

As pointed out in a recent report from the Ontario Law Reform Commission<sup>22</sup> access to justice in the administrative context must mean that people find the system a useful and viable alternative to making use of the court-related system to resolve a problem or determine issues. Where systems are not perceived as fair or useful, this creates an access to justice problem because people may make use of less acceptable alternatives such as conflict or remain dissatisfied with the system.

### **3. The law in Nova Scotia**

It was pointed out above that, although the law and practices governing the administrative law system are not well known or easily accessible to people without legal training, there are

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<sup>21</sup> *Proposal for a Federal Administrative Hearings Powers and Procedures Act*, Department of Justice Canada, April 1995.

<sup>22</sup> Ontario Law Reform Commission, *Report on Avoiding Delay and Multiple Proceedings in the Adjudication of Work Place Disputes*, April 1995, 13.

legal concepts and principles which do govern the system. It is not possible in this *Discussion Paper* to do more than briefly outline some of the main principles that exist in Nova Scotia and operate, usually through the courts, to regulate the practices of ABCs, particularly when they make decisions affecting the rights or entitlements of individuals.

### ***Natural justice***

The most important concept in administrative law is called "natural justice". In law, the concept of "natural justice" has some specific elements, although it can all be understood more generally as fairness. Natural justice is usually concerned with two main issues - fair procedures and bias. Both of these reflect the idea that justice must not only be done but must also be seen to be done.

#### **(a) Fair procedures**

This is a concern that the procedures involved in making decisions be fair and be perceived as fair. There are a number of procedural rights established by common or judge-made law and by legislation. All of these elements are sometimes described by a Latin phrase *audi alteram partem*, which means, "listen to the other side". These include the right to notice that a decision is being made that affects the person; the right to have each side of the issue presented to the decisionmaker; the right to know about the information being considered by the decisionmaker and to comment on it; and finally, the right to have the decision made on the information presented and not on some other material. These are general procedural rights which can apply in a variety of circumstances and can take different forms. For example, there may not always be a right to an oral or a public hearing and decisions may be made, as they often are, on the basis of a written record. In those cases then, there would be a right to know of the material being considered by the decisionmaker and to have an opportunity to respond but it would not necessarily take the form of examination and cross-examination of witnesses. In other cases, there may be an oral hearing where there may be a right to examine and cross-examine witnesses and the materials being considered by the decisionmaker. In general, the courts have found that the greater the effect on a person's rights or the more "court-like" the function of the agency in making a decision, then the greater the procedural requirements.

It is important to realize however, that an interest in informality should not necessarily result in a loss of procedural protection or rights. Section 7 of the Canadian *Charter of Rights and Freedoms*,<sup>23</sup> enshrines these concepts as constitutional rights in some cases. Section 7 states that:

*Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental*

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<sup>23</sup> Constitution Act, 1982

*justice.*

Although the exact meaning of the "principles of fundamental justice" has been debated, it has been understood by the courts to mean, at a minimum, a duty of fairness in procedures and decisionmaking where Government authorized actions affect the life, liberty or security of a person.<sup>24</sup>

A recent case in Nova Scotia provides an example of a situation involving a concern for procedural fairness. In the case of *Walker v. Nova Scotia Board of Registration of Embalmers and Funeral Directors*,<sup>25</sup> Mr. Walker, a funeral director, was suspended by the Board for one month because of a public complaint. It appears that Mr. Walker continued to practice while his licence was suspended and he was given a second suspension. Mr. Walker then sought a judicial review (by *certiorari*) of the Committee's decision in the Supreme Court of Nova Scotia on the basis that the Committee had denied him "natural justice". In particular, he argued that, contrary to the *Embalmers and Funeral Directors Act*, not all members of the Board were notified of the meeting where he was suspended and, in addition, he was not allowed to speak to the nature of his punishment once they had concluded there was misconduct. The trial judge agreed with this concern and also found the Board's process was a violation of Mr. Walker's rights under s.7 of the *Charter*. The trial Judge's decision was later overturned on an appeal to the Nova Scotia Court of Appeal on another basis.

#### **(b) Bias**

In law, the issue of bias is concerned with the nature of the person or agency making the decision. A lengthy Latin phrase has been used to describe this concept which is found, for the most part, in common law: *nemo debet esse iudex in propria causa* (no one can be a judge in his or her own cause). This usually involves two ideas. First, the "judge" cannot have a material interest in the outcome of the case which might affect the decision. Also, there must not be a reasonable likelihood or apprehension of bias in the decision. This often arises in the context of the ABCs involvement in the investigation of a complaint or other issues that might mean it could not make a decision with an open mind. It is also a fairly complex issue where people have been appointed to public boards because they represent an interest or

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<sup>24</sup> A useful review of the debate and case law is found in T. Singleton "The Principles of Fundamental Justice, Societal Interests and Section 1 of the *Charter*" (1995) 74 *Can. Bar Rev.* 446. Recent case law has expanded the *Charter* to apply to situations where non-governmental organizations are involved. In those cases, the concept of "Charter values" has been applied as an approach to evaluating the behaviour of non-governmental organizations: see *Hill v. Church of Scientology of Toronto* (1995) 126 DLR (4th) 129 (SCC).

<sup>25</sup> (1994) 137 NSR (2d) 362 (Tidman, J). The decision was overturned on appeal: *Re Walker and Board of Registration of Embalmers and Funeral Directors et al.* (1995) 126 DLR (4th) 549 (NSCA).



bring some knowledge or expertise to a situation.

Another recent case gives a second example of a situation where procedural rights and bias were involved, although there was no right to an oral hearing. It also serves to illustrate the importance of the concept of bias and how that has been interpreted by the courts in a situation where there has been an investigation by the agency making the decision. In *Re Miramichi Agricultural Exhibition Association Ltd. and Lotteries Commission of New Brunswick*,<sup>26</sup> casino and bingo licences were cancelled by the Lotteries Commission because it found that the Agricultural Exhibition Association broke one of the conditions of the casino licence. The Association applied to the court for a review of the decision. The court found that although there was no right to a hearing, the Association did have a right to be informed and given an opportunity to defend itself against allegations, and to be assured the decision was taken by proper authorities. In the case, the fact that there had not been a proper process raised an apprehension of bias. The concern with bias arose because the process was secret and had not been discussed with the Association. There was also a concern that the person making the decision may also have been involved in investigating the complaints. The New Brunswick Court of Appeal commented:

*It is not acceptable that a public authority issuing licences proceed in an arbitrary fashion in this area. The requirements of procedural justice are such that the investigated party must be informed of the allegations against it and given the opportunity to present its case, no matter how tenuous its position is thought to be by the licensing authority. The licensee must also be assured that the decision will be taken by the proper authorities: it is necessary that those responsible for the investigation not be the persons making a final determination on revocation of the licence.*<sup>27</sup>

### **Judicial review and appeals**

To most people, the terms "review" and "appeal" mean the same thing - someone to reconsider or check to ensure a decision is correct or made properly. In law, these are two different issues, even if both happen to be carried out by a judge of the Supreme Court. In theory, there is a substantial difference between appeal and review. Appeal is strictly a *statutory* right which only exists if it is expressly provided for in the law governing the agency or the issue. In addition, the basis of the appeal is determined by the wording of the legislation. Judicial review is quite different - it is the common law authority of superior courts to review the decisions of administrative decisionmakers and tribunals.

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<sup>26</sup> (1995) 126 DLR (4th) 557 (NBCA).

<sup>27</sup> at 566.

**(a) Judicial review**

The historical core of judicial review is found in the English common law principles relating to legal documents called prerogative writs. These writs were the formal means by which the King and ultimately the courts were able to review the decisions of local administrative authorities, such as justices of the peace and sheriffs.<sup>28</sup> Although there have been some technical changes and even elimination of these writs in some provinces, even today they form the basis of the inherent authority of the court to review the decisions of administrative tribunals and decisionmakers.

The most important of the prerogative writs are *certiorari*, prohibition and *mandamus*. These forms of legal proceedings are used when a person affected by a decision applies to a court arguing that an administrative tribunal or decisionmaker has made a decision which is considered to be "outside of its jurisdiction" (or authority) or committing other jurisdictional errors. *Certiorari* is an examination of the proceedings of an administrative tribunal whereby it is determined whether the decisionmaker has acted within her or his jurisdiction or not, and if so to correct the mistake and/or refer the matter back to the decisionmaker. The writ of prohibition is used to prevent administrative decisionmakers from committing jurisdictional errors, or more specifically from continuing with a proceeding in a matter outside of its powers. *Mandamus* is a specialized writ used to compel a person or body exercising powers delegated under statute to perform an act or do something which they are compelled to do by mandatory provisions in a statute.

The rules and principles in Nova Scotia regarding judicial review are found in several laws, Civil Procedure Rules<sup>29</sup> and the common law. For example, certain rules and principles can be found in *Civil Procedure Rule 24*, and various statutory provisions such as the *Judicature Act*<sup>30</sup> and the *Proceedings Against the Crown Act*.<sup>31</sup> The main development in Nova Scotia coming close to a reform of these judicial review procedures occurred in 1972 when *Civil Procedure Rule 56* was made by the courts. This rule was part of a general reform of the Civil Procedure Rules in Nova Scotia. Under Rule 56, the procedures for obtaining the prerogative writs have been simplified and the courts have allowed combinations of orders which avoids

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<sup>28</sup> S.A. de Smith *Judicial Review of Administrative Action*, (2d ed) (Stevens:1968) 363.

<sup>29</sup> The Civil Procedure Rules are the Rules made by the justices of the Nova Scotia Supreme Court and Nova Scotia Court of Appeal for procedures in court.

<sup>30</sup> R.S.N.S. 1989, c.240.

<sup>31</sup> R.S.N.S. 1989, c.360.

the problem of someone applying for the wrong order.<sup>32</sup>

There are still a number of complex legal issues relating to the meaning of jurisdictional error or acting "within jurisdiction". One of the important points to understand is that where natural justice or procedural rights are not followed then, this is also considered a jurisdictional error. There is another complicating historical anomaly which applies to the prerogative writ of *certiorari* which is used to show that a legal error has been committed by the decisionmaker in question. The problem is that the court, in determining whether a legal error has been committed or not, is restricted to making this determination based on the "record" of the tribunal or decisionmaker. The question of what constitutes the "record" is controversial. It obviously includes any written decision made by the tribunal, but questions arise in cases where, for example, the decisionmaker has kept a recording of the proceeding or hearing or has made notes during the hearing of the evidence and argument, or if there is more than one member of the tribunal, and only one of its members has made notes of the proceeding. There is no general common law duty for a tribunal or administrative decisionmaker to give written reasons or reasons at all.<sup>33</sup> If this is the case then the remedy of *certiorari* for legal error on the face of the record is a hollow remedy, because it will be difficult for a person to establish a legal error in the absence of a written record of the decision in question. In addition there is a six month limitation period for applying for

*certiorari* in Nova Scotia and the Civil Procedure Rule for extensions of time (Rule 3.03) does not apply.

#### **(b) Statutory appeal**

The Law Reform Commission's research in 1994-95 (updated for part of 1995) found over 205 statutory appeals from administrative tribunals and decisionmakers in Nova Scotia statutes and regulations.<sup>34</sup> These appeals are to a number of various Government officials and Ministers, courts and administrative appeal boards. Approximately 32% of the statutory appeals are directly to the Supreme Court of Nova Scotia. An additional 5% are appeals

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<sup>32</sup> See, for example, *Lord Nelson Hotel v. City of Halifax* (1972) 33 DLR (3d) 98 (NSCA) at 111.

<sup>33</sup> Although the court has implied a duty in particular cases; see *Re: Yarmouth Housing and Rent Review Commission* (1985) 139 DLR (3d) 544 (NSCA) where Cooper, J.A. commented at 553 that: *It [the Commission] should not confine itself merely to a recital of information before it and its conclusions, but it has a duty to set out why it has rejected the information and evidence produced before it by the Applicant.*

<sup>34</sup> The research was carried out Dec. 1994 and circulated to the government for corrections. As with the list of ABCs there are changes occurring regularly and these percentages, while useful for purposes of illustration, alter.

directly from administrative tribunals to the Nova Scotia Court of Appeal while 27% of the appeal provisions allow for appeals to other administrative appeal boards, specifically created by the same law. Various provincial Ministers are allowed to review decisions of boards or officials in approximately 17% of these appeal provisions. The Nova Scotia Utility and Review Board is the appeal or reviewing body in approximately 8.3 % of the statutory appeal provisions. The rest of the appeal provisions are divided among the Provincial Cabinet (3%) review by the same administrative decisionmaker (5%), Family Court (in one instance), Probate Court (again in one instance), and also various Government officials (1%).

What is perhaps surprising for many people about these percentages is the number of statutory appeals which go directly to the Supreme Court of Nova Scotia or the Nova Scotia Court of Appeal (a total of approximately 37%). By far the most popular administrative appeal tribunal in Nova Scotia is the Supreme Court of Nova Scotia.

Almost all of these statutory appeals differ in their scope and purpose. It is, however, possible to divide them into four general categories (depending on the different powers of the appeal board or court to reconsider the lower decision):

- (1) Some appeal tribunal or decisionmakers are given the right to hold what is called a hearing *de novo*. In these situations the appeal body makes no reference to and can ignore the lower or first decision. As this category suggests, they must hear the evidence anew, and base their decisions strictly on the evidence they have heard. Examples of these kinds of appeal provisions are contained in the *Nursing Assistants Act*<sup>35</sup> which allows for a trial *de novo* before the Supreme Court from the Nursing Credentials Committee. A similar type of appeal can be made from the Board of Registration of Nursing Assistants under the same legislation. Another well known example of these kinds of appeals are contained in the police regulations made under the *Police Act*<sup>36</sup> which provides that the Police Review Board has the authority to hold a hearing *de novo* with respect to a matter which has been considered by the Chief Officer and Board of Police Commissioners.
- (2) Another form of appeal is referred to as a rehearing. In these situations the appeal tribunal has the right to hear and consider new evidence concerning the matter in question, but at the same time the purpose of the hearing is to consider the correctness of the conclusions and decision reached by the lower authority. One example of this is the Registered Nurses Appeal Committee created under the *Registered Nurses Association Act* to deal with complaints

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<sup>35</sup> R.S.N.S. 1989, c.319, s.17.

<sup>36</sup> R.S.N.S. 1989, c.348, s.27, s.32.

regarding registration decisions and discipline decisions.<sup>37</sup> This Committee, which is an *ad hoc* Committee created by the Board where there is an appeal, has the authority to consider the correctness of the decisions of the Discipline Committee, but in making that determination they have the jurisdiction to hear new evidence or reconsider the same evidence presented to the Discipline Committee, as well as having the power to award costs.

- (3) The third category of statutory appeals are "true appeals", where the appeal body does not have the authority to hear new evidence, but must review and reconsider the decision of the lower authority based on the evidence presented at the initial decisionmaking stage, or at least based on whatever record is available of the lower decision. The scope of these kinds of "true appeals" varies a great deal, but most frequently the appeal is based on "errors or law, jurisdiction or procedure". For example, in a new law, the *Cosmetology Act*, there is a provision for an appeal from a decision of a discipline committee (after a public hearing) although the basis of appeal to the Court is not entirely clear in the *Act*.<sup>38</sup> It is important to note that the vast majority of the 37% of statutory appeals which go to the Nova Scotia Supreme Court or Court of Appeal are "true appeals", where the Supreme Court can only overturn the lower decision on the basis of some standard ground for judicial review (jurisdictional, legal or procedural error).

