

Procedural Fairness and Citizen Control: Addressing the Legitimacy Deficit in the Canadian Administrative State

by

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Faculty of Law
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Abstract

The Canadian administrative state has changed significantly since the first half of the twentieth century, but legal scholarship has paid scant attention to how such changes might affect the administrative state's legitimacy. This thesis argues that the traditional mechanisms for legitimating the increasingly complex and diffuse administrative state are no longer sufficient, particularly in the context of delegated law-making. It uses a republican model of legitimacy to argue for the necessity of citizen control over administrative decision-making.

It is incumbent on Canadian administrative law to help provide this citizen control. A concern with legitimacy is consistent with the first principles of administrative law and judicial review, and the doctrine of procedural fairness is well placed to further the participatory vision of legitimacy the thesis employs. Further, the history of procedural fairness shows that legitimacy of decision-making has always been a core concern of the doctrine. However, more recent developments, including a fixation on adjudicative decision-making and the refusal to apply procedural fairness to delegated law-making, mean that Canadian administrative law does not sufficiently facilitate citizen control. This

is inconsistent with both the internal values of Canadian administrative law and the civic republican vision of legitimacy. There is, however, a separate line of bylaws jurisprudence which more generously extends procedural fairness to delegated law-making. The thesis argues this bylaws jurisprudence is a good starting point to build from.

The experience of comparative administrative law makes it even clearer that Canadian administrative law is able to do this legitimating work. The United Kingdom, New Zealand, and Australia all provide broader participation rights in the law-making sphere with weaker tools than are available in Canada. Further, the domestic aboriginal law duty to consult and accommodate make it clear that the Canadian courts are already comfortable imposing broadly applicable procedural rights.

Building from this comparative and cognate jurisprudence and the bylaws cases mentioned above, the thesis argues that it is possible with only limited substantive changes to the law to develop the doctrine of procedural fairness to provide broad participatory rights in the delegated law-making sphere, thereby securing the legitimacy of the administrative state.

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CHAPTER I INTRODUCTION

Modern government is increasingly complex and decentralised. The days of an all-powerful central government controlling all areas of the economy are over, but the reach of government remains extremely broad. Formerly nationalised industries are open to private enterprise, but operate under government regulation, and sometimes compete with the government-owned remnant of the former monopoly provider. Professions regulate their own affairs, but such self-regulation is subject to oversight by government tribunals. Governments continue to provide a wide array of social services, but delivery of them is contracted out to private providers. And yet despite this decentralised web of contracts and regulation that government has become, we maintain a deep and abiding commitment to the idea of democracy.

We accept, in general, the principle that to be legitimate a government must be democratic. The particular expression of this principle varies from place to place, but the general idea that, at least, the legislation which governs us ought to be made by a body with democratic legitimacy is close to universal. The primary method of conferring that legitimacy is the electoral process: representatives stand for election, trying to convince their fellow citizens that they are the best person to represent those citizens' views in the (local or national) legislature. Each of those representatives carries with them the democratic legitimacy of that election, and decisions made by the legislature in turn carries the backing of a majority of those democratically elected representatives. Certainly, democratic theorists have pointed out a number of flaws in the various different iterations of electoral democracy, but in general some level of democratic accountability on the part of the legislature is seen as essential for legitimate government.¹

None of the apparatus of electoral democracy, though, touches directly on the administrative state. While broad policy is set by the government holding a majority in the

¹ See for example the critique of Canadian Parliamentary democracy in Peter Aucoin, Mark D Jarvis and Lori Turnbull, *Democratizing the Constitution* (Toronto, Ont: Emond Montgomery, 2011).

elected legislature, the bulk of the other work involved in the day to day business of government is conducted by the bureaucracy or by private contractors. From policy development to policy implementation to service delivery, unelected officials control much of the interface between a government and its citizens. Furthermore, much of the lawmaking in the modern state takes place within the administrative state. The number of rules, regulations, and bylaws currently in force dwarfs the amount of primary legislation and yet, other than signoff by Cabinet, the process of making it almost wholly bypasses the elected legislature.²

In a Westminster democracy, the doctrine of Ministerial responsibility is relied upon to confer a democratic imprimatur on the administrative state. In the broadest terms, the doctrine means that Ministers are responsible for the actions of officials within their portfolio, and must account for those actions to the democratically elected legislature. Further, as elected members of the legislature themselves, Ministers can also be held responsible for the performance of officials within their portfolio at the next election. While this idea is deeply embedded in Westminster theory, it has in practice become severely attenuated in the modern state.³ Ministers are these days more likely to blame officials for shortcomings in the portfolio than take personal responsibility for them.⁴ That being the case, we surely cannot rely solely on Ministerial responsibility to provide democratic legitimacy to the administrative state. Doing so creates a substantial risk that an indispensable part of the government, involved in every aspect of citizens' lives, has no claim to legitimacy.

² For comparative discussion of the Federal primary legislative process as compared to the delegated legislative process see Canada, Privy Council Office, *Guide to Making Federal Acts and Regulations*, 2d ed, (Ottawa: Government of Canada, 2001), Parts 2 and 3.

³ See David E Smith, "Clarifying the Doctrine of Ministerial Responsibility as it Applies to the Government and Parliament of Canada," in Commission of Inquiry into the Sponsorship Program and Advertising Activities, *Restoring Accountability - Research Studies: Volume 1 - Parliament, Ministers and Deputy Ministers* (Ottawa: Government of Canada, 2006).

⁴ See for example Max Paris, "The new ministerial responsibility: punish the underlings", *CBC News* (January 27, 2014) online: CBC News <<http://www.cbc.ca/news/politics/the-new-ministerial-responsibility-punish-the-underlings-1.2510068>>.

The flimsiness of Ministerial responsibility has been apparent for some time, and yet legal scholarship in the Westminster tradition has been slow to engage with other ways in which administrative action and administrative law-making might be legitimated. Democratic theorists and political scientists have done significant work on the democratic deficit within executive government, as have administrative law scholars in the rather different contexts of the United States and the European Union.⁵ In general, these scholars suggest that some sort of participatory process is required. Those in Canada, the United Kingdom, Australia, and New Zealand, however, have paid scant attention to the potential for administrative law to facilitate participation in the administrative state, or how it might be otherwise used to provide legitimacy.

The argument I make in this thesis is that Canadian administrative law is well placed to help create this participatory legitimacy. The tools largely exist within the current common law to address the democratic deficit in the administrative state. Moreover, administrative law ought to do so: providing a route to participation in the administrative state is entirely consistent with the underlying purposes of administrative law. This is quite clear from the Supreme Court of Canada's ("SCC") statements about what administrative law is for. Specifically, SCC authority makes it clear the prime purpose of administrative law generally, and judicial review specifically, is to preserve the rule of law. Indeed, its role in doing so is so important that the SCC has made clear that judicial review has constitutional protection.⁶ In turn, the vision of the rule of law that has been put forward by the SCC is an explicitly democratic one. As the Court stated in *Reference re Secession of Quebec*:⁷

To be accorded legitimacy, democratic institutions must rest, ultimately, on a legal foundation. That is, they must allow for the participation of, and accountability to, the people, through public institutions created under the Constitution. Equally, however, a system of government cannot survive through adherence to the law alone. A political

⁵ See for example Henry Richardson, *Democratic Autonomy: Public Reasoning About the Ends of Policy* (New York: OUP, 2002) (in the United States context) and Matthew Ruffert, ed, *Legitimacy in European Administrative Law: Reform and Reconstruction* (Groningen: Europa Law Publishing, 2011) (in the EU context).

⁶ See *Crevier v Attorney-General (Quebec)*, [1981] 2 SCR 220 at 236 [*Crevier*] and *UES, Local 298 v Bibeault*, [1988] 2 SCR 1048 at para 108 [*Bibeault*].

⁷ *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 67.

system must also possess legitimacy, and in our political culture, that requires an interaction between the rule of law and the democratic principle. The system must be capable of reflecting the aspirations of the people.

An area of law concerned solely with the executive, which has as a primary purpose the promotion of a democratic rule of law, must surely be deeply concerned about the democratic legitimacy of the executive. A glance at the last forty years of Canadian administrative law doctrine, however, leads one inexorably to the conclusion that it simply is not. Canadian administrative law has not responded to the legitimacy deficit within the administrative state. While, in general, it provides for adequate participation in individualized decision-making (tribunal hearings, appeals, and the like), Canadian administrative law refuses to impose any participatory requirements on the process for making delegated legislation, an increasingly voluminous and important source of law.

The failure to engage with the legitimacy deficit of executive government and in particular in executive law-making is a significant flaw in Canadian administrative law, and it needs to be remedied. This thesis is an argument in support of that proposition, and an answer to the question of how the legitimacy deficit in the administrative state might be remedied using administrative law.

In order to make that argument, the first thing that is needed is a model of democratic legitimacy, and this is what I set out in Chapter II. The argument starts with the proposition that a burden of legitimacy applies across the machinery of the State, from Parliament to Cabinet to public servants. The model of legitimacy I used draws on the neo-republican work of Philip Pettit and Henry Richardson. In brief, this model argues that what is necessary for legitimate government is that citizens are free from domination. Domination occurs when a government arbitrarily imposes duties on its citizens. The only way this can be avoided is where a government makes laws (i.e. imposes duties) in a non-arbitrary matter. Pettit and Richardson suggest that a non-arbitrary law-making process is one which is made in order to further the general public good rather than the specific interests of the decision-maker. The chapter sketches out what might constitute the public good:

Richardson suggests that the public good can only be discerned through the proper functioning of the processes and institutions of a liberal democracy, while Pettit suggests that a decision made in the public good is one that is made under the control of the citizenry. The two models are compatible and derive from the same basic theoretical approach, but the thesis will employ Pettit's "citizen control" model to evaluate the legitimacy of law-making.

These requirements apply to law-making generally, but I argue that they also apply specifically to delegated law-making. Chapter II argues that existing accountability mechanisms that purport to transmit legitimacy to delegated law-making (most notably Ministerial responsibility and Parliamentary scrutiny of delegated legislation) are not sufficient to do the work required. Delegated law-making is a separate exercise of government power and in order to be legitimate requires a separate processes that allows for citizen control. I also argue that even if accountability mechanisms could somehow transmit the legitimacy of the primary legislative process to delegated law-making, this would not be sufficient: the administrative state constitutes a unique dialogic space that demands a type of participation that is difficult to replicate elsewhere. I conclude that there is a burden of legitimacy on the administrative state and delegated law-making, and current accountability mechanisms do not meet that burden.

In Chapter III, I argue that in the absence of any other effective mechanism, it is incumbent upon the courts to address this legitimacy deficit, and that administrative law is the proper area of law for them to utilise. In particular, the doctrine of procedural fairness is well placed to provide the sort of participation rights necessary for citizen control of delegated law-making. Although administrative law is often seen as primarily concerned with protecting the rights of individuals from the excesses of executive power, I argue that both its underlying principles and doctrinal history suggest it has an abiding concern with legitimate decision-making.

Using the work of Richard Rawlings, Carol Harlow, and Thomas Poole, I argue that judicial review – the primary enforcement mechanism of administrative law – is best seen as an institution concerned with both protecting rights and upholding the legitimacy of the administrative state. Similarly, the history of judicial review for breaches of procedural fairness demonstrates a longstanding focus on the legitimacy of executive decision-making. The early decisions of Coke CJ on natural justice assumed that executive adjudication was impossible without a fair process. This undercurrent was carried forward when natural justice was expanded to cover a broader range of administrative decisions with the birth of the administrative state in the Victorian era. This expansion did not continue when administrative rulemaking and ‘legislation’ became a common part of the administrative state, however. Instead, we saw a regrettable turn towards a fixation on adjudicative procedures in the early 20th century in *R v Legislative Committee of the Church Assembly ex parte Haynes-Smith*.⁸ This fixation remained (and remains) a feature of the doctrine even following the creation of modern procedural fairness in the 1963 case of *Ridge v Baldwin*.⁹ I argue that this adjudicative fixation distorts the content of procedural fairness, and prevents it from properly fulfilling its dual roles of protecting rights and legitimating government action. A shift away from this unnecessary valorisation of adjudication would allow those concerns to again be properly reflected in the doctrine.

Chapter IV argues that despite having what may be the broadest, most flexible iteration of procedural fairness in the common law world, Canada fails to apply the doctrine as widely as it should. As mentioned above, the SCC has clearly articulated a vision the rule of law that is concerned with democratic legitimacy is clear, and has made it clear that judicial review plays an important role in securing it. These in-principle commitments are not carried through to the doctrinal level, however.

Procedural fairness in Canada inherited from United Kingdom law the generous view of procedural fairness established in *Ridge*. The United Kingdom case used to import the

⁸ *R v Legislative Committee of the Church Assembly ex parte Haynes-Smith*, [1928] 1 KB 411 at 419.

⁹ *Ridge v Baldwin*, [1964] AC 40 [*Ridge*].

doctrine into Canada, though, was *Bates v Lord Hailsham*, a case which insisted on a formalistic distinction between legislative decisions, which do not attract fairness, and all others decisions, which do.¹⁰ Although this distinction was not important in the 1978 case of *Nicholson v Haldimand-Norfolk Regional Board of Commissioners of Police*,¹¹ the first Canadian case to apply modern procedural fairness, *Bates*' bar on applying procedural fairness to legislative decisions was quickly adopted in *Attorney General of Canada v Inuit Tapirisat et al.*¹² This combination of authorities means that even after Canadian procedural fairness reached its broad, flexible high point in *Baker v. Canada (Minister of Citizenship and Immigration)*, it has not been able to expand to cover delegated law-making.¹³

The chapter argues that *Inuit Tapirisat*'s continued status as good law is unjustifiable. Its underlying logic is not compelling, the United Kingdom precedent it relies on has never been influential in its own jurisdiction and, most importantly a better approach is already available. There is an entirely separate line of cases, dealing mostly with bylaws, which takes a significantly more nuanced approach than *Inuit Tapirisat*, and with which the dominant line of jurisprudence completely fails to engage. This line of cases, starting in *Wiswell v Winnipeg*,¹⁴ suggest that any executive decision which affects identifiable persons individually, rather than as a group, cannot count as legislative. There is also recent Supreme Court of Canada authority, notably *Catalyst Paper v District of North Cowichan*, which (without engaging with *Inuit Tapirisat*), applies procedural fairness to executive decisions which are is, by any metric, legislative.¹⁵ *Catalyst Paper* does not apply any extra threshold to the application of fairness in the legislative context beyond the general requirement that for fairness to apply, a person's rights, interests, or privileges must be affected.¹⁶ The bifurcation between the bylaws cases and the main line of cases following

¹⁰ *Bates v Lord Hailsham*, [1972] 1 WLR 1373, [1972] 3 All ER 1019 [*Bates*].

¹¹ *Nicholson v Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] SCR 311.

¹² *Attorney General of Canada v Inuit Tapirisat et al*, [1980] 2 SCR 735 [*Inuit Tapirisat*].

¹³ *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 81.

¹⁴ *Wiswell v Winnipeg*, [1965] SCR 512.

¹⁵ *Catalyst Paper v District of North Cowichan*, 2012 SCC 2, [2012] 1 SCR 5 [*Catalyst Paper*]

¹⁶ *Nicholson*, *supra* note 11.

Inuit Tapirisat leaves Canadian procedural fairness somewhat incoherent and in need of reform. This status quo is unacceptable, and I conclude Chapter IV by arguing that Canadian administrative law should move to adopt the currently subordinate line of bylaws jurisprudence.

If Chapter IV is an argument for change based on the internal contradictions of Canadian administrative law, Chapter V extends that argument to include other areas of law. The experience of comparative administrative law and cognate areas of domestic law make it all the more clear that the failure to extend the reach of procedural fairness to cover delegated law-making is unjustifiable. The chapter starts by exploring the different forms of participatory rights which exist in non-participatory circumstances under United Kingdom, New Zealand, and Australian administrative law, with the aim of showing that legally imposed, non-adjudicative participatory rights are both possible and common.

Both the United Kingdom and New Zealand use the doctrine of legitimate expectations to provide participatory rights in non-adjudicative contexts, even when there is no other legal requirement. While, due to the weakness of its Canadian iteration, the doctrine of legitimate expectations does not seem a promising method for expanding procedural fairness in Canada, this experience does show that other jurisdictions are willing to be creative in expanding rights of participation where justice requires. Australia, which otherwise has very similar law to Canada in this area, has entirely abandoned distinctions between legislative and non-legislative decisions, instead relying on the question of whether a party is “individually affected” by a decision to determine the level of their procedural entitlements. In addition, the United Kingdom and New Zealand have both developed comprehensive common law doctrines on the content of consultation – a doctrine which imposes non-adjudicative participation rights. Such jurisprudence does not exist in Canada, and I suggest that this comparative consultation material can be usefully employed in developing Canadian administrative law’s concept of what non-adjudicative participation might look like.

All three of these jurisdictions have narrower, less flexible approaches to procedural fairness than Canada. Yet all have grappled with how to facilitate participation in the administrative state more seriously than have the Canadian courts. I suggest that the successes and even the failures of these comparable jurisdictions can be helpful in determining how Canadian courts might best deal with procedural fairness in non-adjudicative contexts.

Chapter V also argues that domestic aboriginal law contains useful material than can be drawn on. The obligation to consult and accommodate at aboriginal law already gives First Nations participatory rights in some non-adjudicative contexts. While not identical to administrative law procedural fairness, the duty to consult and accommodate explicitly draws on administrative law principles, and shows there is already a domestic context where the Canadian courts are willing to impose generally applicable participation requirements (in the form of consultation).

Chapter VI concludes the argument by drawing together the threads from the previous chapters and suggesting how Canada's doctrine of procedural fairness can more effectively facilitate citizen control and thereby better legitimate delegated law-making. I argue that the current law has the potential to supply most of what is needed, and the comparative and cognate material I discuss in Chapter V can be used to fill any gaps required. The status quo must be abandoned, and one of the approaches currently restricted to bylaws should be adopted. Ideally, this would be the *Catalyst Paper* method of eliminating any arbitrary barrier to the application of procedural fairness in the legislative context (beyond that which applies to procedural fairness generally). Concerns about calibrating the appropriate process in any given circumstances, and avoiding antidemocratic judicial overreach, can be dealt with using the inherent flexibility of procedural fairness. I suggest that an additional level of calibration would be available if the Canadian courts also adopted an explicitly deferential approach to procedural review, similar to the judicial method which already applies to substantive review. The way procedural fairness is currently applied already includes some elements of deference, and prominent appellate judges have already

suggested this shift, so while this proposed change in standard of review would certainly be an alteration to existing doctrine, it would not be a huge one.

As noted above, the consultation material I discuss in Chapter V can be drawn on to give content to this expanded vision of fairness. Canadian administrative law has no history of working out what procedural fairness might mean outside an adjudicative context, and the comparative material available from the United Kingdom and New Zealand – and domestic aboriginal law – could be an important resource in developing domestic law in the area. I briefly consider the American *Administrative Procedures Act* as a potential source of such law, but ultimately conclude that a common law approach is a better fit for Canadian administrative law.

Finally, I argue that a pure process requirement cannot, by itself, do the work of legitimating administrative rulemaking. Some nexus between process and substance is needed to ensure that the citizen control which is essential for legitimacy can actually be achieved. A requirement for reason-giving, already part of procedural fairness in some contexts, could be adapted to provide this nexus. Alternatively, the explicit assessment of a decision-maker's quality of reasoning that is already part of the reasonableness analysis in substantive review could do this work.

The changes put forward in this thesis will move us towards a more democratic and legitimate administrative state. Given the increasingly complex and decentralized nature of the modern state, this shift is essential if we are to retain control over our own government.

CHAPTER II LEGITIMACY AND PARTICIPATION

The basic argument this thesis makes is that public participation is crucial to the legitimacy of the administrative state and delegated law-making and that administrative law ought to facilitate this necessary participation. The starting point of this argument is the idea of legitimacy, and this chapter sets out the concept of legitimacy I will use in this thesis. It is not within the scope of this thesis to offer a complete discussion of competing models of legitimacy, but it is necessary to discuss the key elements of the model of legitimacy against which I am assessing the legitimacy of administrative decision-making.

This model draws on Philip Pettit's republican theory of freedom as non-domination, as expanded upon by Henry Richardson. Pettit and Richardson's approach provides a well thought-out concept of what is required for legitimate laws, and draws from republican, mainstream liberal, and deliberative democracy traditions. It is, importantly, a model which does useful work in explaining the importance of participation in the administrative state, something which I argue in Chapter III is a core concern of administrative law as well. Further, as Pettit notes:¹

Any plausible model of the form that democracy ought to take is bound to support many of the institutions that are actually in place in existing democracies. But no model will have normative bite unless it can be used as a base for arguing for reform.

This thesis does precisely what Pettit notes here: using the normative demands of his model to argue for reform of the existing institution of procedural fairness in order to increase the currently suboptimal legitimacy of administrative decision-making and in particular delegated law-making. More specifically, I use this model to show that despite delegated legislation generally being legally valid in a formal sense, without participation being included in the law-making process, the legitimacy of such delegated legislation is damaged.

¹ Philip Pettit, *On the People's Terms: A Republican Theory and Model of Democracy* (Cambridge: CUP, 2012) at 23.

This is the case even when non-participatory institutions such as individual Ministerial responsibility and Parliamentary review of delegated legislation act to introduce some political accountability into rulemaking. These accountability mechanisms have attenuated significantly over recent years and do not effectively legitimate rulemaking by themselves. In addition, even if legitimacy could be transmitted in this way, the sort of participation enabled in the administrative space has a particular value of its own. The nature of the dialogic space that exists in the administrative state facilitates discussion of issues that are sometimes neglected in electoral and parliamentary democracy, in a context amenable to such discussion. The reasoned deliberation facilitated in this context improves the legitimacy of the state in a way that cannot be replicated by participation elsewhere.

A The Burden of Legitimacy

Any state bears a continuing burden to show its citizens its authority over them is legitimate. This section sets out the model of legitimacy I will use in this thesis, which is based on Philip Pettit and Henry Richardson's republican models of freedom as non-domination. This model holds that laws are required to be legitimate because they have the potential to arbitrarily impose duties upon people. By their nature laws tend to impose duties, so what is necessary for them to be legitimate is for them to be made following a non-arbitrary process. This is not a particularly controversial position, but as it is one of the fundamental premises of my thesis, it is necessary to set out the reasons for it in some detail.²

Pettit argues that the acceptance of laws as legitimate is of crucial importance to the government of the day because:³

it is only possible for politicians and public officials to gain support for the policies they pursue to the extent that they can represent them as legitimate: to the extent that they can represent them as policies motivated by this or that agreed, or more or less agreed, commitment.

² "Because then they would be illegitimate" is a tempting but insufficient answer.

³ Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford: Clarendon Press, 1997) at 1.

Legitimacy is a self-reinforcing value: it is concerned with the perpetuation of the political system within which it operates. A legitimate system provides avenues for citizens who disagree with particular exercises of government power, and “imposes an obligation to accept the regime, opposing unjust law – and of course, illegitimate laws – only within the system: that is, contending those laws but not resisting the regime”⁴ An illegitimate regime, on the other hand, carries no obligation to accept, and those who do not accept its exercises of power are morally free to challenge them outside the system. Continued legitimacy is therefore crucial to the ongoing viability of any state.

In the passage quoted above, Pettit suggests that a baseline shared commitment is required to found a claim to legitimacy. The number of shared commitments among the generally pluralistic societies of the common law world is relatively small. Of these foundational values, perhaps the most ubiquitous is freedom. It is uncontroversial to assert that a legitimate state must respect the freedom of its citizens, and it is freedom upon which Pettit bases – and I will base – my concept of legitimacy.

Even this statement – that a legitimate state promotes freedom – requires further definition. Freedom can be defined in many different ways and some of these differences have a significant impact on our idea of what a legitimate government might be. For example, Isaiah Berlin drew an influential contrast between negative and positive freedom.⁵ Negative freedom is the absence of interference, while positive freedom is the presence of self-mastery. The first of these concepts was at the core of both classical liberalism and modern libertarianism. A government that respects freedom conceived of in this way will, as far as is possible, avoid any interference at all in the affairs of its citizens, beyond that which is necessary to ensure that each citizen’s freedom is not compromised by others.

In contrast, positive freedom embraces the importance of being one’s own master. It also gives rise to the idea that government ought to ensure that people have the capacity to

⁴ Pettit (2012), *supra* note 1, at 140.

⁵ Isaiah Berlin (ed Henry Hardy), *Liberty* (Oxford: OUP, 2002).

genuinely and freely choose between the options available in society. A particularly prominent modern expression of this idea is Martha Nussbaum's capability approach to rights and freedoms. This approach focuses on ensuring that people have the ability to pursue certain desiderata that are asserted to be essential to human flourishing. It is essentially a theory of substantive freedom.⁶

The definition of freedom I propose to use is in some ways a midpoint between positive and negative liberty: the republican idea of freedom as non-domination.⁷ It is a midpoint because it is not obsessed with the absence of interference, but neither does it concentrate on self-mastery. Rather, it concentrates on the lack of mastery by others, and is concerned with avoiding:⁸

The grievance... of having to live in a manner that leaves you vulnerable to some ill that the other is in a position arbitrarily to impose; and this, in particular, when each of you is in a position to see that you are dominated by the other, in a position that you each see this, and so on. It is the grievance expressed by the wife who finds herself in a position where her husband can beat her at will, and without any possibility of redress; by the employee who dare not raise a complaint against an employer, and who is vulnerable to any range of abuses, some petty, some serious, that the employer may choose to perpetrate...

The classical liberal model of freedom would not classify either the employee or the wife as unfree in the above scenarios. Unless the wife was in fact beaten or the employee in fact unjustly sanctioned, there has been no interference in their lives. However, freedom as non-domination sees the *capacity* to arbitrarily interfere as something which restricts

⁶ This is a gross simplification of Nussbaum's nuanced theory. For more detailed discussion of the capabilities approach, see Martha Nussbaum, *Women and Human Development: The Capabilities Approach* (Cambridge: CUP, 2000) or, for a short summary see Martha Nussbaum, "Twentieth Anniversary reflections" (2007) 20 Harv HRJ 21.

⁷ This section contains a relatively short overview of the idea of freedom as non-domination. A full exploration of the subject is beyond the scope of this thesis. For further discussion see especially Pettit (1997), *supra* note 3 at chapters 1 and 2 and also Henry Richardson, *Democratic Autonomy: Public Reasoning About the Ends of Policy* (New York: OUP, 2002), Introduction and Chapter 1.

⁸ Pettit (1997), *ibid* at 4-5.

freedom.⁹ A well-founded apprehension that you will be beaten or dismissed from employment (as the case may be) if you step out of line significantly affects how you will conduct your life, both in relation to the person asserting the authority to beat or dismiss and generally.

It is this situation – “being subject to the potentially capricious will or potentially idiosyncratic judgment of another” – that is the essence of ‘unfreedom’ in the republican model: one can be dominated without ever been harmed or restricted. Conversely, restrictions (so long as they are not arbitrary) will not necessarily count as domination. Of particular relevance to this thesis, and contrary to the classical liberal view, even laws which may restrict one’s actions will not necessarily result in domination.¹⁰ This is because a properly drafted law that is enacted using the appropriate process will in most cases not be an *arbitrary* restriction, and being subject the arbitrary exercise of power is an essential element of domination. This modification to classical liberalism makes the republican model a particularly useful one for the purposes of this thesis. The classical liberal model would hold that *any* state is illegitimate, because all states pass laws which restrict their citizens’ choices and impose taxes.¹¹ The republican model, on the other hand, allows us to engage with how existing states might be reformed to avoid domination.

Pettit distils domination down into 3 constituent elements. He states that someone dominates another to the extent that:¹²

- 1). they have the capacity to interfere
- 2). on an arbitrary basis
- 3). in certain choices that the other is in a position to make.

⁹ As is discussed further below, while Pettit considers that capacity to interfere is sufficient for domination, I agree with Richardson that what is actually required is the capacity to arbitrarily impose duties. Nevertheless, the core of the standard modern republican idea of freedom rests on the capacity to arbitrarily interfere, so this concept will be discussed first.

¹⁰ Pettit (1997), *supra* note 3 at 5.

¹¹ Pettit (2012), *supra* note 1 at 149-152.

¹² Pettit (1997), *supra* note 1 at 52.

In order to provide a fuller understanding of the idea of domination, the meaning of each of these clauses needs to be explored further. In particular, the first clause arguably does not provide a full picture of the sort of power that must be asserted in order to dominate. This issue is discussed further below.

1 The Capacity to Interfere – or Impose Duties

The republican model views interference as an action which intentionally makes things worse for another person.¹³ Pettit notes that almost all traditions in political philosophy subscribe to this definition in that they associate freedom with “constraints only on more or less intentional interventions by others.”¹⁴ Even with this somewhat restrictive meaning, interference still encompasses a wide range of actions. Active physical restraint (such as imprisonment) is clearly interference, as is restraining the choices that people can make via punishing, or threatening to punish, certain courses of action. Pettit suggests that less overt manipulation, such as agenda-fixing, deceptive shaping of people’s beliefs, or rigging the consequences of certain choices, can count as domination.¹⁵

All these types of interference act to change the expected outcomes available for a person to choose from in a given situation. It is this loading or restricting of available choices that is at the core of interference in the republican model:¹⁶

physical obstruction and agenda-fixing both reduce the options available; the threat of punishment and the non-rational shaping of desires both affect the payoffs assigned to those options; and punishment for having made a certain choice and disruption of the normal flow of outcomes both affect the actual payoffs. Where the removal of an option from the range of available alternatives is an on-or-off matter, of course, the other modes of interference come in degrees: the expected or actual costs of certain options may be worsened in a greater or a smaller measure.

¹³ As opposed to accidentally making something worse or deliberately making things better. In the ordinary use of the word, these are both possible meanings, but neither really make sense in the context of defining domination. See Pettit (1997), *ibid* at 52.

¹⁴ *Ibid* at 53.

¹⁵ *Ibid*.

¹⁶ *Ibid*.

Depending on the context, and the degree to which available options are affected, interference can be of greater or lesser severity. The fact remains, though, that any worsening of a person's available choices counts as interference.¹⁷

As for the meaning of "capacity", such capacity must be ready and able to be exercised. That is, the potential dominator must currently have the ability to dominate other persons. The potential for developing such an ability is insufficient. Pettit cites as an example the comparison of a musically talented person who has yet to attempt playing the piano – they may at some point have the capacity to be a concert pianist, but that capacity has not yet crystallised.¹⁸ This sort of potential, yet to be developed, capacity for interference is described by Pettit as "virtual domination", and he does not consider that combatting it is at the core of the republican project.¹⁹ It is not an issue that this thesis will focus on combating, either.

Pettit thinks that arbitrary capacity to interfere is sufficient in order to dominate. Henry Richardson's "democratic autonomy" model, however, adds an additional gloss to this (while remaining essentially a republican model of legitimate government). He considers that Pettit "concedes too much conceptual primacy to the idea of freedom as non-interference by suggesting that the capacity to dominate can be defined as the capacity arbitrarily to interfere."²⁰ Richardson instead states that the sort of arbitrary power that is necessary for domination is the ability to make people's lives or situations worse by imposing (or purporting to impose) duties on a person.²¹

¹⁷ This is true even where we would not see such worsening as entirely wrongful. For example, deliberately undercutting a competitor's prices in order to take some of its business would be interference, even though it is morally neutral. Similarly, even morally praiseworthy actions such as preventing someone from attacking a third party count as interfering with the attacker. Interference is judged in light of the facts and the context; it is not a morally loaded concept. See Pettit (1997) *ibid* at 54.

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ Richardson, *supra* note 7 at 34.

²¹ *Ibid* at 24.

In my view, Richardson's amended condition for domination is a more cogent one than Pettit's. As Richardson puts it:

If we take another look at paradigmatic cases of domination – that of master over slave, king and parliament over the colonies, or a Victorian father [and husband] over his household – we will see that these are all situations in which the dominators acted under a claim to authority. The slavemaster, the colonizing power, and the Victorian father [and husband] all purported to be able to put the persons they dominated under new duties and to do so on an arbitrary basis. The purported exercise of normative power – the power to modify the rights and duties of others – is, I suggest, essential to the idea of domination.

Richardson uses the example of a gang of kidnappers operating in a given area to illustrate where freedom from arbitrary interference is overbroad as a foundation for domination. These kidnappers are, for the sake of argument, well-resourced, able to locate lucrative targets, and their activities are well known to the public. The kidnappers clearly have the capacity to arbitrarily interfere with their potential targets' lives. Yet it would be odd to think of every potential victim – potentially everyone in the geographic area – as being 'dominated' by this gang of kidnappers.²² Richardson suggests that this is at least partly "...because they do so under no color of right, no claim of authority...."²³

It is somewhat odd that Pettit does not include any normative element in his definition of domination. On the first page of his book, he states that "normative ideas are of the first importance in political life."²⁴ Yet Pettit's definition of his core concept, freedom, is a purely descriptive one. Further, as Richardson point out, this definition:²⁵

loses contact with the way he initially located freedom as nondomination as a third possibility in addition to the negative and positive forms of liberty distinguished by Berlin. As Pettit himself points out, Berlin's schema introduces the idea of mastery on the positive side, in the guise of self-mastery. Self-mastery cannot be understood, however, as the capacity to interfere with oneself. Rather, self-mastery is a matter of

²² A more concrete real world example would be the pirates who have become increasingly active off the Horn of Africa in recent years. Although these pirates have demonstrated the ability to harass even large ships, and all traffic travelling from the Red Sea to the Indian Ocean could potentially be interfered with, we would not classify every passenger and crew member on every ship in the area as being dominated by them.

²³ Richardson, *supra* note 7 at 34.

²⁴ Pettit (1997), *supra* note 3 at 1.

²⁵ Richardson, *supra* note 7 at 34.

developing the capacity to put oneself under obligations... What returning to the case of self-mastery shows is that mastery, or domination, is a normatively richer notion than the idea of the capacity to interfere. Domination is the capacity to make people's lives or situations worse by arbitrarily imposing duties upon them, or by arbitrarily purporting to impose duties on them.

The shift from interference to duties is, as Richardson states, a relatively minor amendment to Pettit's definition of domination. It does, however, add a normative element to the concept of domination which makes it a richer basis for discussion of what it means to be free. The first condition for domination will therefore be defined as the power, or purported power, to impose duties upon people.

2 *Non-Arbitrariness*

A public decision will be arbitrary where the decision-maker is permitted to exercise his or her power *only* subject to his or her own judgment.²⁶ An arbitrary decision-maker will not hear submissions, consider relevant evidence, or take account of the interests of the citizens who will be affected by the decision. As Pettit puts it, a choice is arbitrary where it "is not forced to track what the interests of... others [affected by the decision] require according to their own judgments."²⁷ In contrast, "what is required for nonarbitrary government power... is that the power be exercised in a way that tracks, not the power-holder's welfare or world-view, but rather the welfare and world-view of the public."²⁸ Thus, a decision will be arbitrary in two broad situations: where a decision-maker makes no attempt to track the public interest at all, or where, despite some desultory effort to obtain the views of the public, a decision which is substantively and significantly contrary to the "welfare and worldview of the public" is made. To put it in simpler terms, this view of the conditions for non-arbitrariness is particularly concerned with the public good.²⁹ "The public good"

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ *Ibid* at 56.

²⁹ Richardson is careful to distinguish the idea of "the public good" – what we as a citizenry ought to do – from "the common good" – the sum of the individual goods of each citizen. He suggests that the common good carries specifically welfarist assumptions, while "the public good" denotes the ends of collective, political actions without laying down any particular restriction of these collective or institutional ends to

is, however, a somewhat vague concept, and without further definition it is not a particularly useful tool for determining whether or not a decision is arbitrary.

In the context of trying to determine which laws are legitimate (which is the point of both this chapter and a large part of Richardson’s book), Richardson does not think that the parameters of the public good can be delimited by reference only to the concept of the public good itself.³⁰ He therefore rejects an objectivist concept of the public good which sees “the public good” as a definite object floating out there in the ether, ready to be used as a yardstick whenever a public decision is made. Instead, he suggests the answer lies in our liberal political commitments.³¹ Richardson argues that the public good is given content by the proper functioning of the political institutions that are common to liberal democracies. Specifically, “political power is nonarbitrarily used when it is constrained to operate within a set of fair procedures that respects persons as free and equals [sic] and provides adequate protection for their fundamental rights and liberties.”³²

In his most recent book, *On the People’s Terms*, Pettit sets out a similar schematic view of the public good, stating that for a law-making process to be legitimate it must be able to be controlled by the people. He suggests that an interference with a person’s choices that that person controls will not dominate, illustrating this with a hypothetical situation where a person who wishes to reduce their drinking gives the key to their liquor cabinet to a friend and asks that friend not to return it to them for a period of time.³³ Because the restriction

individual well-being” (Richardson, *supra* note 7 at 40). For the purposes of my thesis, Richardson’s concept of the public good is more useful than the welfarist idea of the common good.

³⁰ Richardson, *ibid* at 41.

³¹ He also considers and then quickly rejects a welfarist interpretation of the public good. See Richardson, *ibid* at 41-47.

³² *Ibid* at 51. The objectivist concept of the public good discussed briefly above would allow for the possibility of non-dominant rule by hypothetical Platonic overlords with privileged access to the content of the public good, even though such a possibility instinctively feels like a classic case of domination – rule by a benevolent dictator is still rule by a dictator. Richardson’s liberal concept non-arbitrariness eliminates this possibility by requiring consultative procedures that respect the viewpoint of each consulted person. For further discussion of these issues, see Richardson, *ibid* at 41 and 51-52.

³³ Pettit (2012), *supra* note 1 at 155.

on access to the liquor is controlled by the person who gave their friend the key, it does not dominate them. Pettit sets out three elements that are required before the correct sort of control can be said to exist in a law-making process: there must be the chance for citizens to have an equal chance to have individualised, unconditioned, efficacious influence on decision-making.

By “individualised”, Pettit means that “equal access to the system of popular influence: an opportunity for participation in that system that is available with equal ease to each citizen.”³⁴ In addition, each citizen must have the same capability to have their submission influence the outcome. Pettit suggests we know that this will happen when all those “who accept that the state should treat its citizens as equals” is willing to accept the decision ultimately made by government.³⁵

“Unconditioned” influence requires “a correspondence between the inputs of the controller, on the one side, and the outputs of the controlled, on the other.”³⁶ This nexus between inputs from the public and outputs from government must exist regardless of the benevolence or otherwise of those currently in government.³⁷ The institutions set up to allow for citizen input into decision-making must properly reflect the level of resistance in any given society to any given example of law-making.

Finally, “efficacious” influence is influence that actually causes a state to treat its citizens “well and equally in the manner in which it imposes a social order, as well as in the character of the order imposed.”³⁸ This view of the public good is similar to that put forward by Richardson, above. The nature of a diverse society is such that not every person will be pleased with every decision a government makes. In fact, some will have mutually

³⁴ *Ibid* at 169.

³⁵ *Ibid* at 170.

³⁶ *Ibid.*

³⁷ *Ibid* at 173-174.