As indicated above, it would be helpful if the various statutory appeal mechanisms could be categorized. However, this is not the case. Not only are there literally hundreds of different pieces of legislation with different wording as to the authority of the appellate body, there are also a multitude of different informal and formal practices followed by these appellate tribunals or decisionmakers. Consequently, if a member of the public with or without a lawyer embarks on one of these statutory appeals it is never precisely clear, unless he or she can become familiar with the actual practices of the board, as to the nature and scope of the appeal hearing itself, or the ultimate jurisdiction of the appeal body to deal with the lower decision.

There is also a significant variation in the procedural requirements and details of each of

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<sup>37</sup> R.S.N.S. 1989, c.391, s.11, s.47, s.50, s.54, s.55.

<sup>38</sup> *Cosmetology Act*, S.N.S. 1995, c.5:

s.21 *Any person whose licence is suspended or revoked, or any person who feels aggrieved or is affected by any order or decision of the Committee, may appeal to a judge of the Supreme Court of Nova Scotia at any time within three months from the date of the suspension, revocation, order or decision and the judge may make an order varying, confirming or reversing, either in whole or in part, the suspension, revocation, order or decision appealed from.*

these appeal agencies. The two extremes are appellate decisionmakers, who, like Ministers have an extremely wide latitude in reviewing administrative decisions, but who are under no statutory obligation to hold hearings or follow the other standard procedural requirements associated with judicial-like tribunals or decisionmakers. At the other extreme are hearings before bodies such as the Labour Relations Board which have relatively elaborate practices and procedures for hearings.

In theory, the standard or threshold of review at the court level differs between appeals and judicial review. This difference is supported in theory, since the court should be reluctant to exercise its inherent jurisdiction to overturn administrative decisions, while a statutory appeal is by definition statutory permission to second guess administrators and tribunals. However, in practice, and because of relatively recent developments in the common law, the difference between the two is breaking down. The first trend is that, in the absence of express wording, the courts are reluctant to interpret their powers expansively on appeal.<sup>39</sup> In other words, the courts are reluctant to imply that they have the authority to hold hearings *de novo* or rehearings at the appeal level. The courts also shy away from implying an authority to rehear evidence because of the practical problem of limited court time and resources.

This trend now is also part of official common law doctrine. In *Pezim v. British Columbia Securities Commission*<sup>40</sup> the Supreme Court of Canada considered the standard of an appeal to a court from a "specialized" administrative tribunal. In this case, the Supreme Court held that the British Columbia Securities Commission was entitled to "considerable" deference from the Court on questions of interpretation of the securities law falling squarely within their mandate. In cases where there are appeals from "expert and specialized" administrative tribunals the Supreme Court felt that courts should not interfere with the exercise of discretion unless the tribunal's decision was clearly unreasonable.<sup>41</sup> This is a recent decision of the Supreme Court of Canada, and its future effect on administrative law is somewhat uncertain although it has already been adopted by the Nova Scotia Court of Appeal.<sup>42</sup> Obviously it only applies to "expert and specialized" tribunals. In determining whether the

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<sup>39</sup> For example, in a recent case, *Scott Maritime Ltd. v. Labour Standards Tribunal (NS)* (1994) 135 NSR (2d) 58 (NSCA), the Court took the view that, on appeal, deference should be given to decisions of specialized tribunals even where there is no privative clause unless the interpretation of the law is incorrect.

<sup>40</sup> (1994) 168 NR 321 (SCC).

<sup>41</sup> The test is usually stated as "patently unreasonable". Although the Supreme Court of Canada has described this test a number of times it is not easy to assess when a court will find a decision "patently unreasonable": see *A.G. Canada v. Public Service Alliance of Canada* [1993] 1 SCR 941 (SCC) at 963.

<sup>42</sup> *Scott Maritime Ltd. v. Labour Standards Tribunal (NS)* (1994) 135 NSR (2d) 58.

tribunal is "expert and specialized" the Supreme Court of Canada concentrated on the actual statutory provisions in question, and concluded that because the British Columbia Securities Commission was given such a broad discretion in the statute, this supported the conclusion that it was "expert and specialized". It is also important to note that "curial deference" will only apply in cases where the tribunal is dealing with the interpretation of its own policies, regulations or enabling statute. Therefore, once it goes beyond these parameters in reaching a decision then "curial deference" no longer applies, and presumably the court can consider the "correctness" of the tribunal's decision. In addition, the Supreme Court of Canada has also stated that, although there should be deference to specialized tribunals:

*... on the other side of the coin, a lack of relative expertise on the part of the tribunal vis-a-vis the particular issue before it as compared with the reviewing court is a ground for refusal of deference.*<sup>43</sup>

### **Powers of administrative decisionmakers**

The powers of most administrative decisionmakers are set out in the law giving them authority. In general, in Nova Scotia, people who are required by law to make decisions or hold hearings are given the powers of a Commissioner under the *Public Inquiries Act*<sup>44</sup> and will be able to issue an order requiring witnesses to attend a hearing as well as take information under oath. The administrative decisionmaker often has the ability to register their decisions with courts so they can be enforced as orders of the court. Some decisionmakers can also award costs in cases. There is a great deal of variation in the kinds of powers given to administrative decisionmakers but in general it depends on the wording of the law creating the agency. For example, under the *Utility and Review Board Act*,<sup>45</sup> the Board members have the following powers:

- all the powers and immunities of a Commissioner under the *Public Inquiries Act*;
- power to administer oaths and affirmations and certify official acts;
- power to issue subpoenas; failure to comply will be considered contempt;
  
- power to take evidence;
- power to adjourn hearings;
- the Board may order costs to be taxed and fees to be paid to witnesses; and
- the Board may have its orders enforced as if they are orders of the Supreme

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<sup>43</sup> *United Brotherhood of Carpenters and Joiners of America Local 579 v. Bradco Construction Ltd.* [1993] 2 SCR 316 at 335, per Sopinka, J.A.

<sup>44</sup> R.S.N.S. 1989 c.372.

<sup>45</sup> S.N.S. 1992, c.11.

Court.

### ***Independence of administrative decisionmakers***

The concept of independence is tied closely to the concept of bias which is discussed above as part of natural justice. Independence of administrative agencies can involve issues relating to both the personal independence of the decisionmaker her/himself and the independence of the organization itself.

In terms of the variations on the kinds of bias or lack of independence that might be considered, one authority,<sup>46</sup> under the heading "Procedural Irregularities", provides the following headings for discussion about the rule against bias and personal or pecuniary interest which gives some sense of how broad this issue might be:

- (a) Attitudinal Bias**
  - 1. Prior to the Hearing
  - 2. During the Hearing
  - 3. At the Time the Decision is Made
  
- (b) Interests and Relationships**
  - 1. Pecuniary Interest
  - 2. Family Relationship and Personal Friendship
  - 3. Professional Relationship
  
- (c) Institutional Bias**
  - 1. Bias in Favour of a Departmental Agency
  - 2. Predetermined Guidelines
  - 3. Previously Stated Position
  - 4. Exercise of Functions of Prosecutor and Judge
  - 5. Appeal from One's Own Decision
  - 6. Bias Arising from the Institutional Scheme

Aside from case law settling the point that administrative decisionmakers have a duty to act fairly, which includes an unbiased decisionmaker,<sup>47</sup> case law has established the point that there need not be actual bias proved but rather the question is one of perception and reasonable apprehension of bias.<sup>48</sup> Recent case law has gone perhaps even further in its

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<sup>46</sup> R. Dussault, L. Borgeat, *Administrative Law A Treatise*, Vol 4 (2d ed) (Carswell:1990) ix.

<sup>47</sup> See for example, *Energy Probe v. Atomic Energy Control Board* [1985] 1 FC 563.

<sup>48</sup> *Kane v. Board of Governors of the University of British Columbia* [1980] 1 SCR 1105 at 1116.



evaluation of systemic bias and concerns about institutional biases. For example, the linkage between appointments and these two issues was highlighted in a decision of the Quebec Superior Court dealing with a decision of a Liquor Licensing Board.<sup>49</sup> In that case, the Judge overturned the decision of the Board on the basis that the Board members lacked expertise and were "patronage appointments". In the Judge's opinion, this lack of independence constituted a denial of the complainant's right to a fair and impartial tribunal. Further, the involvement of the Government prosecutors as inspectors, constituted a further problem.<sup>50</sup> The important point to note is that the concerns regarding independence related both to the structural organization of the Board as an entity and also to the members on the Board themselves. This is perhaps one of the most difficult areas to discuss in any analysis but it is key to the notion of fairness and administrative justice. Although this decision was based on the Quebec *Charter of Human Rights and Freedoms*<sup>51</sup> which provides a right to procedural justice, the issue is relevant under the Canadian *Charter of Rights and Freedoms*. In addition, principles of natural justice are an important part of the law in Nova Scotia.

This concern for independence is not new, and as noted by the Judge in the Quebec case, Lord Denning commented in 1949:

*The uneasiness which has been felt about the tribunals is undoubtedly due to the fact that their development is closely linked with the enforcement of policy; and on that account their independence is suspect. It is felt rightly or wrongly that, as the Government Departments appoint the members, they have power indirectly to influence the decisions of the tribunals.*<sup>52</sup>

In the Quebec case, the agency had what would appear to be fairly clear or traditionally recognized decisionmaking powers; it had a right to grant or withhold liquor licenses. This

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<sup>49</sup> *La Régie des permis d'alcool du Québec et Raymond Boulet* [1993] RJQ 1877 at 1907 (CS).

<sup>50</sup> The judge listed many factors which led to the conclusion that the Board was an administrative tribunal in some of its functions. As with many agencies it had educational and operational mandates as well. The Judge also identified a list of problems leading to the conclusion that the Board and its members were not independent. Among the matters raised were the lack of selection process for the members, the fact the nominations were in secret, the discrepancy in terms, the instability and insecurity of terms of the appointments, the fact the government could abolish the board, there was no obligation for impartiality imposed on the Board, there was sufficient financial security, the dependence of the Board on the government department and the lack of an appeal process: see the decision at 1901.

<sup>51</sup> R.S.Q. c.C-12.

<sup>52</sup> *Freedom Under the Law* (Stevens and Sons:1949) 8, as cited in the decision of the Court at 1880-1881.

fits within a category of decisionmaker which has traditionally been recognized as "quasi judicial" even if they have additional responsibilities. The issue is however, far more complex where the body is either functionally or effectively a decisionmaker but is constituted as advisory: for example, where the final decision is the Minister's but where the Minister almost inevitably acts on the advice of the agency. In this situation, should the agency be considered advisory only or should it be considered an administrative or regulatory body making decisions that affect rights? If the latter, then this should be considered in the qualifications for appointment. Should the same considerations apply to these bodies in terms of concern for natural justice?

These are relatively new matters linked to the rise of the administrative state both in Canada and globally. The need to ensure expertise, sectoral representation and advice also brings with it concerns regarding bias, partiality and lack of information. The response of the courts in taking a functional approach to decisionmakers and review may be related to what appears to be the rise of representation rather than particular expertise as the theme in the composition of agencies. Since the notion of stakeholder or interest group representation inherently includes the idea that the person has a particular perspective based on some group interest, the decisionmaker may not, in fact, have more expertise than a court in the particular matter. These are all matters which require recognition in the planning of administrative agencies.

#### **4. Summary**

It can be seen from this outline of the administrative justice system in Nova Scotia that it significantly affects many people. It is a system which, although intended to provide alternatives to use of the courts or the Government can, in fact, be even less accessible because of its sheer size, complexity and lack of design. This creates problems for members of the public and for people who are participating as decisionmakers in that it creates a lack of faith in the system, as well as being costly in terms of time and use of resources. Failures in the system which can result in constant recourse to appeals and the courts mean that the system is no longer an available or even inviting process as a system of justice or decisionmaking in society. The next section of this *Discussion Paper* sets out some specific suggestions which the Commission has developed to deal with these problems in the administrative justice system in Nova Scotia. As noted at the beginning of this Paper these are preliminary suggestions at this stage that the Commission has developed. It is interested in receiving comments from members of the public before preparing a Final Report to the Government in this project.

### III SUGGESTIONS FOR REFORM

**1. *Is there a need for change in the law and what values should any changes seek to promote?***

The Law Reform Commission of Nova Scotia has been asked by the Government to "...consider the state of administrative law in the Province and in particular, to develop a draft law that:

- (a) standardizes the powers and procedures of administrative tribunals;
- (b) guarantees parties appearing before the tribunals basic procedural rights and safeguards;
- (c) simplifies administrative law, particularly with regard to judicial review and appeal; and
- (d) ensures the requisite degree of independence when a tribunal is required to act in a judicial fashion."

By asking the Commission to write a new law, the Government has apparently concluded that a new law dealing with these issues is needed. However, the Commission felt it was important to consider the question with an open mind and ask first whether any change is, in fact, required. The Commission also feels it is important to consider what values and objectives should be achieved in any reform. It is only by identifying specifically what objectives are sought by legal and institutional change that any model for change and measurement of its success can be carried out.

The first two parts of this *Discussion Paper* set out some of the concerns and problems arising from the administrative system. In questioning whether change is needed the Commission also considered the question: from whose point of view should such an evaluation occur? Clearly the Government, in making this Reference, determined that some change was needed. Did people who were acting as decisionmakers or otherwise working within the system feel similarly? In general, the Commission's research indicates that it would be useful to reform the law and also the system regarding independent administrative agencies (ABCs). The issues that seem to be of concern relate to time, cost, duplication, lack of knowledge about rights, lack of training and the quality of appointments. The question of appropriate procedures often seems hard for people to understand, particularly when issues relating to appeals and judicial review are involved. The relationship between the courts and decisionmakers and also relationships between Government and the appointee decisionmaker are not understood and are confusing. Some decisionmakers are concerned that, although

they generally function as one kind of agency, they are sometimes required to carry out another function for which they are not always prepared. Some occupational associations, which often determine whether a person is able to carry out a particular trade, occupation or profession in Nova Scotia are concerned because they feel they are asked to carry out a role that is not really their expertise (e.g., disciplinary proceedings) and their decisions are often appealed or reviewed. This is expensive and distressing to members of these associations who emphasize a need for training if they are asked to carry out this function. In general, where people on agencies or Boards perceive themselves to be making decisions affecting individuals, they have developed some procedures or regulations. Most commented that they work reasonably well but were concerned about possible appeals and reviews and also a perception by colleagues or the public that perhaps they were not acting fairly. At the same time, there was a concern that in carrying out reform, the Commission should try to avoid making decisions expensive or "court-like". Some administrators felt that the quality of decisions and process for the most part depended on the quality of the appointee and suggested that there be an appointment process oriented to specific expertise as well as training for appointees. In general, most people who responded felt that their agency performed a useful public service fairly inexpensively.