³⁸ *Ibid* at 175.

exclusive preferences. In the face of such inevitable disagreement, Pettit suggests the way to determine whether influence has been efficacious is a “hard luck” test:³⁹

Imagine that the party or personnel in government do not meet with your approval. What are you to think if they are manifestly appointed under a suitably efficacious form or popular influence and direction, in which you have an equal share? You can only think that it was tough luck that those appointed are not to your taste; it was not the work of a dominating will, as it would be, for example, under a colonial administration. Or, say, legislation requiring the construction of new prisons. What are you to think if it does so, again manifestly, under the equally shared, suitable efficacious control of the people? You can only think that it was just tough luck for you that the decision went that way; it was not the result of a will at work in the public sphere that operates beyond the equally shared control of you and your fellows.

In summary, for citizen control to be said to exist under Pettit’s formulation, the people must be able to influence law-making, and the law-making process must ensure that influence is applied in a coherent and non-counterproductive manner. Influence needs to be equally available for all citizens – all like submissions must be treated alike. If this state of affairs exists, law-making will be non-arbitrary and therefore non-dominating.

This is a largely procedural vision of legitimacy, but it does have some substantive elements. Bedrock equality and freedom of speech rights must be respected to meet Pettit and Richardson’s criteria, and there must be some nexus between process and end result for the “influence” Pettit requires to have any meaning. Although a somewhat incomplete vision of the public good, it still does very useful work in providing a reference point for why we might prefer one institutional design over another.⁴⁰

3 Depth and Breadth of Domination

Having slightly amended the first clause in Pettit’s definition of domination to consist of the imposition of duties rather than interference, it may seem unnecessary to address the

³⁹ *Ibid* at 177.

⁴⁰ Pettit and Richardson’s visions of legitimacy are broadly compatible, but this thesis will largely use Pettit’s idea of citizen control to assess the legitimacy of law-making.

choices that must be interfered with in order to establish domination. However, this third clause still has an important insight to offer. In Pettit's terms, "someone may dominate another in a certain domain of choice, in a certain sphere or aspect or period of their life, without doing so in all."⁴¹ Similarly, in his discussion of the meaning of arbitrariness, he notes that arbitrariness can be more or less intense.⁴² A government decision which makes no effort at all to gauge the wishes of the public, let alone genuinely consult, would be completely arbitrary, whereas one which used a careful process of consultation and dialogue with all interested parties in a manner which took into account each party's own views on what ought to be done, would be non-arbitrary. A decision following a well-intentioned but imperfect process, or which failed to perfectly track the public good, would fall somewhere in the middle.

These two insights lead to the conclusion that domination is a variable concept – one may be dominated to different degrees and in different areas of one's life. It is not just a matter of being dominated or not, it is a matter of how much and in which areas. Where the degree of potential domination is minimal, we may not be as urgent in insisting on nonarbitrary procedures. As an example, a rule could be made that mandates a change in the colour and shape of the stop sign to conform to a new international standard. The responsible authorities would be under a duty to change all the stop signs within their jurisdiction, while motorists would be duty bound to obey the new sign rather than the old one. Such a rule imposes new duties on people, yet we would not be as concerned with the domination it could cause compared to, say, a newly restrictive set of immigration regulations.⁴³

Similarly, regulatory actions in a particular area (in terms of either the geography or subject matter) will affect some people considerably more than others. Where one group of people has the potential to be dominated more severely than another, there is more call to absolutely

⁴¹ Pettit (1997), *supra* note 3 at 58.

⁴² *Ibid* at 57.

⁴³ A robust public information campaign on the sign change would be required to ensure that people could safely comply with the new signs, but this is not the same as an absolute insistence on consultative procedures seeking and respecting the individual views of each potentially affected citizen (i.e. all drivers).

ensure that those people are heard and involved in decision-making. While ideally anyone with any interest in the decision should be accommodated in the process, the domination will be more severe and the legitimacy of the law more severely harmed when people whose core interests are affected, rather than those with peripheral interests, are excluded.

For example, if a municipality wished to introduce a new toll on a key bridge, the exclusion of residents of the municipality from the decision-making process would severely undermine the legitimacy of the decision. However, excluding those who might have an interest by virtue of vacationing in the municipality occasionally but who do not live there or regularly use the bridge will not affect the legitimacy as severely. Those persons' lives are not affected as centrally as the first group.

This view of domination as a continuum – rather than as bipolar choice between severe domination and complete non-domination – also implies a view of legitimacy should be made explicit: as with domination, legitimacy is a continuum. A law will be *less* legitimate where a flawed process is followed, and perfect legitimacy should always be aimed for, but a less than perfect process will not necessarily be fatal to its legitimacy.

4 Summary

Where the discussion in this section leaves us is here: laws must be legitimate because they have the ability to dominate us by arbitrarily imposing duties upon us. Arbitrariness in the context of government decisions is understood to mean the failure to follow a process that guarantees citizen control over the creation of norms. A valid process will also respect persons as free and equal and provides adequate protection for their fundamental rights and liberties. While mostly procedural, this definition is also in a sense substantive in that a decision which is significantly contrary to these values will also be arbitrary, even if made following a seemingly valid process. It is also important to note that domination and thereby legitimacy exist on a continuum – a law can be more or less legitimate, rather than simply legitimate or not, and in thinking about how to reform a system to improve its legitimacy, the areas with the biggest potential for domination must be the priority.

B Delegated Legislation and Legitimacy⁴⁴

The previous section makes the case for the importance participation in fully legitimating law-making in general. However, I have not yet addressed why participation is required for law-making in the administrative state specifically. Rules and regulations are usually made under legally valid delegations of power to the executive, authorised by legislation. Assuming this legislation was made following a legitimate, citizen-controlled process, what, if anything, is required to ensure that the delegated law-making authority is exercised in a legitimate fashion? In this section I argue that such legal validity is insufficient to legitimate the administrative state. The administrative state bears a particular part of the burden of legitimacy, and if it is to be accepted as legitimate then the process by which the norms of the administrative state are set must be one which facilitates citizen involvement. Participation in the administrative state also has additional benefits beyond its role as a bedrock legitimacy requirement. The nature of the dialogic space that exists within the administrative state is such that it can promote a particular type of deliberation that is hard to replicate elsewhere.

1 Legitimacy Cannot Be Transmitted

There are many mechanisms across the common law world that are intended to hold the executive accountable for the use of the power delegated to it by the legislature. Such accountability is intended to go at least some way to legitimating executive action. The most obvious accountability mechanism (and the supposed foundation for the bulk of judicial review of administrative action) is the truism that executive rulemaking powers must be explicitly delegated by the legislature – the executive has no other power to act. This means that the legislature theoretically oversees and can revoke its delegated authority at any time. Arguably, this also means that the legitimacy inherent in primary legislation is ‘passed through’ to delegated legislation made under it.

⁴⁴ In this section, I draw on some similar analysis I undertook in Chapter III of my LLM thesis – Edward Clark, *Delegated Legislation and the Duty to be Fair in Canada* (LLM Thesis, University of Toronto, 2008) [unpublished].

However, I consider that legal validity is insufficient to ensure legitimacy. If it were sufficient, and a separate participation step for rulemaking can be bypassed, significant efficiency gains could be realised, as extensive public participation can be extremely time-consuming and expensive. For example, the standard form of participation in the United States regulatory process (the “notice and comment” procedure) has been described as having become “more elaborate and correspondingly more time consuming – to the point, recent scholarship has suggested, of paralysis.”⁴⁵ This complaint of delay, complexity, and expense is, to varying extents, a valid one across the common law world (and one which I address further in Chapter VI below). A positive case thus needs to be made for the necessity of participation in making delegated legislation.

The starting point here is the process by which primary legislation is made. Unlike delegated legislation, primary legislation is made in an environment that already has significant opportunities for public participation.⁴⁶ Most fundamentally, the government in a democratic legislature must periodically seek a fresh mandate from the public in the form of a general election. In Canada, the country this thesis focuses on, this period is at least every five years, both federally and provincially.⁴⁷

During a legislative term, there are also significant opportunities for engagement. One of the fundamental roles of locally elected legislators is to meet with constituents and hear their ideas or grievances. In this manner, the population has access, at least by proxy, to legislative debates. Further, most legislatures, including the House of Commons in

⁴⁵ Peter L Strauss, *Administrative Justice in the United States* (Durham: Carolina Academic Press, 1989) at 169.

⁴⁶ I do not intend to debate the efficacy or otherwise of the participation mechanism for the legislative process. That topic could encompass another thesis all by itself. For my purposes, it is sufficient to say that a number of opportunities for participation, be they more or less efficacious, are offered.

⁴⁷ *Canadian Charter of Rights and Freedoms*, s 4, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

Canada, accept petitions from the public.⁴⁸ As the authors of *House of Commons Procedure and Practice* note:⁴⁹

Petitions today may be described as a vehicle for political input, a way of attempting to influence policy-making and legislation and also, judging by their continued popularity, a valued means of bringing public concerns to the attention of Parliament. Petitions also have their place among the tools which Members and Ministers can use to formulate public policy and to carry out their representative duties.

Under Standing Order 36(8), the Government must respond to a validly presented petition within 45 days. Failure to do so results in the matter being referred to the relevant standing committee which must investigate this failure to respond.⁵⁰ Finally, the various standing committees which scrutinise legislation are, to varying extents depending on the jurisdiction, open to the public to make submissions on Bills under consideration.⁵¹

None of these processes allows an interested citizen to have direct input or influence into the making of delegated legislation, however. Although such law-making is empowered by primary legislation, it is still a separate exercise of government power, by a separate branch of government. Yes, the legislature formally delegates the relevant power to the executive, but its exercise is controlled entirely by the executive. Ministers and officials devise policy, draft the rules and, eventually, enforce them. One cannot simply delegate widely, ‘borrow’ legitimacy from the parent statute, and then be satisfied. The legitimating mechanisms of elections and Parliamentary procedures are just too far removed from this secondary assertion of power to be relied upon to legitimate executive rulemaking.

⁴⁸ See for example *House of Commons Standing Orders*, SO 36.

⁴⁹ Audrey O’Brien and Marc Bosc, eds, *House of Commons Procedure and Practice*, 2d ed, (Ottawa: House of Commons, 2009) ch 22.

⁵⁰ *House of Commons Standing Orders*, SO 36(8)(b).

⁵¹ *House of Commons Procedure and Practice*, *supra* note 49, states in Chapter 16 that a committee will “usually choose to hold public hearings.” The practice in Canada does not seem to be as ingrained as in New Zealand, for example, where any member of the public is generally invited to submit on any Bill before Committee.

However, in Parliamentary democracies such as Canada, there are a number of other accountability mechanisms that apply to at least some forms of rulemaking. Specifically, statutory regulations are passed by the Governor-General (or Lieutenant-Governor as the case may be) in Council, on the advice of the relevant Minister or Ministers. The Governor in Council is, for all intents and purposes, the Cabinet of the current Government, made up of Ministers who have all been individually elected to Parliament (albeit not in their capacity as Ministers). This being the case, it could be argued that there is no need to apply robust participation requirements to the making of regulations made by Ministers and/or the Governor in Council. The Ministers are accountable to both Parliament and the electorate in their capacity as Members of Parliament, and thus are democratically accountable for the regulations they promulgate. In theory, if a Minister promulgates regulations that are unpopular or deficient in some way, he or she is accountable for these actions at the next election.

This initially attractive argument ignores three important issues. First, and most importantly, any sanctions imposed on a Minister by the House or the voting public in relation to regulations in his or her portfolio are ex post facto remedies. They do not affect the regulations themselves, and provides no relief for those who have been denied the right to participate in the rulemaking process and/or who are detrimentally affected by the content of the regulations. This type of accountability is in many ways just as important as participation, but accountability is not (and, I think, is not intended to be) a substitute for participation. Secondly, not all rules are statutory regulations – rules made by arms-length agencies do not involve an accountable Minister in the same way. Finally, genuine political accountability for the Parliamentary executive requires a robust convention of Ministerial responsibility in order to be at all effective. The Minister must be willing to resign, or at the very least offer an apology and explanation to Parliament, when a set of regulations developed by a Ministry in his or her portfolio are found to be defective.

Such a convention may arguably still exist in the United Kingdom, but it certainly does not in Canada.⁵² As C E S Franks puts it, “to put it bluntly: in modern governance it is not possible for ministers to exercise direct control over the public service, or for parliament to exercise direct control over ministers.”⁵³ Further, the Canadian academic literature and government reports that argue for a revival of the convention argue not for the increasing responsibility of the Minister, but rather making the relevant Deputy Minister (and other senior bureaucrats) more directly responsible for the operations of his or her Ministry.⁵⁴ Further, Canada (and other Parliamentary jurisdictions such as the UK and Australia) have in recent years seen a centralisation of power within the Parliamentary executive. Particularly where a majority government or stable coalition is in power, the legislation passed by the house is effectively controlled by the Prime Minister’s office and, to a lesser extent, cabinet.

This structure allows the government of the day, if it so wishes, to pass vague legislation containing broad rulemaking provisions, and then enact the bulk of that legislation’s policy goals via administrative rules.⁵⁵ This in turn means that there is the potential for the executive to minimise the amount of Parliamentary debate on any particular issue. Absent any participatory mechanisms at the rulemaking stage, such a broad delegation would also bypass any meaningful citizen involvement.

These same three problems with the general idea of Parliamentary scrutiny – the lack of prospective citizen involvement, limited scope, and executive domination of the House – handicap the most common practical expression of the idea: the scrutiny committee.

⁵² See David E Smith, “Clarifying the Doctrine of Ministerial Responsibility as it Applies to the Government and Parliament of Canada,” in Commission of Inquiry into the Sponsorship Program and Advertising Activities, *Restoring Accountability - Research Studies: Volume 1 - Parliament, Ministers and Deputy Ministers*, (Ottawa: Privy Council of Canada, 2006).

⁵³ C E S Franks, *The Parliament of Canada* (Toronto: University of Toronto Press, 1987) at 240.

⁵⁴ Smith, *supra* note 52 at 133-134. See also C E S Franks, *Ministerial and Deputy Ministerial Responsibility and Accountability in Canada*, Submission to the Public Accounts Committee, 17 January 2005 at 17-33.

⁵⁵ An outrageously broad rulemaking provision would probably be seen as objectionable and attract significant negative comment. However, there is a lot of scope between a too-broad executive overreach and a narrowly tailored rulemaking provision designed to leave only what is necessary to executive discretion.

Virtually all Anglo-Commonwealth jurisdictions have Parliamentary committees whose role it is to scrutinise delegated legislation made by the executive. In Canada this is the Standing Joint Committee for the Scrutiny of Regulations, which is established under the Rules of the Senate and the Standing Orders of the House of Representatives.

The Committee's function is to scrutinise statutory instruments and also to consider guidelines for best practice delegation of power by Parliament to the Executive.⁵⁶ The Committee is also able to recommend to the House that improper delegated legislation be disallowed, although this power is very rarely used.⁵⁷ Section 19.1 of the *Statutory Instruments Act* sets out the procedure used for the disallowance of a regulation. When the Committee finds a regulation that does not comply with the criteria set out in the Standing Orders,⁵⁸ it will usually contact the government body responsible for the instrument. The correspondence between the Committee and that government body will normally result in an amendment. If no amendment is forthcoming, the Committee has the option of issuing a notice to the government body stating its intent to disallow the regulation. In the event the government body fails to respond, the Committee can table a report in the Senate and the House of Commons disallowing the regulation.

After the report is tabled, if the responsible Minister does not introduce a motion challenging the report in either the Senate or the House of Commons within fifteen sitting days of the tabling of the report, the report is deemed to be adopted by Parliament, and the

⁵⁶ *House of Commons Procedure & Practice*, supra note 49 at Chapter 17. See also *Statutory Instruments Act*, RS 1985, c S-22, s 19. "Statutory instrument" is defined in section 2 of the *Statutory Instruments Act* as "any rule, order, regulation, ordinance, direction, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution or other instrument issued, made or established ... in the execution of a power conferred by or under an Act of Parliament." This covers most, but not quite all, forms of executive rulemaking.

⁵⁷ The description of the disallowance procedure that follows is drawn from the useful potted summary on Parliament of Canada, "About the Committee," online: <<http://www.parl.ca/Committees/en/REGS/About>>.

⁵⁸ These criteria include ensuring that the Executive had the statutory authority to make the regulation or issue the statutory instrument; that the regulation or statutory instrument complies with the law, including the Charter; and that the Executive followed the proper process under the *Statutory Instruments Act* in enacting the regulation or issuing the statutory instrument.

regulation maker must revoke the regulation. On the other hand, if the Minister proposes a motion in support of the regulation, and the motion passes a vote in the Senate or House of Commons, then the process ends and the regulation stands.

This process has been treated with respect on the eleven occasions that it has been invoked.⁵⁹ It does, however, have a number of flaws. First, unlike the similar committees in New Zealand, there is no ability for the Committee to hear complaints about statutory instruments from the public.⁶⁰ For the reasons discussed above, this alone would mean that the Committee is not an adequate avenue to ensure the full legitimacy of delegated legislation. Secondly, the workload of the committee is so high (reviewing potentially *every* statutory instrument that has ever been published in the *Gazette*), there will inevitably be some objectionable instruments that are never even scrutinised, let alone recommended for disallowance. Finally, even though more often than not a recommendation for disallowance has resulted in the offending instrument being repealed, a majority (or stable coalition) government still has the power to vote down any recommendation with which it disagrees should it want to do so. While the Committee is a valuable tool for executive accountability, I do not consider that it can (at least by itself) provide an answer to the legitimacy question that hangs over delegated legislation.

2 *The Case for Participation in Delegated Law-Making*

Legitimate executive government needs more than a legally valid delegation of power and more or less oversight by the legislature; it requires widespread participation at the level of delegated law-making as well. Indeed, Pettit's idea that a legitimate political system ought to be interested in what citizens "require according to their own judgment,"⁶¹ and Richardson's insistence on "a set of fair procedures that respects persons as free and

⁵⁹ Eight instruments were revoked without debate, three were debated and sent back to the Committee: *House of Commons Procedure & Practice*, *supra* note 49 at Chapter 17.

⁶⁰ Standing Order 311 of the New Zealand House of Representatives gives the Regulations Review Committee the ability to hear complaints from the public about delegated legislation.

⁶¹ Pettit (1997), *supra* note 3 at 55.

equal”⁶² imply a commitment beyond both legal validity and non-arbitrariness. If we accept that the two factors identified by Pettit and Richardson are important, we must also accept that the judgments of individual citizens are an essential input into the law-making process. That is, laws cannot be fully legitimate without the people being involved in their making.

Pettit’s work focuses largely on the institutions related to primary legislation and associated institutions, but Richardson provides us with a model of legitimacy specifically tailored for the administrative state. He uses the argument that popular involvement in all law-making is required to construct a populist strand in his model of democratic autonomy (in addition to the liberal and republican threads discussed above). This somewhat idiosyncratic populist argument usefully explains why I consider participation at the rulemaking stage a key element of legitimacy.⁶³ Richardson argues that:⁶⁴

The normative importance for democracy of the idea of the will of the people is not that it is an object to be discovered. Rather, the requirement that the political process respect the autonomy of citizens demands that the process invite them to take a role in deciding, together, what ought to be done. What they then decide is their will. This role for the will of the people does not demand that it exist as an object independent of the procedures that treat individuals as free and equal. Rather, it demands only that the political process be constructed so that what emerges from it can fairly be counted as constituting the people’s will.

The question then becomes whether it is possible for every decision in a political system, large or small, constitutes the people’s will. Richardson admits that it is impossible for the people as a whole to decide everything, or for all public decisions to be made at one time. Instead, he suggests that a properly designed political system distributes rule by the people throughout its institutions, which “extend from elections through legislative debate and

⁶² Richardson, *supra* note 7 at 51.

⁶³ I call it idiosyncratic because it does not follow the classic Rousseauian view that sees the “will of the people” as the ultimate determinant of legitimacy. Neither does it see the preference of the majority of the people as constituting the will of the people.

⁶⁴ Richardson, *supra* note 7 at 66.

voting to administrative elaboration, all within the context of an informal public sphere that enables and encourages free political discussion.”⁶⁵

As discussed above, the front end of this formulation is well served with elections, committee hearings, open and public legislative debates and the like. This is not, however, the only locus for popular will formation. Public engagement is also required in the rulemaking phase (“administrative elaboration”, as Richardson calls it). A lack of public engagement will not necessarily make a rule legally invalid in a way that will make it vulnerable to *ultra vires* review, but that is a separate issue. The making of a rule is a separate exercise of power by a separate branch of government, and if we are to take seriously the idea that citizens’ value judgments must be taken into account in order to avoid arbitrariness, the political system should also make room for citizen engagement in the rulemaking process.

This is not to say that any individual can expect the government to make rules that exactly mirrored his or her submission. In determining the public interest and the will of the people, the government also has an important voice. Yes, it is a step removed from the legislature, but in a responsible government model, the executive does have a stamp of legitimacy on it by virtue of Ministers having been elected and, on a continuous basis, being accountable to the legislature. As discussed above, what citizens ought to be able to expect when participating in administrative rulemaking is the equal opportunity to have unconditioned, efficacious influence on the eventual outcome. The decision is ultimately the government’s to make, so long as the correct participatory process has been followed.

Pettit’s model of non-arbitrariness also requires a nexus between public submissions and government output. In my view the best way to provide that in an administrative context is a robust requirement for reason-giving: if the government’s preferred rule differs significantly from one or more submitters’ preferences in a way that significantly affects

⁶⁵ *Ibid*, at 70.

their rights and interests, they must justify this departure with rational reasons.⁶⁶ This position also brings in the deliberative strand of Richardson's democratic autonomy model.⁶⁷ The exchange of views and reasons in this way is respectful of each submitter's rights, autonomy, and views, because a requirement to give serious reasons on the part of the government requires it to *engage* with what the people are saying. In a way that other forms of deciding what to do do not, reasoned deliberation requires the government to take differing views seriously enough to either accommodate those views or explain why, despite those views, the government intends to take another course of action. We (including the government) should all reason together to decide what ought to be done. This is how the will of the people can be reflected in rulemaking, and how such rules can be made non-arbitrarily (and legitimately). The manner in which administrative law might impose a workable version of such a reason-giving requirement is discussed in more detail in Chapter VI.

3 Summary

The discussion in this section shows that, while Parliamentary accountability mechanisms can be useful, they do not do the same work as participation. In order to fully respect the judgments of its citizens, and thereby produce executive rules in a non-arbitrary manner, opportunities for participation must be provided. Such participation should take the form of reasoned deliberation between the government and citizens, with the government providing reasons for its eventual decision that respond to the submissions made by citizens. A failure to follow such a process will damage the legitimacy of all executive law-making.

⁶⁶ Not coincidentally, the current model of Canadian administrative law can be seen as one based justification (i.e. reason-giving). For further discussion of this point see David Dyzenhaus & Evan Fox-Decent, "Rethinking the Process/Substance Distinction: *Baker v Canada*" (2001) 51 UTLJ 193 at 235-242.

⁶⁷ See Richardson's much more extensive discussion of the desirability of democratic reasoning in *Democratic Autonomy*, *supra* note 7 at Chapter 6.

C The Administrative State as a Dialogic Space

In addition to its essential role in making executive law-making legitimate, properly structured participation can facilitate a particular kind of dialogue that cannot easily be replicated by participation elsewhere. This is because both the type of issue and type of participation that one can expect at an executive level is a distinct and important one that is often lacking at the level of electoral or Parliamentary politics. Specifically, executive participation provides opportunities for the public discussion of micro-level, technical issues that are often ignored in the wider public sphere. It also arguably provides for a hybrid public/private dialogic space in which reasoned, public-minded dialogue is more likely to take place.

As to the first point, in political systems with responsible government there is often a substantial delegation of power to the executive (via broad empowering clauses). Although often justified as an efficient way to fill out the details of policy that has been debated in Parliament, this practice also has the potential to short-circuit Parliament on some quite important details. Efficiency is certainly important, but delegated legislation does not consist only of technical details better dealt with by public servants than politicians. Some significant aspects of policy are enacted via delegated legislation and, regardless, even the most technical laws will be important and worthy of debate among at least a subset of the population. The second problem is that the type of rhetoric used in electoral and Parliamentary politics is not usually well-suited to the reasoned discussion of these detailed, often technical issues. Political discourse in the public sphere can be characterised by broad sloganeering, cynical electoral calculus, and pandering to key demographics.

These two factors mean that many micro-level policy issues that have significant importance to significant numbers of people are not publicly deliberated in either during the election process or in Parliament – the two institutions that we traditionally rely upon for democratic discussion of important issues. Participation at the executive level offers a partial antidote to this problem. First, it gives a ‘second chance’ for the discussion of issues neglected in either an election campaign or in Parliament. Secondly, it is arguably a more

fruitful location for reasoned debate to take place. Simone Chambers has developed a framework for analysing the different types of debate that take place about public policy that can be used to illustrate this second point. Chambers undertakes her analysis in the context of constitutional debates, but it can be usefully adapted to this slightly different context.⁶⁸

Chambers isolates two distinct benefits that are often claimed to arise from public reasoning: first, that it disciplines arguments towards those worded in terms of the public good, rather than the good of the submitter; second, that it facilitates open, good faith exchanges between participants, whose views may change as they come into contact with different views and new evidence.⁶⁹ The first represents “public”, the second “reasoning”. Both of these features are desirable. Indeed, if we genuinely believe that the public’s beliefs on what the government ought to do are important (as I have argued above that we must), good faith reasoning within the political system about the public good is essential.⁷⁰ However, Chambers argues that only the first of these benefits – i.e. ensuring that those engaged in a discussion appeal to public rather than private reasons – is inherent in public deliberation.⁷¹ The second benefit she calls the Socratic element of dialogue – being open to absorbing new facts or changing one’s position when confronted with a compelling argument.⁷²

Chambers suggests that this Socratic element – i.e. the “reasoning” part of public reasoning – is in fact not present in many public discussions of important issues. Instead, the participants in debates that are conducted in the full glare of the public eye tend to engage

⁶⁸ Simone Chambers, “Open versus closed constitutional negotiation” in Kahane et al, *Deliberative Democracy in Practice* (Vancouver: UBC Press, 2010) 77.

⁶⁹ *Ibid* at 78.

⁷⁰ This is especially true if we follow Richardson’s view of the public good, as under his model the content of the public good cannot even be determined without a properly functioning political system. Similarly, Pettit would say that a legitimate system cannot exist without proper structures to facilitate and direct citizen influence.

⁷¹ Chambers, *supra* note 68 at 78.

⁷² *Ibid* at 79.

in what Chambers calls “plebiscitary rhetoric”. This “runs along a continuum from mild pandering to manipulative demagoguery.”⁷³ Feeling the need to use such rhetoric to maintain public support on an issue is a particular problem in achieving reasoned debate. This occurs for a number of reasons, but a particularly pertinent example is the fact that:⁷⁴

Speakers...do not want to “look weak” by changing their minds and thus are resistant to good arguments. Deliberation assumes that people change their minds in light of the arguments... If full publicity makes such change unlikely, then approximating deliberation in an open public forum becomes equally unlikely. This is a serious problem in the contemporary public sphere, where being persuaded by arguments can often be interpreted in the press as “flip-flopping.”

This being the case, a better quality of reasoned deliberation could perhaps be achieved if debates on public issues were held with a degree of secrecy, with only those directly affected by a proposed government decision being involved.⁷⁵ This may be true, but the first element of public reasoning – the discipline that debating in public provides – will be lost. In secret deliberation, parties are can more freely resort to offering reasons that are only important to them, rather than those focussed on the public good. Further, it is easier for those in a closed deliberation to move from genuinely discussing what ought to be done (i.e. the public good) to bargaining between the participants.⁷⁶ This may be good for those involved, they can ensure that a course of action that is mutually beneficial to those at the bargaining table, but it may neglect the priorities those who are unrepresented.

The example of the Constitutional Conventions in Philadelphia preceding the founding of the United States to illustrate the strengths and weaknesses of deliberating in private.⁷⁷ The quality of the deliberation at the conventions has been almost universally praised in the years since.⁷⁸ Yet the participants in the deliberation were all white, male, and freeborn. Subsequent US history would demonstrate that the interests of those who were not

⁷³ *Ibid* at 82.

⁷⁴ *Ibid* at 83.

⁷⁵ *Ibid* at 79-80.

⁷⁶ *Ibid* at 80.

⁷⁷ *Ibid* at 79-80.

⁷⁸ *Ibid*.

represented – people of colour, slaves, and women in particular – were certainly not well served by the constitution for at least some of the country’s history. Those who were present bargained for what was important *to them*, not necessarily the (largely unrepresented) public as a whole. Thus while private deliberation may indeed increase the chance for reasoned deliberation, the exclusion of voices that such deliberation can entail can result in real injustice.

The choice is not just between demagoguery about the public interest or well-reasoned but self-centred deliberation in private. Some public deliberation avoids pandering, and private deliberation can indeed attempt in good faith to further the public interest. Ideally, however, public deliberation would reliably appeal to *public* reasons and also be *reasoned*. Richardson makes this point as the final, deliberative, strand of his democratic autonomy model: not only ought we avoid the arbitrary imposition of duties; not only should we take seriously the desires and goals of the public, but we should also reason together as a polity to work out what ought to be done by the government. Reason is to be preferred over other methods of reaching a decision because, unlike chance or whim or other forms of deciding, a polity reasoning together must respect the autonomy and views of all participating citizens.⁷⁹

It may be difficult to achieve reasoned dialogue about the public good at all times and in all contexts, and other modes of discourse are at times appropriate, but such dialogue should be aimed for this where possible. I consider that public participation in executive rulemaking offers a useful middle ground between public and private deliberation, where both Socratic and public reasoning can flourish. Public participation is, by definition, freely open to those who wish to involve themselves. However, most executive rules are only of interest to a subset of the general public – these rules are ‘local’, either literally or in terms of a narrow subject matter. Deliberation about local bylaws, for example, is unlikely to attract much interest from persons outside the municipality in question.

⁷⁹ As noted above, see Richardson’s much more extensive discussion of the desirability of democratic reasoning in *Democratic Autonomy*, *supra* note 7 at Chapter 6.

Similarly, rules regulating a particular industry (setting fishing quota levels, for example) are unlikely to attract much interest beyond the suppliers and consumers within that particular industry, and related NGOs. Others are of course free to participate, but they will often simply not have as large an interest in doing so. Put another way, those who are most likely to participate in executive rulemaking are those most likely to be significantly dominated by the imposition of the new duties that the proposed rule would entail.

This dynamic creates an environment where debates are conducted in public, with the discipline in argument that this provides, but the level of scrutiny from the general public is low enough that rhetorical excesses can be avoided. I therefore consider that wide participation in executive rulemaking will help create a dialogic space where reasoned deliberation about the public good is more likely to take place. Such deliberation is what we ought to aim for if we take seriously the idea that government arbitrariness (and thereby domination) is best avoided when citizens control what ought to be done. The potential of the administrative state to be a space where this type of dialogue is encouraged further reinforces the importance of making the process by which its norms are set a participatory one.

D Conclusion

The model of legitimacy set out in this chapter proposes that to be legitimate, a government must not dominate its citizens. Under the civic republican model I am using, domination occurs when a government arbitrarily imposes duties upon its citizens. The only way government can avoid dominating its citizens is therefore to make laws (which will inevitably impose duties) in a non-arbitrary manner. Pettit states that non-arbitrariness will be achieved when the decision-making process is forced to track the interests of those affected or, more generally, where decisions are made in the public good rather than solely in the judgment of the decision-maker. Without more explanation, though, “the public good” is a relatively meaningless standard. Richardson suggests that the public good can be discerned through the proper functioning of the institutions of a liberal democracy. Specifically, a decision can be said to track the public good when it is made by a process

that respects the individuality and equality of citizens, and respects their fundamental rights. Pettit has a similar schematic view of the public good, stating that a non-arbitrary process must be able to be controlled by the people. The people must be able to influence law-making in an individualised, unconditioned, and efficacious way if they are to be said to have control.

This analysis applies to law-making generally, but it also applies specifically to delegated law-making within the administrative state. The accountability mechanism that exist within the political system cannot transmit the legitimacy of primary legislation to the delegated law-making process. It is a separate exercise of government power and requires separate opportunities for citizen control. Moreover, participation in the delegated law-making process happens in a unique dialogic space that has the potential to facilitate true deliberation between citizens and government about what ought to be done. This sort of environment would not easily be replicated elsewhere in our system of government.

Properly designed participation in the delegated law-making process is therefore essential. Delegated legislation largely sets the norms under which the administrative state operates, and the legitimacy of the whole administrative state is called into question if delegated legislation is not fully legitimate.

CHAPTER III PROCEDURAL FAIRNESS AND LEGITIMACY

Chapter II made the case that broad-based participation is required for citizen control of the administrative state, which is in turn an essential part of the state being legitimate. It also argued that the legislative and executive mechanisms available to facilitate participation in the Canadian administrative state are ineffective in creating citizen control, particularly in the area of delegated law-making. This means that the legitimacy of the administrative state can be called into question. This chapter argues that in the absence of other mechanisms, it is incumbent upon administrative law to create such a participatory culture, and that the part of administrative law that is best suited to do this is procedural fairness.

There are two strands to this argument, one based on the first principles of administrative law, the other on the historical development of the doctrine of procedural fairness. From a theoretical perspective, seeing administrative law – and judicial review – as a mechanism for both protecting rights and reinforcing the legitimacy of the administrative state can be justified both descriptively and normatively. Using the work of Richard Rawlings and Carol Harlow, and that of Thomas Poole, the first part of the chapter makes the case that this is the best way to understand the purpose of administrative law.

In addition, a concern with legitimacy has always been at the core of procedural fairness. This can be seen in the early development of the doctrine of natural justice through to the early twentieth century. However, the requirements of legitimacy in the procedural context were developed in an adjudicative frame of references that focuses on the protection of the individual rights of those directly affected by a decision. In today's administrative state, this is an overly narrow approach to take, and in order to continue to fulfil its core purpose of promoting legitimate decision-making, procedural fairness ought to take into account the factors required for real citizen control over government. Failure to do so risks undermining the legitimacy of the administrative state as a whole.

A The Law Must Step In

In the previous chapter, I made the case that participation in the process of making delegated legislation is essential to the legitimacy of the administrative state, and the state more generally. Such participation is necessary as a distributed part of citizen control over government law-making, and provides a dialogic space not easily replicated elsewhere. The remaining question, though, is why the law ought to step in. While I argued in the previous chapter that political accountability mechanisms do not adequately ‘transmit’ the legitimacy of primary legislation through to rules and regulations made under delegated authority, there are also political mechanisms that directly facilitate participation in administrative rule-making. Most notably in the Canadian context, the *Cabinet Directive on Regulatory Management* requires that government agencies developing regulations identify interested parties and then provide them with “opportunities to take part in open, meaningful, and balanced consultations at all stages of the regulatory process.”¹

This consultation process consists of, among other things, typically allowing 30 days for interested parties to comment on draft regulations (although agencies have discretion to vary this period in some circumstances).² In addition to this general requirement, Regulatory Analysis Impact Statements, which are necessary for almost all regulations, require agencies to describe the consultation they have undertaken in developing the regulations.³

Both of these regimes attempt to facilitate relatively comprehensive participation in regulation-making. While the effect of these executive processes is a welcome one, I do not consider that the *Cabinet Directive* goes far enough to fully legitimate delegated

¹ Treasury Board Secretariat, *Cabinet Directive on Regulatory Management* (Ottawa: Government of Canada, 2014) at para 15, online: Treasury Board Secretariat Website < <https://www.canada.ca/en/treasury-board-secretariat/services/federal-regulatory-management/guidelines-tools/cabinet-directive-regulatory-management.html> >. This directive replaced the old Government of *Cabinet Directive on Streamlining Regulation*, which included a virtually identical consultation requirement.

² *Ibid* at para 17.

³ Treasury Board Secretariat, *RIAS Writers’ Guide* (Consulting and Audit Canada, Ottawa, 1992) at 41 to 44.

legislation. First, both include open-ended exceptions to the consultation requirement. In the case of the *Cabinet Directive*, paragraph 20 allows pre-publication in the *Gazette* (the first step in consultation) to be waived, with no criteria set for the exercise of the waiver. This exemption power means that any policy proposal that the government thinks would be embarrassing or inconvenient to consult on can be insulated from public scrutiny until its implementation is a *fait accompli*. Further, the *Cabinet Directive* is not legally enforceable, meaning that those who may have improperly not been consulted have no remedy. While allegations of improper processes may be embarrassing to the government, after the fact embarrassment does nothing to legitimate delegated legislation made under the flawed process. Moreover, because these mechanisms are internal to the executive, the chances that the use of the exemption will be discovered are low. If the public does not discover that an exemption has been used, not even the embarrassment mentioned above will accrue. An unscrupulous government could therefore largely ignore the consultation requirements contained in the *Cabinet Directive*.

A legal requirement for participation in administrative rule-making can avoid these problems. Legal obligations are unique in both a practical and principled sense. Practically, if we accept that participation by the public is a key element of a legitimate administrative law-making, then we must also accept that the state ought to provide genuine opportunities for such participation to take place. Interested parties who have been denied the right to participate ought to be able to enforce access to the law-making process. The nature of law is such that when a right is granted, a remedy will (or at the very least ought to) be available. As Blackstone put the matter, “It is a settled and invariable principle in the laws of England, that every right when withheld must have a remedy, and every injury it’s [sic] proper redress.”⁴ Making participation a legal rather than a political or moral matter increases the chance that those who wish to participate in the rulemaking process can ensure that they are in fact able to do so.

⁴ William Blackstone, *Commentaries on the Laws of England, Volume 1* at 23. For a similarly famous expression of this general principle, see also *Marbury v. Madison*, (1803) 5 U.S. (1 Cranch) 137 at 162-163.

From a principled perspective, making participation a concern of administrative law also signals to the public and government officials that it is taken seriously. Cass Sunstein has observed that, as well as the regulation of behavior, law also has an expressive function.⁵ That is, law can “make statements” about desirable courses of action as well as controlling behaviour directly.⁶ Sunstein describes the expressive function as follows:⁷

First, and most straightforwardly, the law’s “statement” about, for example, the impropriety of monetary exchanges may be designed to affect social norms and in that way ultimately to affect both judgments and behaviour. On this view, an expressive approach to law depends on an assessment of social consequences; certain expressions are favoured because they will (ultimately) have good consequences.

Dean Knight, drawing on Harlow and Rawlings, suggests that this expressive or educative function – he calls it the “hortatory” function – is an intrinsic part of judicial review:⁸

While judicial review’s immediate role is the policing of administrative legality, it also has an important collateral role in articulating and elaborating the principles of good administration that ministers, public bodies and officials ought to honour. These principles of good administration have currency both within and beyond the system of judicial review itself.

Knight’s observation is important because it suggests that Sunstein’s general observation about law applies to administrative law specifically. One of the functions of administrative law is creating and disseminating administrative norms. It thus makes sense to say that making participation an administrative law requirement, as opposed to a bureaucratic practice, or a cabinet directive, sends a message to government officials and to the public generally that participation *matters*. Administrative law does this in a way that less formal mechanisms cannot. For this, and the practical reason discussed above, it is important that

⁵ Cass R Sunstein, “The Expressive Function of Law” (1996) 144 U Pa L Rev 2021.

⁶ *Ibid* at 2024.

⁷ *Ibid* at 2025-2026.