Other points that emerge from research are concerns about uncertainty, delay and public perceptions about unfairness. There appears to be an *ad hoc* approach to procedures. Some agencies create their own, some are governed by regulations and others have none. This, in fact, is not surprising and is probably a necessary part of administration since one of the values of an administrative system is flexibility and tailoring of the process to meet the situation. It is important to be aware that some issues and systems are complex because they involve complex issues and that complexity alone does not necessarily mean that reform is needed.

The law which the Government asked the Commission to write refers to "basic procedural rights and safeguards" and is based on the idea of the administrative system as dispensing "administrative justice". To some extent, this is already in place in Canada with the common law concept of natural justice and the application of the *Charter of Rights and Freedoms* (s.7) which provides that a person can only be deprived of life, liberty and security in accordance with "principles of fundamental justice".

Issues of efficiency and cost to individuals and to the Government in the administrative system which, like a court system is also expected to provide "justice", are a fundamental matter of concern. In some cases, particularly involving individual's rights or entitlements, delay in the system undermines the credibility of the system as a way to achieve justice. The idea that delay can in itself create an injustice is as much a problem in Nova Scotia for some agencies as in other provinces.<sup>53</sup>

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<sup>53</sup> For example, problems are often encountered across Canada in relation to human rights decisions and decisions relating to employment and the workplace. See Ontario Law Reform

Based on the comments it received in the survey as well as other commentary, and in reviewing research carried out by other agencies and academics the Commission identified some public and Government objectives which should be achieved by an administrative system and also be reflected in the decisionmaking procedures. These objectives include:

- Independence
- Accessibility/ openness
- Expertise
- Representativeness
- Efficiency
- Accountability

The attainment of these objectives by an administrative system will create an environment in which the principles of natural justice can operate and, in fact, many of these objectives are integral to natural justice or fairness. It must be realized that these objectives may have different meanings for different situations. For example, accountability and efficiency may be understood differently depending on whether the person evaluating a system is in the Government or a member of the public. Ultimately, however, since ABCs are generally affecting public matters and resources, the two overall interests are the same.

After considering its research, the Commission believes that the existing law and the system providing administrative justice in Nova Scotia are in need of reform to create a more accessible and efficient system for making decisions affecting individual and public interests.

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Commission Report *Avoiding Delay and Multiple Procedures in the Adjudication of Workplace Disputes*, April 1995: See also, S. Chotalia, "Human Rights Legislation - Does the Administrative Structure Enhance the Objectives of the Legislation" (1993-94) *Can. J. of Admin. Law and Practice* 67. The Commission has received commentary indicating that the problem is exacerbated in cases where a collective agreement and decisionmaking procedures under the agreement also operate in conjunction with the statutory system.

**The Commission suggests:**

- 1. There should be reform of the administrative justice system in Nova Scotia.**
- 2. Reforms to the administrative justice system should seek to ensure independence, accessibility/openness, expertise, representativeness, efficiency and accountability.**
- 3. Any reforms must include education of the public and members of the public acting as decisionmakers and must take into account the need to provide simple access to information about administrative procedures.**

**2. *Should the Commission make suggestions for reform of the ABC system as well as for reform of the law?***

Although the Reference asked the Commission to write a draft law, the Commission found that some of the concerns could not solely be addressed in law but also required changes to the system. The Commission suggests that real reform must consider the question of implementation and the context within which procedures operate. The relationship between how decisions are made and who the decisionmakers are is increasingly being understood by the courts as integral to natural justice and administrative fairness. This linkage was discussed in Part II of this *Discussion Paper* in connection with the idea of independence. The important point to note is that issues of fairness and procedural guarantees relate to independence of the ABC itself and also to the individuals appointed to the ABC. As suggested earlier, the issue is far more complex where the body is either functionally or effectively a decisionmaker but is constituted as advisory.

Reform of the administrative justice system to try to achieve the six objectives the Commission has identified as important means that the Government should also consider institutional changes to both the processes of structuring ABCs and of making appointments to them.

The Commission's research indicates that:

- There is a range of agencies (or extra-governmental structures) which might be useful for a number of reasons;
- The legal structure of each ABC should be linked logically to the objective of creating the agency, which will in turn, dictate

certain appointment and other arrangements;

- The 6 objectives outlined above are necessary to the functioning of a credible and effective administrative justice system. The effectiveness of any system can be measured by the extent to which it meets each of these. Each agency or classification of agency might emphasize one component more than another but in all cases some degree of each of these would be important;
- As with concerns generally central to law reform, reform of the administrative decisionmaking structure must be based on principles consistent with human rights, natural justice, active participation and involvement of diverse and previously unrecognized sectors of the population, and finally, awareness of social concerns about decreasing resources in terms of both fiscal and service resources.

The Commission suggests that there is no right or wrong approach to reform of the ABC system. While there are some stereotypes regarding ABC appointments as "patronage plums", in general, the more significant concerns should be for unnecessary duplication and waste of resources, or a lack of accountability for decisions. The increasing scarcity of public resources suggests that most Governments can ill afford to hand out appointments without concerns for the quality of the decisions to be made, for which the Government will be held accountable. Rather there is a need to specifically identify the reasons for creating an ABC and determining an appropriate structure to allow it to serve that need. This requires a careful analysis on a case by case basis to determine, for example, what degree of independence is essential. In terms of the appointment of people to these agencies, given what is to be the role of the agency, the primary concern should be to ensure that representativeness or expertise or other needs identified as relevant to the purpose of the agency are met. Finally, the issue remains as to the best model for achieving the characteristics identified as important for the agency. The Commission suggests that the best approach is to encourage the Government to plan for and articulate what its objective is in creating the ABC and what the needs of the ABC will be. The appointment process designed for the ABC and the appointments themselves should reflect these needs.

Given the diversity of agencies identified, the question arises as to whether the design will always be on an *ad hoc* basis or whether there can be models developed both for structuring ABCs and for the appointment process. The Commission believes that Government departments in carrying out a review of agencies for which they are responsible should be required to develop some standardized models for appointments and structuring of ABCs in terms of what is needed both from a public and Government perspective. This necessarily requires some system of classification of agencies in terms of activities as well as an assumption that each will include some or all of the objectives set out above in their structure

and appointees. For example, if the agency is one that is advisory only and its purpose is to provide the Government with information and a range of public perspectives on a matter then the appointment process and the structure of the ABC should reflect this role. In the case of advisory agencies the need for knowledgeable, representative people who will supply objective and politically unbiased opinions and advice is paramount. Since these bodies do not make court-like or quasi-judicial decisions the need to observe basic legal principles and to be knowledgeable about them is not of primary importance. Similarly, if the ABC is intended to provide an avenue for addressing complaints or a matter of individual justice which might require independence or legal skills or expertise, then the appointment process and the structure of the agency in terms of powers and relationship to the Government department should reflect these concerns.

In other agencies such as crown corporations with responsibilities for allocating or managing public resources, the Board of Directors needs to be composed of people with public governance or industry management skills and in many cases technical expertise in a particular area. The appointment process in these cases should reflect this need and be consistent with the Government's affirmative action requirements.

Many regulatory agencies carry out adjudicative functions but their primary task is to regulate and control activity in relation to a certain industry or commercial sector of the economy. To this end they need agency members with technical expertise, as is the case, for example, with well drilling and stationary engineers. Technical expertise and experience is the overriding need. Affected groups may be represented in the agency membership but this is a subsidiary consideration. The desirability of having members who are sensitive to and sympathetic towards the Government's objectives in setting up the regulatory agency is also a factor but should be subordinate to the paramount consideration which is technical competence and experience in the regulated area of activity.

This approach is found increasingly in legislation creating agencies. However it is suggested that it would be of benefit if there were some standardized models rather than simply responding to matters on a case-by-case basis. Uniformity of approach would result in some efficiencies as well as a greater degree of certainty and information about ABCs and their roles.

All agencies want and need interested and competent people but, as noted already, the need for particular expertise will vary with the functions being performed by the agency. Some non-regulatory bodies may require almost the same degree of technical expertise as do regulatory bodies while others will operate more effectively if their members are persons with general experience in the area being administered and endowed with good judgement.

The process by which appointments are currently made, although an improvement over earlier procedures in terms of advertising openings, is still deficient because it is still not clear to the public generally what the needs of various administrative agencies are and what



qualifications are required of individuals applying for positions on those agencies, boards or commissions. One way to improve this situation that would help both the public and those responsible for making appointments would be for the advertisements to clearly outline the main functions of the agencies involved and the necessary qualifications and responsibilities of those who wish to serve as members of the agency. This process will require accurate information to be collected about the mandate and primary function of each agency as well as about their subsidiary activities. Such information should assist persons who are contemplating making an application for a position and will provide criteria to help those having to choose the most appropriate candidates.

In addition to knowing and making public the needs of ABCs in terms of members and their qualifications, there is the need to have an appointment process that is seen by the public as open, objective and effective. It should be seen as one that secures, as far as possible, the best people for the job. What must be avoided are appointments or an appointment process in which factors unrelated to the needs of the ABC govern appointments. The needs of the administrative body must be known to the appointing body and every effort made to meet those needs when people are selected to serve on administrative boards. There is a need to ensure a clear connection between the agency, its structure, and the needs it is intended to meet.

**The Commission suggests:**

- 1. The relationship between the administrative structure of an ABC, the operation of an ABC and natural justice, concerns must be fully recognized in any new law and in the system creating administrative agencies.**
- 2. ABCs can come in many different forms, but the role and the operational and structural needs of each should be considered and reflected in the structure, resources, composition and procedures of the ABC.**
- 3. All ABCs should, in both structure and personnel, reflect an analysis of the degree to which independence, expertise, efficiency, accessibility, representativeness and accountability are required to achieve the mandate of the ABC.**
- 4. While evaluation of existing agencies must take place on a case by case basis, it is possible to develop models for various types of ABCs which can be adopted for greater uniformity and efficiency as needs arise.**
- 5. Each Government department responsible for an ABC must have, as part of its legal mandate, a requirement that it carry out an assessment of specific structural and personnel needs and criteria for all agencies it administers. They must specifically outline the needs of each ABC and develop criteria for appointments in accordance with those needs. Although it should not be a basis for an appeal of a decision of the ABC unless bias is established, a new law should say that the appointment process should be transparent and accountable.**

**3. *Should there be a new law?***

The Government asked the Commission to write a new law to respond to its concerns regarding procedures, powers and independence. Currently, the law that governs these issues is found in a variety of sources: the common law, the Canadian *Charter of Rights and Freedoms*, legislation (statutes and regulations) and in any procedures or by-laws the agency might have created. In other words, there are laws and procedures, but they are not standardized in their approach and are not easily available to either people making use of the system or making the decisions. Creating a new law to deal with some of these issues is one approach to creating reform. However, there are some other models for reform which have been used in other provinces or suggested by other research agencies. For example, the Commission could propose an amendment to the *Human Rights Act* to provide for a right to administrative fairness. In Quebec this approach was used in the provincial *Charter of Human*

*Rights and Freedoms* which provides a constitutional basis for human and civil rights.<sup>54</sup> Alternatively, as recommended by the Manitoba Law Reform Commission, reform might involve developing a series of model regulations dealing with the procedures of various agencies and a separate *Act* dealing only with administrative appeals and judicial review.

If a new law is written to deal with some or all of these issues there is also a second question as to whether the law should take the form of a detailed Code or Guidelines for administrative decisionmakers, as proposed by the Department of Justice Canada for federal ABCs who hold hearings,<sup>55</sup> or whether the law be fairly simple and provide some minimum rights and directions to decisionmakers, much as that proposed in a model law developed for the Uniform Law Conference of Canada.<sup>56</sup>

One of the issues that affects the decision on this question relates to how broadly the reform is to apply. Given the range of agencies and possible procedures there is a need to consider the fact that the more formalized the process is, then in general, the fewer the agencies it can apply to. This is because imposing too many procedures or court-like standards on all agencies will undermine one of the main reasons for their creation, flexibility, as well as the fact that they are an alternative to the court system.

**(a) amending or expanding the Human Rights Act**

As noted, one approach might be to adopt the one used in Quebec which has a provincial form of the Canadian *Charter of Rights and Freedoms*. Included in that *Act* is a right to natural

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<sup>54</sup> *Charter of Human Rights and Freedoms*, R.S.Q. c.C-12. It was amended in 1982 to prevail over other provincial statutes. In 1993 a Bill was also introduced to provide for appointments, conflict of interest, procedures and power of administrative tribunals but was not adopted as law: see Bill 105 *An Act Respecting Administrative Justice* introduced National Assembly 2nd Session, 34 Legislature. A similar approach has been suggested by the South African Law Commission: *Final Report on Group and Human Rights, Report No.82*, Project 58, Oct 1994. The Commission proposed that there be a *Bill of Rights* which included the following:

4.157 *Every person shall have the right - (1) to lawful and reasonable administrative action where any of his or her rights or interests is affected or threatened by such action; (2) to have the principles of natural justice applied in administrative actions; (3) to be furnished with reasons in writing for administrative action which affects any of his or her rights or interests unless the reasons for such actions have been made public.*

<sup>55</sup> *Proposal for a Federal Administrative Hearings Powers and Procedures Act*, Dept. of Justice Canada, April 1995. There is currently a revised version of this proposal to be circulated early in 1996.

<sup>56</sup> *Model Administrative Procedure Code* presented to the Uniform Law Conference of Canada, 1991, prepared by Y. Ouellette.

justice in administrative hearings. Although this already exists in case law in any event, to say it in a law, particularly a "constitutional law", has an important educational effect. As a statute it would apply to activities in the province. The problem with this approach is that it tends to avoid the question of what natural justice might look like in terms of procedures so it does not seem to advance the value of access to information or justice beyond the existing Canadian *Charter of Rights*. It also does not appear to assist in terms of determining which hearings it will apply to. The result is that although this creates a strong "right", in that it characterizes it as a "Charter right" to fairness, the way in which it will apply or achieve other objectives is less clear.

**(b) standardized model regulations**

The Manitoba Law Reform Commission after several years of study and two extensive reports resolved the problem of providing specific procedures, but also accommodating a wide range of organizations and a need for flexibility, by recommending that each agency be governed by regulations depending on its function.<sup>57</sup> The Commission designed several minimum model procedures based on classifications of agencies by their function that should be in the regulations for each group of agencies.<sup>58</sup> The problem with this approach is that it does not meet the object of access by the public since legislation, in general, is not easily accessible and regulations are even harder to obtain. In fact, this is largely the current approach in Nova Scotia since many agencies do have procedures set out in regulations for them. However, they tend to be idiosyncratic depending on the nature of the agency. Unlike the case of an agency publishing and making its rules available, the procedures are in regulations which are not available to most people.

**(c) a new law**

A third approach is to write a new law to provide for procedures and powers. There are some existing models to look to on this issue in other provinces. For example, Alberta has a very brief *Administrative Procedures Act*<sup>59</sup> which applies whenever an "authority" (defined as a

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<sup>57</sup> Report #58, *Administrative Law; Part I: Procedures of Provincial Government Agencies* (1984) and Report #69, *Administrative Law; Part II: Judicial Review of Administrative Action* (1987).