⁸ Dean R Knight “Vigilance and Restraint in the Common Law of Judicial Review: Scope, Grounds, Intensity, Context” (PhD Thesis, London School of Economics, 2014) [unpublished] at 35, citing Carol Harlow and Richard Rawlings, *Law and Administration* (Cambridge: CUP, 2009, 3 ed) at 669 and 728. See also David Feldman, ‘Judicial Review’ (1988) 66 Pub Admin 21; Simon Halliday, *Judicial Review and Compliance with Administrative Law* (Oxford: Hart, 2004) 15; Marc Hartogh and Simon Halliday, *Judicial Review and Bureaucratic Impact* (Cambridge: CUP, 2004).

administrative law attempt to facilitate participation, no matter the role played by political conventions or bureaucratic guidelines.

B Judicial Review, Procedural Fairness, and Legitimacy

Having argued that administrative law must step in and facilitate participation in administrative law-making, the next question is which particular part of administrative law is best positioned to do so. In my view, the best place to start is with procedural fairness. It already insists upon participation in individualised decisions, so its expansion to cover broader rulemaking seems like an obvious place to start. However, one of the key questions that must be answered at the outset is whether a common law doctrine like procedural fairness can really be used to further broad goals like improving the legitimacy of rulemaking. As the doctrine's very name implies, procedural fairness's primary concern appears to be with fairness to individuals affected by government action. If the process is fair to affected parties, does the doctrine really have any interest in inquiring further into a government decision?

A similar concern has been raised by Susan Gratton. Responding to Geneviève Cartier's argument that procedural fairness should apply to 'legislative' executive decision making, Gratton states:⁹

Although I generally agree with Cartier's argument in favour of imposing procedural obligations on decision-makers exercising a legislative function, her proposal would maintain this link between judicial intervention and the extent to which decisions affect particular individuals. I suggest that her proposal would ultimately fail as an accountability mechanism for this reason...

This concern about the individual focus of procedural fairness limiting its ability to further wider interests like accountability (in Gratton's case) and participation and legitimacy (in mine) is a real one. It can, however, be overcome. First, we can meaningfully argue that the promotion of legitimacy is one of the key purposes of judicial review generally, and

⁹ Susan Gratton, *Administrative Law in the Welfare State: Addressing the Accountability Gap in Executive Social Policy-Making* (SJD Thesis, University of Toronto, 2010) [unpublished] at p 124 (footnote 294).

procedural fairness is a part of judicial review. Second, after a close examination of the early doctrinal history of natural justice (and thereby procedural fairness), it becomes clear that we can talk about one of the core functions of procedural fairness more specifically being the maintenance of legitimate administrative processes.¹⁰ The latter point is addressed later in the chapter; first I make the case that as a matter of theory, judicial review can do the work I believe it needs to do in promoting legitimacy in the administrative state.

1 The Purpose of Judicial Review

The argument I am making depends very much on what one considers the core purpose of procedural fairness to be, a question which provokes significant debate in administrative law scholarship. One useful schema that throws these different visions of administrative law's purpose into relief is the "red light"/"green light" dichotomy put forward by Harlow and Rawlings. In their text *Law and Administration*, first published in 1984, Harlow and Rawlings introduced their influential categories of 'red light' and 'green light' administrative law theory. Red light proponents see administrative law as a check on the unfettered discretion of the executive, while green light theory instead proposes that law should facilitate the pursuit of beneficial social policies by a bureaucracy which acts in the public interest. While somewhat imprecise, these broad categories help bring into focus the divergent, and in some respects mutually unintelligible, approaches that one can take in exploring administrative law. My argument in this chapter is that a concern with administrative legitimacy has long been a core concern of administrative law, so a brief discussion of these two quite different ways of describing the purpose of administrative law is necessary to explain the approach I take.

¹⁰ Gratton is also arguing here that linking the content of fairness to the degree of impact on an individual is inconsistent with wider concerns – in her case; accountability, in mine; participatory legitimacy. I think that this concern is relatively easily dismissed. While I agree it would be problematic if *no* duty of fairness at all was offered when the decision had a limited impact on a person, that is not what the current law says, or what I am proposing. Rather, the degree of impact on the individual helps determine the exact content of the duty. It may be that when a person's interest is very minor, and the impact very low, they are owed no more of a procedure than simply prior notice. But I do not think that this is inconsistent in principle with using procedural fairness to pursue wider goals like accountability and legitimacy. This is discussed further in Chapter VI below.

a Red and green light theory

Adam Tomkins usefully notes that the disagreements between red and green light theorists are rooted in very different ideas about law, politics, liberty, and control. Tomkins suggests that red light theory:¹¹

...believe[s] (1) that law is autonomous to and superior over politics; (2) that the administrative state is something which needs to be kept in check by the law; (3) that the preferred way of doing this is through rule-based adjudication in courts; and (4) that the goal of this project should be to enhance individual liberty where liberty is conceived as being the right to be left alone, the absence of external constraints—an idea of liberty which is best realised by having small government.

The emphasis here is on control of administration by law, with law and administration as two distinct realms. Green light theorists, on the other hand take a more holistic view of government power and law's role in shaping it. They:¹²

...believe (1) that law is nothing more than a sophisticated (or elitist) discourse of politics and is neither autonomous from politics nor superior to administration; (2) that public administration is not a necessary evil to be tolerated, but a positive attribute to be welcomed; (3) that the objective of administrative law and regulation is not merely to stop bad administrative practices, but is to encourage and facilitate good administrative practices – to control administration by channelling and guiding – and that the best people to do this will not necessarily be professional lawyers, that the best institutions in which to achieve these aims will not necessarily be courts, and that the best vehicle through which to realise these objectives will not necessarily be rule-based adjudication; and (4) that the goal of this project should be to enhance individual and collective liberty where liberty is conceived of as something which is, if not constituted by the state, then is at least facilitated by it, and is certainly not necessarily threatened by it.

There are two very different conceptions of what administrative law ought to be doing. In the summaries quoted from Tomkins above, note how closely red light theory maps on to negative liberty – constraining the state's ability to infringe on liberties – and the emphasis in green light theory on positive liberty – facilitating state action which increases the

¹¹ Adam Tomkins, "In Defence of the Political Constitution" (2002) 22 OJLS 157 at 158.

¹² *Ibid* at 158-159.

welfare of citizens. As set out in the previous chapter, I take the view that the administrative state ought to be concerned with a republican view of liberty: freedom from domination. This is in many ways the midpoint between positive and negative liberty and, perhaps unsurprisingly, I think the appropriate view of administrative law's purpose lies somewhere in the no man's land between green and red light theory.

Although they abandoned the terminology in the most recent edition of *Law and Administration*,¹³ in the first two editions, Harlow and Rawlings identified another strand of administrative law theory which in keeping with their traffic signal metaphor they dub "amber light."¹⁴ Tomkins states that this is a comparatively recent school of thought, coming to prominence from the 1980s onwards, and identifies this school of thought with what is essentially a human rights-focussed version of red light theory:¹⁵

[A]mber-light theorists believe (1) with red-light theorists that law is both discrete from and superior to politics; (2) that the state can successfully be limited by law, although that law ought properly to allow for the administration to enjoy a degree – albeit a controlled degree – of discretionary authority; (3) that the best way of controlling the state is through the judicial articulation and enforcement of broad principles of legality; and (4) that the goal of this project is to safeguard a particular vision of human rights.

This is to a large degree a description of liberal common law constitutionalism as applied to the administrative state.¹⁶ Its general parameters are consistent with the work of writers such as Paul Craig, Dawn Oliver, Jeffrey Jowell and Sir John Laws.¹⁷ I do not entirely agree with Tomkins' characterisation of "amber light" – while this rights-focussed discretionary model certainly stakes part of the middle ground in administrative law theory,

¹³ Harlow and Rawlings (3 ed), *supra* note 8.

¹⁴ See especially Carol Harlow and Richard Rawlings, *Law and Administration*, 2 ed, (London: Butterworths, 1997) Chapter 4.

¹⁵ Tomkins, *supra* note 11, at 160.

¹⁶ See the useful summary of this approach to constitutionalism (and its links to rights-based constitutionalism) in Thomas Poole, "Legitimacy, Right and Judicial Review" (2005) OJLS 697 at 699-700.

¹⁷ Clearly these thinkers do not have identical views of the nature of judicial review. However, all share a particular orientation towards rights and the principle of legality. This is discussed in some detail in Poole, *ibid* at 699-703.

there is plenty of space for other approaches. Amber light need not be synonymous with a particular view of common law constitutionalism. Neither is a ‘middle of the road’ approach a recent phenomenon. As Harlow and Rawlings note, as far back as the 1950s, each side of the red/green light divide saw merit in some elements the other side’s approach. On the green light side, the Fabian socialist (a political orientation very much associated with green light theory) Richard Crossman issued a pamphlet in 1956 called *Socialism and the New Despotism*. In this pamphlet, he took as a given that a welfare state was crucial to true freedom, but also worried about the potential abuses of power in a large civil service:¹⁸

The growth of a vast, centralised State bureaucracy constitutes a grave potential threat to social democracy. The idea that we are being disloyal to our Socialist principles if we attack its excesses or defend the individual against its incipient despotism is a fallacy... for the socialist, as much as for the Liberal, the State Leviathan is a necessary evil; and the fact that part of the Civil Service now administers a Welfare State does not remove the threat to freedom which the twentieth-century concentration of power has produced...

On the other side of the ledger, a conservative group of practitioners and academics released a pamphlet entitled *The Rule of Law* in 1955. While generally suspicious of administrative authority, it also clearly recognised the important work done by the administrative state, stating that the group’s objective was to:¹⁹

[R]econcile freedom and justice for the private citizen with the necessities of a modern government charged with the promotion of far-ranging social or economic policy. We firmly believe that such a reconciliation can be brought about.

These statements came at what was probably the nadir of judicial review, some years before its revitalization in *Ridge v Baldwin* in 1963.²⁰ Yet even at this time a group of conservative lawyers recognized the value of administrative action, and a well-known Fabian acknowledged the necessity of judicial control. This remained the case as judicial review progressively asserted more control and as the administrative state’s responsibilities grew.

¹⁸ Quoted in Harlow and Rawlings (2d ed), *supra* note 14 at 93.

¹⁹ Quoted in Harlow and Rawlings (2d ed), *ibid* at 94.

²⁰ *Ridge v Baldwin*, [1964] AC 40 [*Ridge*].

Some twenty years after *Ridge*, Sir John Donaldson MR observed in *R v Lancashire County Council, ex parte Huddleston* that “a new relationship [has emerged] between the courts and those who derive their authority from the public law, one of partnership based on a common aim, namely the maintenance of the highest standards of public administration.”²¹

Mark Elliott has pointed out that it is descriptively true that any working system of administrative law has both green and red light elements, noting that “in reality, most administrative systems reflect aspects of both traditions, relying upon a combination of external, court-based control, and internal regulation of the administrative process.”²² Harlow and Rawlings ended up in a similar place in the third and most recent edition of their book. As noted above, in this edition they point out that a significant amount of “amber light” theory was accepted by both red and green light theorists, to the extent that a separate discussion was no longer warranted. However, they note “a growing consensus over administrative law values. This has crystallised around a trilogy of values... transparency, participation, and accountability...”²³

I consider that this mixed model identified by Elliott is also normatively correct. Failure to understand that administrative law is intended to perform both controlling and facilitative functions results in an impoverished understanding of the field. A complete theory of administrative law needs to account for both functions. The issue is not merely an academic one – a lack of overarching principle affects the shape of the doctrine. If legal actors do not know what a law, or area of law, is supposed to do, it can become directionless and lose purpose. Insufficient attention to the value of control risks a vision of administrative law which does not sufficiently protect the rights of those affected by maladministration. On the other hand, insufficient attention to the value of facilitating government actions risks a vision of administrative law which provides insufficient scope

²¹ *R v Lancashire County Council, ex parte Huddleston*, [1986] 2 All ER 941 at 945, quoted in Mark Elliott, Jack Beatson and Martin Matthews, *Beatson, Matthews, and Elliott's Administrative law: Text and Materials*, 4th ed, (Oxford: OUP, 2011) at 5.

²² *Ibid.*

²³ Harlow and Rawlings (3d ed), *supra* note 8 at 46.

for the government to act in the interests of citizens. In the section below, I suggest a broadly ‘amber light’ vision of the purpose of administrative law which centres and upholds the importance of a legitimate administrative state.

b Administrative law seeks to promote both rights and legitimacy

In broad terms, red light theory sees administrative law as an external fetter to protect the public from a potentially dangerous actor (i.e. the bureaucracy). Green light theory, on the other hand, sees it as a method for internally directing and shaping the actions of useful actor (i.e. the bureaucracy), for the public’s benefit. Both of these views are incomplete; administrative law ought to do both.

Seeing administrative law as just a fetter on undesirable action misses the point that the administrative state performs functions that we want to see carried out, and that judicial values are sometimes not the appropriate ones to govern administrative action. Likewise, seeing administrative law as purely facilitative of administrative action confuses the public interest with the interests and opinions of the bureaucracy, whereas in reality the two do not always align. Under the model I am using, legitimate government action requires citizen control, and a pure green light model cannot assure us that government decision-making tracks “not the power-holder’s welfare or world-view, but rather the welfare and world-view of the public.”²⁴ Having external oversight of any incidents of maladministration gives us that assurance, and builds public confidence that the interests of government and the public interest in fact coincide. Of course internal controls, accountability mechanisms, and a public service ethic (the sorts of mechanisms promoted by green light theorists) are important in maintaining public confidence but by themselves they are not sufficient. In short, green light theory is correct to place the legitimacy of administrative action at the core of administrative law, but is incorrect to think that judicial oversight is unnecessary in order to achieve this. Likewise, red light theory is correct about

²⁴ Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford: Clarendon Press, 1997) at 56.

the value of judicial oversight, but takes an overly narrow view of the purpose of such oversight.

Given the importance I place on external oversight here, the institution of judicial review should be seen as an indispensable part of administrative law, both in terms of controlling bureaucratic excess and legitimating desirable bureaucratic action. And, indeed, the dual purpose of administrative law described above maps neatly onto the structure of judicial review. Every time an administrative act is judicially reviewed, there are two subjects: the decision itself and the person(s) affected by the decision. Each is affected by the result of the review. Each also represents a different one of the interests discussed above. In the case of a successful judicial review, the decision-maker is forced to remake his or her decision lawfully (i.e. in accordance with the relevant substantive legal principles or in accordance with procedural fairness), while the affected person has his or her right to a fair process vindicated or the decision which unlawfully affected their interest quashed.

Each of those results serves a different value. The vindication of individual rights is functionally similar to the red light goal of protecting individual liberty and even closer to Tomkins' vision of amber light theory (which he identifies as a variant of red light theory). The quashing of the decision, on the other hand, vindicates the broader societal interest in having a bureaucracy which can be accessed and influenced by the citizenry using fair and open procedures. The existence of such procedures increases the legitimacy of bureaucratic action, and public confidence in the same; a green light value.

These are clearly not the same ends. In an adjudicative context, the former may be coextensive with the latter: a rights-respecting process may well be a legitimate process. Where a decision is going to be made about a specific individual, the traditional elements of procedural fairness will ensure the decision is made in such a way that it tracks a vision of the public interest that also takes into account the interests of the individual directly affected. The right to be heard ensures that the affected person's views are put across to the decision-maker and the requirement that decisions be based on probative evidence

means that any relevant issues raised by the affected person must be taken into account in reaching a final decision. In other administrative contexts, however, this is by no means the case. As Thomas Poole points out, a rights-based discourse has difficulty engaging with “second-order concerns” – the sorts of values (participation, accountability, and transparency) identified by Harlow and Rawlings above as the cornerstone principles of administrative law.²⁵ Poole says:²⁶

...second-order considerations cannot be translated into the language of rights without serious mischaracterisation. A right, generally speaking, is (a claim to) an individual entitlement. But second-order considerations are not best understood as individual entitlements. They reflect instead more general concerns about the function of the political and administrative system and, inasmuch as they relate to anyone, they relate to the collective.

In sum, a rights-respecting process is a necessary condition of legitimacy, but it will not always be sufficient to secure it. To completely theorise the purpose of judicial review, and of administrative law more generally, legitimacy must be separately accounted for.

Poole is one of the few thinkers to put forward a comprehensive argument that the overarching concern of judicial review might be legitimacy. He argues that a core focus on legitimacy explains judicial review’s self-referential nature. By this he means the tendency of arguments on judicial review to spend an undue amount of time focusing on issues such as grounds for intervening and standard of review, and even the insistence on the distinction between process and substance. He suggests that this focus might be:²⁷

...an expression of the court’s concern for its own legitimacy. Since all exercises of public power ought, in principle, to be subject to legitimacy claims, there is no reason why the court as an institution that wields considerable public power – not least in the exercise of its judicial review jurisdiction – should not itself be subject to legitimacy-based arguments.

He argues that legitimacy claims “tend to be individual claims, the purpose of which is to question the validity of a particular governmental decision or closely related set of

²⁵ Poole, *supra* note 16 at 712.

²⁶ *Ibid* at 711-712.

²⁷ *Ibid* at 719.

decisions.” This is consistent with the model of legitimacy I set out in Chapter II, where both the system of government and each assertion of government power must be legitimate: the system as a whole can remain legitimate even if a particular exercise of power is found not to be. Indeed, Poole’s account of the purpose of legitimacy also echoes that of Pettit and Richardson. Poole notes that:²⁸

The point of facilitating legitimacy challenges is to ensure the legitimacy of the system of governance as a whole. ...From the government’s point of view, although allowing legitimacy-based claims may well entail defeat... for some of its policy objectives, a legitimacy-based system may well ensure greater overall compliance with its rules and decisions. There are a number of reasons why this might be so. For one thing, letting fire – and ire – be concentrated on isolated issues may help channel public hostility away from the government as a whole... Another reason might be that the adjudication of legitimacy claims by a (relatively) independent body is crucial if the integrity of a system of governance based on legal rules is to be maintained.

This description of legitimacy’s purpose and effect is very similar to that discussed in Chapter II – legitimacy acts to create a moral obligation to challenge particular actions within the system, rather than challenging both the act and the system as a whole. Poole’s suggestion that judicial review is in fact based on legitimacy thus has real utility: it is consistent both with the nature of judicial review as an institution and the vision of legitimacy deployed in this thesis, supporting the contention in this chapter that the protection of legitimacy is one of the core concerns of judicial review.

Poole’s approach is in some ways a “constructive” version of political constitutionalism in the context of judicial review, sharing political constitutionalism’s critique of rights- and court- based legalism, but proposes a method for law to act in the administrative space without dominating the non-legal institutions therein. Brian Flanagan criticises this theory, suggesting it is just an unnecessary extrapolation that is still based ultimately based on the discourse of rights:²⁹

²⁸ *Ibid* at 715.

²⁹ Brian Flanagan, “Judicial Rights Talk: Defects in the Liberal Challenge to Constitutional Review” (2006) 22 SAJHR 173 at 195.

Poole's alternative appears to be the classic individual rights rationale by another name. ...

The poverty of legitimacy as an alternative to individual rights becomes clear in Poole's summation that:

a system that encourages claims on the basis of legitimacy is underpinned – and ultimately justified – by two concerns: an instrumental concern to encourage less fallible decisionmaking, and a non-instrumental concern to engender public trust in the operation of government.

But within a democracy that is (somehow) not predicated on a notion of goodness, the worst fallibility that a public decision could possess is a lack of democratic foundation; thus leaving no room for public decision by way of judicial review. And the goal of engendering public trust in the operation of government can only be non-instrumental if it is based on the idea that the government should hold the public trust, which is the same as saying that it should be accountable to an electorate, which, in turn, is the same as saying that citizens should be able to determine their political destiny within the British body politic.

This is not a strong critique of Poole's model of judicial review. Even if a vision of legitimacy is in part based on certain rights, rights by themselves cannot fully constitute that model. The broader values of a well governed society that follows its own stated norms and provides opportunities for citizen control of decision-making within cannot be explained only by reference to individualised rights. The specific context of judicial review is too far removed from the electoral process for Flanagan's arguments about democracy and autonomy to take hold. As discussed here and in Chapter II, particular individual rights, notably equality and participation, may well be a necessary condition of legitimacy, but they are not sufficient to constitute legitimacy in and of themselves.

The reason I think Flanagan's critique of Poole is useful, though, is that it helps make clear that some theories of legitimacy cannot be fully decoupled from the rights that contribute to them. This is the case with the theory I use in this thesis. Pettit and Richardson's model of legitimate government as one which does not dominate its citizens is a participatory one that relies on some basic liberal rights, notably equality. All citizens must have equal opportunity for input into administrative decision-making, and such input must be treated equally if domination is to be avoided. Thus a theory of administrative law which considers

only legitimacy without taking rights into account is also incomplete. A full account of administrative law must account for both.

c Summary

The discussion in this section demonstrates that, both descriptively and normatively, it is best to think of administrative law's purpose as existing in between the traditional poles of red and green light theory. Seeing administrative law as an institution which ought to both control government power and facilitate its beneficial activities maps well onto the structure of judicial review, and is consistent with Poole's useful analysis of judicial review as a mechanism for securing legitimacy within the administrative state. One can even go as far as saying that it is incumbent upon judicial review to promote legitimacy.

2 Natural Justice and Legitimacy

The discussion in the above section makes the case that as a matter of principle judicial review ought to be seen as concerned with both individual rights and the broader concept of legitimate administration. With a procedural vision of legitimacy such as that of Pettit and Richardson, it is the doctrine of procedural fairness that needs to do this work.³⁰ Theory, however, is only one strand of the law. Using procedural fairness to promote legitimacy must also make sense in terms of the legal rules that make up the doctrine. This section traces the history of procedural fairness and suggests that a concern with legitimacy has shaped the doctrine since its earliest origins. Modern procedural fairness has become somewhat obsessed with adjudicative decisions in a way that unnecessarily narrows its focus, but there is no reason the courts cannot tweak the doctrine to reintroduce more explicit consideration of broader legitimacy issues.

³⁰ The analysis would equally apply to substantive review, but exploring that element is beyond the scope of this thesis.

a The history of natural justice

The roots of the modern doctrine of procedural fairness can be found in the much older concept of natural justice. The entry of natural justice into the common law can be traced back at least as far as Coke CJ's tenure on the King's Bench in the early seventeenth century, with the two core rules associated with natural justice both being enunciated around this time.³¹ The first of these was the rule against bias,³² which was set down in 1610 by Coke CJ in *Dr Bonham's Case*.³³ This case involved a medical doctor who had been fined by the College of Physicians for practicing without a licence and later imprisoned for continuing to do so. Importantly, the College was entitled to keep some of the fine for itself. Dr Bonham sued for false imprisonment. The court held that "the censors [i.e. members of the College] cannot be judges, ministers, and parties; judges to give sentence or judgment; ministers to make summons; and parties to have the moiety of the forfeiture."³⁴

Coke CJ then went on to assert that the rule against bias was founded in common reason, and that:³⁵

the common law will controul Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such Act to be void...

This thread was picked up in later cases, including notably *City of London v Wood*, in which a citizen was fined by the City of London for refusing to accept nomination as a sheriff.

³¹ Although these rules would not be associated together under the umbrella of "natural justice" until sometime later, most likely in the 19th century (See Ian Holloway, *Natural Justice and the High Court of Australia: a Study in Common Law Constitutionalism* (Aldershot: Ashgate, 2002) at 15). H H Marshall argues that this is as late as the second half of 19th century, identifying *Spackman v Plumstead Board of Works*, 10 App Cas 229 as the first case in which this association was made: see H H Marshall, *Natural Justice* (London: Sweet & Maxwell, 1959) at 15-16.

³² *Nemo iudex in causa sua* – literally "no one should be a judge his own cause."

³³ *Dr Bonham's Case*, (1610) 8 Co Rep 113b [77 ER 646] [*Dr Bonham's Case*].

³⁴ *Ibid* at 652.

³⁵ *Ibid*.

The city acted to collect the fine by taking an action in debt against Mr Wood in the name of the Mayor and others in the Mayor's Court. While in practice these actions were heard by another official, formally the court consisted of the Mayor and aldermen. Mr Wood challenged the validity of the proceedings on the basis of bias. Citing *Bonham*, Holt CJ invalidated the City's action, saying:³⁶

... it is a very reasonable and true saying, that if an Act of Parliament should ordain that the same person should be party and Judge, or, which is the same thing, Judge in his own cause, it would be a void Act of Parliament; for it is impossible that one should be Judge and party, for the Judge is to determine between party and party, or between the Government and the party; and an Act of Parliament can do no wrong, although it may do several things that look pretty odd; for it may discharge one from his allegiance to the Government he lives under, and restore him to the state of nature; but it cannot make one that lives under a Government Judge and party.

These assertions from Chief Justices Coke and Holt that the courts had the ability to override Acts of Parliament which contravened fundamental common law principles did not survive as good law into the 19th century.³⁷ That said, these early cases stating that a tribunal cannot validly judge a case in which it holds an interest remain at the core of the modern rule against bias. The language used in the judgments is also important. Coke CJ refers back to "common right and reason" as the source of the rule, while Holt CJ states that it is literally impossible for Parliament to make a law that provides for a person to be both party and judge. These statements, with no citation of authority, demonstrate the pre-legal, natural law principle that lies at the heart of the rule against bias.³⁸

³⁶ *City of London v Wood*, 12 Mod 669 at 687-688 [88 ER 1592 at 1602].

³⁷ French CJ, writing extra-judicially, argues that "the suggestion that the natural law could invalidate or avoid statutes which were contrary to its norms fell before the rising tide of parliamentary supremacy following the Glorious Revolution of 1688." Robert French, "Procedural Fairness – Indispensable to Justice?" (Sir Anthony Mason Lecture, Melbourne, 7 October 2010) at 12. online: <http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenhcj/frenhcj07oct10.pdf>.

³⁸ There is further, detailed discussion of the relationship between natural law and natural justice in Marshall, *supra* note 31 at 6-15.

This pre-legal origin also features prominently in the foundations the hearing rule, from which procedural fairness derives.³⁹ The most prominent of the early hearing rule cases is again a rather entertaining judgment of Coke CJ in 1615.⁴⁰ *Bagg's Case* concerned a burgess (essentially a municipal councillor) named James Bagg who had a somewhat fractious relationship with the mayor and other burgesses. Bagg had insulted the mayor in a number of ways (including “turning the hinder part of his body in an inhuman and uncivil manner towards... [the mayor] and uncivilly, with a loud voice, [saying] ...“Come and kiss...”⁴¹). He also verbally abused a number of other burgesses, calling one a “knave”⁴² and another a “seditious fellow,”⁴³ and acted to undermine a number of the town’s policies.⁴⁴ As a result, the mayor and other burgesses acted to remove Bagg from office, without providing notice or an opportunity for Bagg to state his case. Bagg sued (and ultimately won) in the Court of King’s Bench for reinstatement. Among the issues raised was the question of how a person could be removed from office. On this point, Coke CJ stated:⁴⁵

... although they have lawful authority either by charter or prescription to remove any one from the freedom, and that they have just cause to remove him; yet it appears by the return, that they have proceeded against him without ... hearing him answer to what was objected, or that he was not reasonably warned, such removal is void, and shall not bind the party ...

Bagg's Case established the principle that, even if a substantive power exists, it cannot be validly exercised if the correct procedure was not followed. This foundation was built on a century later in *Dr Bentley's case*.⁴⁶ Bentley, unlike Bonham, was an academic doctor. Dr Bentley had been summoned before the university council to answer an action in debt, and at that hearing rather disrespectfully challenged the ability of the provost and university

³⁹ *Audi alteram partem* – literally a requirement “to hear the other side” before making a decision.

⁴⁰ *Bagg's Case*, (1615) 11 Co Rep 93 [77 ER 1271].

⁴¹ *Ibid* at 1275.

⁴² *Ibid* at 1274.

⁴³ *Ibid*.

⁴⁴ *Ibid* at 1276.

⁴⁵ *Ibid* at 1279.

⁴⁶ *R v Chancellor of the University of Cambridge (Dr Bentley's Case)*, (1723) 1 Str 557 [93 ER 698]

council to judge him. At this point, he was stripped of his degrees with no warning or chance to plead his case. Like Mr Bagg in *Bagg's Case*, Bentley's punishment was voided by the court due to an improper process. As put most famously by Fortescue J:⁴⁷

The laws of God and man both give the party an opportunity to make his defence, if he has any. I remember to have heard it observed by a very learned man upon such an occasion, that even God himself did not pass sentence upon Adam, before he was called upon to make his defence.

This appeal to God's law is important in that it shows just how fundamental the hearing rule was seen to adjudication at this time. As Robert French has pointed out extra-judicially, the idea of a hearing being crucial to adjudication is found in the writings of early Christian thinkers and indeed goes back even farther.⁴⁸ H H Marshall argued that the concept had its roots in Classical Stoic philosophy.⁴⁹ This is demonstrated by Coke CJ's citation of Seneca's *Medea* in *Bagg's Case*:⁵⁰

Who ought decrees, nor heares both sides discust,
Does but unjustly, though his Doome be just.

The purpose of this discussion of very early natural justice cases, and their pre-legal foundational principles, is to expose the core values that have underlain natural justice since its entry into the common law, and thus now underlie procedural fairness. Or, to put it another way, the purpose is to find what Sir John Salmond termed the "ultimate legal principle" behind natural justice and procedural fairness.

Salmond's approach is a useful way to think about this issue. As Ian Holloway explains,⁵¹ Salmond uses this term to describe the historical foundation for a legal order, as follows:⁵²

As a matter of fact and history they [rules of law] have their origin somewhere, though we may not know what it is. But not all of them have legal sources. Were this so, it

⁴⁷ *Ibid* at 704.

⁴⁸ French, *supra* note 37 at 7.

⁴⁹ Marshall, *supra* note 31 at 6 and 18.

⁵⁰ *Bagg's Case*, *supra* note 40 at 1280.

⁵¹ Holloway, *supra* note 31 at 279.

⁵² John Salmond, *Jurisprudence*, 7th ed, (London: Sweet & Maxwell, 1924) at 169.

would be necessary for the law to proceed *ad infinitum* in tracing the descent of its principles. It is requisite that law should postulate one or more first causes, whose operation is ultimate, and whose authority is underived. In other words there must be found in every legal system certain ultimate principles from which all others are derived, but which are themselves self-existent.

The early judgments from Coke CJ and others clearly show judges referring back to such ‘underived’ principles. Natural law ideas underlie these cases, but are not themselves ultimately derived from statute or precedent. The logic of these cases makes it clear that natural justice is not only (or even primarily) important to protect the individual rights of the parties. Instead, an unbiased tribunal and a chance to be heard are seen as indispensable to the act of adjudication itself. Coke CJ, Holt CJ, and the other judges cited could not conceive of adjudication taking place without natural justice being provided.

These early authorities show that the provision of natural justice was, and should continue to be, seen as integral to the legitimacy of adjudication. This is relatively uncontroversial in the context of the rule against bias, as Lord Hewart CJ’s famous aphorism in *R v Sussex Justices, Ex parte McCarthy* makes clear; “[it] is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.”⁵³

In a more modern context, concern for institutional legitimacy continues to be seen as a driving force behind the rule against bias. As Peter Cane puts it, “the rule against bias is designed to foster and maintain confidence in decision-making processes, and it is basic to our idea of what it means to treat individuals fairly when decisions are made which affect them.”⁵⁴ However, very few theorists – beyond Poole, in the article discussed above – seem willing to ascribe the same role to procedural fairness or judicial review more generally. I think this is simply wrong. As the above survey of the early case law shows, this underlying concern about the legitimacy of the decision making process is at least one of the ultimate legal principles underlying procedural fairness. As French observed when

⁵³ *R v Sussex Justices, Ex parte McCarthy*, [1924] 1 KB 256 at 259.

⁵⁴ Peter Cane, *Administrative Law*, 4th ed, (Oxford : OUP, 2004) at 134.

quoting Fortescue J's Garden of Eden reference, "Being omniscient, God had no need to hear from anybody. If His exchange with Adam and Eve reflected respect for the hearing rule, that respect did not depend upon its practical utility."⁵⁵ While flippant, the comment makes a very important point – the hearing rule is essential even if it has no practical utility. Providing a fair hearing is seen as crucial to the process of adjudication process regardless of whether it affects the eventual outcome. The necessity of a hearing is also decoupled from any effect on individual's rights. To be institutionally valid – to be legitimate – a hearing must be held.

b The development of modern procedural fairness

The above discussion shows that a concern about the legitimacy of the decision-making process was at the heart of natural justice from its very early days. This history is relevant because there is a direct doctrinal line from these 17th and 18th century natural justice cases to modern procedural fairness in Canada. While the details of the rules have changed, the principles remain the same, and the core principle of legitimacy I have identified would allow procedural fairness to do the work I think it needs to do in helping legitimate executive rulemaking.

The early cases outlined above all involved adjudicative bodies and, indeed, both the Cambridge University Council in *Dr Bentley's Case* and the Mayor's Court in *Wood* acted as courts. The journey from narrow, adjudication-focussed natural justice to procedural fairness begins in the Victorian era. This period saw the expansion of the natural justice to apply to a wider range of public bodies, as well as to clerical discipline,⁵⁶ club membership,⁵⁷ and private associations.⁵⁸ The most notable of the public body cases is probably *Cooper v Wandsworth Board of Works*.⁵⁹ The Board of Works was empowered to demolish any house that had been built where the construction had taken place without

⁵⁵ French, *supra* note 37, at 8.

⁵⁶ *Bonaker v Evans*, (1850) 16 QB 162.

⁵⁷ *Dawkins v Antrobus*, (1881) L.R. 17 Ch.D. 615.

⁵⁸ *Wood v Wood*, (1874) LR 9 Ex 190.

⁵⁹ *Cooper v Wandsworth Board of Works*, (1863) 14 CB (NS) 180 [(1863) 143 ER 414].

notifying the local authorities. There was no statutory requirement for a hearing. Mr Cooper was found to have constructed such a house, so the local Board of Works ordered it demolished, without providing Mr Cooper a chance to plead his case.

This is clearly not a classically adjudicative situation – the Board of Works is not determining any of Mr Cooper’s rights, or depriving him of office, or levying any punishment. There is no real *lis inter partes*. It is simply ordering an illegally constructed house demolished. Obviously this will inconvenience Mr Cooper, but it is still not the sort of adjudicative situation which attracted natural justice in the earlier cases. Nevertheless, all three judges in the Court of Common Pleas found that the Board of Works’ order should be set aside because it did not give Mr Cooper a chance to be heard. Most famously, Byles J said:⁶⁰

[A] long course of decisions, beginning with *Dr Bentley’s Case*, and ending with some very recent cases, establish that, although there are no positive words in a statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of the legislature.

There was no suggestion that this duty of fairness applied only to court-like bodies. Rather, as Willes J put it, it applied to any “tribunal which is by law invested with the power to affect the property of one of Her Majesty’s subjects.”⁶¹ The focus is on the effect on the subject, not the nature of the body.

The broadly drawn concept of natural justice which developed during the Victorian and Edwardian periods reached its zenith in the 1911 case of *Board of Education v Rice*.⁶² The case concerned a pay dispute between some teachers in Swansea and the local education authority, which had been escalated to the level of the national Board of Education. Lord Loreburn noted, almost in passing (as this did not appear to have been a major issue in the case):⁶³

⁶⁰ *Ibid* at 420.

⁶¹ *Ibid* at 418.

⁶² *Board of Education v Rice*, [1911] AC 179 [*Rice*].

⁶³ *Ibid* at 182.

I need not add that in doing either they must act in good faith and fairly listen to both sides, for that is a duty lying upon every one who decides anything. But I do not think they are bound to treat such a question as though it were a trial. They have no power to administer an oath, and need not examine witnesses. They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view.

This passage shows a concept of natural justice which is very similar to the modern conception of procedural fairness. The duty is broad – applying to “every one who decides anything” – and flexible in its content, so long as the process is, in the end, fair. And yet *Rice* is also easily traceable back through *Cooper* to the early precedents where a concern with the legitimacy of adjudication was the driving factor. At this point, it is therefore fair to say that natural justice’s concern with fairness and legitimate decision-making applies at least to both adjudicative and administrative decisions, if not delegated law-making.

Following *Rice*, however, the courts developed an odd fixation with limiting the application of natural justice to those situations where a duty to act judicially applied to the relevant administrative officials. This can be traced back to the case of *R v Electricity Commissioners. Ex parte London Electricity Joint Committee Company (1920), Limited, and Others*.⁶⁴ The case concerned the establishment, under statutory authority, of a regional electricity authority. When discussing the scope of the prerogative writs, Lord Atkin’s stated that “wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority, they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs.”⁶⁵

Shortly afterwards, in the case of *R v Legislative Committee of the Church Assembly ex parte Haynes-Smith* (which concerned a dispute about the adoption of a new Book of

⁶⁴ *R v Electricity Commissioners. Ex parte London Electricity Joint Committee Company (1920), Limited, and Others*, [1924] 1 KB 171 [*Electricity Commissioners*].

⁶⁵ *Ibid* at 205.

Common Prayer by the Anglican Church), Lord Hewart CJ interpreted Lord Atkin's dictum as only requiring procedural fairness where some sort of 'superadded' duty to act judicially applied.⁶⁶

In order that a body may satisfy the required test it is not enough that it should have legal authority to determine questions affecting the rights of subjects; there must be superadded to that characteristic the further characteristic that the body has the duty to act judicially. The duty to act judicially is an ingredient which, if the test is to be satisfied, must be present.

Lord Hewart's judgment led to a period of decades where natural justice was weakened significantly. The 1950 Privy Council case of *Nakkuda Ali v Jayarante* epitomises this approach.⁶⁷ In this case, a textile dealer was attempting to quash the decision of Ceylon's Controller of Textiles to revoke his textile licence because, among other things, the revocation had been made without the provision of natural justice.⁶⁸ Although seemingly very similar to many of the Victorian cases where natural justice had been held to apply (i.e. a citizen's property or livelihood being threatened by the decision of an administrative official), the Privy Council held that natural justice did not apply because the Controller was not under a duty to act judicially. At this point, natural justice was at such a low ebb that William Wade felt justified in writing an article entitled "The Twilight of Natural Justice".⁶⁹

Despite this pessimism from Professor Wade, the expansive approach of the Victorian era was restored, and in some respects expanded upon, in *Ridge*.⁷⁰ *Ridge* came out of the criminal trial of the Chief Constable of Brighton, who was charged with conspiracy to obstruct the course of justice.⁷¹ He was acquitted at trial, but two subordinate officers were convicted and the trial judge repeatedly criticised Mr Ridge's leadership of the police force.

⁶⁶ *R v Legislative Committee of the Church Assembly ex parte Haynes-Smith*, [1928] 1 KB 411 at 419.

⁶⁷ *Nakkuda Ali v Jayarante*, [1951] AC 66 (PC).

⁶⁸ *Ibid* at 71.

⁶⁹ William Wade, "The Twilight of Natural Justice" (1951) 67 LQR 103.

⁷⁰ *Ridge*, *supra* note 20.

⁷¹ The summary of background facts in this and following sentences drawn from Lord Morris of Borth-y-Gest's Judgment in *Ridge*, *ibid* at 102-109.

Shortly after his acquittal, Mr Ridge was summarily dismissed from office by the unanimous Brighton Watch Committee. No notice was given, nor any opportunity for Mr Ridge to state his case, before the decision was made. Although some later moves were made to provide Mr Ridge with the opportunity to be heard at subsequent administrative hearings, his dismissal was upheld. Mr Ridge ultimately challenged the decision as void because he had been given no notice and no opportunity to be heard.

The House of Lords agreed that Mr Ridge had been unfairly removed. The most important judgment (from a precedent perspective) is that of Lord Reid. Lord Reid rejected the formalist distinction between “quasi-judicial” and administrative executive functions that had arisen following *Electricity Commissioners*. Lord Reid rightly pointed out that these cases were inconsistent with the previous century’s jurisprudence.⁷² He explained Lord Atkin’s statement in *Electricity Commissioners* as a comment on the type of action that would attract natural justice, rather than as the imposition of a ‘superadded’ duty to act judicially before natural justice would be triggered.⁷³ He restored the wider Victorian/Edwardian understanding of natural justice, holding that the rules of natural justice could apply wherever an administrative authority had a duty to decide “what the rights of an individual should be.”⁷⁴ Lord Hodson’s judgment in *Ridge* made this point perhaps more clearly, stating:⁷⁵

...the answer in a given case is not provided by the statement that the giver of the decision is acting in an executive or administrative capacity as if that were the antithesis of a judicial capacity. The cases seem to me to show that persons acting in a capacity which is not on the face of it judicial but rather executive or administrative have been held by the courts to be subject to the principles of natural justice.

The case thus made a bold statement that there ought to be a broadly applicable duty to be fair in the executive sphere.

⁷² *Ibid* at 66-71.

⁷³ *Ibid* at 74-75.

⁷⁴ *Ibid* at 75-76.

⁷⁵ *Ibid* at 130.

Ridge largely restored the broad vision of fairness from *Rice* that had been lost in *Haynes-Smith*, but the 36 year detour into adjudicative formalism is important. This is because it was, in many ways, one of the two rational responses administrative law could have to the broadening of the administrative state that began in the early part of the 20th century and accelerated in response to the Great Depression.⁷⁶ As noted above, the requirements for legitimate decision-making in an adjudicative context are different from, and narrower than, those in administrative and law-making contexts. If the requirements of procedural fairness remain tied to their adjudicative roots, it can be difficult to meaningfully apply the doctrine to those other contexts. Stating that this doctrine rooted in adjudication should only apply to adjudicative (quasi-judicial) decisions is one way to maintain its integrity. That said, I argue in this thesis that one of the core purposes of procedural fairness is to promote participation in delegated law-making and thereby reinforce the legitimacy of the administrative. As discussed above, a narrower doctrine which applied only to individual adjudicative decisions would not fulfil this purpose, so while a coherent vision of the doctrine, it is not one that does the work I consider administrative law ought to be doing.

The other way the specific elements of procedural fairness can maintain consistency with the core principles of the doctrine (which is more consistent with the theoretical approach I advocate above) is to maintain those principles of the doctrine but adopt a more plastic view of what specific procedural elements are required for a non-adjudicative decision to be fair. After *Ridge*, the courts did neither: they attempted to stretch requirements developed for adjudication to administration, and somehow make them fit in a consistent manner. This only barely works for administrative decisions and does not at all for delegated law-making: how can an adjudicatory paradigm deal with the polycentric considerations inherent in policy- and rule-making? Indeed, it has (almost inevitably) led to delegated law-making being wrongly excluded from the scope of procedural fairness.⁷⁷

⁷⁶ See Harlow and Rawlings (3d ed), *supra* note 8 at 31-37.

⁷⁷ The issues discussed in this paragraph are addressed in more detail in Chapter III.

The key to making the procedural fairness more coherent and function in a matter that is more consistent with its underlying principles is to abandon adjudication as the touchstone of fairness, or at least relegate it to an issue of secondary importance. Adjudication's prominence is due to the particular circumstances the courts in *Bagg's Case* and the other early natural justice cases were faced with, not because adjudication is necessarily the paragon of procedural fairness. As Geneviève Cartier notes:⁷⁸

Historically, courts were *not* preoccupied with legislative attempts to delegate *legislative* functions to administrative decision makers and with the question of whether or not this affected the monopoly of the legislature on law-making functions. They were rather preoccupied with legislative attempts to delegate *judicial* functions to these decision makers, because this affected their traditional monopoly on law-interpreting. Therefore, the decision of the courts to impose procedural rules upon administrative decision makers exercising judicial functions was highly influenced by their willingness to preserve the integrity of the judicial process.

As the discussion earlier in this chapter shows, the courts eventually stepped beyond this narrow focus on administrators purporting to act judicially, but the motivation for the imposition of natural justice was to ensure that judicial processes weren't cheapened by administrative 'judges' who used less formal procedures. Judges were concerned about the legitimacy of the decision-making process they used – adjudication – being undermined by an emerging class of executive officials who had begun exerting authority using a superficially similar process. This initial motivation explains the enduring adjudicatory obsession of natural justice, but even that is driven by an underlying concern with decision-making legitimacy (in relation to both administrative decision makers and the judiciary itself). Ultimately, the modern doctrine of procedural fairness must not be primarily concerned with aping court procedures but ensuring the legitimacy of administrative decision-making and ensuring that any individual rights that are implicated by a decision, no matter its form, are protected. A narrow focus on adjudication and the protection of individuals affected by decisions which specifically target them obscures these questions

⁷⁸ Geneviève Cartier, "Procedural Fairness in Legislative Functions: The End of Judicial Abstinence?" (2003) 53 UTLJ 217 at 236.

of legitimacy and citizen control, and will lead to an incoherent doctrine of procedural fairness.

C Conclusion

This chapter argued that it is incumbent upon the law generally to ensure citizen control over the administrative state, and that administrative law specifically is the area of law so responsible. This is true both as a matter of theory and of doctrine. As a matter of theory, administrative law exists between the somewhat artificial poles of red and green light theory, displaying elements of both. It, and its primary institution of enforcement, judicial review, ought to reflect both red light theory's concern about controlling maladministration which can harm citizens and green light theory's focus on facilitating collective state action to benefit the citizenry as a whole. Thomas Poole's work theorising judicial review as being primarily about promoting legitimacy is helpful in explaining this position, though it downplays the continuing importance of individual rights perhaps more than is warranted.

With a procedural vision of legitimacy such as that used in this thesis, the strand of judicial review doctrine that needs to do this work of protecting rights and legitimating the administrative state is procedural fairness. Ever since its origins in the early English natural justice cases, the legitimacy of government decision-making has been at the core of the doctrine. This continued through to the early twentieth century, but a turn towards only applying procedural rights to "quasi-judicial" decisions in *Electricity Commissioners* and *Haynes-Smith* set the doctrine on a path towards an unnecessary obsession with adjudicative methods of decision-making. This overly narrow focus on adjudication continued even when a broader vision of procedural fairness was restored in *Ridge*.

The underlying purpose of ensuring decision-making is legitimate still remains part of the doctrine, however, and a move away from the adjudicative obsession that is a legacy of *Haynes-Smith* would allow procedural fairness to deal properly with non-adjudicative decision-making such as delegated legislation and properly fulfil its legitimating function. The next chapter argues that a similar wrong turn has taken place in Canada: adoption of

the confused UK doctrine that existed following *Ridge* has led to a doctrine of procedural fairness with patchy coverage and an uncertain scope.

CHAPTER IV PROCEDURAL FAIRNESS IN CANADA

The republican theory set out in Chapter II tells us that a vision of administrative law which focuses only on rights is insufficient. A narrowly tailored view of the field which only concerns itself with how individuals are affected will not provide the opportunities for citizen control throughout the system of government that are necessary for the state to be legitimate. Both the legitimacy of the administrative state and the state as a whole are harmed by its lack. Chapter III argued that procedural fairness can and should do this work, but lost its way in the early 20th century and ceased to perform that function as the size and scope of the administrative state increased. This chapter moves from the abstract to the concrete, and argues that despite generally promising doctrinal development, Canadian procedural fairness has followed the same wrong turn as the UK jurisprudence upon which it is based.

The first question that needs to be asked before turning to the specifics of the doctrine is whether the republican theory of legitimacy I set out in Chapter II and the general conceptual and historical framework of procedural fairness and judicial review that I set out in Chapter III are meaningfully applicable to Canadian administrative law. An examination of statements from the Supreme Court of Canada (“SCC”) on the nature and purpose of judicial review suggests that they can be, with strong statements in a number of cases, notably *UES, Local 298 v Bibeault* and the *Reference re Secession of Quebec*, that judicial review serves to uphold a vision of the rule of law that rests upon democratic legitimacy.¹ While not identical, there are enough commonalities of approach for the republican model of legitimacy to be used as a normative goal for the Canadian system of administrative law.

The history of procedural fairness, too, suggests a generally inclusive scope, although that potential is perhaps unfulfilled in the context of delegated law-making. The doctrine was

¹ *UES, Local 298 v Bibeault*, [1988] 2 SCR 1048 [*Bibeault*]; *Reference re Secession of Quebec*, [1998] 2 SCR 217 [*Quebec Secession Reference*].

introduced to Canada via two important British cases – *Ridge v Baldwin* and *Bates v Lord Hailsham*.² *Ridge* provides the basis for the broad modern duty, while *Bates* provides the shaky foundation for both the adoption of procedural fairness in Canada and the exclusion of delegated law-making from the scope of the doctrine.

Procedural fairness made its way into Canada in *Nicholson v Haldimand-Norfolk Regional Board of Commissioners of Police*,³ which was followed quickly by the explicit adoption of the *Bates* exclusion in *Attorney General of Canada v. Inuit Tapirisat et al.*⁴ From this point, I trace the development of procedural fairness in Canada through to *Baker v Canada (Minister of Citizenship & Immigration)* and beyond.⁵ After *Baker*, procedural fairness in Canada is a broad, flexible doctrine that ought to be expandable to cover delegated law-making. Yet this has not happened, due largely to the problematic precedent of *Inuit Tapirisat*.

There is, however, an odd split in the jurisprudence relating to bylaws as compared to other delegated legislation. The courts are increasingly willing to apply a duty of fairness to those individually affected by bylaws, but this approach has not spread to any other form of delegated legislation. This is further evidence of the incoherence of Canadian procedural fairness. The status quo is simply not justifiable, and a change in approach is required.

A The Canadian Context

The civic republican theory of legitimacy outlined in Chapter II was developed in the context of the US political and constitutional system, while the purposive analysis of procedural fairness I perform in Chapter III was based almost entirely on the English common law. While American approaches have in general been influential in Canada in a number of significant ways, and the Canadian common law springs from the English

² *Ridge v Baldwin*, [1964] AC 40 [*Ridge*]; *Bates v Lord Hailsham*, [1972] 1 WLR 1373, [1972] 3 All ER 1019 [*Bates*].

³ *Nicholson v Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] SCR 311 [*Nicholson*].

⁴ *Attorney General of Canada v Inuit Tapirisat et al*, [1980] 2 SCR 735 [*Inuit Tapirisat*].

⁵ *Baker v Canada (Minister of Citizenship & Immigration)*, [1999] 2 SCR 817 [*Baker*].

common law, there is a need to show how these models are useful in arguing the reform of modern Canadian administrative law. The SCC's statements about both the rule of law and the function of judicial review, however, suggest that the framework I propose can indeed be fruitfully applied in Canada.

The SCC has been consistent in stating that the rule of law is a foundational principle in the Canadian legal order. *Roncarelli v Duplessis*, the case from which modern Canadian administrative law essentially emerged, describes the rule of law as “a fundamental postulate of our constitutional structure.”⁶ The view of the courts since *Roncarelli* on exact meaning and role of the rule of law in Canada's constitution – in particular whether it can found a constitutional challenge as a freestanding constitutional principle – has been somewhat variable over time. After a period where it seemed as if a substantive vision of the rule of law might prevail, the SCC (with some continued resistance by lower courts) has largely settled on the position that while the rule of law is a very important unwritten principle in the constitution, it cannot by itself found a constitutional challenge.⁷ Despite this equivocation, the importance of the concept to Canada's constitutional order has been consistently affirmed, and some key elements of the rule of law have been consistently identified. Importantly for present purposes, the *Quebec Secession Reference* makes clear that one of the key aspects of the rule of law is its interaction with the principle of democracy:⁸

...democracy in any real sense of the word cannot exist without the rule of law. It is the law that creates the framework within which the "sovereign will" is to be ascertained and implemented. To be accorded legitimacy, democratic institutions must rest, ultimately, on a legal foundation. That is, they must allow for the participation of, and accountability to, the people, through public institutions created under the Constitution. Equally, however, a system of government cannot survive through adherence to the law alone. A political system must also possess legitimacy,

⁶ *Roncarelli v Duplessis*, [1959] SCR 121 at 142 [*Roncarelli*].

⁷ This variable approach is charted well by Mary Liston in “Governments in Miniature: The Rule of Law in the Administrative State” in Lorne Sossin and Colleen Flood, eds, *Administrative Law in Context*, 2d ed, (Toronto: Emond Montgomery, 2013) 39.

⁸ *Quebec Secession Reference*, *supra* note 1 at para 67.

and in our political culture, that requires an interaction between the rule of law and the democratic principle.

The SCC's vision of the rule of law is thus fundamentally concerned with how to achieve legitimate government, and its vision of the legal framework required to reach this goal is in good part democratic. This view on what is required for legitimate state authority maps very closely onto the civic republican model set out in Chapter II. This model argues that a particular form of citizen participation in law-making is required in order for citizens to control that law-making. Such control is required for law-making to be non-dominating and therefore legitimate. Mary Liston sees similar, though not identical, sentiments on the relationship between rule of law and public participation and democracy in the passage quoted above from the *Quebec Secession* reference:⁹

...as the Supreme Court emphasizes above, the principles of democracy and the rule of law are mutually supportive in the shared goal of minimizing the abuse of public power. They can also, under the right conditions, work in harmony to secure accountability and legitimacy in public institutions. Both democracy and the rule of law justify the creation of institutional mechanisms for citizens and affected persons to prevent or challenge the abuse of power by public officials.

The role of judicial review in upholding the rule of law is also consistent with the model I set out in Chapter III: that judicial review is designed to both protect individual rights and reinforce the legitimacy of the administrative state. Canadian case law from (at least) *Crevier v Attorney-General (Quebec)* onwards makes it clear that, judicial review is seen by the courts as a crucial element in upholding the legitimacy of government.¹⁰ *Crevier* concerned an appeal and review structure set up by the Quebec government to deal with the discipline of various regulated professions. The top tier of this review tribunal structure was insulated from judicial review in the superior courts, and effectively exercised final supervisory jurisdiction over the inferior tribunals within the hierarchy. The SCC held that such an arrangement breached section 96 of the *British North America Act* (which

⁹ Liston, *supra* note 7 at 57.

¹⁰ *Crevier v Attorney-General (Quebec)*, [1981] 2 SCR 220 [*Crevier*]

guaranteed the existence of federally appointed superior courts with inherent jurisdiction), with Laskin CJ stating:¹¹

It is true that this is the first time that this Court has declared unequivocally that a provincially-constituted statutory tribunal cannot constitutionally be immunized from review of decisions on questions of jurisdiction. In my opinion, this limitation, arising by virtue of s. 96, stands on the same footing as the well-accepted limitation on the power of provincial statutory tribunals to make unreviewable determinations of constitutionality.

The ability of the superior courts to judicially review inferior tribunals and administrative authorities, at least on matters of jurisdiction, is thus a constitutional imperative in Canada. Later cases have suggested that the same might be true of judicial review more broadly.¹²

While *Crevier* simply states the constitutional necessity of judicial review, shortly afterwards *Bibeault* made the policy justification for such a position more explicit. In this case, primarily remembered for developing the “pragmatic and functional” test in substantive review, Beetz J emphasises the importance of “the superintending and reforming function of the superior courts” – i.e. the superior courts’ review function.¹³ Citing *Crevier*, he states that “the role of the superior courts in maintaining the rule of law is so important that it is given constitutional protection.”¹⁴ More recently, Dyzenhaus has suggested that *Baker* can be seen as the SCC imposing:¹⁵

...the discipline of the common law conception of the rule of law on a statutory grant of discretion, which in the past would have been regarded... as “unfettered”, or subject to very minimal constraints. As L’Heureux- Dubé J. stated:

[D]iscretion must ... be exercised in a manner that is within a reasonable interpretation of the margin of manoeuvre contemplated by the

¹¹ *Ibid* at 236.

¹² See *MacMillan Bloedel Ltd v Simpson*, [1995] 4 SCR 725 and *Trial Lawyers Association of British Columbia v British Columbia (Attorney General)*, 2014 SCC 59, [2014] 3 SCR 31.

¹³ *Bibeault*, *supra* note 1 at para 108. *Bibeault* is in general a regressive decision, but Beetz J’s interpretation of *Crevier* as a defence of the constitutional importance of judicial review is an important one. It is only for this purpose that the case is cited.

¹⁴ *Ibid* at para 126.

¹⁵ David Dyzenhaus, “Constituting the Rule of Law: Fundamental Values in Administrative Law” (2002) 27 *Queen’s LJ* 445 at 487-488.

legislature, in accordance with the principles of the rule of law (*Roncarelli v Duplessis*, [1959] SCR 121), in line with general principles of administrative law governing the exercise of discretion, and consistent with the Canadian Charter of Rights and Freedoms (*Slaight Communications Inc v Davidson*, [1989] 1 SCR 1038).

The reason the SCC sees the protection of judicial review jurisdiction as so important is to safeguard the rule of law. In addition, the continued recognition of the rule of law as an important, if unwritten, constitutional principle means that it can it turn be used in *conducting* judicial review, by shaping the proper interpretation of the statutory discretion under review. Tying in the at least partially democratic definition of the rule of law discussed above from the *Quebec Secession Reference*, the SCC can be seen as endorsing judicial review as an important mechanism for defending the democratic legitimacy of the state.

I am not arguing that the SCC relied upon the republican theory I set out in Chapter II, but the principles of current Canadian law are broadly compatible with the principles of the republican approach. What I therefore suggest is that the republican model of citizen control can usefully be used as a normative ideal type for the system of Canadian administrative law. Similarly, the argument that judicial review ought to both protect rights and enhance legitimacy allows one to criticize a model of judicial review that fails on either front. The discussion in this chapter is intended to show that, while the doctrine of procedural fairness applied by the courts in Canada does a generally good job of protecting individual rights, it is not fully consistent with this ideal type because it does not protect the rule of law and legitimate government as it should. In particular, Canadian administrative law's coverage of executive law-making is inconsistent with these broad principles, and also contains two incompatible strands of jurisprudence that cannot be reconciled.

B The Problem of Bates v Lord Hailsham

As the previous chapter explained, *Ridge* created a broadly applicable duty to be fair in the executive sphere, restoring (and arguably even exceeding) the wide vision of natural justice that developed during the 19th century.¹⁶ However, the scope of this duty would be curtailed somewhat 10 years later in *Bates*.¹⁷ For reasons that are difficult to understand, it was *Bates* that was used to import the idea of procedural fairness to Canada rather than *Ridge*, a jurisprudential decision that seems to have shaped Canadian doctrine ever since.

Bates stemmed from a 1972 decision by the Lord Chancellor to abolish the solicitors' scale fee system, which was set out in the Solicitors' Remuneration Order 1883 (i.e. a piece of delegated legislation). The statutory process required any changes to be referred to a special committee. The Plaintiff, Mr Bates, was a member of National Executive Committee of the British Legal Association; a professional organisation for solicitors. The British Legal Association wrote to the Lord Chancellor, requesting that the decision be delayed and that further consultation be conducted by the Committee. The Lord Chancellor declined, which resulted in Mr Bates seeking an ex parte injunction from the Chancery division of the High Court to stop the scale fee system being abolished. The case was heard over two days, and the judgment delivered the same day the hearing concluded. Megarry J declined to issue an injunction and, in relation to the scope of natural justice/procedural fairness, said:¹⁸

Let me accept that in the sphere of the so-called quasi-judicial the rules of natural justice run, and that in the administrative or executive field there is a general duty of fairness. Nevertheless, these considerations do not seem to me to affect the process of legislation, whether primary or delegated. Many of those affected by delegated legislation, and affected very substantially, are never consulted in the process of enacting that legislation; and yet they have no remedy... I do not know of any implied right to be consulted or make objections, or any principle upon which the courts may enjoin the legislative process at the suit of those who contend that insufficient time for consultation and consideration has been given.

¹⁶ See discussion in section III(B)(2)(a) above.

¹⁷ *Bates*, *supra* note 2 at 1378.

¹⁸ *Ibid.*

Megarry J's distinction between natural justice, which applies to quasi-judicial decisions, and procedural fairness, which applies to other administrative decisions, was not in fact part of the reasoning in *Ridge*, or the Victorian jurisprudence. Indeed, as noted in the previous chapter, Lord Hodson in *Ridge* suggested that natural justice was simply to be expanded to all decisions affecting persons individually, not that some new duty would be imposed to decisions that were not quasi-judicial. Similarly, shortly after *Bates* was decided, Lord Morris of Borth-y-Gest (who sat in *Ridge*) famously described natural justice as "fairness writ large and juridically. It has been described as 'fair play in action.' Nor is it a leaven to be associated only with judicial or quasi-judicial occasions."¹⁹

These statements suggest that the higher courts at the time *Bates* was decided saw procedural fairness and natural justice essentially as synonyms, not as two distinct concepts. *Bates*' suggestion that two different sorts of procedural rights applied to 'quasi-judicial' as compared to administrative decisions harks back to the situation immediately pre-*Ridge*. Although *Bates* allowed for the existence of a duty of fairness beyond the scope of natural justice, it was implied that this is a lesser form of procedural protection, and one that certainly does not apply to legislative decisions. These two distinctions, although inconsistent with the majority of contemporaneous (and Victorian) precedent, would become extremely influential in the development of procedural fairness in Canada.

*C The Development of Procedural Fairness in Canada*²⁰

The wider duty to be fair recognised in *Ridge* was adopted in Canada in the SCC case of *Nicholson v Haldimand-Norfolk Regional Board of Commissioners of Police*.²¹ Prior to this point, the application of natural justice had been restricted to 'quasi-judicial' decisions. Like *Ridge*, *Nicholson* concerned the dismissal of a constable without a hearing or the

¹⁹ *Furnell v Whangarei High Schools Board*, [1973] 2 NZLR 705 at 718, Lord Morris of Borth-y-Gest (PC).

²⁰ Parts of this section are adapted from similar discussion in my LLM Thesis: see Edward Clark, *Delegated Legislation and the Duty to be Fair in Canada* (LLM Thesis, University of Toronto, 2008) [unpublished].

²¹ *Nicholson*, *supra* note 3.

provision of reasons. The relevant regulation allowed the Board of Commissioners of Police to dismiss him within 18 months of his appointment to the force, and Mr Nicholson's dismissal came just before the expiry of this 18 month period.²² Thus, as in *Ridge*, there was no statutory duty imposed on the Board of Commissioners of Police to provide Mr Nicholson with a hearing.²³

Despite this lack of a statutory duty, the SCC found that the Board of Police Commissioners owed a duty of fairness to Mr Nicholson, even though it was not exercising a 'quasi-judicial' function.²⁴ Writing for the majority, Laskin CJ stated that he was "...of the opinion that although the appellant clearly cannot claim the procedural protections afforded to a constable with more than eighteen months' service, he cannot be denied any protection. He should be treated "fairly" not arbitrarily."²⁵ In support, he cited Megarry J's statement from *Bates* that "that in the sphere of the so-called quasi-judicial the rules of natural justice run, and that in the administrative or executive field there is a general duty of fairness."²⁶ He did not make any reference to the part of Megarry J's judgment immediately following the quoted sentence; the part which set out the bar on applying procedural fairness to legislative executive decisions. Laskin CJ then went on to say that:²⁷

What rightly lies behind this emergence [of a general duty of fairness] is the realization that the classification of statutory functions as judicial, quasi-judicial or administrative is often very difficult, to say the least; and to endow some with procedural protection while denying others any at all would work injustice when the results of statutory decisions raise the same serious consequences for those adversely affected, regardless of the classification of the function in question.

Laskin CJ's judgment thus introduced a broadly applicable administrative law duty to be fair to Canadian law. However, as Geneviève Cartier notes, even as the scope of procedural

²² *Ibid* at 314.

²³ *Ibid* at 314-315.

²⁴ *Ibid* at 324.

²⁵ *Ibid* at 325.

²⁶ *Bates*, *supra* note 2 at 1378.

²⁷ *Nicholson*, *supra* note 3 at 325.

rights was widened, some odd distinctions were maintained.²⁸ In citing *Bates* as the key support for introducing procedural fairness into Canada, Laskin CJ adopted and maintained that case's unfounded distinction between natural justice, which applies only to 'quasi-judicial' bodies, and procedural fairness, which applies to other administrative institutions. Not only is this approach inconsistent with *Ridge* and later British case law, the citation of *Bates* rather than *Ridge* effectively made *Bates* the key British natural justice case in Canada. This staked out the path for the SCC's decisions in *Martineau v Matsqui Institution (No. 2)*²⁹ and, most importantly, *Inuit Tapirisat*.

Martineau (No. 2) was somewhat equivocal about *Bates*'s impact. Mr Martineau was a prisoner who, for disciplinary reasons, was sentenced to 15 days in the special corrections unit of the institution in which he was detained. He sought an order in court to quash his disciplinary conviction. The lead judgment in *Martineau (No. 2)*, written by Pigeon J, did cite *Bates*,³⁰ but not in the context of asserting an exemption from procedural fairness for legislative functions. Rather, he used it in the same way Laskin CJ had in *Nicholson* – to affirm the existence of a wider duty of fairness.³¹ Dickson J's concurrence, on the other hand, did *not* cite *Bates* but did state:³²

The authorities, in my view, support the following conclusions:

...

2. A purely ministerial decision, on broad grounds of public policy, will typically afford the individual no procedural protection, and any attack upon such a decision will have to be founded upon abuse of discretion. Similarly, public bodies exercising legislative functions may not be amenable to judicial supervision.

The only "authority" cited here is *Nicholson*. The authority cited in that case for the existence of a duty to be fair, and also mentioned in the lead judgment in *Martineau (No. 2)*, is *Bates*. It is thus not unreasonable to suggest that Dickson J was relying on *Bates* to

²⁸ Geneviève Cartier, "Procedural Fairness in Legislative Functions: The End of Judicial Abstinence?" (2003) 53 UTLJ 217 at 225.

²⁹ *Martineau v Matsqui Institution (No. 2)*, [1980] 1 SCR 602 [*Martineau (No. 2)*].

³⁰ *Ibid.* at 634.

³¹ *Ibid.*

³² *Ibid.* at 628-629, Dickson J.

support his statement that “public bodies exercising legislative functions may not be amenable to judicial supervision,” even if it was not relied upon for that proposition in *Nicholson*.

If *Martineau (No. 2)*’s reference to *Bates* was oblique, *Inuit Tapirisat* was unequivocal about its significance. The case concerned an increase in the rates charged for telephone services by Bell Canada. This increase had been approved by the relevant regulatory body, the Canadian Radio-television and Telecommunications Commission (CRTC). The Inuit Tapirisat of Canada objected to the increase before the CRTC, but Bell’s rate increase was approved in spite of these (and other) objections. The Inuit Tapirisat then appealed to the Governor in Council (i.e. the Cabinet). It also failed in that appeal. Following this loss, it applied to the Federal Court for an order to the effect that it should have been given a hearing in relation to the Cabinet appeal. The application was summarily dismissed by the Trial Division, but the Inuit Tapirisat successfully appealed the dismissal in the Federal Court of Appeal. The government finally appealed to the SCC.

The primary question before the SCC was whether the duty to be fair applied to the rate setting appeal determined by the governor in council. Addressing this question Estey J, writing for the majority, stated:

...I am assisted by the reasoning of Megarry J. in *Bates v. Lord Hailsham* (cited by the majority judgment of this Court in *Nicholson*, supra). ...

...

...It is clear that the orders in question in *Bates* and the case at bar were legislative in nature and I adopt the reasoning of Megarry J. to the effect that no hearing is required in such cases.

Again, like Dickson J in *Martineau (No. 2)*, Estey J incorrectly implied here that Laskin CJ in *Nicholson* relied upon Megarry J’s assertion that procedural fairness did not apply to legislative executive actions. As I have noted above, Laskin CJ did no such thing. Regardless, the decision in *Inuit Tapirisat* (and, to a lesser extent, the one in *Martineau*

(*No. 2*) has remained the governing precedent on the issue of “legislative functions” and procedural fairness.³³

Despite the nervousness surrounding the expansion of procedural fairness that *Inuit Tapirisat* demonstrates, the doctrine continued to develop. The next milestone, *Cardinal v Director of Kent Institution* was, like *Martineau (No. 2)*, a prison discipline case.³⁴ Mr Cardinal and another prisoner had been involved in a hostage-taking at another prison, and on their transfer to the Kent Institution, the Director immediately put them in administrative segregation. This was distinct from the punitive disciplinary segregation that was at issue in *Martineau (No 2)*. The Director took this action without independently verifying the prisoners’ involvement in the hostage-taking, or hearing their version of events. The Segregation Board established under the relevant regulations reviewed this segregation decision and recommended that the prisoners be re-integrated into the prison population. The Director refused to do so, refusing to explain his reasons to the prisoners or give them an opportunity to argue why he ought to follow the Board’s recommendation. The prisoners challenged the Director’s refusal to follow the Board’s recommendation as unfair.

The case eventually arrived in the SCC, where the judgment of the Court was delivered by LeDain J. This judgment made several important statements about both the scope and content of procedural fairness. First, LeDain J noted that there is no question that procedural fairness applies to the situation. He said that while the segregation is administrative rather than punitive, “its effect on the inmate in either case is the same and

³³ It is, for example, cited in the Federal Court case of *Canadian Society of Immigration Consultants v. Canada (Citizenship and Immigration)*, 2011 FC 669 (available on CanLII), with Snider J approvingly referring to the Crown’s citation of *Inuit Tapirisat* in support of the statement that, “legislative” decisions are not subject to a duty of fairness. The SCC has also recently approvingly quoted a passage from *Cardinal v Director of Kent Institution*, [1985] 2 SCR 643 [*Cardinal*], stating that procedural fairness does not apply to legislative functions – see *Canada (Attorney General) v Mavi*, 2011 SCC 30, [2011] 2 SCR 504 at para 38. The authority *Cardinal* cites for that proposition is *Inuit Tapirisat* (and *Martineau (No 2)*). As is discussed further below, some very recent doubt has been cast on *Inuit Tapirisat* by the SCC, but the case still remains good law for the time being.

³⁴ *Cardinal*, *ibid.*

is such as to give rise to a duty to act fairly.”³⁵ The effect of the decision on the subject determines whether procedural fairness applies, not the classification of the decision as administrative or punitive (and therefore ‘quasi-judicial’). The judgment repeated *Inuit Tapirisat*’s insistence that this broadly applicable duty of fairness is not applicable to “decisions of a legislative nature.”³⁶

Later in the judgment, LeDain J also isolates broad factors that will determine what type of process is required to provide procedural fairness in any given circumstance. One factor is similar to that just referenced in relation to scope: the seriousness of the decision’s effect on the subject.³⁷ The next is the nature of the decision and the surrounding context – in the particular circumstances of *Cardinal*, the decision had to be made on an emergency basis, and a lengthy process may have interfered with this necessity.³⁸ This emphasises that procedural fairness is a flexible doctrine that can change with the circumstances.

The 1990 decision of the SCC in *Knight v. Indian Head School division No. 19* built on *Cardinal* and *Nicholson*, further elaborating the content of the duty to be fair.³⁹ *Knight* was yet another case about an official being dismissed from office without being provided with a fair process. Mr Knight was the director of education for a school board, and the board had declined to reappoint him, following an arguably unfair process. Writing for the majority, L’Heureux-Dubé J held that a duty of fairness was owed to Mr Knight, but that in the circumstances the duty did not require Mr Knight to be granted a structured hearing or for formal reasons to be provided. L’Heureux-Dubé J summarised the factors that go into determining the content of the duty of fairness as follows:⁴⁰

³⁵ *Ibid* at para 14.

³⁶ *Ibid*.

³⁷ *Ibid* at para 21.

³⁸ *Ibid* at para 17.

³⁹ *Knight v. Indian Head School division No. 19* [1990] 1 SCR 653 [*Knight*].

⁴⁰ *Ibid* at 668-669. Note that I disagree that the second factor identified by L’Heureux-Dubé J in fact played a significant part in LeDain J’s reasoning in *Cardinal*. Regardless, post-*Knight*, this factor has become an accepted part of Canadian law, as confirmed in *Baker*.

[t]here may be a general right to procedural fairness, autonomous of the operation of any statute, depending on consideration of three factors which have been held by this Court to be determinative of the existence of such a right (*Cardinal v. Director of Kent Institution ...*): (i) the nature of the decision to be made by the administrative body; (ii) the relationship existing between that body and the individual; and (iii) the effect of the decision on the individual's rights.

Relying on *Syndicat des employés de production du Québec et de l'Acadie v. Canada (Canadian Human Rights Commission)*,⁴¹ *Knight* also confirmed that the distinction between administrative and quasi-judicial functions (previously maintained by Laskin CJ's reliance on *Bates* in *Nicholson*) was no longer necessary, with L'Heureux-Dubé J stating:⁴²

There is no longer a need, except perhaps where the statute mandates it, to distinguish between judicial, quasi-judicial and administrative decisions. Such a distinction may have been necessary before the decision of this Court in *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311. Prior to this case, the "duty to act judicially" was thought to apply only to tribunals rendering decisions of a judicial or quasi-judicial nature, to the exclusion of those of an administrative nature. Following *Nicholson*, that distinction became less important and was found to be of little utility since both the duty to act fairly and the duty to act judicially have their roots in the same general principles of natural justice...

This statement is important, because it suggests that the same principles always govern the application of procedural fairness, regardless of whether a decision is classed as 'quasi-judicial' or not. However, immediately after dispensing with one distinction, L'Heureux Dubé J repeated another, reiterating the rule from *Inuit Tapirisat*, specifically stating that "legislative and general" decisions do not attract a duty to be fair.⁴³

Despite this caveat, the generally broad, contextual duty to be fair set out in *Knight* has been embraced by Canadian law.⁴⁴ It was followed and further built upon in the 1999 case

⁴¹ *Syndicat des employés de production du Québec et de l'Acadie v. Canada (Canadian Human Rights Commission)* [1989] 2 SCR 879.

⁴² *Knight*, *supra* note 39, at 669.

⁴³ *Ibid* at 670.

⁴⁴ It should be noted, however, that the scope of procedural fairness as set out in *Knight* was partially overruled in *Dunsmuir*, and longer applies in employment situations.

Baker v Canada (Minister of Citizenship & Immigration).⁴⁵ Ms Baker was a Jamaican national who was the subject of a deportation order. She had Canadian-born dependent children. She applied for a deportation exemption on humanitarian grounds, on the basis of both medical considerations and the effect on her children. The exemption was declined, with no oral hearing. She eventually filed for review of the decision, which ended up in the SCC. The case was decided in the applicant's favour on the basis of both apparent bias and unreasonableness, but the procedure followed was found to be sufficient. Despite this substantive finding, the case extensively discusses the nature of the duty to be fair.

Again writing for the majority, L'Heureux Dubé J discussed the factors that determine the exact content of the duty to be fair in any given circumstances:⁴⁶

Although the duty of fairness is flexible and variable, and depends on an appreciation of the context of the particular statute and the rights affected, it is helpful to review the criteria that should be used in determining what procedural rights the duty of fairness requires in a given set of circumstances. I emphasize that underlying all these factors is the notion that the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.

The five factors she identified are:

- (a) the nature of the decision being made and process followed in making it;
- (b) the terms of the statute pursuant which the body operates;
- (c) the importance of the decision to the individual or individuals affected;
- (d) the legitimate expectations of the person challenging the decision; and
- (e) the choices of procedure made by the agency itself.⁴⁷

⁴⁵ *Baker*, *supra* note 5.

⁴⁶ *Ibid* at para 22.

⁴⁷ *Ibid* at para 23-27. L'Heureux Dubé J was careful to note that this list is not exhaustive, but thus far no other factors appear to have been identified in later cases.

Some of these factors are those set out in *Knight*, and some were developed between that case and *Baker*. By pulling together and synthesising these factors, *Baker* has become in the years since, and remains, the leading case used in determining the content of procedural fairness. The *Baker* synthesis is an extremely flexible test, allowing courts to calibrate the general parameters of the procedure required in the particular circumstances and then assess whether or not the specific procedures used by the decision-maker meet those requirements.

There is also, via factor (e) listed above, an element of deference to agency choice in the *Baker* test: courts are required to take seriously the choices made by the decision-maker. This element of deference was implicit both in how the test was applied in *Baker*, but has since been made explicit by the SCC. In the 2004 case *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v Lafontaine (Village)*, McLachlin CJ restated the *Baker* factors using slightly different wording.⁴⁸ The first four factors were substantively identical, but she listed the fifth as “the nature of the deference accorded to the body.”⁴⁹ At least post-*Lafontaine*, then, the inquiry into what fairness requires is in part a deferential one.⁵⁰ This makes the application of procedural fairness yet more able to adjust to different contexts.

D An Inconsistent Doctrine

Given the broad, contextual scope of procedural fairness in Canada, an expansion of the doctrine to cover delegated law-making has been theoretically relatively simple at least since *Baker* was decided almost twenty years ago. Such an expansion would also be consistent with the SCC’s vision of judicial review as protecting the rule of law via the institution of judicial review. It would also bring us closer to the normative goal of administrative law which facilitates citizen control of delegated law-making. No such

⁴⁸ *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v Lafontaine (Village)*, [2004] 2 SCR 650 [*Lafontaine*].

⁴⁹ *Ibid* at para 5.

⁵⁰ The degree to which the *Baker* synthesis is a deferential test is discussed in more detail in Chapter VI. It is sufficient to note the possibility here.

expansion has taken place, however. I consider that there are two broad doctrinal reasons for this.⁵¹ The first is a fixation on adjudicatory procedures as the touchstone of procedural fairness and the second is the precedent of *Inuit Tapirisat*, and the trepidation about stepping into non-justiciable areas that it represents.

1 An Adjudicatory Fixation

In broad terms, an obsession with adjudication can be seen in the already noted distinction that *Bates* and *Nicholson* drawing between natural justice – full, court-like procedures for adjudicative decisions – and procedural fairness, which applies to administrative decisions and is a pared back version of natural justice. *Knight* makes this point more explicitly, stating “the closeness of the administrative process to the judicial process should indicate how much of those governing principles should be imported into the realm of administrative decision making.”⁵² This point was reiterated in *Baker*, with L’Heureux-Dubé J citing her own judgment in *Knight* and saying that:⁵³

The more the process provided for, the function of the tribunal, the nature of the decision-making body, and the determinations that must be made to reach a decision resemble judicial decision making, the more likely it is that procedural protections closer to the trial model will be required by the duty of fairness.

All of this is correct, as far as it goes – the more a decision making process is trial-like, the more that a ‘quasi-judicial’, adjudicatory procedure will be appropriate. But this method of classification is unfortunate, because it locks in the court trial as the ideal method of providing a fair process. As the quotes from *Baker* and *Knight* show, fairness in other contexts will be determined by picking and choosing from various elements of court procedure depending on the context.

⁵¹ Obviously I consider there are good normative reasons for these sorts of changes, but I cannot necessarily expect the courts to share my normative convictions. This section therefore focuses on the doctrinal inconsistency of procedural fairness.