<sup>58</sup> It should be noted that the Manitoba Law Reform Commission recommended that in connection with judicial review the scope of review be with respect to "decisions of an administrative character" which was to be defined to include any *Act* or thing whether in the exercise of a discretion or not and whether characterized as judicial, quasi-judicial, administrative, legislative or otherwise (Recommendation 5), *Report on Administrative Law: Part II Judicial Review of Administrative Action* (1987) 208.

<sup>59</sup> R.S.A. 1980, c.A-2.

person authorized to exercise a statutory power) exercises or is asked to exercise "statutory power" (which include actions such as giving approvals, licences, permits, making orders or declaring rights or duties under a statute). Its application is clarified by a schedule which has a list of agencies to which the Act applies.<sup>60</sup> Ontario also has an Act dealing with statutory powers and procedures which applies to tribunals in the exercise of a statutory power of decision.<sup>61</sup> A similar *Act* was also proposed for New Brunswick with four schedules of agencies to which it would apply.<sup>62</sup> The Uniform Law Conference of Canada also developed a model Administrative Procedures Code dealing with procedures which was reasonably brief and applied to agencies required to hold a hearing.<sup>63</sup> This model Code or law did not purport to alter the law but proposed only general and minimum rules which already exist in common law to facilitate the work of lawyers, unrepresented parties and decisionmakers. It requires decisionmakers to develop specific rules to govern their procedures. The Code states that:

*s. 2. The purpose of this code is to provide for fair, expeditious and simple proceedings and to ensure that decisions are of good quality.*

Finally, the federal Department of Justice has proposed a Federal Administrative Hearings Powers and Procedures Act which, although very detailed, has a schedule and applies only to the agencies listed in the schedule whenever they hold a hearing (oral or written).<sup>64</sup>

On balance, it appears to the Commission that a new law, perhaps called an *Administrative Justice Act*, which deals with these issues is the best approach in terms of public education and access to information.

Having concluded that reform should include a new law, an *Administrative Justice Act*, the second question must be considered. As mentioned above, the federal Government is

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<sup>60</sup> The Schedule is found in the Regulations. The original Schedule listed 11 agencies: Alberta Reg. 135/80. This list has been amended to add and remove various agencies; Alberta Reg. 57/86; Alberta Reg. 264/90; Alberta Reg. 240/93.

<sup>61</sup> *Statutory Powers Procedure Act* R.S.O. 1990, c.S.22 as amended S.O. 1993 c.27; S.O. 1994, c.27, s.56.

<sup>62</sup> *Proposals for an Administrative Procedure Act: A Discussion Paper*, Law Reform Branch, AGNB, 1991.

<sup>63</sup> *Model Administrative Procedures Code*, presented to ULCC in 1991 prepared by Y. Ouellette.

<sup>64</sup> Proposal for a Federal Administrative Hearings Powers and Procedures Act, Department of Justice Canada, April 1995.

currently looking at a codified approach to writing an *Act*. This approach is useful in that it helps people in a step-by-step way to make decisions during hearings. This means it can give guidance to non-lawyers because it explains the basis for making decisions on a range of matters that might arise in a hearing. For example, in deciding whether an adjournment should be granted it can explain the issues to consider. However, the Commission is concerned that it may create some inflexibility and that compliance with the additional rules, rather than the result of the hearings, may become the focus of appeals. In short, it may just be creating more work for lawyers. This debate as to the best format is long-standing in the literature. In 1985 one authority noted that:

*Several commentators urge the adoption of minimum rules. In our view, given the variety of jurisdictions and of decisions that "administrative tribunals" have to make, the adoption of a uniform code of procedures does not seem to represent an appropriate solution. As Y. Ouellette notes... it "is uncertain whether uniformity of procedure is desirable and it is even probable, given the current mosaic, that it is simply not achievable: the made-to-measure suit always fits better than the off-the-rack suit" [Tr].*<sup>65</sup>

As noted earlier, the Manitoba Law Reform Commission took a different approach. It felt a pluralistic, that is a more generalized Code, would not be appropriate because it would result in increased uncertainty. It concluded that the best approach was to enact separate rules of practice for each agency in the regulations.<sup>66</sup> The Manitoba Commission chose to categorize agencies based on the extent to which the agency affected individual interests, collective interests, was administrative, or was an agency which did not affect interests. The more

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<sup>65</sup> R. Dussault, L. Borgeat, *Administrative Law A Treatise* Vol 1 (2d ed) (Carswell:1985) 125 at note 309.

<sup>66</sup> Manitoba Law Reform Commission Report #58 *Administrative Law; Part 1: Procedures of Provincial Government Agencies* (1984) at 51 and 55:

Generally, however, we do not favour that this procedure be established in the statutes which create and empower each agency. Not only is it inappropriate for the Legislature to occupy itself with such details, given the demands placed upon its timetable, statutory enactments would create inflexibility for agencies because procedural changes could not be implemented without legislative amendment... Instead procedures should, where possible, be drafted in regulations, pursuant to authority in each statute creating the agency in question to pass rules of practice and procedure... The creation of separate rules of procedure for each agency admittedly has one potential flaw. That is, because rules are individually designed, it is possible that procedure will be devised for each agency in isolation without looking at the overall consistency of procedure among agencies performing similar functions... In light of this objective, we have prepared various models of procedure as examples to assist in the preparation of rules for particular powers exercised by most of the agencies... These models are intended to be guidelines to assist in the preparation of separate rules for each agency.

individual interests were affected by the agency, the more "court- like" the rules that were suggested.

While this approach seems to have some merit, it is in many senses no different from the existing system in Nova Scotia in that it requires officials to prepare regulations and to draft the procedural rules for the agencies. The proposal does, however, highlight the need for consistency in practices between agencies performing similar functions while recognizing the need for flexibility. It is suggested that this model appears to place too much weight on administrative convenience and not enough on the need to advance access interests. One of the biggest problems in Nova Scotia lies in the lack of information and training regarding appropriate practices. Regulations are not easily accessible to the public unless a further step to locate them is taken, so it is not really an advantage in terms of access. At the same time, however, the importance of recognizing flexibility and the fact that each agency may need to tailor its rules to meet the needs of the situation is instructive and important.

Although the arguments for imposing detailed and formalized procedures are attractive, the Commission felt that on balance it was more useful to focus on providing for fairness and administrative justice from the point of view of the impact of the decision, rather than a more formalistic approach which focuses on the question of classification of the agency. In addition, the Commission was concerned that while, in some cases, an agency may be dealing with issues between the Government and individuals, in other cases, it might be two private parties which means that the parties would have to follow what may be very detailed rules which may be unfairly demanding in terms of their resources.

The question then is whether there are some common procedural matters which can be expected of all decisionmakers and stated in a law. The Commission suggests that a combination of both approaches may be most appropriate for Nova Scotia. It is suggested that a law be passed which contains some basic rights, as set out below, which will be required as "minimum rights"; that is, agencies making decisions must develop procedural rules and make these rules available. This law would set out some of the issues that should be addressed, if relevant, and also clarify some issues around the powers of agencies. If this is combined with training for people asked to be administrative decisionmakers, then this will assist in addressing the other, perhaps even more important points. The degree to which rights and rules are useful is often determined by the way in which they are understood and implemented. This approach appears to balance concerns for uniformity and fairness and recognizes the character of administrative decisionmaking. It also provides additional legal force to minimum procedural rights.

The Commission has considered how best to accommodate its view that an *Act* should apply to a wide range of agencies (see discussion below on Issue 4) with the need to provide for public education and information regarding natural justice procedures in the law itself. It has reached a preliminary conclusion that concerns about access and education as well as minimum rights could be met by writing a short *Act* providing some general direction or minimum rights which apply to all ABCs and by recommending more training for people

who are to make decisions.<sup>67</sup> The Commission suggests that an *Administrative Justice Act* should oblige decisionmakers to develop appropriate procedures and rules and ensure that these are made available to people who are involved with it. The *Act* should require that ABCs develop rules to deal with some basic points (e.g., notice, the hearing process, any right to counsel, public access, any right people have regarding documentation, materials, witnesses and the right to receive written reasons) as well as any available options for appeal. This will ensure these issues are addressed and that people are informed, but would still allow each agency the flexibility to make the process as formal or informal as deemed appropriate. Currently, most regulations in Nova Scotia simply say something similar to the following:

*Hearings may be conducted in an informal manner and need not follow the strict rules of practice and procedure required by a court of law.  
A hearing may be conducted by video conference or by telephone conference with the agreement of the parties.*<sup>68</sup>

Where decisionmakers are affecting individuals rights, there should be legally trained persons involved as decisionmakers (at least one on a panel) for cases requiring extensive procedures. Although the Commission felt that a law which was in effect a "guidebook" might be useful, it concluded that a simpler *Act* would better relate to the goals of reform. For example, the values that might be advanced to ensure administrative justice may include things such as access (which could be understood as developing procedures and simply informing people as to their options and communicating decisions) or efficiency (to both the public and Government) and provision of a system which is inexpensive to individuals or society but which also provides procedural protection to ensure decisions are made in as fair a way as possible.

The choice of approach relates to the question of why there are administrative decisionmaking systems at all. The goals generally are efficiency, independence, and expertise, all in the context of fairness. The recent Report of the Ontario Law Reform Commission dealing with delay in the adjudication of workplace disputes (basically looking at the administrative law system under the *Human Rights Act* and other laws) commented on problems associated with seeking efficiency and informality.

*While there are some obvious needs to have disputes resolved expeditiously and inexpensively, faster and cheaper justice is not necessarily good justice. Clearly, administrative tribunals ought to have the basic requirement of a fair adjudicator, independence from the parties and from the State, the ability to make decisions in light*

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<sup>67</sup> The need for training has been identified in many reports: see comments in D. Labelle "Report on the Study on Training Administrative Tribunals Members in Canada" (1992-93) 6 *Can. J. of Admin. Law and Practice* 251.

<sup>68</sup> Excerpt from the Utility and Review Board Regulations N.S. Reg. 25/95.



*of, and indeed to further the purposes and policies of their governing legislation, and the ability to decide like cases alike. However, the more difficult question is whether administrative tribunals, valued for their informality, should adopt more formal court-like procedures.*<sup>69</sup>

The Ontario Law Reform Commission adopted, as its fundamental value the idea of "accessibility".

*To be accessible, therefore, an administrative tribunals must provide a service that attracts those who wish to avail themselves of its jurisdiction... disputes must be resolved quickly and inexpensively... by those who are experts in such areas [in this case workplace issues]. Similarly, since no-one wants to have a dispute resolved in an arbitrary manner, administrative tribunals must have some of the characteristics of courts.*<sup>70</sup>

It is important to note that although the Ontario Report dealt with administrative law in connection with employment situations, it proposed that the analysis in the Report could be a model for other *Acts* and other provincial agencies also.

The Commission also notes that model rules for statutory decisionmakers have recently been developed in Ontario by the Society of Ontario Adjudicators and Regulators.<sup>71</sup> These model rules are intended to provide a "template" which decisionmakers can adopt or adjust according to their particular needs. Such an approach will provide guidance and information and will have an educational value for decisionmakers, but will not necessarily create the same problems as binding regulations or laws. If an agency of Government is assigned a coordinating role for all ABCs then this agency could take responsibility for developing and publishing the model rules which could be given to all appointees to ABCs who are required to make decisions affecting others.

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<sup>69</sup> Ontario Law Reform Commission Report *Avoiding Delay and Multiple Proceedings in the Adjudication of Workplace Disputes*, April 1995, 5.

<sup>70</sup> Ontario Law Reform Commission Report, 13.

<sup>71</sup> Model Rules of Practice, S.O.A.R., 1996 (on file).

**The Commission suggests:**

- 1. There should be a new *Administrative Justice Act*, which sets out a number of minimum rights, powers and procedures that could be expected of most ABCs when making decisions that affect others. The *Act* and the administrative justice system must be simple and as accessible as possible for members of the public.**
- 2. The *Act* should require decisionmakers to develop and to communicate their rules of practice.**
- 3. The Government should prepare and publish "model" rules which, combined with training, will assist decisionmakers but which are not in the form of a law or regulations but rather are there to provide guidance.**

**4. *To whom should the Administrative Justice Act apply?***

This is probably one of the most difficult issues in this Reference in that it also relates to the degree of specificity or detail in the legislation. There are several ways to deal with who should have to provide procedural rights or comply with the *Act*. As pointed out above the more detailed or court-like the procedures in an *Act*, then the fewer agencies it can easily apply to. One way is to list the agencies. Another is to develop procedures and attached regulations which apply to each agency. Finally, the *Act* can generally apply unless excluded by the law creating the ABC.

There are, as noted earlier, approximately 380 ABCs in Nova Scotia which could be called "administrative". The Reference to the Law Reform Commission was a specific request to consider those agencies which could be classified as "administrative tribunals". As explained in the Introduction, this is a phrase which is understood by the legal community to mean those agencies which are authorized by the Government through law to make decisions which can affect people's rights or entitlements.<sup>72</sup> There are, however, many decisionmaking

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<sup>72</sup> The range of people who could potentially be covered by this system is large. For example, in a Report on this topic, Report #69 *Report on Administrative Law; Part II: Judicial Review of Administrative Action*, 3 (1987), the Law Reform Commission of Manitoba noted in connection with judicial review, that this could include the acts and decisions of:

- the Crown, Ministers of the Crown and government department officials;
- provincial government agencies [*which in the case of Manitoba was understood to include over 200 Boards, Commissions, Associations or other body of persons all or some of which were appointed by legislation or by Order in Council*];
- municipal and other local government authorities;
- Crown Corporations;

bodies which affect people and make decisions about resources in a community which are not, strictly speaking, tribunals. In addition to the agencies generally thought of as "public agencies" there are many agencies affecting people through regulation of occupational requirements and discipline. These are agencies which are also exercising a public function although often the appointees and process are less understood as "public" (ie., Registered Nurses' Association; the Barristers' Society).

For this reason, many recent proposals for reform tend to have either a broad definition of which agencies the *Act* will cover, but then attach a schedule to ensure certainty, or to have a narrow definition of the agencies covered. The federal proposal, as mentioned above, is to have an *Act* which applies to a broad range of agencies which may have a number of functions but are by law required to have hearings (both written and oral). When they are performing this function then the federal law will apply to these agencies. The federal proposal also has a schedule of agencies attached to it for certainty.

The complexity of the question of which agencies such Acts should apply to is illustrated in a New Brunswick Discussion Paper, *Proposals for an Administrative Procedure Act*.<sup>73</sup> After commenting on the difficulty in applying an *Act*, the Commission developed four schedules for agencies to which the *Act* might apply:

- (1) Tribunals required to hold hearings;
- (2) Tribunals that will be required once created to have hearings;
  
- (3) Tribunals neither expressly empowered nor required to conduct hearings;
- (4) Tribunals that make recommendations not decisions and also (possibly) some Government decisionmakers.

The New Brunswick paper takes the view that some agencies are not required to have a hearing but if they do so, then the rules should apply.

The term "administrative tribunals" can also be understood very narrowly as referring only to those agencies which either make a "final decision", or agencies where individual rights are decided. The problem is that there are many agencies which functionally make decisions but

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- school boards and universities;
  - self-governing professional and occupational associations;
  - provincial inferior courts;
- and in some instances "domestic tribunals" [eg. *consensual/contractual decisionmakers*].

<sup>73</sup> *Proposals for an Administrative Procedure Act: A Discussion Paper*, Law Reform Branch, AGNB (1991).

which on this narrow test are not "tribunals". For example, some ABCs only make recommendations to a Minister and consequently, the Minister is the decisionmaker and the ABC only performs an advisory function. It would not, on the test of "final decisionmaker", be a "tribunal" although it may hold public hearings and legal counsel may be involved in these hearings, (an example of this type of agency is the Environmental Assessment Board of Nova Scotia).

As noted above, there are also many agencies which might be considered private or self-governing occupational associations, but these agencies have authority under the law to affect people's ability to work (e.g., Nursing Registry, Dental Licensing Boards, the Barristers' Society, Medical Boards). Should these agencies be included and required to use these procedures? The concern is that if all these agencies are subject to an *Administrative Justice Act* it may limit the flexibility which administrative tribunals are supposed to bring to decisionmaking. At the same time, it is important to be assured that where people are making decisions affecting other people and they are given the authority to do so in law, then this authority must be exercised properly. This means that decisions which are made must be within the power given to the agency (i.e., they do not decide something they have no authority to decide) and secondly, the decisions they make must be made fairly. The Commission considered whether a schedule of agencies should be attached to this *Act* to avoid uncertainty as to whether a particular agency is covered by the legislation. This is an attractive option but it also poses some problems in that the list will be quickly outdated (probably as soon as its published).

The Commission is proposing that the *Administrative Justice Act* be as brief as possible and that it include all agencies unless the law creating the agency expressly says the *Act* should not cover it. This takes the opposite approach to the multiple regulations as proposed in Manitoba or a scheduled list of agencies in that it creates some minimum requirements which any decisionmaker should consider and makes them applicable unless the law creating the ABC specifically excludes them. This gives some sense of direction and certainty. While some people feel that self-governing agencies should not be included, where they receive their power to affect people through a statute there is no reason not to include them. Currently, rules of natural justice will apply irrespective of who the agency is, if it makes decisions affecting people's rights. A good example might be an "internal" university appeal committee, which can be reviewed by a court if it does not operate fairly. It should also be noted that in some of the laws creating these agencies there are also very formal requirements set out.<sup>74</sup>

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<sup>74</sup> For example, as mentioned earlier, the recently passed law, *An Act Respecting Cosmetology* S.N.S. 1995, c.5 provides that a person whose licence may be suspended is entitled to a public hearing in the local region in which they are resident including a right to full answer and defence to all allegations and to examine and cross examine witness by a legal counsel before the licence can be suspended. An appeal is also available under this *Act* from a decision of the Discipline Committee to the Supreme Court of Nova Scotia.

The Commission feels on balance that an *Act* which requires decisionmakers to develop procedures and which applies to all decisionmakers unless excluded is the best approach, particularly given the rapidity of change of agencies in Nova Scotia. The only exclusion should be organizations created under laws such as the *Societies Act*<sup>75</sup> or *Companies Act*,<sup>76</sup> as these are, essentially, private sector corporate entities created by individuals. Their ability to affect the individuals involved with them stems from individual agreement rather than the Government providing authority to the individuals. These organizations or corporations also have rules that govern their procedures under these *Acts*.

**The Commission suggests:**

- 1. There should be a broadly inclusive *Administrative Justice Act*, which will include minimum rules directing agencies to develop their own procedures as appropriate which are consistent with these rules.**
- 2. The *Act* should say it covers all decisionmakers including those carrying out deliberations and providing recommendations to another agency or person unless their statute specifically excludes operation of the *Administrative Justice Act*. This *Act* would cover all self-governing agencies which are specially created by statutes.**
  
- 5. *What are the basic procedural rights and safeguards that should be guaranteed in a new Administrative Justice Act?***

The Reference asked the Commission to develop standardized procedures and powers and also to provide guaranteed "basic procedural rights and safeguards" for parties appearing before administrative tribunals. In considering this the Commission felt that it was more useful to discuss the question of standardized procedures and procedural guarantees together. The subject of standardized powers for ABCs when they are acting as tribunals is discussed in Issue 6 below. In considering the question of standardized procedures and procedural safeguards the Commission considered how best to accommodate two competing values in suggestions for reform. The argument in favour of standard procedures set out in law for administrative tribunals when having a hearing is valuable in that this will provide uniformity between agencies and also provide some clarity for the decisionmakers and people appearing before them. Consistency is itself an important value in administrative justice. At the same time, the Commission is concerned that in trying to provide in legislation particular minimum procedures they would have to either have only a few

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<sup>75</sup> *Societies Act* R.S.N.S. 1989, c.435.

<sup>76</sup> *Companies Act* R.S.N.S. 1989, c.81, as amended.

procedures which could apply to a broad range of agencies or have very detailed procedures which applied only to a few agencies which could formally be classified as "tribunals" when they were acting like courts. The fact that the Reference called for guarantees and rights also suggests that the Government in making this Reference was considering only the case of an agency that acted like a court, since to create a right usually suggests that a failure to comply with it would entitle the person to some sort of remedy. As pointed out above the classification of a decisionmaker as a "tribunal" has usually focused on whether the decision is "judicial" or "administrative". Sometimes this decision has also been based on whether or not the decisionmaker is making a final decision as opposed to simply preparing advice or recommendations. These distinctions are both artificial and difficult for most people to understand, partly because they seem circular or can only be determined by the court in reviewing the whole process. For example, the question of when a hearing should be held is sometimes determined by the nature of the decision and its effect on individuals.

To call something a right assumes that something will happen if it is not complied with. This means that if there is a whole series of detailed rules and one of them is not complied with, this should have some result, (ie., be a basis for judicial review or an appeal.) This means that the procedures set out in the *Act* should be considered as the basic *minimum* level of procedural fairness that must be addressed. These include things that would already apply as a matter of common law (and common sense) but have an educational value that arises from setting them out in law. This also helps decisionmakers who may not be lawyers. For example, the simple rule that a decisionmaker must hear the case (or read if it is a written hearing) that he or she is to decide, is a fairly obvious minimum right.

The Commission's approach provides a series of items that the decisionmakers must address to some degree if it is appropriate, in the procedures they are to develop. The Commission felt that requiring decisionmakers to develop procedural rules that reflect these rights in appropriate cases would accommodate the need for flexibility, while at the same time providing information about the requirements of procedural natural justice. This provides for a form of standardized rules in that decisionmakers are told that they must develop rules regarding the various issues and make these rules known to individuals.

In terms of standardized rules the Commission also notes that there is an increasing interest and activity in the field of civil justice reform which encourages a "caseflow" management

approach to scheduling of courts and administrative decisionmaking to provide for greater efficiency and avoidance of delay.<sup>77</sup>

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<sup>77</sup> See for example the CBA, Systems of Civil Justice Task Force which is focusing on modernizing the civil justice system to ensure an efficient, and accessible justice system : see the Systems of Justice Task Force Terms of Reference, Oct.4, 1994.

In terms of which rights should specifically be included, there already exist a number of procedural rights in the law which are generally understood as part of natural justice. For purposes of this discussion they are described as "traditional". There are also some rights which are part of a broader duty of administrative fairness. For purposes of this discussion, these are described as "emerging". The Commission understands that many of the "emerging" rights could equally be seen as aspects of the existing rights.

**(a) traditional rights**

There are several "rights" which traditionally have been seen as providing content to the idea of procedural justice (or natural justice). These are:

- the right to notice if one's rights/property/liberty may be affected by a decision;
- the right to notice of a hearing if one is to take place;
- the right of the person to know the issues being considered and to be given sufficient time to prepare a response;
- the right of the person or interest being affected to be heard. This might mean the right to have an appropriate hearing which may be in person or on the basis of written submissions. This may include the right of the person to have a public hearing although not the right of the public to attend a hearing;
- the right to call and cross examine witnesses or give other evidence;
- if no hearing is required, the right of the person affected by a decision to have prior notice of the facts on which the decision is based and the fact that a decision has or will be made; and
- a right to have decisions made without bias on the part of the person making the decision.

**(b) emerging rights**

It is suggested there are now emerging rights to administrative justice which are somewhat broader. The Commission suggests they can be considered as:

1. access to justice/information rights;
2. hearing rights to expedition, efficiency and resolution;
3. substantive rights to written reasons, to rules of evidence and to expedition

*(i) access to justice/information rights*

It appears that one basic right, although not historically within the notion of a fair hearing, is a requirement that agencies determine or develop "a process" (whatever it might be) and make that information available to every person directly affected by their decision or the process. The point is that irrespective of the particular procedures, there is a right to be informed of the process. Commensurate with that would be the right to be informed about the decisionmaker, alternatives and potential remedies. Among the more important information rights identified by the Commission are:

1. the right to be informed about the process;
2. the right to be informed about the outcome;
3. the right to be informed of rights (which may include a right to seek counsel) within the process;
4. the right to be informed of alternatives and to be put in a position to make informed choices; and
5. the right to know what information is being considered by the decisionmaker and to have an opportunity to comment upon it.

The Commission also felt that in order to deal with concerns about possible bias on the part of decisionmakers there might be a right to some information about the decisionmaker. At the same time the Commission was concerned that if there was a right to know the specific identity of decisionmakers in each case ahead of time this might give rise to either a form of "judge" shopping or unfair pressure or lobbying of decisionmakers, particularly in smaller communities. The Commission suggests that perhaps it would be fair to say that there should be a right to information about the composition of the decisionmaker but not about the particular individuals ahead of time. With a basic procedural right to information this would be a corresponding obligation on all agencies to provide the information. This would also include the requirement that information be presented in an understandable fashion, not to legal counsel, but to a member of the public appearing before the agency unrepresented by counsel.

It has been suggested, for example, that as part of a general information right, wherever possible, standard forms should be drawn up and made available to the public by agencies. These forms would be particularly useful for the initial documents such as a Notice of



Appeal. They would expedite and simplify the process, particularly for the individual without a lawyer who is unsure as to how to proceed. Forms of this nature, in combination with increased public awareness, through information brochures and other material, would be of great assistance.

There should also be a right to privacy or confidentiality where this is appropriate. This is currently provided for in some cases, particularly where commercial or business information or personal information is provided to the decisionmaker. In addition there should be some protection provided in the use of video or electronic hearings. The Commissioners are concerned and seek comment on the question as to how to reconcile this privacy right with the right to have access to information provided to the decisionmaker. For example, should a discipline committee be able to seek confidential comments which might not otherwise be provided to them if it was believed that these could be available for review? At the same time however the Commission felt that the value of ensuring that people have an opportunity to answer allegations was a significant aspect of fairness. The Commission seeks advice on this issue but, in general, believes that the importance of ensuring that people have an opportunity to know of and answer comments made about them outweighs the interests of obtaining confidential or anonymous assessments of individuals.

The Commission considered whether there should also be a separate right to have decisions which are not based on or affected by factors contrary to human rights. In considering this, the Commission concluded that this right already exists in the *Human Rights Act*<sup>78</sup> and the *Canadian Charter of Rights and Freedoms* and that to provide for it separately would be confusing rather than helpful. However, the importance of human rights as an aspect of access to justice and their implications in terms of bias and fairness should be part of any training program for administrative decisionmakers.

The Commission also considered whether or not there should be a right to participate and felt that in some cases this might be an important value to be served by ensuring broad participation in decisions affecting the public interest. The Commission is also aware that there are some views which suggest, particularly where alternative dispute resolution processes and consultation are involved, that there may be a "right to meaningful participation."<sup>79</sup> At the same time providing a right to meaningful participation through intervenor funding in all cases does not seem viable. On balance, the Commission believes that it might be appropriate for decisionmakers to consider whether in particular cases some other participation in the hearing is useful. If so they should have the power and budget

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<sup>78</sup> S.N.S. 1989, c.214.

<sup>79</sup> See comments in "Alternative Dispute Resolution Process The Legal Issues, *News Brief*, Environmental Law Centre, 1995, Vol.10, No. 2 and see M. Jackman, "Rights and Participation: The Use of the *Charter* to Supervise the Regulatory Process" (1990) 4 *Can. J. of Admin. Law and Practice* 23.

available to provide for financial assistance in some cases to enable intervenors to allow them to participate meaningfully in public regulatory hearings.

In summary, the Commission suggests that the *Administrative Justice Act* should have a basic right to information and access to justice. This would mean that:

- an agency should have a stated duty to provide individuals with the relevant legislation and any applicable rules; an agency should have an obligation to prepare a brochure or a handbook or a computer disc, outlining, at the very least, its function and the steps that an individual must take in preparing for a hearing before it and make it available to the public and that a staff person or persons should be available to assist and answer questions;
- these duties and responsibilities should form a part of its function and annual budget;
- where public hearings are involved there should be public notice of any hearings or consultations, published in newspapers and electronic media. The notice should clearly state what the members of the public need to know to actively participate; where relevant, standardized forms written in language which can be understood by non-lawyers should be provided to people affected by decisions; and
- there should be a right to privacy and agencies must develop procedures to protect personal and commercial privacy where appropriate, however this protection is subject to the right of a person to know of any allegations made or information provided about them to the decisionmaker.

***(ii) hearing rights to expedition, efficiency, and resolution***

As articulated in the 1995 Ontario Law Reform Commission Report<sup>80</sup> on delay in the resolution of workplace disputes, it appears that the concept of administrative justice is starting to include the notion of delay as a barrier to justice. This would mean that access to

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<sup>80</sup> Ontario Law Reform Commission Report *Avoiding Delay and Multiple Proceedings in the Adjudication of Workplace Disputes*, 1995.

justice must include expedition in hearings so that access to the service is not denied by the fact that is perceived to be useless as a process.<sup>81</sup>

It may be important to provide for a right to have a conference or meeting with the decisionmaker before any hearing, where there is to be a hearing. A pre-hearing conference is a formal or informal meeting held prior to the hearing. It provides all involved with the opportunity to get a fuller understanding of the issues, thereby encouraging agreement wherever possible and perhaps settlement. It allows the agency to get a clearer picture of the scope of the issues involved, allowing it to set aside realistic amounts of time. The meeting serves a valuable organizational purpose as the individuals involved discuss how the hearing will proceed and determine what needs to be done in preparation for the hearing. These meetings are only as successful as the parties make them, but have the potential to save money and time for all involved. Any issues that are resolved at this conference or facts which are uncontested should be recorded on a document, signed by both parties, and submitted at the hearing. The proceedings at the conference can be recorded to remove any question as to what was agreed upon. The agency should have the power to hold such meetings or pre-hearing conferences by telephone conference call. This would facilitate attendance in cases where the hearing is to be held in another part of the province. Different considerations on the "record" of the meeting would apply in the case of a meeting held by conference call.