⁵² *Knight*, *supra* note 39 at 683.

⁵³ *Baker*, *supra* note 5 at para 23.

This approach to the content of procedural fairness is also present in academic treatises. Discussion of what procedural fairness requires is dominated by a list of when certain aspects of court procedures will apply in an administrative context and when they will not.⁵⁴ Everything is defined in terms of how close the required decision-making process is to adjudication.⁵⁵ From this starting point, many argue that it does not make sense to apply procedural fairness to rulemaking because delegated law-making (and any given policy decision) requires the consideration of so many divergent interests that adjudication is not an appropriate process to determine the right course of action.

As put most famously by Lon Fuller, such decisions are “polycentric”.⁵⁶ By polycentric, Fuller means that the nature of the decision being made is such that not only are many different people typically affected, but that any decision will affect not only the person directly concerned but every other person potentially involved.⁵⁷ In fact, in a polycentric decision each potential course of action “would have a different set of repercussions and might require in each instance a redefinition of the “parties affected.””⁵⁸ The form of participation that typifies adjudication – the presentation of proofs and arguments by affected parties that the adjudicator decides between – is rendered meaningless by the interdependent nature of polycentric decision-making.⁵⁹

In one respect, the idea that an adjudicatory vision of administrative law is a poor fit for many administrative decisions is quite correct – as was already discussed in Chapter III, an adjudication-based process can be an extremely poor fit when there are many interests at stake.⁶⁰ At the same time, I consider that such concerns about polycentricity are

⁵⁴ See for example H W R Wade and C F Forsyth, *Administrative Law*, 8th ed, (Oxford: OUP, 2000) at 501-525, Paul Craig *Administrative Law*, 6th ed, (London : Sweet & Maxwell, 2008) at 380 to 411 and G D S Taylor, *Judicial Review: A New Zealand Perspective*, 2d ed, (Wellington: LexisNexis, 2010) at 520 to 539.

⁵⁵ See Craig, *ibid* at 395-409 and Peter Cane, *Administrative Law*, 4th ed, (Oxford : OUP, 2004) at 159-167.

⁵⁶ See Lon L Fuller, “The Forms and Limits of Adjudication” 92 (1978) Harv L Rev 353. See also Cane, *ibid*, at 143-144.

⁵⁷ Fuller, *ibid* at 394.

⁵⁸ *Ibid* at 395.

⁵⁹ *Ibid* at 393.

⁶⁰ See section III(B)(2)(b) above.

misdirected in the context of procedural fairness. First, problems with balancing many interests are more acute in the context of substantive review than they are in the procedural arena. Wide procedural protections do raise some difficult issues, such as determining who should be heard and exactly what procedures they should be afforded. However, these issues are not as problematic as the potential for the court to substitute its own ranking of competing interests that exist in the substantive review arena, and it is in fact *this* problem that most commentaries warning about judicial overreach focus on.⁶¹ As Fuller put it (in the context of contract law, but I consider that the same reasoning applies here), “[t]he court gets into difficulty, not when it lays down rules about contracting, but when it attempts to write contracts.”⁶²

Secondly, the issue of adjudication arguably being a poor fit for making some executive decisions is not true just of rulemaking. In fact, the adoption of various aspects of trial-like procedures barely makes sense in the context of some administrative decisions. This issue was raised by Martin Loughlin decades ago, with him noting that: “imposition of an adjudicative model on many administrative procedures would distort the peculiar nature of administrative decision-making by ignoring policy factors which often make the problem incapable of adjudicative resolution.”⁶³

It has long been accepted that the distinction between ‘quasi-judicial’ and other administrative functions is unhelpful in determining the type of procedure that is required to ensure that decisions are made fairly. I would argue that a hard distinction between administrative and legislative functions is similarly unhelpful.

⁶¹ Procedural requirements inevitably have some impact on the substantive outcome in that they shape the information the decision-maker receives and sometimes how it has to be assessed. This is not the same as the court directly inquiring into how a decision-maker has substantively assessed the relevant competing interests, however. The line between process and substance is a fuzzy one, but that does not mean that there is no difference in the issues that are the primary focus of each species of review.

⁶² Fuller, *supra* note 56 at 404.

⁶³ Martin Loughlin, “Procedural Fairness: A Study of the Crisis in Administrative Law Theory” [1978] 28 UTLJ 215 at 220. I do not agree with Loughlin’s overall conclusions in this article, but he is correct about the difficulties caused by adapting adjudicative procedures in order to try to provide a fair process for non-adjudicative decision making.

A good illustration of the problems caused by this distinction, and in insisting too dogmatically on adjudicative procedures, are administrative decisions that could conceivably be classed as all three types of executive decisions. Take, for example, the determination of how to allocate tradable quota for fishing resources. Allocating a certain amount of quota to one fishing company will of course directly and significantly affect that company – if the quota granted is too low, their business may become unviable. In this sense, one may think to classify the function as quasi-judicial. However, given that the total resource is finite, the decision will also affect every other company that hopes to fish that particular species. This sort of allocation between parties in order to implement policy could be classified as administrative. Finally, the decision of who exactly to give quota to, how many foreign companies will be allowed to fish, whether special consideration is given to smaller operators, and other such considerations veer close to *creating* policy in the national (or provincial) interest.

There is lower court Canadian authority stating that quota allocation is legislative, and therefore no duty of fairness applies, but as the above discussion suggests, classifying it solely as such is essentially arbitrary.⁶⁴ It ignores the narrower effects discussed above – on fishing companies who are disappointed that they have been allocated too little or others have been allocated too much. However, if any process that procedural fairness is going to impose will be based on an adjudicative model, one can see the logic of the decision – with so many competing, interdependent interests, and a national or provincial policy overlay, a traditional hearing would be an inappropriate way to deal with the issue of fishing quota.

These are not, however, the only options. One does not have to have an ill-fitting adjudicative process or no process rights at all. As has long been accepted in relation to

⁶⁴ See *Boyd v Eacon*, 2012 SKQB 226 at paras 78 to 79. The judge in *Boyd* usefully summarises a number of Federal Court and Federal Court of Appeal cases which conclude that quota decisions are legislative/policy decisions.

quasi-judicial and administrative decisions, no real purpose is served in artificially classifying executive decisions as one or the other. The same is true of a hard and fast distinction between legislative executive functions and the rest.

The key to making the whole area more coherent is to abandon both such artificial distinctions and also to stop treating adjudication as the touchstone of fairness, or at least relegate it to an issue of secondary importance. Adjudication is *not* a core principle of natural justice. As was discussed in Chapter III, its prominence is due to the historical accidents of the doctrine's development, not because fairness would lose meaning without it.⁶⁵ There is no reason that Canadian courts must adhere an adjudicative model of fairness. Indeed, in order to fulfil the doctrine's purpose properly, a concept of fairness which embraces processes beyond the adjudicative model is needed.

2 *The Problem of Inuit Tapirisat*⁶⁶

The accepted wisdom in Canada is that, due to *Inuit Tapirisat*, procedural fairness does not apply to legislative or purely policy decisions. This sometimes seems so ingrained in Canadian judicial thought that it goes virtually unexamined. In my view, this is reflective of a general anxiety among judges to avoid stepping on the toes of the legislative or executive branch by interfering in matters that are dubiously justiciable. And yet there are a number of reasons why its status as good law ought to be seriously questioned. First, there is a long line of jurisprudence, including cases from lower provincial courts all the way up to the SCC, which ignores or sidelines *Inuit Tapirisat*. Further, the British case which *Inuit Tapirisat* heavily relies upon, *Bates*, has never been authoritative in its home jurisdiction and has recently been all but overruled. Finally, arguments that delegated law-making and policy decisions by the executive ought to be immunized against procedural fairness rely on what is in my view a mistaken argument about the nature of legislative power.

⁶⁵ See section III(B)(2) above.

⁶⁶ Parts of this section are adapted from similar discussion in my LLM thesis: Edward Clark, *Delegated Legislation and the Duty to be Fair in Canada* (LLM Thesis, University of Toronto, 2008) [unpublished].

If, as I argue, these doctrinal objections are weak, there is no barrier to extending procedural fairness towards the normative end goal I posit: a system of citizen control over delegated law-making, facilitated by procedural fairness.

a The legislative powers argument

The logic for excluding decisions to make delegated legislation from the duty to be fair seems to be that it bears substantial resemblance to primary legislation. The analogy between primary and delegated legislation was made explicit by L'Heureux-Dubé J in *Knight*:⁶⁷

[o]ver the years, legislatures have transferred to administrative bodies some of the duties they have traditionally performed. Decisions of a legislative and general nature can be distinguished in this respect from acts of a more administrative and specific nature, which do not entail such a duty.

The reason that decisions to make *primary* legislation are so exempted was famously stated by Sopinka J in *Reference Re Canada Assistance Plan*.⁶⁸ However, this justification appears to have become seen as an argument for why *delegated* legislation ought to be exempted as well.⁶⁹ *Canada Assistance Plan* concerned a decision by the Federal government to limit the growth in its payments to richer provinces under the Canada Assistance Plan. This decision was to be enshrined in legislation via Bill C-69. Under the Plan, the Federal government entered into agreements with the provinces as to how various costs would be shared. Lieutenant-Governor of British Columbia posed two constitutional questions to the BC Court of Appeal:

⁶⁷ *Knight*, supra note 39 at 670.

⁶⁸ *Reference Re Canada Assistance Plan*, [1991] 2 SCR 525 [*Canada Assistance Plan*].

⁶⁹ Later cases have treated *Canada Assistance Plan* as authority for the proposition that fairness does not apply to executive rulemaking. See for example *Smith/Wills Brook Farm Ltd v City of Surrey*, 1998 CanLII 3820 (BCSC) at para 40; *Apotex v Ontario (Office of the Lieutenant Governor)*, 2007 ONCA 570 (CanLII) at para 31; *Apotex Inc v Canada (Attorney General)*, [2000] 4 FC 264 (CA), 188 DLR (4th) 144 at para 106, Evans JA.

- 1). Whether the Federal government had any authority to limit its responsibilities to BC under Canada Assistance Plan or agreement; and
- 2). Whether the Plan, and the subsequent conduct of the Federal government under the Plan and the agreement, gave rise to a legitimate expectation that no Bill limiting the funds that BC received would be introduced without the consent of the BC government.

The British Columbia Court of Appeal answered the first question in the negative and the second in the affirmative. The Federal government appealed to the SCC, which reached the opposite conclusion on both questions. The second question is the one most relevant to the issue of procedural fairness. Sopinka J found that legitimate expectations in Canada could not create any substantive rights, and then stated:⁷⁰

Moreover, the rules governing procedural fairness do not apply to a body exercising purely legislative functions. Megarry J. said so in *Bates v. Lord Hailsham*, [1972] 3 All E.R. 1019 (Ch. D.), and this was approved by Estey J. for the Court in *Attorney General of Canada v. Inuit Tapirisat of Canada*, *supra*, at p. 758. In *Martineau v. Matsqui Institution Disciplinary Board*, [1980] 1 S.C.R. 602, Dickson J., as he then was, wrote (at p. 628):

The authorities, in my view, support the following conclusions:

...

2. A purely ministerial decision, on broad grounds of public policy, will typically afford the individual no procedural protection, and any attack upon such a decision will have to be founded upon abuse of discretion. Similarly, public bodies exercising legislative functions may not be amenable to judicial supervision.

While Sopinka J was certainly correct that procedural fairness does not apply to Federal or Provincial legislatures, the cases he cites to make this point are frustratingly misused. All three of *Bates*, *Inuit Tapirisat*, and *Martineau* (no. 2) concern the actions of the executive branch in making policy decisions or delegated legislation. None of the cases even once mentions the application of fairness to the legislative branch. However, by citing them, Sopinka J implies that the same arguments which apply to judicial interference with the

⁷⁰ *Canada Assistance Plan*, *supra* note 68 at 558.

legislative process also apply to the delegated law-making process. I do not think that they do.

The reasons for avoiding interference in the primary legislative process were stated succinctly by Sopinka J when he said “Parliamentary government would be paralyzed if the doctrine of legitimate expectations could be applied to prevent the government from introducing legislation in Parliament.”⁷¹ Clearly, this concern cannot apply to a purely executive action such as delegated law-making and it is misleading to suggest that it can. By definition, delegated law-making cannot be undertaken until an empowering statute has been passed, at which point Parliament is no longer involved in the process. Neither do the principled reasons for insulating Parliament from procedural fairness apply. As Cartier explains well:⁷²

Functionally, there is no fundamental difference between legally binding norms coming from statute and those coming from regulations. However, I think courts tend to understate the distinction that must be made between legislative functions exercised by Parliament and ‘legislative’ functions exercised by the executive. The former cannot exercise legislative functions outside the legislative institution and process, which entail public debates in the presence of the parliamentary opposition; the latter is not so constrained. Therefore, while refusing to impose procedural obligations on legislative assemblies exercising legislative functions might be justified on the basis of democratic considerations, no such justification exists *a priori* as regards administrative authorities exercising functions of a similar nature.

Note that Cartier puts executive ‘legislative’ functions in inverted commas. This is important, as it highlights the fact that the analogy between primary and delegated legislation is imperfect. As discussed in Chapter II, primary legislation in Canada is required to pass through two houses of Parliament, being subjected to public debate by (at least in the House of Representatives) elected representatives. In most cases it is examined by Committees of cross-party MPs. Much major legislation is signaled months in advance,

⁷¹ *Ibid* at 559.

⁷² Cartier, *supra* note 28 at 246-247.

either in an election manifesto or a Throne Speech. Local MPs are accessible to their constituents so that the public's views on legislation can be fed into the debate.

None of this applies to delegated law-making. Unless the empowering statute specifically requires it, it can be conceived, drafted, revised, and published without any public input. Thus, while it is clearly law, I am wary about calling it legislation.⁷³ It is law that does not have the benefit of the legislative process. The term 'delegated legislation' obscures this fact, as do cases such as *Canada Assistance Plan* which do not carefully distinguish between the two very different forms of lawmaking.

Whatever one prefers to call it, the legislative function of the executive does not share the democratic and constitutional insulation that primary legislation has. A better justification than "it is legislative" is required to exclude it from the scope of procedural fairness. The most commonly offered justification is the difficulty in the courts ruling on polycentric decisions. However, as mentioned in the section above, I do not think that this holds much water, either. I therefore query whether arguments based on the supposed legislative nature of delegated law-making have any value in determining the proper scope of procedural fairness. The question ought not to be "should a fair process apply?", but rather "what is a fair process in these circumstances?".

b The uncertain authority of Bates v Lord Hailsham

If *Inuit Tapirisat*'s principled foundation about legislative functions is unsound, so is its foundation in precedent. *Inuit Tapirisat* relies almost entirely on *Bates* for the proposition that procedural fairness does not apply to legislative decisions, but *Bates* is not, and has never been, influential in its home jurisdiction. This is not really surprising. *Bates* was only a High Court decision (albeit one delivered by a well-respected judge). It was heard urgently over two days; being a hearing for an ex parte injunction. The judgment was

⁷³ I use the term "delegated legislation" primarily because it predominates in the literature and in the jurisprudence. This should not be taken as a signal that I find it unproblematic.

delivered orally on the same day the trial finished. If anything, it is more surprising that such a seemingly minor judgment has had such lasting influence in Canada.

By the time *Canada Assistance Plan* was decided, confirming Canada's broad reliance on the case, *Bates* had been cited exactly three times in the United Kingdom.⁷⁴ Of these cases, only the Queen's Bench case *R v. Secretary of State for Environment, Ex parte Greater London Council* substantively considered *Bates*.⁷⁵

This case concerned an application for *certiorari* from the Greater London Council and the Inner London Education Authority to quash an order made under the *Rates Act 1984* by the Secretary of State. The Court dismissed the application, rejecting, among other points, the arguments that there had been insufficient consultation or that the applicants had a legitimate expectation that a particular procedure would be followed, finding that there was no evidence to support these contentions. However, the Court *did* substantively address these fairness-based arguments, declining to accept the Secretary of State's argument that procedural fairness could never apply to delegated legislation. In addressing this argument, Mustill LJ took a decidedly narrower interpretation of *Bates* than was taken in *Inuit Tapirisat* and *Canada Assistance Plan*. He thought that *Bates* did not shield delegated legislation from the duty of fairness. Rather, he considered that:⁷⁶

[t]he learned judge did no more than decide that, given the particular nature of the delegated powers, the omission of an act which in other contexts might be an element of fairness was not a ground for relief.

Read this way, *Bates* simply becomes an example of the inherently contextual nature of procedural fairness – consultation was simply not seen as an element of the duty to be fair in the circumstances. This is consistent with my argument above that adjudicative

⁷⁴ Joan G Small, "Legitimate Expectations, Fairness and Delegated Legislation" (1995) 8 CJALP 131 at 141-142.

⁷⁵ *R v Secretary of State for Environment, Ex parte Greater London Council*, (Crown Office List) CO/237/85, CO/252/85, Mustill LJ and Otton J (Mustill LJ for the Court) [*Secretary of State for Environment*] (Lexis Transcript).

⁷⁶ *Ibid.*

procedures will not always be appropriate methods of providing fairness in non-adjudicatory decision-making contexts. Interpreted this way, *Bates* would not support the sort of decision made by the SCC in *Inuit Tapirisat*.

Recent treatments of *Bates* in the United Kingdom have been, if anything, even less enthusiastic applying it in order to exempt delegated legislation from procedural fairness. In the Northern Ireland Queen's Bench decision of *Re Campbell*,⁷⁷ a group of solicitors challenged the decision of the County Court Rules Committee and the Lord Chancellor not to give reasons for their most recent determination of a fees scale. Kerr LCJ was invited by counsel for the Lord Chancellor to accept that *Bates* shielded the Lord Chancellor from the reach of a duty to give reasons.⁷⁸ Kerr LCJ was, however, doubtful that *Bates* remained good law, and stated:⁷⁹

I consider, however, that there is much force in Mr Larkin's [counsel for the appellant] submission that a general exclusion from the duty to give reasons for legislation can only be justified where some form of scrutiny other than that provided by the courts by way of judicial review is available.

Somewhat surprisingly, the first appellate-level consideration of *Bates* came in the Court of Appeal's 2007 judgment in *R (BAPIO Action Limited) v Secretary of State for the Home Department*.⁸⁰ *BAPIO* concerned the tightening of the United Kingdom's Immigration Rules to make it much harder for doctors from outside the European Union to obtain leave to enter or to remain in the country for the purposes of postgraduate training. Soon after, the Department of Health issued formal guidance to National Health Service employers which made it more difficult for doctors on the Highly Skilled Migrant Programme to obtain employment in the NHS. The Plaintiffs challenged both decisions.

⁷⁷ *Re Campbell*, [2005] NIQB 59.

⁷⁸ *Ibid* at para 20.

⁷⁹ *Ibid* at paras 16-20. There is also further interesting discussion of *Bates* and the duty to consult generally in another Northern Ireland Queen's Bench case decided shortly after *Re Campbell* – see *Re General Consumer Council*, [2006] NIQB 86 at paras 28-61, Weatherup J.

⁸⁰ *R (BAPIO Action Limited) v Secretary of State for the Home Department*, 2007 EWCA Civ 1139, [2008] ACD 7 [*BAPIO*].

The applicants argued that the changes to the Immigration Rules were invalid due to lack of consultation on the part of the Government and that the Department of Health's guidance was invalid because it misrepresented the effect of the Immigration Rules and constituted an illegitimate attempt to circumvent the requirements of the Immigration Act 1971. The applicants were unsuccessful on both grounds at the first instance, and appealed. In the Court of Appeal, BAPIO failed again on the consultation argument but was successful in arguing that the Department of Health's guidance was invalid.⁸¹ This ruling was in turn unsuccessfully appealed to the House of Lords.⁸²

While this case is also particularly interesting in its discussions of the practical difficulties inherent in the courts imposing a general duty to consult (and this will be discussed further in Chapter VI), both lead judgments also contain interesting statements about *Bates*. In his concurring judgment in the Court of Appeal, Sedley LJ commented as follows on the section of Megarry J's judgment that is cited in Canada as authority for excluding the making of delegated legislation from the duty to be fair:⁸³

As Megarry J's taxonomy reminds us, these were early days in modern public law. What he says about primary legislation of course holds true: the preparation of Bills and the enactment of statutes carry no justiciable obligations of fairness to those affected or to the public at large. The controls are administrative and political. But... there is no necessary or logical extension of this immunity to delegated legislation, much less to the Immigration Rules, and good reasons of constitutional principle for not extending it.

Sedley LJ also dismissed the Government's argument, based on *Bates*, that Parliament must be presumed to have intended to exclude participation in the making of delegated legislation if the empowering provision remains silent:⁸⁴

⁸¹ *Ibid* at paras 56-57 and 62.

⁸² *R (BAPIO Action Limited) v Secretary of State for the Home Department* [2008] UKHL 27. The consultation issue was not cross-appealed to the House of Lords, so the Court of Appeal's dicta remain authoritative on this particular issue.

⁸³ *BAPIO*, *supra* note 80 at para 34, Sedley LJ.

⁸⁴ *Ibid* at para 35.

This submission inverts the rationale of procedural fairness. As was long ago explained by the Court of Common Pleas in *Cooper v Wandsworth Board of Works* (1863) 14 CB (NS) 180 (approved *inter alia* in *Ridge v Baldwin* [1964] AC 40), where there is a want of fairness in procedures laid down by Parliament, the common law will supply it. ... [A]s Lord Loreburn LC put it in *Board of Education v Rice* [1911] AC 179, the duty to act in good faith and listen to both sides is a duty which lies on everyone who decides anything. The limit, of course, is where Parliament has expressly (see *Wiseman v Borneman* [1971] AC 297) or by necessary implication (see *Pearlberg v Varty* [1972] 1 WLR 534) excluded such requirements.

This is an important observation. The doctrinal foundation of procedural fairness is that when the legislature is silent, the courts will imply from that silence that fairness was not excluded – i.e. that it ought to apply. As Sedley LJ said, it seems bizarre to apply the exact opposite logic in the context of legislative functions. He did not see any formal bar to applying procedural fairness to delegated legislation. He also appeared to overrule the core dictum from *Bates*. Maurice Kay LJ, in his separate judgment, also noted that he agreed with Sedley LJ that *Bates* “is not or is no longer on point.”⁸⁵

The bar on applying procedural fairness to delegated law-making in Canada thus rests on the foundation of an interlocutory judgment, delivered from the bench immediately following the hearing, that has never been widely cited and has been dismissed as “no longer on point” in its home jurisdiction. It seems extraordinary that this is seen as sufficient reason to continue this unprincipled exclusion from procedural fairness.

E Contradictory Bylaws Jurisprudence

The mainstream approach to procedural fairness post-*Baker*, then, is a broadly applicable, flexible and contextual requirement that decisions be made fairly, with a specific exclusion for legislative and general decisions. This exclusion rests almost exclusively on *Inuit Tapirisat*. Such an exclusion is problematic because it means that for a significant class of executive decision-making – i.e. delegated law-making – administrative law does not impose any procedural obligations on decision-makers. This is inconsistent with

⁸⁵ *Ibid* at para 58, Maurice Kay LJ.

administrative law's general functions of protecting individual rights and legitimating administrative decision-making.

There is, however, a longstanding strand of jurisprudence, mostly focused on bylaws, that takes a significantly different approach to procedural fairness in legislative contexts than does the line of cases which follow *Inuit Tapirisat*. While it does not exactly do away with this restriction on procedural fairness, it is less insistent that decisions not be “legislative” to attract procedural fairness, and is therefore significantly more flexible as to when the doctrine can apply, meaning that the problems I identify above in relation to the mainstream jurisprudence are less acute. This body of jurisprudence does not engage at all with *Inuit Tapirisat*, despite most of the cases being decided after *Inuit Tapirisat*.

1 The Origins of the Bylaws Jurisprudence

This interesting line of bylaw cases starts with the SCC's 1965 judgment in *Wiswell v Winnipeg*.⁸⁶ The case concerned a challenge to a zoning variation bylaw made by the Winnipeg Metropolitan Council which allowed the construction of multiple-unit housing (i.e. an apartment building) on a block of land situated in what was at that point a neighbourhood consisting only of single-family homes. A local residents' association opposed to the bylaw challenged its validity on the basis that it had not been given the required notice. The notice requirements for public hearings were set out in a resolution of the Council, and consisted of notices in two major newspapers, and notices posted at the site that was the subject of the zoning variation. The Council correctly published the newspaper notices, but failed to post a notice at the site. The residents' association did not see the newspaper notices, and therefore was unaware of the variation hearing (and thus was unable to oppose it).

The Council argued that, despite its own resolution setting out notice and hearing procedures, bylaw-making is a legislative act and as such it was entitled to proceed without

⁸⁶ *Wiswell v Winnipeg*, [1965] SCR 512 [*Wiswell*].

any notice whatsoever. Hall J, writing the lead judgment for the majority,⁸⁷ seemed to tacitly accept this contention, but did not think that the decision was properly classified as legislative. He extensively quoted the trial judge on this point, who said:⁸⁸

But to say that the enactment of By-law No. 177 was simply a legislative act is to ignore the realities and the substance of the case. For this was not a by-law of wide or general application, passed by the Metropolitan Council because of a conviction that an entire area had undergone a change in character and hence was in need of re-classification for zoning purposes. Rather this was a specific decision made upon a specific application concerned with a specific parcel of land... In proceeding to enact By-law No. 177 Metro was essentially dealing with a dispute between Dr. Ginsburg, who wanted the zoning requirements to be altered for his benefit, and those other residents of the district who wanted the zoning restrictions to continue as they were. That Metro resolved the dispute by the device of an amending by-law did indeed give to its proceedings an appearance of a legislative character. But in truth the process in which it was engaged was quasi-judicial in nature; and I feel I must so treat it.

The trial judge then went on to note the truism that even if an empowering statute is silent, the courts will always apply natural justice to ‘quasi judicial’ decisions.

Hall J endorsed this approach, citing *Re Howard and the City of Toronto* in further support:⁸⁹

The obligation of a municipal body in carrying out its responsibilities is aptly and correctly stated by Masten J. A. in *Re Howard and City of Toronto*,⁹⁰ at p. 576:

In dealing with a proposed by-law which involves a conflict of interests between private individuals who are affected, the council, while exercising a discretion vested in it by statute, acts in a quasi-judicial capacity ... and its preliminary investigations and all subsequent proceedings ought to be conducted in a judicial manner, with fairness to all parties concerned.

The approach in *Wiswell* was therefore to treat decisions that are legislative as a matter of law – a bylaw is of general application and binding force – as *de facto* ‘quasi-judicial’ when

⁸⁷ Martland J joined in Hall J’s reasons, while Cartwright and Spence JJ concurred with most of Hall J’s judgment except one aspect which they did not feel it was necessary to determine either way.

⁸⁸ *Wiswell*, *supra* note 86 at 520.

⁸⁹ *Ibid* at 522 (footnote in the original).

⁹⁰ *Re Howard and City of Toronto* (1928), 61 OLR 563 (ONCA).

they effectively act to resolve a dispute between a limited number of parties, with little wider impact. Using this approach, Hall J found that the lack of notice to the residents' association was a breach of natural justice, and therefore the zoning variation bylaw was void.⁹¹

The leap from legislative to 'quasi-judicial' in *Wiswell* was a large one, and not strictly necessary. *Ridge* had recently been decided in the House of Lords, and the broader idea of a doctrine of procedural fairness which applied to administrative decisions was available to be drawn upon. It may have made more sense to classify the zoning bylaw decision as administrative rather than quasi-judicial but, as discussed above, Canada did not adopt *Ridge* until some thirteen years later in *Nicholson*. Absent the adoption of *Ridge's* wider concept of procedural fairness, if the majority in *Wiswell* wished (as it did) to apply any procedural safeguards at all, it needed to classify the zoning bylaw as a quasi-judicial.

The lone dissenting judge, Judson J, took a radically different approach. He agreed that natural justice applied, but thought that the notice provided by the council was sufficient.⁹² However, his reasons for finding that fairness applied are particularly interesting. Whereas the majority argued that legislative decisions had to be *de facto* quasi-judicial before fairness applied, Judson J stated:⁹³

I do not think that it helps one towards a solution of this case to put a label on the form of activity in which the Metropolitan Council was engaged when it passed this amending by-law. Counsel for the municipality wants to call it legislative and from that he argues that they could act without notice. The majority of the judges prefer the term quasi-judicial. However one may characterize the function, it was one which involved private rights in addition to those of the applicant and I prefer to say that the municipality could not act without notice to those affected.

This is a much less formalist approach than that taken by the majority. Rather than classify the nature of the decision made by government, Judson J considered that the effect of the decision was the determining factor of whether natural justice applied. Though not

⁹¹ *Wiswell*, *supra* note 86 at 525.

⁹² *Ibid* at 525-526.

⁹³ *Ibid*.

identical (Judson J's focus seems to be on property rights), this dissent somewhat foreshadowed *Baker*'s subject-focused approach to procedural fairness over 30 years later.

The next major case in this line of authority is *Homex Realty v Wyoming*, decided in 1980.⁹⁴ In this case, a municipality and Homex, the owner of the majority of a new subdivision, were in a dispute as to who should pay to provide services (such as municipal water and sewage) to the subdivision. The two parties were unable to resolve the dispute, and as a result the municipal council passed a bylaw invalidating the subdivision plan. This was done without notice to Homex, although there was no statutory requirement to allow Homex to be heard. The approach of the majority and minority in *Homex* closely mirrored that of the majority and minority judges in *Wiswell*. Indeed, *Wiswell* is specifically cited in both judgments. Writing for the majority, Estey J said:⁹⁵

Here we have the circumstance that the statute does not expressly require notice to the affected landowners. Council, of course, was aware that Homex would oppose such a by-law as no. 7. The by-law had some characteristics of a community interest by-law, as in the *Hershoran* case, *supra*, but it also represented the purported culmination of an *inter partes* dispute conducted on adversarial lines between Homex and the Council. As in *Hershoran* and in *Wiswell*, *supra*, I would conclude that the action taken by the Council was not in substance legislative but rather quasi-judicial in character so as to attract the principle of notice and the consequential doctrine of *audi alteram partem*, as laid down by the courts as long ago as in *Wandsworth*, *supra*.

Estey J then concluded that, in such circumstances, Homex's right to a fair hearing had been breached.⁹⁶

Dickson J, who was in the minority in the result but not on whether procedural fairness applied, stated:⁹⁷

Above all, flexibility is required in this analysis. There is, as it were, a spectrum. A purely ministerial decision, on broad grounds of public policy, will typically afford the individual little or no procedural protection. ... On the other hand, a function that

⁹⁴ *Homex Realty v Wyoming*, [1980] 2 SCR 1011 [*Homex*].

⁹⁵ *Ibid* at 1031.

⁹⁶ *Ibid* at 1031-1032. However, the majority declined to quash the Council's decision, using its discretion to withhold relief in the circumstances of the case – see discussion at 1033-1038.

⁹⁷ *Ibid* at 1051-1052.

approaches the judicial end of the spectrum will entail substantial procedural safeguards, particularly when personal or property rights are targeted, directly, adversely and specifically.

...[I]t is not particularly important whether the function of the municipality be classified as “legislative” or as “quasi-judicial”. Such an approach would only return us to the conundrums of an earlier era. One must look to the nature of the function and to the facts of each case. I would adopt what was said by Judson J. in the *Wiswell* case.

He then proceeded to cite approvingly the passage quoted above from Judson J’s judgment in *Wiswell*. Here Dickson J stated that broad policy decisions would entail a very low level of procedural protections – possibly none – but he did not say that such decisions, or those classified as legislative, were categorically barred from the reach of the duty to be fair.

It is interesting to note that this case was decided only a month after the decision in *Inuit Tapirisat*, but did not cite or even make reference to it. The same judges were involved in considering both cases, yet *Inuit Tapirisat* was not seen at all on point.⁹⁸ Given that bylaws are simply another form of delegated legislation, it is difficult to understand why the SCC was much more willing to interfere here than in *Inuit Tapirisat*. It is also odd that the distinction between legislative and quasi-judicial decisions, which was at the core of *Inuit Tapirisat*, is dismissed as “not particularly important” by Dickson J.

Ten years later, *Old St Boniface Residents Assn Inc v Winnipeg (City)* changed direction away from *Wiswell*, but again did not cite *Inuit Tapirisat*.⁹⁹ The case was, like *Wiswell*, about a rezoning application to allow condominium towers to be built in a primarily single family home neighbourhood. One of the municipal councillors on the Community Committee, one of the Council committees required to approve the rezoning, was known to be an advocate for the development of the towers. A local residents’ association

⁹⁸ The influence of *Inuit Tapirisat* can perhaps be seen in the different reasons given by Estey J and Dickson J. Estey J’s judgment implies that fairness is not available in legislative decision-making contexts, thus necessitating the classification of the bylaws in question as either administrative or quasi-judicial if fairness is to apply. This mirrors the exclusion adopted into Canadian law via his judgment (albeit written for the Court) in *Inuit Tapirisat*. That said, Dickson J joined Estey J’s judgment in *Inuit Tapirisat*, so it is odd that he takes an approach that seems to quite significantly contradict the *ratio* of that case.

⁹⁹ *Old St Boniface Residents Assn Inc v Winnipeg (City)* [1990] 3 SCR 1170 [*Old St Boniface*].

challenged the approval on the basis that the councillor was biased, and therefore breached the association's right to a fair hearing.

In discussing whether procedural fairness or natural justice applied in the situation, Sopinka J first dealt with the place of *Wiswell*. While the applicants argued that *Wiswell* meant that the bylaw hearing was a quasi-judicial one, and therefore must be conducted in an unbiased fashion, Sopinka J did not think it was on point any longer.¹⁰⁰

Wiswell must be read in light of comparatively recent changes that have occurred in applying the rules of natural justice. The content of the rules of natural justice and procedural fairness were formerly determined according to the classification of the functions of the tribunal or other public body or official. This is no longer the case and the content of these rules is based on a number of factors including the terms of the statute pursuant to which the body operates, the nature of the particular function of which it is seized and the type of decision it is called upon to make. This change in approach was summarized in *Syndicat des employés de production du Québec et de l'Acadie v. Canada (Canadian Human Rights Commission)*, [1989] 2 S.C.R. 879. I stated (at pp. 895-96):

Both the rules of natural justice and the duty of fairness are variable standards.

Their content will depend on the circumstances of the case, the statutory provisions and the nature of the matter to be decided. The distinction between them therefore becomes blurred as one approaches the lower end of the scale of judicial or quasi-judicial tribunals and the high end of the scale with respect to administrative or executive tribunals. Accordingly, the content of the rules to be followed by a tribunal is now not determined by attempting to classify them as judicial, quasi-judicial, administrative or executive. Instead, the court decides the content of these rules by reference to all the circumstances under which the tribunal operates.

The description of the way the law had changed *is* accurate: at the time *Wiswell* was decided, natural justice was only available in quasi-judicial situations, and by 1990 that was no longer the case – a more contextual approach was by then being employed. However, this statement of the law did not actually grasp the true distinction at issue in *Wiswell* or in the case at hand. The passage from *Syndicat des employés* cited by Sopinka

¹⁰⁰ *Ibid* at para 44.

J addresses the breakdown in the importance of the distinction between “judicial, quasi-judicial, administrative or executive” functions. It did not mention the distinction that was at the core of *Wiswell* and *Old St Boniface* (and, indeed, *Inuit Tapirisat*, which is again not cited here): that between those four functions and legislative functions. Sopinka J therefore failed to distinguish *Wiswell* from the factual situation in *Old St Boniface* to the extent that he apparently thought he had.

This is not to say that I think the outcome was incorrect. Sopinka J built on the above reasoning to find that the rule against bias does not apply to municipal councillors, who are democratically elected officials, sitting on a body with a multitude of functions, in the same way as it would to a more ‘judicial’ body.¹⁰¹ This argument is sound on its own and, arguably, Sopinka J’s attempt to distinguish *Wiswell* on the basis of recent changes in the law need not have been undertaken. *Wiswell* was brought into the case when, at the start of his discussion of natural justice, Sopinka J stated that “The rules which require a tribunal to maintain an open mind and to be free of bias, actual or perceived, are part of the *audi alteram partem* principle which applies to decision-makers.”¹⁰² As the discussion of natural justice in Chapter III should make clear, this classification is not correct. While both rules are part of natural justice, the rule against bias and *audi alteram partem* are separate rules with separate, if related, rationales. Sopinka J could quite easily have distinguished *Wiswell* by arguing that *Old St Boniface* was a bias case and *Wiswell* was not. The distinction is important because the requirements of rule against bias will obviously be mitigated when applied to elected representatives such as municipal councillors – who are elected at least partly on the basis of their pre-existing beliefs – in a way that *audi alteram partem* may not be. *Wiswell* could have been distinguished entirely on this basis. Discussing the changes to the law of procedural fairness was unnecessary.

The end result of the failure to squarely address the nature of the decision at issue in *Wiswell* and the related failure to distinguish between the rule against bias and *audi alteram partem*

¹⁰¹ *Ibid* at paras 46 to 59.

¹⁰² *Ibid* at para 41.

is that *Old St Boniface* effectively held that the classification of the type of decision being made does not matter in deciding whether natural justice/procedural fairness applies. *Inuit Tapirisat* was simply not mentioned, and the analysis assumed that *Wiswell* would have used the *Syndicat des employés* approach if it was decided in 1990. This would mean, according to Sopinka J's approach, that the majority in *Wiswell* would not have had to stretch to classify bylaw-making as a quasi-judicial function, but could still have found that procedural fairness applied. This looks very close to implying that procedural fairness could apply to some functions that are legislative and policy orientated. This does not appear to have been Sopinka J's intent, but if we take his reasoning at face value that is what the case said.

It does not seem possible to reconcile the prominent line of cases which stem from and follow *Inuit Tapirisat* – notably *Cardinal*, *Knight*, and *Baker* – with the cases discussed in this section. The latter seem to largely ignore *Inuit Tapirisat's* bar on applying procedural fairness, instead allowing various degrees of procedural fairness to apply to what are, at least as a matter of law, legislative decisions, while the former see the case as laying down a key part of the boundaries of procedural fairness.

2 Recent Developments

Two more recent SCC cases followed the approach of *Homex* by essentially ignoring *Inuit Tapirisat*, but take it a step further. The first of these, *Canadian Pacific Railway v Vancouver (City)*, concerned a challenge to an Official Development Plan By-law (“ODP By-law”) which affected Canadian Pacific Railway's land on the basis of, amongst other things, a breach of the duty of fairness.¹⁰³ The Council sent out a letter to residents of the area concerned, stating that a public hearing would be held on what to do with the land but that no decisions would be made as a result of that hearing. However, following the public meeting, the Council zoned the land in a manner that was detrimental to CPR's interests.

¹⁰³ *Canadian Pacific Railway v Vancouver (City)*, 2006 SCC 5, [2006] 1 SCR 227 [*Canadian Pacific*].

On the issue of fairness, McLachlin J, writing for the unanimous SCC, started by setting out the basic scope and content of procedural fairness from *Baker*, then commented:¹⁰⁴

The *Vancouver Charter* imposes no statutory requirement to hold a public hearing before adopting an ODP. However, given the potential impact of the ODP By-law on CPR in this case, there can be little doubt that the City owed it a duty of fairness. The City sought to fulfil this duty through the public hearing process, which it is required to conduct prior to zoning by-laws: see *Vancouver Charter*, s. 566(1). The issue here is whether the City's conduct in relation to CPR meets the standard of fairness with reference to the factors set out in *Baker*.