The Commission has considered the recent interest in various forms of conflict resolution generally labelled "ADR" (Alternative or Appropriate Dispute Resolution) which includes processes such as mediation and counselling and other forms of negotiated settlements. While the Commission believes that in some cases there may be situations where an administrative tribunal, particularly one which holds more formal hearings, might encourage parties to resolve all or some matters, this should be a procedure which is enabling rather than a right. The Commission also felt that since, in some cases, the administrative process is itself an alternative to the courts, this also seemed a somewhat inconsistent process. The Commission does note, however, in connection with the concern for expedition and resolution that current caseload management procedures often make use of negotiation and resolution of all or some issues to reduce the number of cases and delays in the system. This would seem therefore to be a process that many agencies might consider in managing their decisionmaking schedules.

The question of information about expert witnesses to some extent overlaps with the information rights provided above; however, the specific context here is a concern for expedition and avoidance of undue delay, arising from last minute access to the information

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<sup>81</sup> See also the recent development of standards for the timely disposition of litigation (cases in court) outlined in CBA Working Group on Court Delays, "National Time Standards for the Disposition of Civil Cases: A Discussion Paper, 11 Dec 95 considered at the CBA Systems of Civil Justice Task Force Workshop, Toronto, Feb 1-2, 1996.

rather than the absence of the information. With the right to have witnesses there must be a right to have information about expert witnesses ahead of time. Presently there are few rules dealing with experts even though expert witnesses appear on a regular basis before many ABCs. Without pre-filing requirements for expert reports, there is potential for one side to undermine the other by presenting the information at the hearing. This inevitably leads to an adjournment for the other side to prepare, thereby increasing the delay and costs. Pre-filing of the expert report and the inclusion of a summary of what the expert will be speaking about at the hearing would reduce the element of surprise. In addition to the report, there might be a requirement that the qualifications of the expert be included with the report. Where an expert report will not be filed, but an expert will be called as a witness, the other parties involved should be notified. Pre-filing seems to be a logical step in ensuring a fair and efficient hearing where all parties are aware of what they will have to deal with at the hearing. Pre-filing of expert reports also allows the parties and the Board time to read and understand the material.

All of the time restrictions for filing documents and serving notices should be clearly set out in the agency's procedures or caseflow management rules.<sup>82</sup> These should not be standardized for all functions, since it is difficult to do so if there are a variety of hearings. However, some standard functions such as notice times and appeal periods could be included. If rules of practice and procedure are viewed as providing information to the general public about what they can expect during the whole process, time requirements are certainly important. In addition to filing of reports, using modern technology such as fax machines and electronic methods should be accepted without question.

The Commission suggests that it is appropriate that there be a right to resolution, expedition and efficiency which might include the following:

- a right to have a pre-hearing conference where a hearing is required;
- a right to information about expert witnesses and reports ahead of time to avoid delays in hearings;
- there should be appeal periods and time restrictions for pre-filing documents and serving notices which should be clearly and openly stated;

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<sup>82</sup> The use of caseflow management has now been introduced in Nova Scotia in the Court process: See *Preliminary Report Nova Scotia Working Group to the CBA System of Civil Justice Force* presented February 1996, and G. Pohlkamp "Caseflow Management: A Delay Reduction Tool", Issue Paper prepared for the CBA Systems of Civil Justice Task Force, January 1996, presented February 1996.

- there should be provision for filing the Notice of Appeal and any other documents which can reasonably be filed in this manner, to be filed by facsimile machine or electronic communication systems; and
  - there should be caseflow management rules with specified case management procedures and a timeframe for hearings to ensure that matters are resolved as promptly and efficiently as possible.
- (iii) *substantive rights to written reasons, rules of evidence and to expedition***

A right which is becoming a fairly standard right is the right to written reasons (and with it the right to have reasons within a reasonable time). At common-law, tribunals are generally not required to give reasons. However, fairness necessitates that the affected party be informed of the reasoning that went into the final outcome so that he or she can understand the outcome and decide whether to appeal the decision. The Commission supports the need to have this requirement recognized as a right. At the same time, however, there is a concern about possible delays in the process if decisions on every matter had to be written. In addition there was some concern that this requirement not make decisions more open to appeal and delay. After considering these matters the Commission suggests, in order to allow people to understand the decision and to give substance to the right to seek review based on the "record", that it is important to have the reasons for the final determination in a case given to the people affected by the decision.

Reasons mean more than just stating the evidence and a conclusion. It involves the process of fact finding as it relates to the evidence and the reasoning which went into the final decision. A clear statement of these steps is essential to aid the party who may wish to appeal the decision and it should be of assistance to the appeal board or agency itself.

A further right should include a right to reasons within a reasonable amount of time. Prompt decision writing is beneficial in that it ensures that the evidence being considered is still fresh in the decisionmaker's mind. This can only serve to increase the accuracy and correctness of the decision. The Commission felt that the importance of having reasons and a decision within a reasonable time is often as important to individuals as the reasons themselves since often opportunities are lost or rights affected by delays. One of the more difficult issues considered by the Commission is what form of remedy or sanction could be provided if a decisionmaker delays and does not comply with the requirement for expedition. Clearly allowing the case to start over will not meet the needs of people who may have lost opportunities and incur financial costs because of the delays. The Commission specifically seeks public suggestions and comment on this issue.

In addition the Commission suggests that all decisions and reasons should be filed in an

central public office easily accessible to the public.

The Commission's research suggests that there is an emerging right to have rules of evidence applied in administrative proceedings. It has been suggested that a good starting point when considering the rules of evidence and administrative proceedings is to state that they do not generally apply unless there are contrary statutory requirements.<sup>83</sup> However, the principles upon which the rules are based may be invaluable to agencies in dealing with evidentiary issues. When a tribunal is faced with an objection made about an evidentiary point, it should go further than merely determining whether an evidentiary rule has been breached. It should inquire into whether the evidence would be helpful in reaching a decision and whether it would be fair to the other side if the evidence is admitted. For example,<sup>84</sup> when the tribunal rules on an objection to evidence such as a document, it should clearly state for the written record the basis upon which the decision was reached. Any further consideration, after admitting a document into evidence should be noted as going to the weight that the tribunal will give to the evidence. Therefore, even though the document is admitted into evidence it may not be relied upon greatly by the Board because the objection had some validity to it.

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<sup>83</sup> This is suggested in E. Ratushny "Rules of Evidence and Procedural Problems Before Administrative Tribunals" (1989) 2 *Can J. of Admin. Law and Practice* 157.

<sup>84</sup> E. Ratushny, at 162.

**The Commission suggests:**

- 1. ABCs should be required to develop and to communicate standardized rules of procedure for making decisions affecting rights and entitlements. The standardized rules should reflect minimum procedural rights including traditional natural justice rights and emerging fairness rights, such as the rights to access to justice, information, expedition, efficiency and resolution as well as substantive rights to written reasons within a reasonable time and to a decision based on principles of evidence.**
  - 2. All decisions should be filed in one central office so they are easily accessible to the public.**
  - 3. The enactment of a new law should be combined with the implementation of a training program and the adoption of comprehensive model rules or guidelines (which are not law) to assist decisionmakers in each agency to develop and interpret the requirements of natural justice, fairness, human rights law and modern casflow management practices.**
  - 4. The Commission invites comment as to how to protect privacy interests while also providing for a right to know of all material being considered by a decisionmaker.**
  - 5. The Commission specifically invites comment on the form of remedy or sanction that could be provided if a decisionmaker does not comply with the requirement for expedition.**
- 6. *What are the standard powers that an administrative tribunal should have?***

The issue of standardized powers for ABCs when they act as tribunals is important to the effectiveness of the decisionmaker in efficiently conducting hearings. In general this will be the powers made use of when holding hearings, that is, when they are acting like courts. Where agencies hold hearings or are considered administrative tribunals they are often given the powers in their statute of a Commissioner under the *Public Inquiries Act*.<sup>85</sup> This provides them with the power to take oaths, subpoena witnesses and have the immunities and privileges of a judge of the Supreme Court. If standard powers were listed in an *Administrative Justice Act* they would be a minimum list in that, in some cases, an agency could have additional powers if it was deemed to be appropriate.

In general, the concern here is to ensure that the system is effective and does not result in

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<sup>85</sup> R.S.N.S. 1989, c.372.

additional delay and inconvenience to people. This would suggest that an agency should be able to control its own process and enforce its decisions. However, there is also concern that decisionmakers might end up looking like courts, particularly where sanctions or liberties might be involved, but constitutionally may not be able to act as though they were courts.<sup>86</sup>

In determining what legal powers an agency should have, it is important to remember that what is being sought are minimum powers. These could include:

1. the power to initiate and terminate proceedings and to carry out or initiate matters to expedite cases;
2. the power to hold hearings using modern technology (eg. such as video or electronic hearings);
3. the power to seek and obtain expert advice when a decisionmaker needs more information<sup>87</sup> and to seek assistance from a department and a secretariat as long as rights of parties to the information are not affected;
4. the power to decide not to hear matters which it considers an

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<sup>86</sup> There has been a move to amend the Ontario legislation to provide more power to agencies to control their own process. The Ontario Law Reform Commission Report *Avoiding Delay and Multiple Proceedings in the Adjudication of Workplace Disputes* 1995 also recommended that the agencies be able to develop and implement caseflow management rules which set deadlines to deal with problems of delay. In addition, the ability of agencies to interpret other statutes in making decisions is also a matter of importance.

<sup>87</sup> The Government of Ontario when revising its *Statutory Powers Procedure Act* received a number of submissions. Among the more comprehensive of these was a submission of the Society of Ontario Regulators and Administrators, which set out on behalf of its very large membership some proposals which, in its view, would expedite the work of administrative decisionmakers. Included was the need to clarify the relationship between an agency and governmental or support staff. Often decisions are drafted by support staff who may be civil servants or, more commonly, research may be carried out for an agency by a Secretariat with a governmental staff person. This fact alone does not necessarily result in a lack of independence, although any information received by an agency which might affect about the substance of decisions must, in all fairness, be communicated to the parties in the case. However, because it may cause problems of institutional bias or public perceptions as to bias, the ability of an agency to seek advice from a department staff person is a matter which should be clearly addressed in an *Act*: see J. Sprague "The Role of Staff in Post-hearing Deliberations and Reasons Writing", 1994 a paper (on file) in which the author drew from Chapter 22 of R. W. Macaulay, J. Sprague, *Practice and Procedure Before Administrative Tribunals* Vol 2 (Carswell: 1988).



abuse of process;

5. the power to decide to hear cases as "generic cases" to settle matters of more common concern;
6. the power to control its process to the extent of being able to subpoena witnesses and enforce its own orders by registering them with a court and also through contempt proceedings (where it has authority to issue the particular substantive order);
7. the power to appear in court to argue matters in review or in appeals where its view is challenged;<sup>88</sup>
8. the power to determine, subject to the statute, who should be included (ie., intervenors and standing) in a hearing;
9. the power to determine the panel size and what happens if a panellist's term expires.

The Commission also considered some powers that exist in other jurisdictions and seek public comment or advice on these issues. The first question is part of the power of the agency to control its own process. In order to allow for expedition and simplification of process the Commission considered whether the agency should be able to rehear cases itself instead of sending the matter on for appeal. At common law there is a limited right to rehear in cases of problems such as typographical errors or fraud, however, in general an agency cannot rehear a case. In some provinces there is a right to have a rehearing. The Commission while agreeing that this might speed up decisions for people felt it also results in concerns about bias and also confusion over finality and timing of appeals.

Another issue that the Commission seeks specific comment on relates to costs. It has sometimes been suggested that ABCs should have the power to award costs to one or other of the parties in a case. This is a power that courts have available and some administrative decisionmakers (ie., the Utility & Review Board, Registered Nurses Appeal Committee). At the same time there is a concern that this may be a power that is easily subject to abuse and one which should in general be confined to the courts since it can result in punishment of one party or another party. The Commission is unresolved as to whether administrative

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<sup>88</sup> Currently, there is a perception that a tribunal is similar to a court in that it determines matters before it and has no role in a proceeding regarding its decision in a case should the decision be appealed. However, this ignores the fact that in many cases this places an onus on one of the parties to support a broad argument on the jurisdiction and expertise of the agency rather than allowing the agency to speak for itself.

decisionmakers should always have a standard power to award costs.

All of these powers can be adjusted, increased or decreased, if the Government expressly determines that it should be so. The advantage in providing for minimum powers, is that it clarifies the situation in all cases where it is not stated. Where tribunals are dealing with matters affecting rights, there should be sufficient authority to ensure that it has sufficient power to carry out its strategy and policies without fragmentation of authority. The supervisory role of the courts would then be as suggested earlier, properly oriented to considering situations where it appears a mistake was made in law or there was failure to provide for natural justice in the case (ie., judicial review).

**The Commission suggests:**

- 1. An administrative tribunal should be able to control its own process, subject to the rights of people who are affected by its decisions and subject to the supervisory power of the courts through judicial review.**
- 2. There should be minimum standard powers provided in an *Administrative Justice Act* for all administrative tribunals which can be adjusted by the Government in creating the agency.**
- 3. There should only be a very limited power on the part of the decisionmaker to re-hear a case to correct an error. However, the Commission invites specific comment on this matter.**
- 4. The Commission is unresolved as to whether administrative decisionmakers should always have standard power to award costs and invites specific comment on this issue.**

**7. *How should the law relating to judicial review and appeal be simplified?***

In Part II of this *Discussion Paper* the differences between judicial review and a statutory appeal were outlined. Although from a public perspective the two issues might be seen as one as they involve having someone reconsider or rehear the decisionmaker's conclusion, they are legally different processes and will be discussed separately in this section. In addition, the Commission's preliminary conclusions on the reforms for the two issues are different. The Commission suggests that judicial review should not be significantly reformed but that the system of statutory appeals should be altered significantly.

**(a) judicial review**

The availability of judicial review (that is review of a decision by a court which in general considers the way in which the decision is made rather than substance of the decision itself) can be dealt with on the basis of two models: 1) the existing common law (and Civil Procedure Rules); and 2) statutory judicial review. In Nova Scotia, aside from a few anomalies in the statutes, judicial review is available through the common law and through the Civil Procedures Rules of Nova Scotia. Research and consultation carried out so far has led the Commission to conclude that the existing system should be retained, aside from perhaps one change regarding removing a 6-month time limit on filing deadlines that exist for one application (*certiorari*) under the Civil Procedure Rules. The Commission's research suggests that the existing system is fairly flexible, known to most people working with it and, aside from the time restriction on one process, the procedural changes which occurred in 1972 in the form of Rule 56 do not provide significant impediments to justice. The impediments involved with judicial review relate more to general questions regarding access to court time, delay and legal costs. The procedure involved in judicial review, while not completely inaccessible to people not trained in law is an area of law which generally requires the assistance of legal counsel. Other models of reform do not really address these issues and in fact other approaches may provide for more difficulty than clarity.