One of the arguments raised by CPR was that, given the letter to residents, it had a legitimate expectation that no decisions would be made following the meeting without it having a chance to comment first. McLachlin J responded to this argument as follows:¹⁰⁵

Whether the City acted contrary to legitimate expectations must be decided in the context of the nature of the City's decision-making power, the statutory scheme and the City's role in arriving at a decision that is in the interest of the whole city. ... The decision-making process is not judicial, but legislative. The City Council exercises discretionary power in the public interest. CPR had a special interest because of its ownership of the land affected, but the impact of the by-law was much broader, potentially affecting many other private and public citizens.

Ultimately, the Court found that CPR's right to a fair process had not been breached.¹⁰⁶ What was important here, however, was that in the middle of a discussion of whether procedural fairness has been breached, the Court classified the ODP By-law process as legislative. It was also clearly flagged as having polycentric attributes – the interests of many private citizens and public bodies will be affected in different ways by any decision that is made. There was no issue raised as to whether fairness applies or not; it was stated that there is “little doubt” that it does. *Inuit Tapirisat* was not cited, nor were the passages from *Baker*, *Cardinal*, and *Knight* which repeat the former case's exclusion of procedural fairness from the legislative realm. Quite simply, the Court in *Canadian Pacific* ignores

¹⁰⁴ *Ibid* at para 40.

¹⁰⁵ *Ibid* at para 48 (emphasis added).

¹⁰⁶ *Ibid* at paras 62-63.

this aspect of procedural fairness law with no explanation, and finds unambiguously that fairness applies to a legislative decision.

A similar approach is taken in *Catalyst Paper v District of North Cowichan*, with McLachlin CJ again writing for the Court.¹⁰⁷ The case concerned a corporation attempting to have a municipal taxation bylaw set aside on the basis that it was unreasonable. Obviously, as a substantive review case, a reasonableness analysis takes up most of the analysis in the judgment. However, in introducing the nature of review, McLachlin CJ stated that:¹⁰⁸

A municipality's decisions and bylaws, like all administrative acts, may be reviewed in two ways. First, the requirements of procedural fairness and legislative scheme governing a municipality may require that the municipality comply with certain procedural requirements, such as notice or voting requirements...

This statement can be read two ways. First, if this phrasing is taken literally, bylaw-making could be seen as an administrative act like other decisions, rather than a legislative one. As was discussed above, I consider that the analogy between primary and delegated legislation is not as close as the terms may imply, and I would welcome any suggestion from the SCC that this executive law-making is not truly legislative. However, it is also possible that the above phrase was simply poorly written, and was intended to say that bylaws, just like administrative decisions, are amenable to procedural review. This is, I think, the more likely interpretation, as it is consistent with *Canadian Pacific*, but even this is inconsistent with the more prominent cases that follow on from *Inuit Tapirisat*.

3 *The Waning Force of Inuit Tapirisat?*

This split in the jurisprudence of the SCC is confusing enough, but lower courts have also taken another tack in avoiding the rule from *Inuit Tapirisat*. Obviously such courts cannot ignore or sideline *Inuit Tapirisati* as easily as the SCC, so a different tactic was required.

¹⁰⁷ *Catalyst Paper v District of North Cowichan*, 2012 SCC 2, [2012] 1 SCR 5 [*Catalyst Paper*].

¹⁰⁸ *Ibid* at para 12.

The one most commonly used was to essentially resurrect the *dictum* from *Wiswell*: namely that some decisions that appear legislative are not really legislative.

These cases rely on one or both of *Wiswell* and the commentary from John Evans (later to be Evans JA of the Federal Court of Appeal), first in the 4th edition of *De Smith* and later in his own (Canadian) text with Donald Brown, QC.¹⁰⁹ The most recent iteration of this statement from Evans and Brown was well summarised in the Alberta Queen’s Bench case of *Evraz Inc NA Canada v Alberta*:¹¹⁰

Brown and Evans, in *Judicial Review of Administrative Action in Canada*, discuss the characteristics that must be considered in determining whether Cabinet is exercising a legislative power. The first is the element of generality: “the power is of general application and when exercised will not be directed at a particular person.” (7:2330). The second is that “its exercise is based essentially on broad considerations of public policy, rather than on facts pertaining to individuals or their conduct.” (7:2330). The authors further note that generally when the exercise of a power takes the form of making a regulation, a by-law, or order-in-council, the power is legislative in nature. However, the form of the instrument will not be determinative, as the context will be important in determining whether the action is more legislative or more judicial.

Wiswell was given as an example of a case in which a by-law is in fact not an exercise of legislative power. Other cases which classified formally legislative acts as *de facto* administrative or quasi-judicial include *Maple Ridge (District) v. Thornhill Aggregates Ltd.*,¹¹¹ *Petherbridge v Lethbridge (City)*,¹¹² and *PJD Holdings Inc v Regina (City)*.¹¹³

All of the approaches discussed in this section – *Wiswell* and the more recent lower court cases which draw on it, *Homex*, *Canadian Pacific*, *Catalyst Paper*, and arguable even *Old St Boniface* – take an approach to the scope of procedural fairness that conflicts with or

¹⁰⁹ Donald J M Brown and John M. Evans, *Judicial Review of Administrative Action in Canada* (Toronto: Carswell, 2009) (loose-leaf).

¹¹⁰ *Evraz Inc NA Canada v Alberta*, 2012 ABQB 173 at para 118.

¹¹¹ *Maple Ridge (District) v. Thornhill Aggregates Ltd* (1998), 162 DLR (4th) 203. See especially paras 66 to 72.

¹¹² *Petherbridge v Lethbridge (City)*, 2000 ABQB 699, (2000) 274 AR 159. See especially paras 19 to 23.

¹¹³ *PJD Holdings Inc v Regina (City)*, 2010 SKQB 386. See especially paras 31 to 42. Note that this case was decided after *Canadian Pacific*, and adopts that case’s approach of using the type of decision made to calibrate the *content* of procedural fairness, not the scope.

subverts the absolute bar in *Inuit Tapirisat* on applying fairness to legislative functions. This bifurcation suggests that the Canadian judicial system is at war with itself: aware, up to the level of the SCC, that denying procedural fairness in some legislative cases is unjust, but unwilling to address or overrule *Inuit Tapirisat*. In a recent decision, the SCC has shown that it may be willing to move away from *Inuit Tapirisat* in the future. In *Canadian National Railway Co v Canada (Attorney-General)*, Rothstein J discussed *Inuit Tapirisat*'s interpretation of the predecessor statute of the law at issue in *Canadian National*, noting:¹¹⁴

As Estey J. explained, “[t]here can be found in s. 64 nothing to qualify the freedom of action of the Governor in Council, or indeed any guidelines, procedural or substantive, for the exercise of its functions under subs. (1)” (p. 745) (Although Estey J.’s conclusion, at p. 759, that the trappings of procedural fairness could not be implied into the provision may not represent the current view of how natural justice operates in an administrative context, the issue of procedural fairness owed by the Governor in Council is not before this Court.)

Rothstein J here clearly questioned whether *Inuit Tapirisat* still represents the current law on the application of fairness. That said, he explicitly noted that the issue is not before the Court in *Canadian National*, made no firm conclusion either way on whether his hunch that *Inuit Tapirisat* “may not” represent the law was correct, and placed the comment in a parenthetical aside. This was as *obiter* a statement as it is possible to find. If this is a signal that the SCC plans to substantively address *Inuit Tapirisat* in the near future, this is to be welcomed. However, as it stands, *Inuit Tapirisat* continues to be applied by lower courts and, with two largely contradictory lines of jurisprudence that do not engage with each other at all, the scope of procedural fairness continues to be unclear and incoherent.

F Conclusion

There is no good reason for *Inuit Tapirisat* to continue as good law. The Canadian duty of fairness emphasises the importance of being fair to persons affected by administrative decisions, without regard to exactly how that decision is classified. This was made clear

¹¹⁴ *Canadian National Railway Co v Canada (Attorney-General)*, 2014 SCC 40, [2014] 2 SCR 135 at para 39 (emphasis added) [*Canadian National*].

in *Knight* at the absolute latest. Instead of relying on mostly meaningless fine distinctions, the content of the duty is determined on a contextual basis depending on the factors set out in the *Baker* synthesis. Shielding delegated legislation from procedural fairness seems grossly inconsistent with this general approach. The general approach has abandoned formalism; the rule in *Inuit Tapirisat* reinforces it. The general approach applies the duty to be fair broadly and contextually; the rule in *Inuit Tapirisat* is narrow and absolute.

Cartier suggests, and I agree, that *Inuit Tapirisat* can to a large degree be explained by judicial nervousness in the wake of *Nicholson*.¹¹⁵ *Nicholson* had resulted in a large expansion of the circumstances in which the duty to be fair applied, and the Court was probably eager to show that it did not intend to lightly interfere with the perceived will of the legislature. *Inuit Tapirisat* was a particularly extreme example of a legislative power, one where it would be very hard to argue that procedural fairness should apply, so it was perfect for this purpose. As Cartier puts it:¹¹⁶

At the time *Inuit Tapirisat* was decided, and given the contested nature of *Nicholson*, refusing to recognize implied procedural obligations in the field of legislative functions seemed to be the price to pay for the acceptance of procedural fairness in particularistic, individual decision making.

The politics of *Inuit Tapirisat* may be understandable, but its continued status as good law is not. It relies on outdated precedent and a misleading definition of legislative functions and, at least in the case of bylaws, the SCC seems to selectively ignore it. It is inconsistent with the otherwise broad duty of fairness in Canada, and should be discarded. An alternative approach without this clear bar on applying fairness to legislative functions has been signalled by *Catalyst Paper* and *Canadian Pacific*, but this has not gained widespread acceptance outside the bylaw context. The tools for procedural fairness to facilitate citizen control over delegated law-making are there, either in the current law or in similar cognate and comparative areas of law. The general shape of the doctrine and SCC jurisprudence such as *Crevier* and the *Quebec Secession Reference* suggest that Canadian Administrative

¹¹⁵ Cartier, *supra* note 28, at 219-220.

¹¹⁶ *Ibid* at 220.

Law ought to be able to achieve this normative goal of citizen control, or at least get much closer to it than is currently the case. If Canada's administrative state is to be truly legitimate, a change to something resembling the approach in *Catalyst Paper* and *Canadian Pacific* is needed.

CHAPTER V OTHER MODELS OF PARTICIPATION

In Chapter IV, I identified two related reasons that the Canadian law concerning procedural fairness undermines its own rationale: an adjudicative fixation and a lack of coverage for legislative and policy decisions. These issues mean that current Canadian doctrine fails to further the dual purposes I identified procedural fairness as serving in Chapter III: the protection of individual rights and ensuring the legitimacy of the administrative state. This lacuna in coverage means that current administrative law does not protect the rights of those affected by legislative executive decisions, and that legislative decision-making is not subject to citizen control, as my participatory model of legitimacy (set out in Chapter II) requires. In addition, the adjudicative focus of Canadian procedural fairness means that the courts do not even consider methods for extending procedural protections into the legislative sphere. The shape of the doctrine is such that the matter is almost never litigated and when it is, as discussed in Chapter IV, the courts do not substantively engage with what procedural fairness might mean in the legislative context.

The absence of law in this area ought to be remedied, and the tools largely exist within current Canadian administrative law to expand procedural fairness into the legislative realm. Those elements that are not present in Canadian administrative law can be sourced from cognate doctrines in Canada or by drawing on the comparative experience of other common law jurisdictions. As discussed in Chapter IV, the justifications offered for the status quo – a focus on adjudication as the ‘best’ form of decision-making and the concerns about the separation of powers represented by *Attorney General of Canada v. Inuit Tapirisat et al* – are relatively flimsy.¹ They certainly do not justify the absolute bar on expanding fairness into legislative executive action that persists in Canada.

If Chapter IV focused on the internal inconsistencies of Canadian administrative law, this chapter looks at exactly how cognate domestic law and comparative administrative law can help fill the gaps. It explores the different forms of non-adjudicative participation that exist

¹ *Attorney General of Canada v. Inuit Tapirisat et al*, [1980] 2 SCR 735 [*Inuit Tapirisat*].

in the administrative law doctrines of the United Kingdom, New Zealand, and Australia and in the Canadian aboriginal law sphere, with the aim of showing that legally imposed non-adjudicative versions of fairness are both possible and common, even in the absence of explicit statutory consultation requirements.

The courts in the United Kingdom and New Zealand both grant participatory rights in non-adjudicative contexts where there is a legitimate expectation of participation, even in the absence of a statutory consultation requirement. Even more interestingly, Australian law, which is otherwise very similar to Canadian law in this area, has moved entirely away from the legislative/adjudicative/administrative set of distinctions relied on in Canada to determine the applicability of procedural fairness. In addition, there is significant jurisprudence in the United Kingdom and New Zealand in particular on what fair procedures might look like outside of an adjudicative context. Such jurisprudence does not exist in Canada.

These are all jurisdictions with narrower, less flexible approaches to administrative law in general and procedural fairness in particular than Canada. Yet all have grappled with the idea of what to do with legislative decisions more seriously and more recently than Canadian courts. Even those routes which cannot profitably be followed in Canada can be useful as an illustration of how other Commonwealth judges have worked through these issues in contexts where justice might seem to demand participatory rights but where Canadian judges have not even attempted to do so.

Finally, the obligation to consult and accommodate at aboriginal law shows that an area of law built partially on procedural fairness is already being used to grant participatory rights in non-adjudicative contexts. While not identical to administrative law procedural fairness, aboriginal law consultation is a meaningfully comparable area of law, and shows a domestic context where the courts are not afraid to use the tools available to them to impose generally applicable participatory rights.

A Common Law Consultation

As noted above, there is significant case law elsewhere in the Commonwealth on procedural fairness in a legislative context. I consider that it can be usefully adapted to the Canadian situation. The fact of its existence also throws into relief the Canadian courts' failure to engage with process rights where courts elsewhere in the common law world quite readily do so.

Most of this jurisprudence takes the form of the doctrine of common law consultation. As G D S Taylor states, "consultation" in these jurisdictions is essentially a synonym for procedural fairness when the decision-making process to which it is applied is non-adjudicative, consultation being "distinct from natural justice only in that it is a specific degree of intensity of natural justice."² When I use the term "consultation" this is what I mean – a generally lower-intensity form of procedural fairness typically applied in non-adjudicative settings. While this doctrine has only been used in limited circumstances to confer participation rights in the absence of an explicit statutory consultation obligation or legitimate expectation to consultation, it is a detailed body of law that gives content to the idea of procedural fairness in a legislative context. Detailed statutory consultation procedures can override the expectations of procedural fairness to some extent, but if there is just a bare obligation to consult (and many of the relevant statutes here do simply instruct officials to "consult"), courts enforcing this obligation are largely applying the law of procedural fairness. The statute provides the trigger, the common law the content. Looking at common law consultation therefore provides a good idea of how the common law can develop procedures which are appropriate for non-adjudicative contexts. It also shows the difficulty other jurisdictions have had in expanding the scope of procedural fairness to legislative decisions. Both the successes and failures in this regard are worthy of consideration.

² G D S Taylor, *Judicial Review: A New Zealand Perspective*, 2d ed, (Wellington: LexisNexis, 2010) at para 13.15.

The body of law on consultation descends from the United Kingdom cases of *Fletcher v Minister of Town & Country Planning*³ and *Rollo v Minister of Town & Country Planning*,⁴ and has been virtually ignored in Canada's common law jurisdictions.⁵ Although this law originated in the United Kingdom, significant jurisprudence has also developed in New Zealand in the last thirty years, following the adoption of *Port Louis Corporation v Attorney-General of Mauritius*⁶ in *Prebble v West Coast United Council*.⁷ Australian law diverges somewhat from the other two jurisdictions on the content of fairness, but does have some relevant cases on consultation, and also some useful law on when procedural fairness rights can be triggered.

1 Scope

a United Kingdom

The experience of the United Kingdom shows a jurisdiction with a generally narrower approach to procedural fairness working creatively to expand from that narrow foundation where required. *Inuit Tapirisat*, the case which founds Canada's exclusion of rulemaking from the scope of procedural fairness, relied upon *Bates v Lord Hailsham* as authority.⁸ As was discussed at some length in Chapter IV, *Bates* is not (and arguably has never been) authority for any such proposition in the United Kingdom.⁹ It was all but overruled in *R*

³ *Fletcher v Minister of Town & Country Planning*, [1947] 2 All ER 496 [*Fletcher*].

⁴ *Rollo v Minister of Town & Country Planning*, [1948] 1 All ER 13 [*Rollo*].

⁵ The only engagement with these cases that I could find was in two provincial appellate court decisions: the Alberta Court of Appeal in *Lakeland College Faculty v Lakeland College*, 1998 ABCA 221, (1998) 162 DLR (4th) 338 (see in particular paragraphs 33-38) and the British Columbia Court of Appeal in *Gardner v. Williams Lake (City)*, 2006 BCCA 307 (available on CanLII) (see in particular paragraphs 22-31) [*Gardner*]. See also *Jackson, Hebbard and Swanson v. Vancouver Regional Transit Commission* (1986), 4 BCLR (2d) 321 (BCSC). Evans JA also deals briefly with the concept of administrative law consultation (without citing the United Kingdom cases) in his dissent in *Apotex Inc v Canada (Attorney General)*, [2000] 4 FC 264 (CA), 188 DLR (4th) 144 [*Apotex*].

⁶ *Port Louis Corporation v Attorney-General of Mauritius*, [1965] AC 1111 (PC) [*Port Louis*].

⁷ *Prebble v West Coast United Council*, [1988] 12 NZTPA 399 (HC) [*Prebble*].

⁸ *Bates v Lord Hailsham*, [1972] 1 WLR 1373 [*Bates*].

⁹ See section IV(D)(2)(b) above.

(on the application of BAPIO Action Ltd.) v. Secretary of State for the Home Department.¹⁰

The concurring reasons of Sedley LJ in that case were later adopted by the United Kingdom Supreme Court (“UKSC”) in *Bank Mellat v Her Majesty's Treasury (No. 2)*,¹¹ providing a wider concept of when procedural fairness might apply than had previously been the case, namely it applies to even legislative decisions when someone is individually targeted by said decision.

Specifically, the relevant case law makes clear that participation rights in the form of consultation will apply where provided by statute or where legitimate expectations require.¹² In other circumstances, procedural fairness will apply when a person is individually targeted by delegated legislation, and arguably in other situations where the statutory scheme permits. Legitimate expectations are not, for reasons discussed below, a particularly useful method for expanding Canadian procedural fairness, so this aspect is only touched on briefly. Similarly, the statutory requirements trigger is relatively self-explanatory so is only briefly discussed. The application of procedural fairness in other circumstances is the most interesting, and is discussed in the most detail.

i Statutory requirement

Statutory consultation requirements are relatively self-explanatory. When a regulation-making power in a statute requires a decision maker to consult before promulgating regulations (or other rules), a court will enforce this obligation, and interpret that obligation to ensure it is consistent with the requirements of procedural fairness. The courts obviously enforce statutory consultation obligations in Canada as well; the key difference is they do not engage substantively with what the obligation to consult actually means – there is no

¹⁰ *R (on the application of BAPIO Action Ltd.) v. Secretary of State for the Home Department*, 2007 EWCA Civ 1139, [2008] ACD 7 [*BAPIO*]. This particular point was unaffected by the subsequent House of Lords appeal.

¹¹ *Bank Mellat v Her Majesty's Treasury (No. 2)*, 2013 UKSC 39, [2013] 4 All ER 533 [*Bank Mellat (No. 2)*].

¹² See Taylor, *supra* note 2 at paras 13.75-13.78.

coherent body of Canadian administrative law on what it means to be properly consulted. As is discussed below, this is in stark contrast to the situation in the United Kingdom.

There is also some United Kingdom authority supporting the idea that an obligation to consult can be implied by statute. In *Findlay v Secretary of State for the Home Department*, Lord Scarman appeared prepared to imply a duty to consult from statute in much the same way as any other aspect of procedural fairness that would apply in an adjudicative decision-making context.¹³ However, on the facts of the case, he did not find that any duty to consult could be implied.¹⁴ While there is not a huge amount of other authority on this point, it is safe to conclude that in at least some circumstances a duty to consult can be imposed by necessary implication from the statutory scheme.¹⁵

ii Legitimate Expectations

The doctrine of legitimate expectations is generally traced back to a pair of judgments by Lord Denning in the mid 20th century. The concept was first mentioned in 1969 in *Schmidt v Secretary of State for Home Affairs*.¹⁶ This case involved foreign Scientologists having extensions to their visas refused without the opportunity to present their cases. In his judgment, Lord Denning noted that a duty of fairness would be owed to a person where “he has some right or interest, or, I would add, some legitimate expectation, of which it would not be fair to deprive him without hearing what he has to say.”¹⁷

¹³ *Findlay v Secretary of State for the Home Department*, [1985] 1 AC 318.

¹⁴ *Ibid.* See also *R v Secretary of State for Transport, ex parte Greater London Council*, [1986] QB 556, [1985] 3 All ER 300, where McNeill J finds a duty to consult implicit in the statutory scheme by following the same sort of analysis that one would undertake when determining whether any other aspect of procedural fairness was implicitly required by statute. Further, as G D S Taylor notes, McNeill J explicitly groups consultation in with legitimate expectations, natural justice, and procedural fairness (*Greater London Council* at 587) Taylor, *supra* note 2 at para 13.76.

¹⁵ See also discussion in Taylor, *supra* note 2 at paras 13.76 and 13.78 and Jonathan Auburn QC, “Consultation” (conference paper, April 2008) at 2-4 [unpublished].

¹⁶ *Schmidt v Secretary of State for Home Affairs*, [1969] 2 Ch 149 (CA) [*Schmidt*].

¹⁷ *Ibid* at 170.

The idea of legitimate expectations set out in this passage is designed to provide some sort of procedural protection to those who may not have what could strictly be called a right or interest affected by an administrative decision. Under the general formula of procedural fairness adopted in *Ridge v Baldwin*, a person needed to have a right or interest that was so affected before procedural fairness would apply.¹⁸ This test is narrower than the Canadian one. As discussed in Chapter IV, in Canada procedural fairness applies to any (non-legislative) decision which affects the rights, interests, or *privileges* of any person.¹⁹ The additional protection for “privileges” considerably broadens the baseline coverage of Canadian procedural fairness. With no such coverage for privileges in the United Kingdom, the doctrine of legitimate expectations acts as a context-dependent expansion to the usual requirement for a person’s rights or interests to be implicated. While the Canadian doctrine also used to function as a threshold expansion, it has since *Baker v. Canada (Minister of Citizenship and Immigration)* spoken only to the content of procedural rights.²⁰

Since *Schmidt*, the case law in the United Kingdom has made it clear that legitimate expectations to either a specific substantive outcome *or* a specific process can found a right to procedural fairness.²¹ Where past practice by a public body has created such an expectation, this can also create a legitimate expectation that such past practice will be followed.²² It was unclear for a number of years whether a substantive expectation could found a substantive right. This lack of clarity was resolved in the case of *R v North and*

¹⁸ *Ridge v Baldwin*, [1964] AC 40. See discussion of this point in David Wright, “Rethinking the Doctrine of Legitimate Expectations in Canadian Administrative Law” (1997) 35 Osgoode LJ 141 at 143 to 145.

¹⁹ *Cardinal v Director of Kent Institution*, [1985] 2 SCR 643 at 653.

²⁰ *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 174 DLR (4th) 193. See also Grant Huscroft “From Natural Justice to Fairness” in Colleen Flood and Lorne Sossin, eds, *Administrative Law in Context*, 2d ed, (Toronto: Emond Montgomery, 2013) at 169-170.

²¹ The foundational case regarding substantive expectations creating procedural rights is *R v Liverpool Corporation, ex parte Liverpool Taxi Fleet Operators Association*, [1972] 2 QB 299, Lord Denning. See also *R v Secretary of State for the Home Department, ex parte Khan*, [1985] 1 WLR 1337. The key case regarding a promise of a particular procedure creating procedural rights is *Attorney-General of Hong Kong v Ng Yuen Shiu*, [1983] 2 AC 629.

²² *Council of Civil Service Unions v Minister for the Civil Service* (the “*GCHQ Case*”), [1985] AC 374. The case is also very well known for finding that natural justice applied to the exercise of prerogative powers.

East Devon Health Authority, Ex parte Coughlan, which confirmed that legitimate expectations could in some circumstances give rise to substantive rights.²³

Importantly, legitimate expectations can expand the duty to fairness into the realm of legislative decision-making, expanding the scope of procedural fairness significantly wider than in Canada. This applies even to general rulemaking, where there had been a past practice or promise of consultation.²⁴ The relative position of the two jurisdictions is well summarised by David Wright:²⁵

The Canadian concept of "rights, interests, or privileges" is broader than the British concept of "rights, interests, or legitimate expectations," since there are privileges that would not be classified as legitimate expectations. However, a legislative decision that affects privileges is not subject to the duty of fairness in Canada, while a legislative decision affecting legitimate expectations is subject to review in Britain. Therefore, someone subject to an administrative decision who had a privilege but not a legitimate expectation would have procedural protection in Canada but not in Britain; someone subject to a legislative decision who had a legitimate expectation would have protection in Britain but not in Canada.

iii General application of procedural fairness in other circumstances

The status of any participation rights (i.e. consultation) outside of those provided in statute or via legitimate expectations is a rapidly developing area of law. While the issue was not really litigated for some time after *Bates v Lord Hailsham*, it has been squarely addressed in recent years.²⁶ As noted in Chapter IV, in *BAPIO* Sedley LJ dismissed the Government's

²³ *R v North and East Devon Health Authority, Ex parte Coughlan*, [2001] QB 213 (HL) [*Coughlan*]. At paragraph 24, the court held that a substantive legitimate expectation could be created in situations where taking a different course of action from that promised would result in an abuse of power. If this occurred, the courts are required to weigh the requirements of fairness against any overriding policy reason relied upon for the change of position. The cases where the courts will enforce a substantive expectation will typically be those that concern only one person or a few people, where what was promised is extremely important to the applicant, and where the government would suffer only financial consequences from keeping its promise (see para 60).

²⁴ See discussion in Paul Craig, *Administrative Law*, 6th ed, (London: Sweet & Mawell, 2008) at para 12-028. See also *R (on the application of Greenpeace Ltd) v Secretary of State for Trade and Industry*, 2007 EWHC Admin 311, [2007] NPC 2.

²⁵ Wright, *supra* note 18 at 144.

²⁶ *Bates v Lord Hailsham* [1972] 1 WLR 1373, [1972] 3 All ER 1019 [*Bates*].

argument, based on *Bates*, that Parliament must be presumed to have intended to exclude participation in the making of delegated legislation if the empowering provision remains silent, arguing that accepting such a proposition would “invert... the rationale of procedural fairness.”²⁷

Sedley LJ thus did not see any formal bar to applying procedural fairness to delegated legislation. He also appeared to overrule the core dictum from *Bates*; that procedural fairness cannot apply to legislative decisions. Maurice Kay LJ, in his separate judgment, also noted that he agreed with Sedley LJ that *Bates* “is not or is no longer on point.”²⁸ This being said, the appellant ultimately lost its argument that a duty to consult existed. This is because while *BAPIO* confirms that there are no absolute doctrinal barriers to the application of procedural fairness, it also identifies significant practical barriers to applying such a duty to the making of delegated legislation.

Sedley LJ confined his comments to the particular process for amending the Immigration Rules under section 3 of the *Immigration Act 1973*. He noted that *BAPIO* has not been able to propose any limits to the generality of its proposed duty, and that several difficult issues arise, such as the level of interest required before consultation would be required, whether any interests should be excluded, and how consultation should be carried out.²⁹ All these interests would be possible triggers for litigation, and all would have to be determined by the courts.³⁰ Such determinations by the court would, Sedley LJ stated, risk breaching the separation of powers.³¹ He did not see such factors as necessarily making a general right to some sort of participation “unthinkable”,³² but the heavily contextual questions inherent in consultation, and the different types of consultation that specifically

²⁷ *BAPIO*, *supra* note 10 at para 35.

²⁸ *Ibid* at para 58, Maurice Kay LJ.

²⁹ *Ibid* at para 44, Sedley LJ.

³⁰ *Ibid*.

³¹ *Ibid* at paras 44 and 47, Sedley LJ.

³² *Ibid* at para 45, Sedley LJ.

prescribed by different statutes, led him to conclude that in the circumstances of the case at least:³³

[I]f it [a duty to consult] is to be introduced it should be by Parliament and not by the courts. Parliament has the option, which the courts do not have, of extending and configuring an obligation to consult function by function. It can also abandon or modify obligations to consult which experience shows to be unnecessary or unworkable and extend those which seem to work well. The courts, which act on larger principles, can do none of these things.

Importantly, he qualified this statement by adding that he was “not seek[ing] to elevate this to a general rule that fairness can never require consultation as a condition of the exercise of a statutory function.”³⁴ If, in the particular circumstances of the case, a duty to consult that will not conflict with the “principles of public administration that are also part of the common law”³⁵ (such as those discussed above) can be determined, it would seem that Sedley LJ would be open to recognizing such a duty.

In the other substantial judgment in the case, however, Maurice Kay LJ held that the fact that Immigration Rules must be laid before Parliament and are subject to a negative resolution procedure was important. He stated that:³⁶

As a matter of principle, I consider that where Parliament has conferred a rule-making power on a Minister of the Crown, without including an express duty to consult, but subject to a Parliamentary control mechanism such as the negative resolution procedure, it is not generally for the courts to superimpose additional procedural safeguards. In one sense, this view gains support from the reasoning by reference to which Sedley LJ would dismiss the appeal. The lack of specificity and the absence of a clear principle of limitation which exist in the present case would, in my view, be present in most cases in which an unexpressed duty to consult might be postulated.

³³ *Ibid.*

³⁴ *Ibid* at para 47, Sedley LJ.

³⁵ *Ibid* at para 43, Sedley LJ.

³⁶ *Ibid* at para 58, Maurice Kay LJ.

Rimer LJ agreed with Maurice Kay LJ on this point,³⁷ so this it is this version of the duty to consult that constituted the majority statement. This rule might appear to completely bar the application of procedural fairness to delegated legislation where a Parliamentary control mechanism exists. Subsequent caselaw, however, suggests that Maurice Kay LJ's pronouncement was not this absolute, and instead functions as a rebuttable presumption that no procedural safeguards should be superimposed when a procedure, however scant, has been prescribed by Parliament.³⁸

Although Sedley LJ was in the minority in *BAPIO*, the UKSC later confirmed that his approach on the issue of procedural fairness in non-adjudicative situations is to be preferred. Building on Sedley LJ's comments in *BAPIO*, the UKSC in *Bank Mellat (No. 2)* (in particular the judgment of Lord Sumption) suggested that procedural fairness ought to always apply when a person is individually targeted, whether the targeting is administrative or legislative in form.³⁹ *Bank Mellat (No. 2)* concerned a statutory Order issued under the *Counter-Terrorism Act 2008* which prohibited anyone in the United

³⁷ *Ibid* at para 64, Rimer LJ.

³⁸ Additional support for this interpretation is gained by examining some of Maurice Kay LJ's judgments following *BAPIO*. In particular, in *R on the application of "C" (a Minor, by his litigation friend MS) v Secretary of State for Justice*, 2008 EWHC 171 (Admin) (available on BaILOI), writing for himself and Burton J, Maurice Kay LJ considered his own judgment from *BAPIO*. The case concerned a challenge to a change in the rules for Secure Training Centres (essentially a form of juvenile prison) to allow wider use of physical restraint. As required by the statutory scheme, the rules had been laid before Parliament. One of the grounds of challenge was a failure to consult the Children's Commissioner before making the changes. *BAPIO* was brought up in argument, and Maurice Kay LJ addressed these arguments as follows (at para 4):

Mr Starmer is correct in submitting that the above passage from *BAPIO*, [para 58 of *BAPIO*] does not say that a statutory duty to consult can never arise absent an express requirement. The use of the word "generally" was deliberate. This leads Mr Starmer to submit that the present case falls outside the general rule.

Ultimately the court found (at para 24) that there was nothing to rebut the application of the general rule. Importantly, however, this passage confirms that Maurice Kay LJ's judgment in *BAPIO* laid down not an absolute rule but a rebuttable presumption against the application of procedural fairness where Parliamentary oversight procedures applied to delegated legislation. Maurice Kay LJ again refused to rule out the possibility of a common law duty to consult in some circumstances, albeit declining to find one in the circumstances, in *Bank Mellat v HM Treasury*, 2011 EWCA Civ 1, [2012] QB 101 (see especially paras 57-63). The narrow view he took of the circumstances where this could happen was overruled by the UKSC in *Bank Mellat v Her Majesty's Treasury (No. 2)*, *supra* note 11.

³⁹ *Bank Mellat (No. 2)*, *ibid*.

Kingdom from transacting with Bank Mellat, a major Iranian commercial bank. The bank's assets were frozen on the basis that it was involved in financing the development of nuclear, radiological, biological or chemical weapons in Iran in a manner that posed a risk to the United Kingdom. Bank Mellat was the only Iranian bank targeted, despite others also being active in the United Kingdom. Bank Mellat challenged the order on both procedural and substantive grounds. It lost in the High Court and in the Court of Appeal, finally appealing to the UKSC, again on both substantive and procedural grounds. It won the appeal on both grounds, but it is the Court's comments on the procedural issues that are of particular interest for this thesis.

Orders which impose the sort of restrictions imposed upon Bank Mellat are required by the *Counter-Terrorism Act 2008* to be laid before Parliament.⁴⁰ If they are not approved by affirmative resolution within 28 days, they expire.⁴¹ Writing for the majority,⁴² Lord Sumption stated that Parliamentary scrutiny of a statutory instrument did not in and of itself insulate the instrument from procedural review. Instead, he said judges who decline to review such instruments rely on three related principles:⁴³

- (a) Respect for Parliament's constitutional function (this applies especially to general, policy orientated instruments);
- (b) The significant difference between statutory instruments which supplement the general policy of the parent act and those which target individuals. The core function of procedural fairness is ensuring fairness for those individually targeted by executive actions. The doctrine does apply in a wider sense, but this must be seen as secondary, and the courts are reluctant to impose procedural requirements absent a legitimate expectation; and
- (c) The idea that "a court may conclude in the case of some statutory powers that Parliamentary review was enough to satisfy the requirement of fairness, or

⁴⁰ *Counter-Terrorism Act 2008*, Schedule 7, clause 14(2).

⁴¹ *Ibid.*

⁴² On both the substantive and procedural issues, though the combination of judges supporting each aspect of Lord Sumption's judgment differs.

⁴³ *Bank Mellat (No 2)*, *supra* note 11, at para 44.

that in the circumstances Parliament must have intended that it should be.”⁴⁴ Again, this will particularly be the case where the instrument in question concerns general policy matters.

Lord Sumption noted *BAPIO* as a case which grappled with all these considerations. He agreed with Sedley LJ’s approach in that case, thinking it “a more nuanced and accurate statement of the law than the more hard-edged formulations of Maurice Kay LJ and Rimer LJ in the same case.”⁴⁵ He then distinguished the situation in *Bank Mellat (No 2)* from *BAPIO*, noting that, unlike the immigration rules at issue in *BAPIO*, the statutory order in the case at hand individually targeted Bank Mellat.⁴⁶ Lord Sumption concluded that in a case such as this, in which a statutory instrument was so obviously targeted at specific people, scrutiny by Parliament could not possibly provide the level of fairness required.⁴⁷ He noted that in some cases, an opportunity to submit on the proposed order during its scrutiny by Parliament might be sufficient to provide the requisite degree of fairness, but that this was not possible for Bank Mellat.⁴⁸

⁴⁴ *Ibid.*

⁴⁵ *Ibid* at para 45.

⁴⁶ *Ibid* at para 46. Interestingly, Lord Sumption cites *Bates v Lord Hailsham* [1972] 1 WLR 137 as authority for *collapsing* the hard distinction between legislative and administrative functions (essentially the exact opposite of what that case is taken to mean in Canada), stating (at para 46):

In point of form, a statutory instrument embodying a Schedule 7 direction is legislation. But, as Megarry J observed in *Bates v Lord Hailsham of St. Marylebone* [1972] 1 WLR 1373, the fact that an order takes the form of a statutory instrument is not decisive: “what is important is not its form but its nature, which is plainly legislative” (page 1378). The Treasury direction designating Bank Mellat under Schedule 7, paragraph 13, was not legislative in nature. There is a difference between the sovereign’s legislation and his commands. The one speaks generally and impersonally, the other specifically and to nominate persons. ... The Treasury direction in this case was a command. The relevant legislation and the whole legislative policy on which it was based, were contained in the Act itself. The direction, although made by statutory instrument, involved the application of a discretionary legislative power to Bank Mellat and IRISL and nothing else. It was as good an example as one could find of a measure targeted against identifiable individuals.

⁴⁷ *Bank Mellat (No 2)*, *ibid* at para 47.

⁴⁸ *Ibid* at para 45.

Bank Mellat (No 2) signaled a quite significant shift in the British approach to procedural fairness. Although the three principles outlined about by Lord Sumption were laid down in the context of an Order which required a positive resolution by Parliament, they apply more widely. The second principle is of particular interest for the purposes of this thesis. It confirmed the uncontroversial position that decisions affecting individuals have historically been the core of procedural fairness, and continue to be so. The novel part of this formulation is that it declares the form of executive action effectively irrelevant: as long as the action targets identifiable individuals, it is by definition non-legislative, even if it took the form of a regulation, order-in-council, or statutory instrument. This is similar to the position taken by the majority in *Wiswell v Winnipeg* in Canada.⁴⁹ It is not as inflexible as the mainstream Canadian position adopted in *Inuit Tapirisat*, but still maintains a hard distinction between legislative and administrative decisions. That said, Lord Sumption also explicitly noted that it was possible for procedural fairness to apply more widely than this core context. Given that he said little more about how it might apply but endorsed Sedley LJ's statement of the law from *BAPIO*, it is reasonable to suggest that he also endorsed Sedley LJ's assessment of why it is difficult to apply procedural fairness in these areas, leaving these practical difficulties and associated issues of institutional competence as the main barriers to any further widening of the duty to consult.

b New Zealand

The scope of administrative law consultation in New Zealand was set out by Tipping J in *Nicholls v Health and Disability Commissioner*.⁵⁰ The case involved a challenge to the decision of the New Zealand Health and Disability Commissioner to investigate patient safety at Christchurch hospital, pre-empting a public inquiry that was to be made by the Minister of Health.

⁴⁹ *Wiswell v Winnipeg*, [1965] SCR 512 [*Wiswell*] at 520.

⁵⁰ *Nicholls v Health and Disability Commissioner*, [1997] NZAR 351 (HC) [*Nicholls*].

One of the grounds of challenge was that the Health and Disability Commissioner had failed to consult with interested parties and was under a duty to do so. In addressing this point, Tipping J set out the situations in which a duty to consult might apply:⁵¹

Conventionally a duty to consult arises in two situations and possibly a third. The first situation is where the duty is provided for expressly or impliedly by statute. The second situation is where the plaintiffs have a legitimate expectation of consultation deriving either from a promise of consultation or from past practice. ... There is room to argue that there is a duty to consult in a third and residual category of case where the demands of fairness in the particular circumstances clearly require the decision maker to consult either generally or with a particular person or persons before reaching the decision in question.