The other model of judicial review reform is called statutory judicial review. It involves replacing the common law process of judicial review with a statute dealing with judicial review. This model exists in several provinces (ie., Ontario,<sup>89</sup> British Columbia<sup>90</sup> and Prince Edward Island).<sup>91</sup> These laws are similar to the Nova Scotia Civil Procedure Rules in that they remove the former prerogative writs and call them all "applications for judicial review." This has some merit in terms of public education (the Civil Procedure Rules are even more unknown to most of the public than the statutes of Nova Scotia). However, the danger is that ultimately it ends up creating yet another law to require interpretation by the courts. One of the concerns of the Commission is whether reform is needed or whether the current process generally works. While it is hard to get public comment on the review procedures (given that the process is not one which is easy for people to follow) it appears to the Commission that the reforms a number of years ago to the Nova Scotia Civil Procedure Rules eliminated a number of the procedural problems that judicial review laws are intended to address. The result is that it is similar to the provisions of the *Judicial Review Acts* in other provinces in that it does not particularly matter if you ask for the wrong form of action (*certiorari* or *mandamus*,) except for the time periods. It may be that the Civil Procedure Rules also have more flexibility in terms of amendments. They are reviewed and clarified frequently by the judiciary.

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<sup>89</sup> *Judicial Review Procedure Act*, R.S.O. 1990, c.J.1.

<sup>90</sup> *Judicial Review Procedure Act*, R.S.B.C., 1979, c.209.

<sup>91</sup> *Judicial Review Act*, R.S.P.E.I., 1988, c.J-3.

Sometimes the idea behind passing such a law is to more clearly define and perhaps limit the basis of judicial review however, the reality of court practice is that, in general, it is still not possible to insulate an agency from review if the court feels that there is a legal problem involved. The Commission suggests that if the initial decisionmaking procedures are better developed and clarified, and decisionmakers better trained, then this would be more helpful to the public than creating options for more recourse to the courts which will also require additional legal assistance.

**(b) statutory appeals**

The issue of simplification and reform is more easily addressed in relation to administrative appeals. The Commission's research has established, as discussed earlier, that the system of appeals varies from agency to agency with no one settled process.<sup>92</sup> Most troubling, given the backlog in the court system, is the fact that large numbers of appeals are directly to the Supreme Court or Court of Appeal, who will also have a role in supervising the operation of the administrative justice system through judicial review. This seems to defeat many of the benefits of the administrative justice system and adds to the cost of the courts. In addition the courts are, in general, a process that is less accessible to members of the public who may wish to have their concerns addressed without legal counsel. In addition to the courts there are a number of appeal agencies with varying powers. Often their function is not to totally rehear the case but to consider matters which might suggest the decision was incorrectly made. The role of the appeal agencies is, in that sense more like the role of the appeal courts in that often the role is not one of expertise in the particular issue but one of considering the first decision and how it was made. However, as noted in Part II, the basis of appeals in Nova Scotia varies greatly from agency to agency. In some cases appeals are in this form, in others they are "*de novo*" - or a complete rehearing of a case.

The Commission considered reforms in places such as Australia<sup>93</sup> and also the evolution in Nova Scotia of what appears to a "super" board in the form of the Utility and Review Board which, aside from being the first level tribunal for some matters, is the Appeal Board for a wide range of issues. The Commission also notes a Bill introduced in the Quebec Legislature in December 1995, *An Act Respecting Administrative Justice*, Bill 130, which, if adopted, will create the Administrative Tribunal of Quebec. This Tribunal acts as the single Board for all third-party adjudication of complaints brought by citizens against decisions of the administration in Quebec. The Bill also characterizes all individual decisions made by Government departments with respect to entitlements, privileges and benefits as "administrative". The Bill sets out two sets of rules which apply depending on whether the

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<sup>92</sup> In 1994 there were over 200 appeal agencies including courts and Ministers listed in the statutes and regulations.

<sup>93</sup> T. Ison, *The Administrative Appeals Tribunal of Australia* Law Reform Commission of Canada *Study Paper 27* (Administrative Law Series) 1989.

decision is administrative or adjudicative.

At the same time, the Commission considered the fact that there are also disadvantages to creating new boards or "superboards". That is, it may add to the overall cost and not necessarily end up in a better situation. This concern is balanced by the fact that currently problems with decisions end up in court which also has a cost both to the parties involved and the court system as a whole.

The Commission considered several models of consolidation including consolidation and stream lining of first level decisionmakers boards and consolidation of Appeal Boards into one or several Boards. For example it may be useful to have one Board or Appeal Board dealing with all the health professions. In this case then appeal periods and the scope of the appeal could be standardized for a number of similar occupations or issues. This would allow for some full-time people to be involved with training who would develop some expertise in these issues.

After considering these issues, the Commission has come to a preliminary view that at this point the need for specific expertise and flexibility suggests that it would not be useful to consolidate or create superboards for first level decisions, where most hearings occur. However, in the context of appeals the Commission suggests that rather than consolidate into several "superboards" there should be one "Administrative Appeal Board" in Nova Scotia, which would be the Appeal Tribunal for all administrative appeals in the province. In general, appeals should not be in the form of *de novo* appeal or a full re-hearing but instead should be in the form of what is described in Part II of this *Discussion Paper* as a "true appeal". The members of this Board should be trained and full-time. In order to deal with some specific issues that might require specialized information, it should be possible to provide for part-time panellists who could be involved in hearing appeals on technical matters to ensure that expertise is available on the appeal, an approach which might distinguish its process from the courts. Having one Board dealing with appeals would enable better caseflow management and generate efficiencies within the administrative system as a whole. It is proposed that, although recourse to the court from decisions of this Board would continue to be available in the form of judicial review, the Board would be the final decisionmaker and no statutory appeals to other Boards, Ministers or Courts would exist. This would serve to ensure accountability and natural justice through general supervision by the courts while also ensuring finality in decisionmaking. Clearly some resources would be required to ensure it could properly meet public demands; however, the reduced cost and efficiencies elsewhere in the system would balance this initial expenditure. This consolidation may also provide for more training of people who make these decisions and write reasons. Arguably, as the quality of justice improves in agency decisionmaking, appeals and reviews

of decisions will decrease. Again, however, the quality of the people making the decisions and their training and awareness will be instrumental to the success of such an approach.

**The Commission suggests:**

1. **The law relating to judicial review remain as it is currently operating with some amendments to the Civil Procedure Rules regarding the six month time limit on *certiorari*.**
  2. **The Government should create a single consolidated Administrative Appeal Board for all administrative appeals in Nova Scotia, much like the role currently played by the Utility and Review Board, for many issues in Nova Scotia. This Board should have standardized times for appeals and a standardized basis of appeal. The Administrative Appeal Board should have full and part-time people appointed to it who can meet the public need for expedition, independence, informality and experience combined with sufficient training to ensure principles of natural justice and fairness are complied with.**
- 8. *What is the requisite degree of independence for a tribunal when it is required to act in a judicial fashion and how can it be ensured by law?***

The Reference requires that the Law Reform Commission develop draft legislation that, amongst other things "(d) ensures the requisite degree of independence when a tribunal is required to act in a judicial fashion." There are a number of general points that can be made about this. First, while this can be addressed in legislation, it could also be in the form of recommendations. In fact, it is likely that it should be in the form of various recommendations and woven throughout any draft *Act*. Interpreted narrowly, it could be confined to a narrow group of tribunals which act in a judicial fashion and whose decisions are independent of (presumably) Government direction. Under the *Canadian Charter of Rights and Freedoms* there is a right to an impartial tribunal and further, there is, in common law, a fundamental rule of natural justice, that the decisionmaker must not apparently or actually be biased or interested in a decision. To the extent then that the right to an unbiased decisionmaker is fundamental to procedural or natural justice, it would normally be part of a law on administrative procedures. However, it is not clear from the Reference what is envisaged by independence which might distinguish it from procedural guarantees to an unbiased decisionmaker. It could be understood as going to the issue of institutional impartiality - that is, the structuring of the agency *vis-a-vis* the Government department or organization which creates it, as well as the impartiality of the decisionmaker himself or herself. In addition, it may be referring to the notion of tenure or security such that the decisionmaker's decision will be truly independent.

Assuming that the idea of "bias" or "interest", which is now included (by case law) in the concept of a duty to act fairly, is interchangeable with independence, then it appears that

there are two main issues to face: one is the independence or lack of conflict of interest in the structural relationship between an administrative agency/tribunal and any of its client bodies (e.g., Government) including the way in which decisions are made and, two, the relationship between the individual decisionmaker and the decision itself.

Independence as an aspect of the functioning of administrative agencies in Nova Scotia seems to be affected by at least two factors. First, many agency members are part-time appointments. Being part-time means that these people do not rely solely upon their position as an agency member for their livelihood. They can, therefore, theoretically afford to take an independent approach to their part-time job and to resist any attempts by Government to influence their individual case decisions. This is not to say that their part-time income will not be of some importance to these people (depending on how much they are paid). Some will not want to see that income lost on the altar of independence but clearly their dependence upon agency-related income is far less than that of a full-time employee.

A second factor affecting independence concerns chairpersons who hold full-time appointments. In many cases the appointment is at the Government pleasure or on a term of two or three years which can be renewed (in some cases only once). This arrangement hardly provides an adequate degree of the security of tenure and means that some chairpersons may be more susceptible to Government influence should it be exerted, than would be the case if they were tenured. Tenure too has its problems unless there is a process of periodic appraisal of performance and the right to replace if the performance is not satisfactory. Term appointments probably have another consequence, that being the reluctance of good candidates to commit themselves to a position which may last for only two or three years and perhaps six at the most. Good candidates for appointment may never apply.

As noted earlier, independence can be understood in a fairly narrow way to mean that the decisionmaker acts without bias, e.g., he or she has an impartial or open mind on the case. This is both a state of mind but also equally important, must be a situation where it is seen to be the case.

While this may sound reasonably straightforward, the issues are quite complex. For example, some agencies are specifically designed to implement or further some Government objective or policy and are therefore institutionally "biased" in some respects. The fact that most, if not all, agencies and adjudicators are paid by the Government which may be, in some cases, one of the parties to a matter, adds a further level of uncertainty to the discussion. In some cases, concern about bias or lack of impartiality can extend back to the ways in which appointments occurred or people were selected which give rise to the view that they are inherently biased. In addition the procedure and process for making decisions might also seem problematic. For example in some cases the process of investigation and then the relationship between the investigator or investigation process and the decisionmaker may give rise to concerns about independence. This was discussed earlier in connection with the case

dealing with the Miramichi Agricultural Exhibition Association and its lottery licence.<sup>94</sup>

As noted above the concern for independence can be approached from two perspectives. First, the independence of the decisionmaking agency itself and second, the independence or impartiality of the particular individual(s) involved in the decision. The first perspective includes an analysis of the way in which agency/Government relationships are structured under statutes including finality of decisions, appeals, reviews and secretariat arrangements as well as budget matters. The second perspective overlaps to some extent but focuses on the specific appointment process, qualifications of personnel, tenure of individuals. The Commission suggests that, much as the case of appointments and the structure of each agency, there is no single measure of independence for each agency. The Commission suggests that, as part of overall review of the administrative agencies the Government should consider in creating or restructuring an agency whether the need for independent decisions is one of the reasons for creating of the agency. If independence is important, then the ABC's relationship to the Government department and the procedure by which it makes decisions as well as the appointment process should reflect this determination.

Independence can be provided in a number of ways ranging from the Government's decision not to intervene, tenure of appointees, separate funding, separation of staff from Government departments, budgetary control, funding sources, to Government and public reporting of agencies to ensure public awareness of the independence of the agency. As noted in the beginning of the *Discussion Paper* the issue of independence of an agency, particularly when it is making "public interest" decisions, as opposed to decisions between individuals creates a tension on the part of Government. This is because Government is, at the same time, accountable to the public for those decisions since they often result in public expenditures and actions for which the Government must ultimately account to the public. At the same there are often good reasons for separating some decisions from political influence and Government decisionmaking to obtain expertise or the view of other interests in a matter. None of these concerns are inherently right or wrong or of more value. They are simply factors which must be explicitly considered to ensure an efficient and credible administrative system. If that system affects individual's liabilities, rights and entitlements, then the value of independence in the sense of freedom from bias on the part of decisionmakers should be paramount.

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<sup>94</sup> *Re: Miramichi Agricultural Exhibition Association Ltd. and Lotteries Commission of New Brunswick* (1995) 126 DLR (4th) 557.



**The Commission suggests:**

- 1. The appointment process for members of any agency which is making decisions and particularly to the Administrative Appeal Board should ensure that where independence from the Government and from any particular interest is important to the agency mandate and to fairness then appointments must reflect this requirement.**
- 2. Appointees must be trained to ensure an understanding of the meaning of conflict of interest and procedures must be developed for ensuring that this is respected.**
- 3. In cases where institutional bias may suggest that otherwise independent decisionmakers are biased, then there should be a clear separation from Government and provisions for tenure or other mechanisms of accountability, including stated terms of appointment and secondment of staff whose primary obligation is to the agency in question.**
- 4. Where an individual's liabilities, rights or entitlements are affected, then freedom from bias on the part of the decisionmaker should be paramount.**
- 5. The rights to information and fairness, particularly where the same agency might carry out several roles including investigation, must be respected and are central aspects of the independence of decisionmakers.**

## IV SUMMARY OF SUGGESTIONS

The Commission invites comments on its suggestions that:

1. There should be reform of the administrative justice system in Nova Scotia.
2. Reforms to the administrative justice system should seek to ensure independence, accessibility/openness, expertise, representativeness, efficiency and accountability.
3. Any reforms must include education of the public and members of the public acting as decisionmakers and must take into account the need to provide simple access to information about administrative procedures.
4. The relationship between the administrative structure of an ABC, the operation of an ABC and natural justice, concerns must be fully recognized in any new law and in the system creating administrative agencies.
5. ABCs can come in many different forms, but the role and the operational and structural needs of each should be considered and reflected in the structure, resources, composition and procedures of the ABC.
6. All ABCs should, in both structure and personnel, reflect an analysis of the degree to which independence, expertise, efficiency, accessibility, representativeness and accountability are required to achieve the mandate of the ABC.
7. While evaluation of existing agencies must take place on a case by case basis, it is possible to develop models for various types of ABCs which can be adopted for greater uniformity and efficiency as needs arise.
8. Each Government department responsible for an ABC must have, as part of its legal mandate, a requirement that it carry out an assessment of specific structural and personnel needs and criteria for all agencies it administers. They must specifically outline the needs of each ABC and develop criteria for appointments in accordance with those needs. Although it should not be a basis for an appeal of a decision of the ABC unless bias is established, a new law should say that the appointment process should be transparent and accountable.
9. There should be a new *Administrative Justice Act*, which sets out a number of minimum rights, powers and procedures that could be expected of most ABCs when making decisions that affect others. The *Act* and the administrative justice system must be simple and as accessible as possible for members of the public.