This statement of the law is still authoritative.⁵² New Zealand law thus imposes a duty to consult in three circumstances:

- (a) where consultation is expressly or impliedly required by statute;
- (b) where a person has a legitimate expectation that he or she will be consulted;
- or
- (c) (possibly) in other circumstances where the demands of fairness require either individualised or general consultation.

Tipping J made it clear that his comment on the potential third category was strictly *obiter*, as the plaintiffs in *Nicholls* fit in none of the three categories, meaning that he was not required to determine its existence or otherwise.⁵³ Nevertheless, the theoretical validity of Tipping J's third category has never been rejected. On the first two criteria, the law is very similar to that in the United Kingdom: an express or implied statutory requirement triggers a duty to consult,⁵⁴ as does a procedural or substantive legitimate expectation.⁵⁵

⁵¹ *Ibid* at 369-370.

⁵² It is, for example, relied upon in *Walsh v Pharmaceutical Management Agency* [2010] NZAR 101 (HC), and has not been overturned.

⁵³ *Ibid* at 370.

⁵⁴ As in the United Kingdom, if a statute says that an administrative decision-maker must consult before making a particular decision (including the making of regulations), he or she must consult. Likewise, this arguably extends to situations where consultation is a necessary implication of the statutory wording. Arguably, authority for implying a duty to consult is stronger in New Zealand than in the United Kingdom. See Taylor, *supra* note 2, at paras 13.76 and 13.78.

⁵⁵ See Taylor, *ibid* at para 13.75.

Justice Tipping’s third category – consultation where “the interests of justice otherwise require” – is nebulous and does not appear to have ever been litigated. However, it could at least theoretically accommodate something close to a general duty of fairness (in the context of executive rulemaking). This is because, as in the United Kingdom, *Bates* was not an important decision in New Zealand. Indeed, I have been unable to find any New Zealand case which cites *Bates* as authority for the proposition that procedural fairness does not apply to the making of delegated legislation. It and *Inuit Tapirisat* were specifically considered as potential authority for the proposition that fairness cannot apply to the making of delegated legislation in the case of *Turners & Growers Exports Ltd v Moyle*.⁵⁶ In that case, McGechan J did not definitively state that the duty of fairness applied generally to the making of delegated legislation, because the fairness argument in the case was ultimately decided on the basis of legitimate expectations.⁵⁷ However, after reviewing overseas authority, including *Bates* and *Inuit Tapirisat*, he clearly doubted they were good authority in New Zealand, stating that:⁵⁸

One ...wonders whether, on this point, New Zealand Courts need feel obliged to follow overseas tendencies. Approaches which may well be appropriate to the constitutional, political, and social backgrounds of the United Kingdom, Canada and even Australia may not be apt for New Zealand with its unwritten constitution, unicameral legislature, small and interdependent population, and sometimes activist executive practices. This may be an area where, indeed, New Zealand law should be “significantly indigenous” (Cooke J in *Budget Rent A Car v ARA* [1985] 2 NZLR 414, 418).

Moreover, I am far from sure doctrine ever has been or now is so strict in New Zealand.

This view has been borne out in subsequent case law, with *Bates* and *Inuit Tapirisat* both being almost entirely ignored. The issue of whether procedural fairness applies to delegated legislation in New Zealand thus remains largely unresolved. The only leading case that, in my opinion, could possibly be interpreted as a sort of *Bates*- or *Inuit Tapirisat*-

⁵⁶ *Turners & Growers Exports Ltd v Moyle*, High Court, Wellington CP 720/88, 15 December 1988, McGechan J (Unreported).

⁵⁷ *Ibid* at 62.

⁵⁸ *Ibid* at 58.

like bar against applying fairness to rulemaking is *CREEDNZ Inc v Governor-General*.⁵⁹ However, closer examination of the case suggests it was merely an example of a statutory scheme excluding the normal application of natural justice. The case involved a group of local business owners challenging an Order in Council which fast-tracked the approval of an aluminium smelter and thereby bypassed a number of the usual procedural protections. The plaintiffs argued that they were directly affected by the Order and as such should have a right to be heard, despite the empowering Act not providing for it. The Court of Appeal dismissed the application for review largely on the basis that the very purpose of the statute concerned – the *National Development Act 1979* – was to bypass usual procedural protections.⁶⁰ Procedural fairness here was incompatible with the statutory scheme.

The type of decision and identity of the decision-maker were also seen as relevant. Importantly for the purposes of this thesis, Cooke J cited *Inuit Tapirisat* when discussing this point, stating: “that decision illustrates how slow the Courts are to treat the Executive Council or Cabinet as under any duty to follow a procedure at all analogous to judicial procedure.”⁶¹ Cooke J did *not* say the Courts are unable to imply such a procedure, rather that they would require a very good reason to do so. It also made the obvious point that an adjudicative procedure will very likely not be an appropriate form of procedural safeguard in relation to a Cabinet-based policy decision. In Canadian parlance, Cooke J interpreted *Inuit Tapirisat* as an illustration of the deference owed to a body like Cabinet making decisions with significant policy content, rather than as an absolute bar on applying procedural fairness to such decisions. Adopting this interpretation in Canada would be a

⁵⁹ *CREEDNZ Inc v Governor-General*, [1981] 1 NZLR 172 [*CREEDNZ*].

⁶⁰ *Ibid* at 177, Cooke J, at 191, Richardson J, and at 206, McMullin J.

⁶¹ *Ibid* at 178. *Inuit Tapirisat* has only been cited twice in New Zealand since *CREEDNZ*: once in *Turners & Growers* and once in *Whangamata Marina Society Inc v Attorney-General*, [2007] 1 NZLR 252 (HC) [*Whangamata*]. In *Whangamata*, Fogarty J recalled *Inuit Tapirisat*'s citation in *CREEDNZ*, and repeated Cooke J's characterisation of the case as standing for the proposition that the statutory scheme as a whole must be examined when determining what (if any) hearing rights exist (*Whangamata* at paras 35 and 36).

positive first step in opening up procedural fairness address the coverage issues I have identified throughout this thesis.⁶²

None of this is to say that New Zealand has actively extended procedural fairness to legislative decisions in the absence of statutory consultation obligations or legitimate expectations. The issue has not been resolved one way or the other in New Zealand. While it appears that Tipping J's tentatively expressed third category can accommodate a (contextual) general duty to consult, any such duty is nascent at best. It would therefore not be accurate to say that a general common law duty to consult exists in New Zealand, but rather that it *could*. This is, however, is a considerably more open position than that which applies in Canada. Adopting even this level of openness would be an important first step in Canada addressing its insufficiently broad approach to the scope of procedural fairness. The New Zealand experience shows that this is entirely possible.

c Australia

The Australian approach to the scope of fairness is a particularly interesting one to compare to Canada's. Like Canada, legitimate expectations do not, and never really have, played a significant role in defining the scope of procedural fairness in Australia. It is thus a useful case study in how a common law jurisdiction might move to expand the scope of procedural fairness without using legitimate expectations. As the discussion below will show, the Australian courts have gone considerably further than Canada has, with quite similar tools.

i Legitimate Expectations

The limited scope of legitimate expectations in Australia was signalled even in the High Court of Australia's ("HCA") seminal decision in *Kioa v West*,⁶³ which confirmed the role of legitimate expectations in Australia. *Kioa* concerned a Tongan family who had stayed in Australia past the expiration of their visas and were challenging their deportation.

⁶² Although this is only true of an extension to cover legislative decisions. The other problem I identified with Canadian procedural fairness – an adjudicative fixation – is repeated here by Cooke J.

⁶³ *Kioa v West*, [1985] HCA 81, (1985) 159 CLR 550 [*Kioa*].

The majority of the judges concluded that procedural fairness applied, but for very different reasons. Mason and Deane JJ both stated that direct effect on a person's rights or interests was required before procedural fairness would apply, and that disappointment of a legitimate expectation could count as such an effect.⁶⁴ Brennan J, on the other hand, did not consider that legitimate expectations expanded the direct effect threshold for the duty of fairness.⁶⁵ He doubted that it added anything to the concept of an interest, other than perhaps emphasising that the term "interest" ought to be broadly construed.⁶⁶ Aronson, Dyer and Groves agree that the concept of legitimate expectations does little to expand the scope of procedural fairness in Australia.⁶⁷

Brennan J's position seems to have won the day. This is demonstrated by the judgments of four of the five judges in the important case *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam*.⁶⁸ This case concerned a Vietnamese refugee who had committed a number of crimes while legally in Australia on a temporary visa. The Minister exercised his discretion to cancel Mr Lam's visa on the basis of a good character requirement.

The court found that there was no denial of procedural fairness and, as noted above, most of the judges found that legitimate expectations had little role to play in defining the doctrine's scope. McHugh and Gummow JJ cited comments from Brennan J in *Attorney-General (NSW) v Quin* and from McHugh J in *Minister for Immigration and Ethnic Affairs v Teoh* which together suggested that legitimate expectations, if they do have any role, can

⁶⁴ *Ibid* at 585-586 (Mason J) and 633 (Deane J).

⁶⁵ *Ibid* at 618.

⁶⁶ *Ibid*.

⁶⁷ Mark Aronson, Bruce Dyer, and Matthew Groves, *Judicial Review of Administrative Action*, 4th ed, (Pyrmont, NSW: Thomson Reuters Australia, 2009) at 444. The authors also note that Professor Allars considers that Deane and Mason JJ's "directly affected" test in *Kioa* was already broad enough not to require consideration of legitimate expectations.

⁶⁸ *Re Minister for Immigration and Multicultural Affairs; ex parte Lam*, [2003] HCA 6, (2003) 214 CLR 1 [*Lam*].

only be used to alter the content of fairness, not its scope.⁶⁹ They agreed that this is an accurate statement of the law.⁷⁰ Hayne J suggested that, while legitimate expectations may once have fulfilled a necessary function, they may no longer be useful in Australian law.⁷¹ Finally, Callinan J seemed to go even further, doubting whether legitimate expectations had any role at all, stating: “the necessity for the invention of the doctrine is questionable. The law of natural justice has evolved without the need for recourse to any fiction of “legitimate expectation”.”⁷²

Post-*Lam*, then, the doctrine of legitimate expectations has little to no role in extending the scope of procedural fairness in Australia. It is still occasionally referenced by the courts, but mostly in the context noted by Brennan J in *Kioa* – to emphasise that what constitutes an “interest” should be construed widely.⁷³ This use of interest is somewhat wider than that which applies in the United Kingdom, where “interest” tends to be restricted to things such as trade union and club membership and some positions of employment,⁷⁴ In Australia, on the other hand, “interest” extends to such things as reputational interests,⁷⁵ liberty,⁷⁶ confidentiality⁷⁷ and financial interests.⁷⁸

⁶⁹ *Attorney-General (NSW) v Quin*, [1990] HCA 21, (1990) 170 CLR 1 at 22 and 40 and *Minister for Immigration and Ethnic Affairs v Teoh*, [1995] HCA 20; (1995) 183 CLR 273 at 310-311.

⁷⁰ *Lam*, *supra* note 68 at para 67.

⁷¹ *Ibid* at paras 121-122.

⁷² *Ibid* at para 140. As Aronson, Dyer, and Groves, *supra* note 67 at 444, state, Gleeson CJ has a different view from the other four judges on the bench, stating at para 34 that “in some contexts, the existence of a legitimate expectation may enliven an obligation to extend procedural fairness.”

⁷³ Aronson, Dyer, and Groves, *ibid* at 445.

⁷⁴ Craig, *supra* note 24 at 12-15.

⁷⁵ See for example *Annetts v McCann*, [1990] HCA 57, (1990) 170 CLR 596 at 582 (Mason J), 632 (Deane J) and *Criminal Justice Commission v Parliamentary Criminal Justice Commissioner*, [2002] 2 Qd R 8 at para 16, McPherson J.

⁷⁶ See for example *Kioa*, *supra* note 63 at 582 (Mason J) and *Bromby v Offenders’ Review Board* (1990), 22 ALD 249 (NSWCA).

⁷⁷ See for example *Johns v Australian Securities Commission* (1993), 178 CLR 408 and *Consolidated Press Holdings Ltd v Federal Commissioner of Taxation* (1995), 57 FCR 348.

⁷⁸ See for example *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342 and *Kioa v West* (1985) 159 CLR 550 at 618-619 (Brennan J). For a good, concise discussion of the scope of interests in Australia generally see Aronson, Dyer, and Groves, *supra* note 72, at [7.95] to [7.105].

This situation means that Australia has arrived at much the same general position on the scope of fairness as that which applies in Canada; a relatively broad-based doctrine of procedural fairness (albeit slightly narrower than Canada in that it does not include privileges, but does use a very broad definition of interest) and a relatively weak doctrine of legitimate expectations. This similarity to Canada's 'default' approach makes the way Australia deals with fairness in the legislative sphere an ideal point of comparison.

ii General application of procedural fairness in other circumstances

Australian procedural fairness differs from procedural fairness in Canada in one key way: it abandoned some time ago the legislative/administrative/quasi-judicial distinction as a method for determining when procedural fairness ought to apply. The fact that a jurisdiction with very similar parameters to its law of procedural fairness did this suggests that it is possible for Canadian administrative law to do so as well.

Bread Manufacturers of New South Wales v Evans was the first decision which made this explicit. The case concerned a challenge by an association of bread manufacturers to a price setting order on, among other grounds, procedural fairness. Gibbs CJ, writing for the HCA, stated:⁷⁹

I am not persuaded that the question whether the rules of natural justice apply should be answered by deciding whether or not the power in question should be classified as legislative.

Statements will be found in many authorities that appear to support the view that the rules of natural justice apply to proceedings only if they are judicial or quasi-judicial in nature. Although, in England, *Cooper v Wandsworth Board of Works*, and, in Australia, *Sydney Corporation v Harris* (1912) 14 CLR 1, long ago showed that view to be untenable, it enjoyed something of a revival until *Ridge v Baldwin* [1964] AC 40 ; [1963] 2 All ER 66, gave it its quietus. It is now clear that the obligation to observe the principles of natural justice attaches whether the authority is judicial or administrative... Equally, it does not seem to be useful to decide the question whether the rules of natural justice apply by deciding whether the power in question should be classified as executive or legislative. The distinction between powers of an executive and those of a legislative nature is a fine one and opinions may easily differ on the

⁷⁹ *Bread Manufacturers of New South Wales v Evans* (1981), 38 ALR 93 at 103 [*Bread Manufacturers*].

question. ...To make the question whether the rules of natural justice apply depend on the classification of the power seems only to introduce a distracting complication into the process of decision.

Here the HCA clearly discarded the classification of government power as a useful method for defining the scope of procedural fairness. Gibbs CJ instead endorsed the approach of Jacobs J in *Salemi v. MacKellar (No. 2)*,⁸⁰ namely that procedural fairness is owed to anyone “affected individually” by an executive decision, but not to a person who is affected “simply as a member of the public or a class of the public”.⁸¹ This focus on “individual effect” has seemingly been rolled into the threshold requirement articulated in *Kioa* (discussed above) that a person be “directly affected” before procedural fairness applied.⁸² Although it does not quite use the same language, as with *Bank Mellat (No. 2)* in the United Kingdom, this approach is similar to that used by the majority of the Supreme Court of Canada (“SCC”) in *Wiswell*.

This focus on individual effect combined with a very broad scope for procedural fairness set the scene for Deane J’s judgment in *Haoucher v Minister for Immigration and Ethnic Affairs*.⁸³ Like *Lam*, it concerned the deportation of a non-citizen for serious criminal convictions. The deportation was challenged on the basis that the process followed was unfair. The challenge was ultimately unsuccessful, but Deane J had made interesting comments about the broad scope of procedural fairness. He stated that procedural fairness applies where the statutory scheme implies a legislative intent that fairness ought to apply, and that:⁸⁴

There is a strong presumption of such a legislative intent in any case where a statute confers on one person a power or authority adversely and directly to affect the rights, interests, status or legitimate expectations of a real or artificial person or entity in an

⁸⁰ *Salemi v. MacKellar* (1977), 137 CLR at 452.

⁸¹ *Bread Manufacturers*, *supra* note 79 at 103.

⁸² The “directly affected” test in *Kioa* makes sense as an evolution of *Bread Manufacturers*, and *Bread Manufacturers* was specifically noted in by Brennan J in *Kioa* as authority for the proposition that fairness might apply to legislative decisions – see *Kioa*, *supra* note 63 at 610, Brennan J.

⁸³ *Haoucher v Minister for Immigration and Ethnic Affairs* (1989), 169 CLR 648 [*Haoucher*].

⁸⁴ *Ibid* at 652.

individual capacity (as distinct from merely as a member of a section of the general public).

After noting that the doctrine is flexible, and that its content varies greatly depending on the circumstances, he opined:⁸⁵

Indeed, the law seems to me to be moving towards a conceptually more satisfying position where common law requirements of procedural fairness will, in the absence of a clear contrary legislative intent, be recognized as applying generally to governmental executive decision-making (cf. *Halsbury's Laws of England*, 4th ed. (1989), vol. 1(1), par. 85) and where the question whether the particular decision affects the rights, interests, status or legitimate expectations of a person in his or her individual capacity is relevant to the ascertainment of the practical content, if any, of those requirements in the circumstances of a particular case and of the standing of a particular individual to attack the validity of the particular decision in those circumstances.

Deane J's approach would eliminate any question of scope from procedural fairness. It would apply to *all* executive decisions – from low-level administrative discretion to the prerogative to the making of Orders-in-Council. The role of the degree of individual effect is to define the content of the right.

This approach can be read two ways. First, it could simply be seen as a reconceptualization of the familiar threshold test; while fairness technically applies to broad policy decisions, if a person cannot show that they are individually affected by it, the content of their right to fairness would be zero. This is a slightly odd way of thinking about procedural fairness, but functionally is close to the orthodox Australian view.

The second reading is significantly more radical: it could be read as a call to develop a doctrine of fairness that accommodates a lower level of fairness for those who are not individually affected by decisions. This would open up broad policy and legislative decisions to challenge on a procedural basis. While I think this approach is one with a lot of potential benefits (as discussed further in Chapter VI), the law in Australia did not

⁸⁵ *Ibid* at 653.

develop this way, although as Aronson, Dyer, and Groves point out, it remains an available reading of the case.⁸⁶ As is the case in Canada, the Australian view of procedural fairness remains thoroughly rooted in the adjudicative model, accommodating this in the context of delegated law-making by restricting procedural protections to those who are individually affected by the decision.

d Lessons for Canada

There are several insights that can be drawn from the comparative material discussed above when considering how Canada might go about expanding its duty of fairness to better meet the doctrine's underlying aims. As stated at the beginning of this chapter, the aim in assessing this material is to see how these jurisdictions deal with the major problems I identified in the structure of Canadian procedural fairness – a lack of coverage of legislative decisions and a fixation on adjudicative procedures – and see what can be learned. The above discussion shows that in general all three jurisdictions go further than Canada in engaging with legislative decisions, and do so with generally weaker tools than are available in Canada. Canada ought to be able to do at least the same, or go even further, with relative ease.

Any general expansion of procedural fairness in New Zealand has been unexplored since *Nicholls*, but even the position in *Nicholls* is more open to expanding fairness rights than Canada. Australia and the United Kingdom have quite clearly tailored the scope of their doctrines to focus on instances where a person is individually affected by a decision even when in an area traditionally thought of as legislative. The two tracks taken by the United Kingdom and Australia essentially mirror the two judgments in the SCC case *Wiswell*, discussed in some detail in Chapter IV. Like the majority in *Wiswell*, the United Kingdom excludes anything targeted at individuals from scope of “legislative” functions. This maintains the distinction between legislative and other executive functions, but considerably narrows what counts as legislative. Like Judson J's dissent in *Wiswell*,

⁸⁶ Aronson, Dyer, and Groves, *supra* note 72 at 423-424.

Australian law does not see the distinction between legislative, administrative, and quasi-judicial decisions as important so long as individuals are directly affected.⁸⁷ While not ultimately adopted as part of mainstream Australian law, Deane J's approach in *Haocher* also has some real utility as a starting point for addressing some of the problems I highlighted in Canadian procedural fairness. This approach is considered further in Chapter VI, below.

Both the United Kingdom and Australia have moved significantly away from Canada's prevailing legislative/administrative distinction, and New Zealand is at least open to such a move. All three countries belong to the same common law Westminster constitutional tradition as Canada. All three extend procedural fairness, to a greater or lesser degree, to decisions that are typically classified as legislative in Canada. All three do so with at least a slightly narrower starting point for the scope of procedural fairness than does Canada. The experiences of these other Westminster jurisdictions that do more with less in terms of expanding procedural fairness suggests similar movement is both possible and overdue in Canada. Administrative law demonstrably *can* fulfil the functions I argue it ought to be fulfilling.

In addition to this generally broader scope for procedural fairness, it is important to consider the role legitimate expectations play in the United Kingdom and New Zealand, if only to explain why they are not a promising route to expanding fairness in Canada. The relatively broad scope of legitimate expectations in these jurisdictions means that procedural fairness has been quite regularly applied in a rulemaking context by imposing a duty to consult in circumstances where resiling from a promise will defeat a legitimate expectation.

That said, I do not think that legitimate expectations are a promising route to pursue to expand the scope of procedural fairness in Canada. This is because legitimate expectations play a very different role in Canada than they do in the United Kingdom and New Zealand,

⁸⁷ *Wiswell*, *supra* note 49 at 525-526.

and the Canadian doctrine is ill-equipped to carry the weight of expanding fairness. Legitimate expectations do not need to be strong in Canada. With a broadly drawn duty of fairness, available for anyone with a right, interest, or privilege affected, the need for a route to correct obviously unfair decisions where a strictly construed right or interest is not implicated was not so acute. Within the adjudicative and administrative spheres this entirely makes sense – Canada’s content-focused doctrine of legitimate expectations serves its purposes fairly well.

However, this also means that the Canadian legitimate expectations have never really had the doctrinal strength to carry participatory rights into the legislative area – its role in Canadian administrative law simply has not been to expand the threshold for the application of procedural fairness. The doctrine does not need to address the same level of injustice as it does in the United Kingdom and so, in a self-fulfilling prophecy of sorts, it has developed in such a way that it would no longer fit with the general parameters of the Canadian doctrine to use it in the same way as it is used in the United Kingdom.⁸⁸ As such, we are left in the slightly counter-intuitive situation that the United Kingdom, with its more restrictive base doctrine of procedural fairness, actually has broader coverage than Canada’s wider, more flexible doctrine, by virtue of having to develop a more robust doctrine of legitimate expectations to make up for its initial narrow scope. This shows the United Kingdom courts being more creative in attempting to safeguard individual rights and legitimate decision-making despite the relatively ineffective tools they had to work with. Australia, too, which is similar to Canada in that it has a relatively minimalist concept of legitimate expectations and relatively expansive idea of the sort of interests which trigger procedural fairness, goes significantly further than Canada in applying procedural fairness to legislative decisions.

⁸⁸ David Wright makes the point quite forcefully, arguing that using legitimate expectations to expand fairness in the way it is in the United Kingdom risks undercutting the broad scope of Canadian procedural fairness generally: see Wright, *supra* note 18 at 143 to 145 and 185 to 188.

Fortunately, Canada does not need to rely on legitimate expectations to expand the duty of fairness in this way. Its more sophisticated procedural jurisprudence already provides the basis for something better, based on the suppressed line of bylaws cases culminating in *Canadian Pacific Railway Co v Vancouver (City)*⁸⁹ and *Catalyst Paper v District of North Cowichan*, as discussed in Chapter IV.⁹⁰ These cases point the way towards simply discarding the issue of whether a decision is legislative or not as a threshold question. Pursuing this line of cases would allow any artificial boundaries between legislative and non-legislative decisions to be removed and, without relying on the somewhat ad hoc approach taken by legitimate expectations, calibrate the content of fairness based simply on what the statutory and factual context required.⁹¹ Indeed, given the availability of this jurisprudence, it is all the more surprising that the legislative category has the grip it does on the Canadian judicial imagination. The international experience and the availability of a different approach domestically both suggest that the status quo should change, and could change with relative ease.

2 *Content of Procedural Fairness*

The above discussion sets out the thresholds for applying procedural fairness to rulemaking in the United Kingdom, New Zealand, and Australia. These thresholds are made up of a patchwork of different areas of law, and are far from coherent. The story is a little different in relation to the content of fairness in the rulemaking context. Here, the United Kingdom and New Zealand have developed a robust, comprehensive doctrine of common law consultation, which is in those jurisdictions seen as the expression of procedural fairness outside the adjudicative context. There is some very limited Australian law on this as well, though as a rule Australia rarely departs from the adjudicative model of procedural fairness. As such, most of the authorities cited below are from the United Kingdom and New Zealand. This material shows a real attempt to engage with what procedural fairness in a

⁸⁹ *Canadian Pacific Railway Co v Vancouver (City)*, 2006 SCC 5, [2006] 1 SCR 227 [*Canadian Pacific*].

⁹⁰ *Catalyst Paper v District of North Cowichan*, 2012 SCC 2, [2012] 1 SCR 5 [*Catalyst Paper*].

⁹¹ This exercise is described rather cursorily here; how it might practically be achieved is discussed in detail in Chapter VI.

non-adjudicative context looks like, something I identified as a major problem in Canadian procedural fairness. A discussion of this jurisprudence thus demonstrates the possibility of procedural fairness applying in such contexts, and provides some idea as to what this might look like should Canada move into applying fairness in the legislative domain. I am not arguing that the doctrine discussed here should necessarily be adopted wholesale in Canada, but its existence – and its extent – show the degree to which Canada is out of step with other Commonwealth countries. The courts are clearly capable of crafting meaningful expressions of procedural fairness outside the adjudicative context.

As noted above, the case from which this area of law springs is *Fletcher v Minister of Town and Country Planning*.⁹² It concerned the proposed development of a new town by the Minister of Town and Country Planning in the mid-1940s. Six local authorities complained that they had not been sufficiently consulted in relation to the proposed development.⁹³

The word 'consultation' is one that is in general use and that is well understood. No useful purpose would, in my view, be served by formulating words of definition. Nor would it be appropriate to seek to lay down the manner in which consultation must take place. The Act does not prescribe any particular form of consultation. If a complaint is made of failure to consult, it will be for the court to examine the facts and circumstances of the particular case and to decide whether consultation was, in fact, held.

This passage appears to have been interpreted in Canada (to the extent that *Fletcher* is considered at all) as meaning that there is not any utility in developing a jurisprudence of consultation.⁹⁴ This interpretation is clearly incorrect. The passage is better interpreted as a warning against the courts laying down specific procedures that must be followed when the statute has left this up to the decision-maker. This interpretation is supported both by the text of *Fletcher* itself and the subsequent use that has been made of the case in the United Kingdom and New Zealand.

⁹² *Fletcher*, *supra* note 3.

⁹³ *Ibid* at 500.

⁹⁴ See for example *R v Sampson*, [1996] 2 CNLR 184 at paras 99 and 100.

Consider first the passages in *Fletcher* in which Morris J elaborated what qualities are required of a genuine process of consultation. He noted that “consultation may often be a somewhat continuous process and the happenings at one meeting may form the background of a later one.”⁹⁵ Morris J was also the judge in the Queen’s Bench decision in *Rollo v Minister of Town and Country Planning*, in which he stated that:⁹⁶

The holding of consultation with such local authorities as appear to the Minister to be concerned is, in my judgment, an important statutory obligation. The Minister, with receptive mind, must by such consultation seek and welcome the aid and advice which those with local knowledge may be in a position to proffer in regard to a plan which the Minister has tentatively evolved.

The latter statement was cited with approval by the Court of Appeal in *Rollo* (in which Morris J’s judgment was upheld). In *Rollo*, Lord Greene MR further stated:⁹⁷

I should have thought myself that under the Act the Minister, in fulfilling his duty of consultation, would naturally, and, indeed, ought to, put to the local authorities any point on which in his honest opinion he considered they could assist him in the task which he had in hand.... If he thought of something on which he felt a local authority could help him, I cannot think that he would keep it up his sleeve. I venture to think that, if he did so, he would be acting wrongly.

These are quite clearly comments on what proper consultation requires. This suggests that the judges in *Rollo* and *Fletcher* did not think it impossible to set out certain qualitative requirements of consultation.

The United Kingdom, and later New Zealand, took up this idea of setting out qualitatively what constitutes proper consultation – that is, what consultation will be fair in the circumstances.⁹⁸ This position contrasts markedly with the Canadian experience, where the legal meaning of even explicit statutory consultation obligations garner little attention from the courts. Both the United Kingdom and New Zealand have been judicially assessing

⁹⁵ *Fletcher*, *supra* note 3 at 500.

⁹⁶ *Rollo*, *supra* note 4 at 496.

⁹⁷ *Ibid* at 16.

⁹⁸ For a good, if slightly dated, discussion of the consultation requirements laid down by United Kingdom, New Zealand, and Australian law, see Richard Best, “Consultation Obligations” [1999] NZLJ 192.

consultation for decades, demonstrating that it is possible to have meaningful, enforceable legal standards about consultation.

New Zealand in particular has developed a comprehensive jurisprudence of consultation. The statement of the duty to consult that is most often cited in New Zealand is from the decision of the Privy Council in *Port Louis Corporation v Attorney-General of Mauritius*.⁹⁹ In this case, Lord Morris of Borth-y-Gest built on *Fletcher* and *Rollo*, suggesting that the content of consultation depends on the circumstances but would in general require relevant parties to be adequately informed of the content of the proposal and given a reasonable opportunity to state their views.¹⁰⁰ He also stated that “the requirement of consultation is never to be treated perfunctorily or as a mere formality.”¹⁰¹

From the starting points of *Port Louis*, *Fletcher*, and *Rollo*, a substantial body of case law has enumerated the various aspects of consultation. The broad requirements of consultation developed in these cases are discussed below.¹⁰²

a General content

In New Zealand, McGechan J provided useful guidance as to the meaning of consultation in his decision in *West Coast United Council v Prebble*: “Consulting involves the statement of a proposal not yet finally decided upon, listening to what others have to say, considering their responses and then deciding what will be done.”¹⁰³ There are also several well-known formulations of the duty to consult in the United Kingdom, most notably the ‘Sedley requirements’. These are not judicial pronouncements of Sedley LJ, but rather submissions

⁹⁹ *Port Louis*, *supra* note 6.

¹⁰⁰ *Ibid* at 1124.

¹⁰¹ *Ibid*.

¹⁰² Portions of the discussion below are adapted from a similar discussion in my LLM thesis – Edward Clark, *Delegated Legislation and the Duty to be Fair in Canada* (LLM Thesis, University of Toronto, 2008) [unpublished].

¹⁰³ *Prebble*, *supra* note 7 at 405.

of his from his time at the bar which were adopted by Hodgson J in *R v Brent London Borough Council, ex parte Gunning*.¹⁰⁴ These requirements are:¹⁰⁵

First, that consultation must be at a time when proposals are still at a formative stage. Second, that the proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response. Third, ...that adequate time must be given for consideration and response and, finally, fourth, that the product of consultation must be conscientiously taken into account in finalising any statutory proposals.

While these formulations are useful starting points, the case law on consultation suggests several other features which are essential to valid consultation, which will also be discussed below.

In general, the ‘depth’ of consultation required is contextual. In Jonathan Auburn’s excellent paper on consultation, he identifies a number of factors that will affect what depth of consultation is needed:¹⁰⁶

The following matters may affect the extent of consultation required in a case.¹⁰⁷

- (i) The general and statutory context may point against too rigorous an application of the consultation requirements.¹⁰⁸
- (ii) The degree of urgency required by the nature of the decision-making.¹⁰⁹
- (iii) Whether views have already been expressed by interested parties in earlier discussions and/or earlier consultation opportunities. If they have, this may reduce the extent of consultation required in the instant case.

¹⁰⁴ *R v Brent London Borough Council, ex parte Gunning* (1986), 84 LGR 168.

¹⁰⁵ *Ibid* at 169.

¹⁰⁶ Auburn, *supra* note 15 at 6. Footnotes in the original.

¹⁰⁷ See *R v Secretary of State for Education and Employment and Anor, ex parte M* [1996] ELR 162, 207, Simon Brown LJ [*Ex parte M*].

¹⁰⁸ *Ibid* at 208 C-D, where the omission of a statutory duty to consult was considered to be intentional and “reflects the perceived practicalities of the situation...The underlying statutory objectives...must not be stultified by an over-zealous superimposition of common law procedural requirements”.

¹⁰⁹ For example in *R v Lord Chancellor, ex parte Law Society* (1994), 6 Admin LR 833 the urgency required for a decision was an indication that there was no obligation to consult.

The content of the duty to consult should generally be the same whether the duty arises from statute or common law legitimate expectation, unless the statute provides or implies a difference in the content of the duty.¹¹⁰

Finally, it should also be noted that there are some things that are explicitly *not* required. Most importantly, the courts have never held that consultation in the context of executive decisions requires agreement. As the New Zealand Court of Appeal put it in *Wellington International Airport Limited v Air New Zealand*:¹¹¹

We do not think "consultation" can be equated with "negotiation". The word "negotiation" implies a process which has as its object arriving at agreement. There is no such requirement in the present case...One cannot expand the statutory requirement by replacing the word "consultation" with "negotiation" and then importing into the section the very different meaning of the latter word.

b Consult while proposal remains under consideration

If it is not negotiation, consultation is still more than a formality. What is required, as noted in McGechan J's decision in *Prebble*, and in the 'Sedley requirements,' is that the decision-maker listens to submitters while the proposal is still under consideration. In *R v Camden London Borough Council, ex parte Cran & Ors*, the English High Court set out a number of factors that were required for proper consultation.¹¹² The first of these was that "consultation must take place while the proposals are still at a formative stage."¹¹³ It is

¹¹⁰ *R v Brent London Borough Council, ex parte Gunning* (1986), 84 LGR 168, 187; *R (Partingdale Lane Residents' Association) v Barnet London Borough Council* [2003] EWHC 947 (Admin) at para 45 (requirements of the duty are equally relevant whether the duty arises by virtue of statute or common law); cf *Ex parte M, supra* note 107 at 208 C-D (fact that the consultation duty arises only from the common law and statute does not provide for a duty may be relevant when determining the extent of consultation required).

¹¹¹ *Wellington International Airport Limited v Air New Zealand*, [1993] 1 NZLR 671 (CA) at 676 [WIAL].

¹¹² *R v Camden London Borough Council, ex parte Cran & Ors*, [1995] EWJ 2214 at para 141, McCullough J [*Ex parte Cran*].

¹¹³ *Ibid* at para 141. Similarly, the Court in *WIAL* (*supra* note 111 at 683) stated:

It was further submitted WIAL had excluded the airlines from the formative stage of its thinking, and from arguing whether or not it should review its fees at all, and whether any increase in charges was justified. There was no obligation on WIAL to do more than consult properly and with an open mind before making any final decisions. On the Judge's findings, which in our view were fully supported by the evidence, it did this.

thus a well-established aspect of the duty to consult that a proposal must be consulted upon while it is still under consideration.

c Contacting parties to be consulted

The law on consultation is not just about how submissions are considered by the decision-maker. It also has something to say about how potentially interested people should be contacted. In *R v Secretary of State for Social Services, ex parte Association of Metropolitan Authorities*, the court stated that “the essence of consultation is the communication of a genuine invitation to give advice and a genuine receipt of that advice”.¹¹⁴ Auburn suggests that failure to contact the right people could sometimes result in insufficient consultation, particularly in situations where a statutory consultation requirement names specific targets for consultation they must be contacted individually.¹¹⁵

d Information to be supplied to consulted parties

During consultation, a decision-maker is required to supply the consulted parties with the information necessary for them to engage in the consultation process. As the Privy Council pointed out in *Port Louis* (and echoed in the ‘Sedley requirements’), the consulted parties must know what is proposed before they can state their views on the subject of the decision.¹¹⁶ Further, one of the constituent elements of consultation set out by the English High Court in *Ex parte Cran* was that “those consulted must be provided with information which is accurate and sufficient to enable them to make a meaningful response.”¹¹⁷ As Richard Best puts it, “Sufficiency is therefore a relative and flexible concept dependent

¹¹⁴ *R v Secretary of State for Social Services, ex parte Association of Metropolitan Authorities*, [1986] 1 WLR 1 at 4, quoted in Auburn, *supra* note 15, at 7.

¹¹⁵ Auburn, *ibid*, at 8. As an example, he cites *R (Wainwright) v Richmond London Borough Council*, Times, January 16, 2002, where consultation was held to be inadequate when, in a context where every person on a particular street had to be consulted. The decision-making authority left a letter setting out the opportunities for consultation at each house in the street, but failed to account for houses which had multiple dwellings and/or occupants. The court therefore deemed consultation inadequate.

¹¹⁶ *Port Louis*, *supra* note 6 at 1114.

¹¹⁷ *Ex parte Cran*, *supra* note 112 at para 114.

upon the context and purpose for which the consultation is required....”¹¹⁸ Consulted parties are not necessarily entitled to every piece of information that might conceivably be relevant.¹¹⁹ Rather, they should be made aware of the substance of the proposals at issue.¹²⁰

e Changes to the proposal

In *Ex parte Cran*, McCullough J also suggested that the decision-maker has an additional duty to highlight any changes made to any proposals advanced to the consulted parties.¹²¹ Thus, at the very least, where new information is being relied upon by a decision-maker, they must supply that information to consulted parties and allow them an opportunity to comment.

Similarly, where new information has resulted in a large change to the proposed rule, consulted parties must be given a chance to respond to that change and the information upon which it is based. *Electra v Commerce Commission* made it clear, however, that this duty applies only when the change is drastically different from the original proposed rule, and the possibility and basis for such a change was not flagged in the original consultation.¹²²

¹¹⁸ Best, *supra* note 98, at 193, citing *R v Secy of State for Social Services, ex p Association of Metropolitan Authorities*, [1986] 1 WLR 1 at 4 and 6-7 [*Association of Metropolitan Authorities*].

¹¹⁹ *R v Secretary of State for Transport, ex p Richmond-upon-Thames London Borough Council (No 4)*, [1996] 1 WLR 1460 at 1474.

¹²⁰ *Ozmanian v. Minister for Immigration, Local Government and Ethnic Affairs* (1996), 137 ALR 103 at 122-123 (FCA). See also Best, *supra* note 98 at 193.

¹²¹ *Ex Parte Cran*, *supra* note 112 at para 187. A similar suggestion was also put forward by Blanchard J in the New Zealand case of *McInnes v. Minister of Transport*, [2001] 3 NZLR 11 at para 16 where he said “If, as a result of the submission and consultation process, the draft is so transformed that what the Minister is then considering is really a completely new rule, the Minister would have to start again.” This requirement is similar to the duty under the United States American Procedures Act to undertake further consultation if a proposal is significantly changed.