10. The *Act* should require decisionmakers to develop and to communicate their rules of practice.
11. The Government should prepare and publish "model" rules which, combined with training, will assist decisionmakers but which are not in the form of a law or regulations but rather are there to provide guidance.
12. There should be a broadly inclusive *Administrative Justice Act*, which will include minimum rules directing agencies to develop their own procedures as appropriate which are consistent with these rules.
13. The *Act* should say it covers all decisionmakers including those carrying out deliberations and providing recommendations to another agency or person unless their statute specifically excludes operation of the *Administrative Justice Act*. This *Act* would cover all self-governing agencies which are specially created by statutes.
14. ABCs should be required to develop and to communicate standardized rules of procedure for making decisions affecting rights and entitlements. The standardized rules should reflect minimum procedural rights including traditional natural justice rights and emerging fairness rights, such as the rights to access to justice, information, expedition, efficiency and resolution as well as substantive rights to written reasons within a reasonable time and to a decision based on principles of evidence.
15. All decisions should be filed in one central office so they are easily accessible to the public.
16. The enactment of a new law should be combined with the implementation of a training program and the adoption of comprehensive model rules or guidelines (which are not law) to assist decisionmakers in each agency to develop and interpret the requirements of natural justice, fairness, human rights law and modern caseflow management practices.
17. The Commission invites comment as to how to protect privacy interests while also providing for a right to know of all material being considered by a decisionmaker.
18. The Commission specifically invites comment on the form of remedy or sanction that could be provided if a decisionmaker does not comply with the requirement for expedition.
19. An administrative tribunal should be able to control its own process, subject to the rights of people who are affected by its decisions and subject to the supervisory power of the courts through judicial review.

20. There should be minimum standard powers provided in an *Administrative Justice Act* for all administrative tribunals which can be adjusted by the Government in creating the agency.
21. There should only be a very limited power on the part of the decisionmaker to re-hear a case to correct an error. However, the Commission invites specific comment on this matter.
22. The Commission is unresolved as to whether administrative decisionmakers should always have standard power to award costs and invites specific comment on this issue.
23. The law relating to judicial review remain as it is currently operating with some amendments to the Civil Procedure Rules regarding the six month time limit on *certiorari*.
24. The Government should create a single consolidated Administrative Appeal Board for all administrative appeals in Nova Scotia, much like the role currently played by the Utility and Review Board, for many issues in Nova Scotia. This Board should have standardized times for appeals and a standardized basis of appeal. The Administrative Appeal Board should have full and part-time people appointed to it who can meet the public need for expedition, independence, informality and experience combined with sufficient training to ensure principles of natural justice and fairness are complied with.
25. The appointment process for members of any agency which is making decisions and particularly to the Administrative Appeal Board should ensure that where independence from the Government and from any particular interest is important to the agency mandate and to fairness then appointments must reflect this requirement.
26. Appointees must be trained to ensure an understanding of the meaning of conflict of interest and procedures must be developed for ensuring that this is respected.
27. In cases where institutional bias may suggest that otherwise independent decisionmakers are biased, then there should be a clear separation from Government and provisions for tenure or other mechanisms of accountability, including stated terms of appointment and secondment of staff whose primary obligation is to the agency in question.
28. Where an individual's liabilities, rights or entitlements are affected, then freedom from bias on the part of the decisionmaker should be paramount.

29. The rights to information and fairness, particularly where the same agency might carry out several roles including investigation, must be respected and are central aspects of the independence of decisionmakers.

## Appendix I ABCs identified in statutes in 1992/1993\*

*\*Please note, this list is illustrative of the breadth of ABCs in Nova Scotia only. Some of the Boards no longer exist except in a statute which may have been amended in a later Act, e.g., the Municipal Board, Tax Appeal, Public Utilities and Expropriations Boards were merged in late 1992. Similarly the Environmental Control Council is now the Environmental Assessment Board. In addition some are Government officials, e.g., Public Trustee, others are internal Government committees and many also have internal committees and tribunals for some decisions, e.g., discipline.*

Acadia University - Board of Governors  
Advisory Commission on AIDS  
Advisory Council on Heritage Property  
Advisory Committee on the Protection of Special Places  
Advisory Council on the Status of Women  
Advisory Committee on Victims' Rights and Services  
Amusements Regulation Board  
Apple Maggot Control Board  
Art Gallery of Nova Scotia  
Artificial Insemination Board  
Association of Interior Designers of NS  
Association of Professional Engineers of Nova Scotia  
Association of NS Land Surveyors  
Association of NS Hairdressers  
Atlantic Institute of Education  
Atlantic Provinces Special Education Authority  
Bedford Waterfront Development Corporation  
Blueberry Association of NS  
Board of Chiropractors  
Board of Commissioners under the Marsh Act  
Board of Commissioners under the Uniform Law Act  
Board of Directors under the Mutual Insurance Companies Act  
Board of Directors of the Preston Area Housing Fund  
Board of Dispensing Opticians  
Board of Examiners under the Coal Mine Act  
Board of Examiners under the Engineering Profession Act  
Board of Examiners of the Nova Scotia Land Surveyors  
Board of Examiners of the Nova Scotia Pharmaceutical Society  
Board of Examiners of the Optometrists Association  
Board of Examiners in Pharmacy  
Board of Examiners in Psychology  
Board of Examiners under the Registered Barbers Act

Board of Examiners under the Scalers Act  
Board of Examiners of Social Workers  
Board of Examiners under the Stationary Engineers Act  
Board of Governors of the Nova Scotia Museum  
Board of Health (in every municipality)  
Board of the Nova Scotia Association of Occupational Therapists  
Board of Registration of Embalmers and Funeral Directors  
Board of Registration of Nursing Assistants  
Board of Review for Lieutenant Governors Warrants  
Board of Trustees of the Public Archives of NS  
Board of Trustees (for each school section)  
Business Improvement District Commission  
Canada-NS Offshore Petroleum Board - Oil and Gas Committee  
Cancer Research Treatment Foundation  
Cape Breton Barristers' Society  
Childrens' Aid Society of NS -Advisory Boards  
City Health Units  
Civil Service Commission  
Civil Service Employee Relations Board  
Clean Nova Scotia Foundation  
Commodity Board under the Natural Products Act  
Community College Planning Commission  
Condominium Act - Board of Directors for each condo corp.  
Conseil d'ecole under the School Boards Act  
Construction Industry Conciliation Board  
Consumer Services Bureau (consumer affairs)  
Consumer Reporting Agency  
Correctional Facilities Employee Relations Board  
Council of NS Pharmaceutical Society  
Council of the NS Society of Medical Radiation Technicians  
Credit Unions - Board of Directors  
Criminal Injuries Compensation Board  
Cultural Foundation -Board of Directors/Advisory Committees  
Cumberland Development Authority - Board of Directors  
Dairy Industry Advisory Committee  
Dairymens' Association of NS  
Dalhousie University - Board of Governors  
Dartmouth Senior Care Society  
Denturists Licensing Board  
Denturists Society of Nova Scotia  
Disabled Persons Commission  
District Planning Commission under the Planning Act  
Drug Dependency Foundation -Board of Directors

Education Assistance Committee  
Educational Advisory Committee  
Election Commission  
Emergency Measures Organization  
Energy and Mineral Resources Conservation Board  
Environmental Control Council  
Expropriations Compensation Board  
Family Benefits Review Board Cape Breton  
Family Benefits Review Board Halifax  
Family Benefits Review Board New Glasgow  
Farm Loan Board  
Fences Arbitration Committees (15 local committees)  
Film Development Corporation -Board of Directors  
Financial Assistance Advisory Board  
Fisheries Loan Board  
Forest Advisory Council- Commissioner of Forest Enhancement  
Gaelic College Foundation  
Guide Examination Boards, Central and Eastern  
Guide Examination Boards, Western  
Halifax County Regional Rehabilitation Centre  
Halifax Court House Commission  
Halifax/Dartmouth Bridge Commission  
Halifax/Dartmouth Port Development Commission  
Health Services and Insurance Commission  
Heritage Advisory Committee  
Home Care Co-ordinating Agency  
Hospital Aberdeen  
Hospital All Saints  
Hospital Annapolis  
Hospital Bayview Memorial  
Hospital Buchanan Memorial  
Hospital Camp Hill Medical Centre  
Hospital Cape Breton Regional  
Hospital Cobequid Multi-Service Centre  
Hospital Colchester  
Hospital Dartmouth  
Hospital Digby General  
Hospital Eastern Shore Memorial  
Hospital Eastern Kings Memorial  
Hospital Fisherman's Memorial  
Hospital Glace Bay General  
Hospital Glace Bay Community  
Hospital Grace Maternity



Hospital Guysborough Memorial  
Hospital Hants Community  
Hospital Highland View Regional  
Hospital Inverness Consolidated Izaak Walton Killam  
Hospital Kings County Health and Rehabilitation Centre  
Hospital Lillian Fraser Memorial  
Hospital Lunenburg and Bridgewater Home for Special Care  
Hospital Management Board of the NS  
Hospital Musquodoboit Valley  
Hospital New Waterford Consolidated  
Hospital North Cumberland Memorial  
Hospital Northside Harbourview  
Hospital Nova Scotia  
Hospital Oceanview Manor  
Hospital Queens General  
Hospital Roseway  
Hospital Sacred Heart  
Hospital Saint Martha's  
Hospital Saint Mary's  
Hospital Sainte Anne Community and Nursing Care Centre  
Hospital Services Planning Commission  
Hospital Soldier's Memorial  
Hospital South Cumberland  
Hospital South Shore Regional  
Hospital Sutherland Harris  
Hospital Twin Oaks Memorial  
Hospital Valley Health Services Association  
Hospital Victoria General Foundation-Board of Directors  
Hospital Victoria General  
Hospital Victoria County Memorial  
Hospital Western Kings Memorial  
Hospital Yarmouth Regional  
Housing Development Board  
Industrial Commission  
Industrial Loan Board  
Industrial Inquiry Commission  
Industry Advisory Committee  
Joint Municipal Board of Health  
Judgment Recovery (NS) Ltd.  
Judicial Appointments Review Committee  
Judicial Council  
Labour Relations Board - Construction Industry Panel  
Labour Standards Tribunal

Law Foundation of NS - Board of Governors  
Law Reform Commission of NS  
Legislature Internal Economy Board  
Library Boards (11 local boards)  
Licensing Board of the NS Veterinary Medical Assn.  
Liquor License Board  
Literacy NS  
Livestock Health Services Advisory Body  
Livestock Health Services Boards (23 local Boards)  
Local Traffic Authority  
Louisbourg District Planning and Development Commission  
Maritime Dental College  
Maritime Medical Care Inc - Board of Directors  
Maritime Provinces Higher Education Board  
Marshland Reclamation Commission  
Meat Inspection Board  
Medical Advisory Board  
Metropolitan Authority/Area Planning Commission  
Metropolitan Health Unit  
Mount Saint Vincent University - Board of Governors  
Multicultural Advisory Committee  
Municipal Affairs Service Commissions  
Municipal Berry Committees  
Municipal Board of Police Commissioners  
Municipal Housing Authorities  
Natural Products Marketing Council  
Novaco Limited  
NS Amateur Sports Advisory Council  
NS Association of Optometrists  
NS Association of Medical Radiation Technologists  
NS Association of Occupational Therapists  
NS Association of Architects - Council  
NS Association of Social Workers  
NS Barristers' Society  
NS Beef Commission  
NS Boxing Authority  
NS Building Advisory Commission  
NS Business Development Corporation  
NS Business Capital Corporation  
NS Certified Nursing Assistant Association  
NS Chiropractic Association - Board  
NS College of Art and Design  
NS College of Physiotherapists - Board of the College

NS Commission on Drug Dependency  
NS Council of Higher Education  
NS Credit Union Stabilization Board  
NS Crop and Livestock Arbitration Board  
NS Crop and Livestock Insurance Commission  
NS Dairy Commission  
NS Dental Technicians Association - Board of Examiners  
NS Dental Association  
NS Dietetic Association - Board of Directors  
NS Economic Council  
NS Educational Communications Agency  
NS Federation of Agriculture - Board of Directors  
NS Government Purchasing Agency  
NS Hairdressing - Board of Examiners  
NS Horse Racing Commission  
NS Housing Development Corporation  
NS Human Rights Commission  
NS Institute of Agrologists  
NS Labour Relations Board  
NS Legal Aid Commission  
NS Liquor Commission  
NS Lottery Commission  
NS Municipal Finance Corporation  
NS Municipal Housing Corporation  
NS Municipal Board  
NS Museum - Board of Governors  
NS Pharmaceutical Society  
NS Police Commission  
NS Power Commission  
NS Primary Forest Products Marketing Board  
NS Provincial Exhibition Commission  
NS Provincial Health Council  
NS Real Estate Association  
NS Registered Barbers Association  
NS Rehabilitation Centre Corporation  
NS Research Foundation Corp  
NS Residential Centre Board  
NS Resources Limited  
NS School Board Association  
NS Securities Commission  
NS Senior Citizens Secretariat  
NS Social Services Council  
NS Sport and Recreation Commission

NS Statistics Agency  
NS Student Aid Committee  
NS Tax Review Board  
NS Veterinary Medical Association  
NS Voluntary Planning Board  
NS Youth Secretariat  
NS Youth Training Centre - Advisory Boards  
NS Youth Conservation Corps - Advisory Committee  
NS Youth Conservation Council  
Occupational Health and Safety Advisory Council  
Parks and Trails Advisory Council  
Pay Equity Commission  
Peggy's Cove Commission  
Pension Committee under the Pension Benefits Act  
Pest Control Products Advisory Committee  
Pharmacy Association of NS  
Planning Advisory Committee under the Planning Act  
Police Review Board  
Primary Forest Products Marketing Board  
Private Land Directorate  
Proprietors Committees under the Common Fields Act  
Provincial Advisory Council - consumer protection  
Provincial Apprenticeship Board  
Provincial Dental Board  
Provincial Grain Commission  
Provincial Health Council  
Provincial Home Care Advisory Committee  
Provincial Library Council  
Provincial Library of NS  
Provincial Medical Board of NS  
Provincial Private Trade School Board  
Provincial Tax Commission  
Provincial Traffic Authority  
Public Archives of  
Public Trustee  
Public Utilities Board  
Public Accountants Board  
Recreational Council of Disability in NS  
Regional Transit Authority  
Registered Nurses Association of NS-Board of Directors  
Rent Review Commission  
Residential Tenancies Board, (9 panels)  
Rosedale Home for Special Care

Saint Francis Xavier University - Board of Governors  
Saint Mary's University - Board of Governors  
School Board in each electoral district  
Schooner Bluenose Foundation - Board of Governors  
Shelburne Youth Centre - Advisory Board  
Sherbrooke Restoration Commission  
Small Business Development Corporation  
Social Service Commission  
Sport NS  
Sport and Recreation Commission of NS  
Stabilization Fund Board - credit unions  
Student Aid  
Supervisors of the Public Grounds  
Surplus Crown Property Committee  
Sydney Steel Corporation  
Sydney Waterfront Development Corporation  
Tax Review Board  
Teachers Pension Commission  
Technical University of - Board of Governors  
Tidal Power Corporation  
Timber Loan Board  
Trade Advisory Commission  
Trade Development Authority  
Universite Sainte Anne - Board of Governors  
University College of Cape Breton- Board of Governors  
Upper Clements Family Theme Park  
Venture Corporations Board  
Veterinary Assistance Board  
Village Commissioners  
Waterfront Development Corporation  
Weed Control Advisory Committee  
Well Drilling Advisory Board  
Wildlife Advisory Council  
Womens' Institute of NS  
Workers' Compensation Board  
Workers' Compensation Appeal Board