¹²² *Electra v Commerce Commission*, Unreported (High Court, Wellington, 23 March 2005, CIV-2004-485-389, Ellen France J) at para 103.

f Sufficiency of time

Once consulted parties have been given sufficient information, they must also be given sufficient time in which to comment.¹²³ As with the amount of information required, what constitutes sufficient time is also contextual. As the judge put it in *Association of Metropolitan Authorities*:¹²⁴

... what would be sufficient information or time in one case might be more or less than sufficient in another, depending on the relative degrees of urgency and the nature of the proposed regulation. There is no degree of urgency, however, which absolves the Secretary of State from the obligation to consult at all.

g Open/closed mind

Once the period for submissions has closed, the decision-maker must consider those submissions “with a receptive mind and in a conscientious manner when reaching its decision.”¹²⁵ A decision-maker is not required to approach a proposal from a position of absolute neutrality. It is the job of government to come up with proposals for regulation and the like, and the agency concerned would not be proposing regulations if it did not have already have at least an initial preference in mind. This point was made by Leggatt LJ in *R v Secy of State for Health, ex p London Borough of Hackney*:¹²⁶

It is in my judgment quite legitimate to conduct consultations by reference to a preferred option, provided that the decision-maker keeps an open mind and is prepared to depart from that option in favour of another if persuaded by the cogency of the responses.

¹²³ This point has been made in a number of cases. See *Association of Metropolitan Authorities*, *supra* note 118 at 6; *Ex parte Cran*, *supra* note 112 at para 114; *Diagnostic Medlab Ltd v. Auckland District Health Board*, [2007] 2 NZLR 832 at paras 258 and 287. The issue is discussed in some length in Auburn, *supra* note 15 at 22-26.

¹²⁴ *Association of Metropolitan Authorities*, *ibid*, at 7.

¹²⁵ *Ex parte Cran*, *supra* note 112 at para 114. See also *WIAL*, *supra* note 111 at 674-678.

¹²⁶ *R v Secy of State for Health, ex p London Borough of Hackney* (25 April 1994, QB, Lexis transcript). See also *R v Hillington Health Authority, ex parte Goodwin & Ors* [1984] (QB) 800 at 809.

Further, as Cooke P observed in *Devonport borough Council v Local Government Commission*, “the fact that new arguments do not persuade one to change views previously formed does not mean that one has approach the new arguments with a closed mind.”¹²⁷

h Issues not raised

In *Port Louis* the Privy Council held:¹²⁸

“The local authority [the consultee] cannot be forced or compelled to advance any views but it would be unreasonable if the Governor in Council could be prevented from making a decision because the local authority had no views or did not wish to express or declined to express any views.”

The Privy Council’s position was adopted by the New Zealand Court of Appeal in *WIAL*.¹²⁹ McKay J held:¹³⁰

“[WIAL’s] obligation was to consult, and on the evidence and on the Judge’s findings, it did that in a way which gave the airlines every opportunity to seek such information as they required and to put forward any matters they wished. Their failure to do so does not mean that they were not consulted.”

If a consulted party does not raise an issue during the consultation, the decision-maker cannot be criticised for failing to take account of it as part of that consultation.¹³¹

i Good faith

In *Residential Care (New Zealand) Inc & Ors v Health Funding Authority*, the Court of Appeal had to consider whether consultation between the appellants and the respondent under the *Health and Disability Services Act 1993* had been effective.¹³² The appellants alleged that the respondent had breached a contractual obligation of negotiation in good

¹²⁷ *Devonport borough Council v Local Government Commission*, [1989] 2 NZLR 203 at 207-208 (CA). See also Beck, *supra* note 98 at 196.

¹²⁸ *Port Louis*, *supra* note 6 at 1114.

¹²⁹ *WIAL*, *supra* note 111 at 674.

¹³⁰ *Ibid* at 682.

¹³¹ *Ibid* at 684-685.

¹³² *Residential Care (New Zealand) Inc & Ors v Health Funding Authority*, Unreported (Court of Appeal, 17 July 2000, CA 170/99, 268/99 Henry J for the Court) [*Residential Care*].

faith, a contractual obligation to cooperate in developing a transparent method for negotiation of contracts, and a statutory obligation to consult.¹³³ The Court held that:¹³⁴

...although there is a distinction to be drawn between consultation and negotiation, that distinction does not impact on the concept of a duty of good faith. Consultation in the statutory context carries with it the implication of a good faith duty.

The Court went on to find that the respondent had not breached its obligation to consult in good faith, rejecting the submission that the respondent was required to adopt the appellants' views as part of a genuine consultation process.¹³⁵ Finally, the Court noted that “the issues of good faith consultation essentially came down to an overall assessment and evaluation [of the evidence].”¹³⁶

j Lessons for Canada

The extensive jurisprudence from the United Kingdom and New Zealand on the content of consultation is useful for two reasons. First, it provides an example of the sorts of qualitative factors which can be weighed to determine whether proper consultation has taken place. These factors have all been developed entirely by the courts, with little or no statutory intervention.

While, as will be discussed below, the United Kingdom and New Zealand consultation jurisprudence is in some respects limited, it provides a useful starting point from which Canadian courts can build their own concept of consultation. The uncertainty created for

¹³³ The obligation to consult was contained in section 34 of the *Health and Disability Services Act 1993* (now repealed), which read:

Every regional health authority shall, in accordance with its statement of intent, on a regular basis consult in regard to its intentions relating to the purchase of services with such of the following as the authority considers appropriate:

- (a) Individuals and organisations from the communities served by it who provide [public health services or personal health services] or disability services:
- (b) Other persons including voluntary agencies, private agencies, departments of State, and territorial authorities.

¹³⁴ *Residential Care*, *supra* note 132 at para 13.

¹³⁵ *Ibid* at para 34.

¹³⁶ *Ibid* at para 39.

government and the public by the sort of expansion of administrative law I am advocating is not insignificant, particularly if the new doctrine needs to be developed from the ground up. The development of the common law is an iterative process, and the law will be in a state of flux for some time. The existence of highly developed qualitative standards for common law consultation from comparable jurisdictions has the potential to assist Canadian judges in developing a non-adjudicative concept of fairness and shorten the period of legal uncertainty.

Secondly, and related to the first, the simple fact that this comprehensive body of law exists in the United Kingdom and New Zealand but does not in Canada indicates that there is a significant blind spot in the Canadian judicial imagination. Part of the reason here is doctrinal: Canada's narrow doctrine of legitimate expectations means that consultation obligations are never implied by past practice or promise in a legislative context, while *Inuit Tapirisat* means that Canadian courts have deprived themselves of the resources that would enable them to think about procedural fairness in a legislative context generally. These two aspects of the law of procedural fairness means that the Canadian courts almost never have occasion to think deeply about what an administrative law obligation to consult means.

Statutory consultation obligations of the sort which spawned almost all of the jurisprudence discussed above in the United Kingdom and New Zealand *do* exist in Canada, but have attracted virtually no judicial elaboration. When the courts in the United Kingdom and New Zealand elaborate on such obligations, they see what they are doing as the application of procedural fairness. Unless the statutory language excludes it, the same content will be given by the courts to statutory consultation obligations as are given to those triggered by the common law (i.e. a legitimate expectation). Canadian courts' failure to engage even in this situation shows how deeply rooted – and how out of step with other common law countries – their approach to procedural fairness in a legislative context really is. The comparative jurisprudence discussed above should give us confidence that the task of developing a broader vision of fairness is well within the Canadian courts' capabilities.

The way Canada deals with the content of procedural fairness can accommodate this comparative material. The *Baker* test is flexible, and includes an element of deference that can help ensure that the procedure used is appropriate for the situation, even in legislative contexts. If further adjustment is required to ensure courts do not unduly intrude into the executive's policymaking function, Canada already has a well-developed doctrine of reasonableness, albeit in the context of substantive review. As is discussed further in Chapter VI, this highly developed reasonableness jurisprudence provides Canadian judges with a systemic, doctrinal approach that could be used to quite precisely calibrate what will be required of decision-makers. The tools to broaden the scope of procedural fairness and give it meaningful content in the legislative realm are all there in the existing law, domestic and comparative. What is needed is for the courts in Canada to have the courage to build on this existing jurisprudence and take it just a little further.

B Aboriginal Law Duty to Consult and Accommodate

Further confidence in the Canadian courts' ability to expand the scope of procedural fairness can be gained by examining the aboriginal law duty to consult and accommodate. While, as discussed above, Canada has no real concept of administrative law consultation, aboriginal law consultation is a highly developed, though still evolving, doctrine. While rooted in constitutional law, the aboriginal law duty to consult and accommodate uses administrative law concepts as building blocks, showing that the procedural fairness does have the potential to work outside the adjudicative context.

A specific duty for the Crown to consult with Aboriginal peoples has been recognised at least since the 1990 SCC case of *R v Sparrow*.¹³⁷ *Sparrow* considered, among other things, the Crown's obligation to recognise the aboriginal and treaty rights of indigenous peoples

¹³⁷ *R v Sparrow*, [1990] 1 SCR 1075 [*Sparrow*]. For good general discussion of this subject see Dwight G Newman, *Revisiting the Duty to Consult Aboriginal Peoples* (Saskatoon: Purich Publishing, 2014).

under section 35(1) of the Constitution.¹³⁸ *Sparrow* stated that one of the factors that must be considered in determining whether the Crown has discharged its obligations under section 35(1) is whether affected aboriginal peoples with proven rights have been consulted.¹³⁹ It was later held in *R v Van der Peet* that the core purpose of section 35 is to promote the reconciliation of aboriginal rights and culture with the reality of the sovereignty of the Crown and this interpretation of section 35 – as a remedial measure designed to promote reconciliation – has prevailed ever since.¹⁴⁰ The right to be consulted as laid down in *Sparrow*, however, was only afforded to aboriginal groups that had already proved their claims, leaving those with claims pending no recourse when the government acted to damage their claimed interests. The duty to consult was expanded to apply to pending claims in 2004 by the case of *Haida Nation v British Columbia (Minister of Forests)*.¹⁴¹ It is the law that has developed in the wake of *Haida* that is of particular interest to administrative lawyers.

Haida concerned the transfer by the BC government of a Tree Farm License from one logging company to another. This transfer took place without consulting the Haida Nation, which had a pending claim over the territory covered by the Tree Farm Licence. Haida Nation challenged both the transfer and the past renewals of the tree farm licence going back decades. The case ultimately ended up in the SCC.

Writing for the SCC, McLachlin CJ held that “the honour of the Crown may require it to consult with and reasonably accommodate Aboriginal interests pending resolution of the claim.”¹⁴² This duty applies where: “... the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might

¹³⁸ *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11, s 35(1). Section 35(1) reads “The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.”

¹³⁹ *Sparrow*, *supra* note 137.

¹⁴⁰ *R v Van der Peet*, [1996] 2 SCR 507 at paras 26-43.

¹⁴¹ *Haida Nation v British Columbia (Minister of Forests)*, [2004] 3 SCR 511 [*Haida*].

¹⁴² *Ibid* at para 27.

adversely affect it...”¹⁴³ From these starting points, a relatively broad duty to consult at aboriginal law has been developed.¹⁴⁴

The fact that a non-administrative law concept of consultation exists does not necessarily mean that it can be meaningfully drawn on by the courts in developing an administrative consultation doctrine. However, for a variety of reasons, I consider that the procedural fairness and aboriginal law consultation are usefully comparable. In *Haida*, McLachlin CJ stated that in determining the content of the duty to consult, “regard may be had to the procedural safeguards of natural justice mandated by administrative law.”¹⁴⁵ This point was later amplified by Binnie J in *Beckman v Little Salmon/Carmacks*, where he saw the section 35 consultation obligations as capable of being resolved entirely within the administrative law paradigm.¹⁴⁶

Administrative law is flexible enough to give full weight to the constitutional interests of the First Nation. Moreover, the impact of an administrative decision on the interest of an Aboriginal community, whether or not that interest is entrenched in a s. 35 right, would be relevant as a matter of procedural fairness...

The utility of using procedural fairness to fill out the content of consultation has also been noted recently by Stratas JA in the Federal Court of Appeal:¹⁴⁷

To date, the Supreme Court has developed the law concerning the scope and nature of the duty to consult as a special body of law, divorced from normal administrative law principles. To me, however, administrative law remains relevant and the special body of law developed by the Supreme Court is consistent with it. It may be useful in cases like the present to think of the duty to consult within the rubric of administrative law. After all, the matter before us is an administrative law matter—an appeal of an application for judicial review brought to challenge the Treasury Board’s November

¹⁴³ *Ibid* at para 35, citing *Halfway River First Nation v. British Columbia (Ministry of Forests)*, [1997] 4 CNLR 45, at 71, Dorgan J (available on CanLII).

¹⁴⁴ There is also an allied duty to accommodate in some circumstances, which will be discussed separately below.

¹⁴⁵ *Haida*, *supra* note 141, at para 41.

¹⁴⁶ *Beckman v Little Salmon/Carmacks*, 2010 SCC 53, [2010] 3 SCR 103 at para 47 [*Beckman*]. See also paras 45 and 46, where Binnie J confirms the relevance of procedural fairness generally to questions of adequate consultation at administrative law.

¹⁴⁷ *Canada v Long Plain First Nation*, 2015 FCA 177, 388 DLR (4th) 209 at para 107.

23, 2007 discretionary decision to sell the Barracks property to the Canada Lands Company.

Stratas JA's assertion that the two areas of law are completely separate is somewhat belied by *Haida* and *Beckman*, though he is correct that detailed reference to administrative law doctrine is uncommon. His insight that most invocations of the aboriginal law duty to consult will be in the context of judicial review of administrative action is, however, valuable. The aboriginal law duty to consult pled in such cases thus blends administrative and constitutional law.

In addition to this doctrinal similarity, the qualities required for legally adequate aboriginal law consultation are very similar to those that are required for legally adequate common law consultation in the UK and New Zealand. In *The Duty to Consult: New Relationships with Aboriginal Peoples*, Dwight G Newman notes that adequate consultation "does not mean that there will necessarily be ultimate agreement on every issue."¹⁴⁸ Rather, it must be "meaningful," and carried out in "good faith."¹⁴⁹ Consultation will be inadequate if it "short-circuit[s]" the process.¹⁵⁰ All of these comments about the nature of aboriginal law consultation are echoed in the comparative administrative law jurisprudence discussed above in section V(A)(2).

The aboriginal law experience should therefore be seen as both evidence and a resource for Canadian administrative law. It is evidence that the courts in Canada are capable of developing non-adjudicative process rights when that is required in the interests of justice and to bolster the legitimacy of government action, exactly the context in which I am arguing the courts ought to expand procedural fairness. Further, given its intermittent integration with administrative law concepts, it is evidence that *administrative law* can be used to impose procedural rights in non-adjudicative contexts. It is also a resource for the courts to draw upon in developing appropriate content for procedural fairness in the non-

¹⁴⁸ Newman, *supra* note 137 at 87.

¹⁴⁹ *Ibid* at 88.

¹⁵⁰ *Ibid*.

adjudicative context. For both reasons the duty to consult and accommodate is well worth exploring here.

I should at this point acknowledge that there is one obvious difference between aboriginal law consultation and procedural fairness: Section 35(1) of the *Constitution Act, 1982*, which recognises and affirms “the existing aboriginal and treaty rights of the aboriginal peoples of Canada,” gives a level of constitutional recognition to the duty to consult that is not enjoyed by procedural fairness.

Even this difference, though, is easy to overstate. Despite the explicit constitutional layer to aboriginal law consultation, I think the underlying impetus for the two areas of law is in fact quite similar. The aboriginal law doctrine of consultation is founded on the idea of the honour of the Crown. To quote McLachlin CJ in *Haida*:¹⁵¹

The historical roots of the principle of the honour of the Crown suggest that it must be understood generously in order to reflect the underlying realities from which it stems. In all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably. Nothing less is required if we are to achieve the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.

The honour of the Crown in relation to treaty rights is given a constitutional flavour by virtue of section 35(1). At first instance this appears to be similar to the statutory ‘hook’ required in the common law jurisdictions discussed above in order to trigger administrative law consultation, but it is not quite that straightforward. Section 35(1) does nothing but recognise and affirm rights which already exist in the common law; the obligation to deal honourably with aboriginal Canadians would exist with or without section 35(1).¹⁵²

McLachlin CJ made it clear that the honour of the Crown is at the core of the duty to consult.¹⁵³ As Binnie J put it in *Beckman*, “The concept of the duty to consult is a valuable

¹⁵¹ *Haida*, *supra* note 141 at para 17.

¹⁵² See Evan Fox-Decent, “Fashioning Legal Authority from Power: The Crown-Native Fiduciary Relationship” (2006) 4 NZJPIL 91 at 100.

¹⁵³ *Haida*, *supra* note 141 at para 25.

adjunct to the honour of the Crown, but it plays a supporting role, and should not be viewed independently from its purpose.”¹⁵⁴ In other words, the core purpose of the duty to consult is to maintain the honour of the Crown. In turn, the honour of the Crown is the common law concept which legitimates, both in fact and appearance, the Crown’s assertion of sovereignty over lands that were pre-settled by Canada’s aboriginal people (*i.e.*, most of the country), and the legitimacy of all subsequent interactions between the Crown and Aboriginal peoples. The purpose of the duty to consult is therefore to give effect to a common law constitutional principle and thereby legitimate the Crown’s actions – past, present, and future – as they relate to aboriginal peoples and aboriginal lands.

Insofar as one accepts that the common law contains constitutional principles, the right to a fair process is indisputably one of them. It is as fundamental a principle as exists in public common law, deriving, as discussed in Chapter III, from Coke CJ’s creative expansion in the 1600s of the Magna Carta right to trial by jury.¹⁵⁵ As also discussed in Chapter III, it was seen then as a precondition for any sort of legitimate adjudication. I argued that with the broadening of both the administrative state and of procedural fairness, it should be seen as a precondition for any administrative action to be seen as fully legitimate. In a modern Canadian context, it has been seen as “a fundamental value of the legal order, so that it is constitution-like...”.¹⁵⁶

For these reasons, I consider that procedural fairness and aboriginal law consultation are meaningfully comparable. This is not to say that they are identical. But given the very similar sources and motivations, and the infiltration of administrative law principles into aboriginal law consultation that has already taken place, it would be a mistake to think that these differences render comparison unhelpful.

¹⁵⁴ *Beckman*, *supra* note 146 at para 44.

¹⁵⁵ See section III(B)(2)(a) above.

¹⁵⁶ David Dyzenhaus, “Constituting the Rule of Law: Fundamental Values in Administrative Law” (2002) 27 *Queen’s LJ* 445 at 497.

1 Scope of Aboriginal Law Consultation

The scope of the duty to consult at aboriginal law is set out in the passage above from *Haida*. A duty to consult applies when the Crown:

- (a) Knows or ought to know of a potential aboriginal right; and
- (b) Contemplates that its (i.e. the Crown's) actions;
- (c) May adversely affect such a right.¹⁵⁷

The specifics of this area of law are only tangentially relevant; the interesting part for the purposes of this thesis is simply the existence of a doctrine of consultation closely related to administrative law that does not require a specific statutory trigger. The details of the scope of the duty will therefore be discussed only briefly here.

There has been little interpretation of the first of these criteria by the SCC since *Haida*, but the threshold appears to be low.¹⁵⁸ As the passage from *Haida* made clear, this claimed right can be of aboriginal title, or of any other recognised rights. It also clearly applies to knowledge of a treaty right and, as Binnie J said in *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, it would be almost impossible for the Government to deny knowledge of a treaty right: “In the case of a treaty the Crown, as a party, will always have notice of its contents.”¹⁵⁹

The SCC jurisprudence does not address the level of evidence that might be required before a rights claim is seen as credible, but this has been taken up by lower courts. The jurisprudence from these courts suggests that something more than mere assertion of a right is required as evidence of its existence, but that it is not reasonable to require more than a

¹⁵⁷ *Haida*, *supra* note 141 at para 35.

¹⁵⁸ For further discussion on the content of this threshold criterion, see Newman, *supra* note 137, at Chapter 2.2(a).

¹⁵⁹ *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, [2005] 3 SCR 388 at para 34 [*Mikisew*].

“credible claim”.¹⁶⁰ If such a credible claim exists, and the government knows or ought to know about it, then this first step is satisfied.

The second criterion is only sketched very broadly by the SCC. It is clear that exercising rights under an existing treaty, whether historic or modern, counts as a Crown action.¹⁶¹ However, in *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, the SCC explicitly left open the issue of whether a legislative act could count as a Crown action for the purposes of triggering a duty to consult.¹⁶² As David Mullan put it, this reservation:¹⁶³

...must put in some doubt the issue of whether the duty to consult intrudes on the legislative activities of Parliament and the legislatures, and presumably also those of the Governor and Lieutenant Governors in Council in the promulgation of subordinate legislation. Obviously, this may be a critically important question in some contexts.

There is less equivocal lower court authority that the duty to consult might not apply to the process of making subordinate legislation. In *R v Lefthand*, where the primary issue was a conflict between aboriginal fishing rights and provincial fishing regulations, Slatter JA asserted:¹⁶⁴

It would be an unwarranted interference with the proper functioning of the House of Commons and the Provincial Legislatures to require that they engage in any particular processes prior to the passage of legislation. The same is true of the passage of regulations and Orders in Council by the appropriate Executive Council. Enactments must stand or fall based on their compliance with the constitution, not based on the processes used to enact them.

¹⁶⁰ See *Labrador Métis Nation v Newfoundland and Labrador (Minister of Transportation and Works)*, 2007 NLCA 75, 288 DLR (4th) 641 at paras 36-45, 50-51 [*Labrador Métis*]. See also *Native Council of Nova Scotia v Canada* 2007 FC 45, [2007] 2 CNLR 233 at paras 68-70 (affirmed in *Native Council of Nova Scotia v Canada*, 2008 FCA 113, 165 ACWS (3d) 1, [2008]) and discussion in Newman, *supra* note 137, at Chapter 2.2(a).

¹⁶¹ David Mullan, “The Supreme Court and the Duty to Consult Aboriginal Peoples: A Lifting of the Fog?” (2011), 24 CJALP 233 at 239.

¹⁶² *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, [2010] 2 SCR 650 at para 44 [*Carrier Sekani*].

¹⁶³ Mullan, *supra* note 161, at 239.

¹⁶⁴ *R v Lefthand*, 2007 ABCA 206, (2007) 77 Alta LR (4th) 203 at para 38 [*Lefthand*]. The case was cited in *Carrier Sekani*, *ibid* (at para 44), as an example of a case which doubted the application of the duty to consult to delegated legislation, but was not endorsed by the SCC.

Watson JA concurred with Slatter JA's judgment, subject to some specific reservations. He specifically stated that he agrees that primary legislation is not subject to the duty to consult, but did not think it "necessary here to pronounce on what sort of regulatory activity by government would be a legislative process in that sense".¹⁶⁵ It is therefore not entirely clear whether Slatter JA's assertion that the duty to consult does not apply to delegated legislation is the view of the majority or not.

I certainly agree that primary legislation ought not be subject to administrative review, but disagree that this principle also applies to delegated legislation. As Evans JA noted in *Apotex* in relation to legitimate expectations, any constitutional objection to interfering with the Parliamentary process does not apply to the process of making delegated legislation.¹⁶⁶ Any concerns about interfering with the rights of Parliament are reduced in that context, and concerns about a democratic deficit if proper processes are not followed are increased. Be that as it may, as Mullan says, it is important to be aware that the application of the duty to consult to legislative acts, primary and secondary, has been questioned. That said, in the years since *Carrier Sekani* was decided, lower courts have not taken up the SCC's invitation to address the duty to consult's application to delegated legislation.

As with the first two criteria, the third has not been elaborated in much detail by the SCC, though *Carrier Sekani* does add an interesting gloss to it. The Carrier Sekani Tribal Council's grievance was based on the construction of a hydro dam a considerable time in the past. The court in *Carrier Sekani* held that a continuing grievance caused by such a past action could not trigger a duty to consult.¹⁶⁷ As it was put later by Savage J of the BC Supreme Court ("BCSC"): "*Carrier Sekani* confirms that consultation is to be directed at

¹⁶⁵ *Lefthand*, *ibid* at para 194.

¹⁶⁶ *Apotex*, *supra* note 5 at paras 103-104.

¹⁶⁷ *Carrier Sekani*, *supra* note 162 at para 49.

the potential effects of contemplated conduct, not the past, existing, ongoing or future impacts of past decisions or actions.”¹⁶⁸

The requirements for triggering the duty to consult in an aboriginal law context are thus squarely based in addressing current crown infringements of aboriginal rights, proven or unproven. The specifics are not of particular use in developing an administrative law equivalent. However, the general structure – an easily met threshold to apply consultation rights without a statutory requirement, – indicates that imposing broadly drawn procedural rights via the common law is very much within the court’s capabilities. At least for the moment, these rights apply to executive rulemaking and in my view should continue to do so. This precedent suggests that protestations by judges that it is too difficult for administrative law to apply procedural fairness more widely in the legislative context are overblown.

2 *Content of Aboriginal Law Consultation*

The content of the duty to consult is highly contextual. As noted above, aboriginal groups do not need a particularly strong claim to trigger the duty to consult, but the content of the duty depends on the strength of the claim. McLachlin CJ explained this dynamic in some depth in *Haida*. The key points can be summarised as follows:

- (a) Good faith is required at all stages, but there is no duty for the Crown and the Aboriginal group to agree.¹⁶⁹
- (b) The duty to consult constitutes a spectrum. At the lower end of the spectrum lie cases where the claim to title is weak or Aboriginal right is limited. In these cases, the duty to consult might only require aboriginal groups to be informed of the Crown’s plans and discuss any issues raised. At the other end of the spectrum are cases where the *prima facie* claims are strong, the rights affected are important, and the degree of infringement high. In these

¹⁶⁸ *Upper Nicola Indian Band v British Columbia (Minister of Environment)*, 2011 CarswellBC 730, [2011] 2 CNLR 348 (BCSC [In Chambers]), at para. 119 (Quoted in Mullan, *supra* note 161 at 239).

¹⁶⁹ *Haida*, *supra* note 141 at para 41.

cases, deep consultation with more formal processes will be required. Written reasons may also be required. In between these two extremes lie various different degrees of consultation.¹⁷⁰ “In general terms, however, it may be asserted that the scope of the duty is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed.”¹⁷¹

- (c) “The controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake.”¹⁷²

The framework set out in *Haida* was relatively skeletal (although as noted above McLachlin CJ does suggest that an analogy with natural justice could be useful), and since that decision the courts have spent some time trying to expand on its meaning. Shortly after *Haida*, the court in *Mikisew* summarised previous authority on the subject, and stated that this new duty to consult and accommodate should focus on “substantially addressing the concerns of the Aboriginal peoples whose lands are at issue,” and that “the controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and Aboriginal peoples with respect to the interests at stake...”¹⁷³ Beyond this emphasis on the importance of the honour of the Crown, however, *Mikisew* did not provide much more concrete guidance as to the content of the duty.

The more recent case of *Beckman* provided a little more detail. In his judgment in *Beckman*, Binnie J wrote at some length about the relationship between the duty to consult

¹⁷⁰ *Ibid* at paras 42-45.

¹⁷¹ *Ibid* at para 39.

¹⁷² *Ibid* at para 45.

¹⁷³ *Mikisew*, *supra* note 159 at paras 61-62.

at aboriginal law and administrative law procedural fairness.¹⁷⁴ His ultimate conclusion appeared to be that, at least at the lower end of the spectrum, the requirements of procedural fairness and the duty to consult would often be very similar.¹⁷⁵ In the case at hand in *Beckman*, which concerned the impact an application for a land grant would have on a First Nations trap line owner, Binnie J dealt with the procedural fairness and consultation arguments largely in tandem. He concluded that “[o]n the record, and for the reasons already stated, the requirements of procedural fairness were met, as were the requirements of the duty to consult.”¹⁷⁶ He made it clear that while he saw the rights protected by the two doctrines as different¹⁷⁷ – procedural fairness protects individual right while the duty to consult protects the rights of a First Nation as a group – the end result may in many cases be the same.¹⁷⁸

The influence of administrative law can further be seen in the standard of review used in judging the sufficiency of government consultation efforts. In *Haida*, the discussion of how a court should approach allegations that the Crown has not fulfilled its duty to consult and accommodate is positioned under the heading “Administrative Review”.¹⁷⁹ Under this heading, McLachlin CJ stated:¹⁸⁰

The process itself would likely fall to be examined on a standard of reasonableness. Perfect satisfaction is not required; the question is whether the regulatory scheme or government action “viewed as a whole, accommodates the collective aboriginal right in question”: *Gladstone, supra*, at para. 170. What is required is not perfection, but reasonableness. As stated in *Nikal, supra*, at para. 110, “in... information and consultation the concept of reasonableness must come into play. ...So long as every reasonable effort is made to inform and to consult, such efforts

¹⁷⁴ This is usefully discussed in Mullan, *supra* note 161 at 243-245. The rest of this paragraph draws on Mullan’s analysis.

¹⁷⁵ *Ibid.*

¹⁷⁶ *Beckman, supra* note 145 at para 79.

¹⁷⁷ *Ibid* at para 35.

¹⁷⁸ Mullan, *supra* note 161 at 245. I agree that the rights protected by the two doctrines are different but, as discussed above, both function to legitimate government action in the area in which they operate, and both also act to protect, in general terms, the rights of people affected by government action in those areas.

¹⁷⁹ *Haida, supra* note 141 at para 60.

¹⁸⁰ *Ibid.*

would suffice.” The government is required to make reasonable efforts to inform and consult. This suffices to discharge the duty.

Here we see the right for aboriginal peoples to be consulted – largely a procedural right – being reviewed on a reasonableness basis. Traditionally, administrative law has universally applied correctness to its analysis of procedural rights on the basis that courts are best placed to determine what is required for a fair process in the circumstances.

Newman shows that reasonableness has remained the applicable standard of review in the years since *Haida*.¹⁸¹ Comments to this effect can be found in a number of cases which address the quality of consultation. In *Lefthand*, the judge assessed the steps taken by the Government to consult and concluded that “not one iota of evidence was presented to show that there was any actual failure to provide a reasonable opportunity for consultation...”.¹⁸² *Labrador Métis* suggests that any gaps in the hard law on what consultation requires can be filled through the Government “implementing a process for reasonable ongoing dialogue.”¹⁸³ Finally, and most clearly, in *Hupacasath First Nation v. British Columbia (Minister of Forests)*, the BCSC said:¹⁸⁴

Reasonableness, not perfection, is required, of the Crown in its efforts to consult with and accommodate aboriginal peoples when it makes decisions potentially affecting their claimed aboriginal rights. Here, I find that the Crown's efforts did not fall within a range of reasonably defensible approaches...

The difference in standard of review between aboriginal law consultation and procedural fairness is notable. It suggests that correctness review is not an absolute requirement to guarantee appropriate procedural protections. The extent to which this may also be true in the context of administrative law procedural fairness is discussed further in Chapter VI.

¹⁸¹ Newman, *supra* note 137 at Chapter 2.4.

¹⁸² *Lefthand*, *supra* note 164 at para 42.

¹⁸³ *Labrador Métis*, *supra* note 160 at para 52. See also *Ahousaht Indian Band v Canada (Minister of Fisheries and Oceans)*, 2008 FCA 112 at para. 54.

¹⁸⁴ *Hupacasath First Nation v British Columbia (Minister of Forests)*, 2008 BCSC 1505 at para 252, [2009] 1 CNLR 30.

3 *The Duty to Accommodate*

The duty to accommodate is important to administrative lawyers because it represents a possible answer to one of consultation's perennial problems: its potential to function only as window dressing. At administrative law, it is entirely permissible, as the international and domestic jurisprudence shows, for submissions to be received by a decision-maker, considered, and ultimately rejected. There is no necessary link between the process the law imposes and the end result reached by the decision-maker. This means that there is a real risk that any process demanded by administrative law will ultimately be meaningless. In the context of aboriginal law consultation, the duty to accommodate disrupts this undesirable dynamic.

Haida makes it clear that even when the duty to consult is triggered there will not necessarily be an associated duty to accommodate. Accommodation is only required where appropriate.¹⁸⁵ This was reiterated in *Beckman*, with Binnie J stating: "*Haida Nation* and *Mikisew Cree* affirm that the duty to consult *may* require, in an appropriate case, accommodation."¹⁸⁶ The question of when it will be appropriate and what will be required is somewhat difficult to answer, however. It is clearly a question about which the court is willing to grant considerable discretion to decision-makers. In *Beckman*, Binnie J made this extremely clear, stating that:¹⁸⁷

Whether or not a court would have reached a different conclusion on the facts is not relevant. The decision to approve or not to approve the grant was given by the Legislature to the Minister who, in the usual way, delegated the authority to the Director. His disposition was not unreasonable.

This passage strongly suggests that the standard of review for whether accommodation is necessary or sufficient is one of reasonableness.

This said, the case law does not leave the content of consultation entirely to the Crown, and also has something to say about the content of the duty to accommodate. *Haida* made it

¹⁸⁵ *Haida*, *supra* note 141 at para 10.

¹⁸⁶ *Beckman*, *supra* note 145 at para 81.

¹⁸⁷ *Ibid* at para 47.

clear that, as with the duty to consult, the content of any duty to accommodate will depend on the strength of the claim put forward.¹⁸⁸ When there is a weak claim, there is unlikely to be any duty to accommodate, but in the case of a strong claim the Crown may be required to take “steps to avoid irreparable harm or to minimize the effects of infringement” on claimed aboriginal rights.¹⁸⁹ In *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, the SCC stated that accommodation requires willingness on the part of the government “make changes based on information that emerges during the process.”¹⁹⁰ This obligation sounds substantive but, as noted by Verónica Potes:¹⁹¹

...the Court has also insisted that the duty to accommodate does not impose a duty to reach consensus.¹⁹² Indeed, in the absence of agreement with the consulted, the Crown is called upon to strike a “balance of interests.”

Where accommodation is meaningful, there is no ultimate duty to reach agreement. Accommodation requires that Aboriginal concerns be balanced reasonably with the potential impact of the particular decision on those concerns and with competing societal concerns. Compromise is inherent to the reconciliation process.¹⁹³

In summary, accommodation will never amount to a veto, at least before rights are conclusively proved, but can certainly require some substantive shifts in government position.¹⁹⁴ Examples of this substantive accommodation include the court in *Mikisew* requiring the government to reconsider the proposed route of a winter road,¹⁹⁵ and the BC Court of Appeal in *Musqueam Indian Band v. British Columbia (Minister of Sustainable Resource Management)* requiring that a government-owned golf course not be disposed of to a third party pending resolution of the Musqueam Band’s claim.¹⁹⁶

¹⁸⁸ *Haida*, *supra* note 141 at para 47.

¹⁸⁹ *Ibid.*

¹⁹⁰ *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 SCR 550 at para 29 [*Taku River*].

¹⁹¹ Verónica Potes, “The Duty to Accommodate Aboriginal Peoples Rights: Substantive Consultation?” [2006] 17 JELP 27 at 32-33 (footnotes in the original).

¹⁹² *Taku River*, *supra* note 190 at para 66.

¹⁹³ *Ibid* at para 2.

¹⁹⁴ *Ibid* at para 48. See also *Beckman*, *supra* note 145 at para 14.

¹⁹⁵ *Mikisew*, *supra* note 159 at paras 64-66.

¹⁹⁶ *Musqueam Indian Band v. British Columbia (Minister of Sustainable Resource Management)*, 2005 BCCA 128 (Available on CanLII). See especially paras 66 and 67.

4 Lessons for Administrative Law

As discussed above, procedural fairness and the duty to consult and accommodate have similar sources in common law constitutional principles and similar motivations in protecting rights and the legitimacy of government action. The existence of a broadly applicable, contextual doctrine of consultation, without the requirement of a statutory ‘hook’ both suggests that Canadian judges are able to develop a procedural fairness similarly and apply it to legislative decisions. To put the matter bluntly, the existence of the duty to consult and accommodate suggests yet another way in which Canada is better equipped than the United Kingdom, New Zealand, or Australia to grapple with procedural fairness in a non-adjudicative context, and is yet another reason to argue that Canada’s failure to do so is unjustifiable.

The aboriginal law consultation jurisprudence is also a resource that can be drawn upon in developing this broader doctrine of procedural fairness. As with the New Zealand and United Kingdom jurisprudence, aboriginal law consultation provides some qualitative factors than can be used in assessing whether proper consultation is carried out. In addition, using the aboriginal law duty to consult as a model could show the courts how a robust, contextual duty to consult can be developed without a specific statutory requirement to provide structure. Finally, it is noteworthy that the duty to consult – a procedural right – is reviewed under a reasonableness standard, in contrast to the correctness standard applied to review for procedural fairness. As is discussed further in Chapter VI, I consider that an explicit acknowledgement that deference may sometimes be appropriate for questions of procedural fairness could prove useful in developing a coherent, broadly applicable doctrine that properly fulfils its rationale of protecting rights and legitimating administrative action. The aboriginal law experience shows that it is possible to do so without abandoning the core commitment to a fair process that vindicates the rights of those who participate in it.

The presence of a duty to accommodate in aboriginal law also provides an insight into how process obligations might be made meaningful outside the adjudicative context. The main

point of the duty seems to be to make it crystal clear that the contextual duty to consult in aboriginal law can in certain contexts require a substantive change in position. This is very different from the position set out in the administrative law consultation model discussed above, which imposes no substantive obligations on government (with the possible narrow exception of substantive legitimate expectations). The duty to accommodate provides Canadian administrative law with a relatively familiar option for improving on the overseas jurisprudence discussed earlier in this chapter.

C Conclusion

The discussion in this chapter suggests that, in comparison to other Westminster jurisdictions, Canadian administrative law has been especially timid in addressing the two major flaws I identify in its version of procedural fairness: a failure to cover legislative decisions and a fixation on adjudicative procedures. In comparison, the United Kingdom has significantly narrowed which decisions count as “legislative”, while New Zealand is at the very least more open than Canada to the possibility of developing a wider concept of fairness. Both also have significantly broader doctrines of procedural fairness which are used to expand participation rights into the legislative sphere. Of course, this does not mean that Canada needs to follow exactly the same route: its concept of legitimate expectations has developed following a different track to New Zealand and the United Kingdom, and would not be an appropriate vehicle to extend fairness to legislative decisions. A better way to do this would be an expansion of the general scope of procedural fairness. This is the route Australia has followed at least to some extent, in applying fairness to all people who are individually affected by an executive decision, regardless of how the power is classified.

In general, however, none of these three jurisdictions has entirely broken free of the adjudicative fixation that seems to be at the heart of procedural fairness since *R v Electricity Commissioners. Ex parte London Electricity Joint Committee Company (1920), Limited, and Others* and *R v Legislative Committee of the Church Assembly ex parte Haynes-Smith*

in the early 1900s.¹⁹⁷ New Zealand and the United Kingdom *have* developed a doctrine of consultation, which functions as the non-adjudicative expression of procedural fairness in the legislative context, but this almost exclusively applies only where there is a statutory consultation obligation or legitimate expectation. Even so, the content of this consultation jurisprudence can be used in developing a broader concept of procedural fairness in Canada. The statutory obligation or legitimate expectation only act as triggers; the content of the duty is entirely a creature of the common law.

Somewhat counterintuitively, Canada is in the best position of any of the jurisdictions discussed in this thesis to break away entirely from a narrow, adjudicatively-focused doctrine of procedural fairness. The broadly drawn duty of fairness in Canada is more easily triggered than that in the UK, New Zealand, or Australia. The line of bylaws cases discussed in Chapter IV provides a body of law from which a broader duty can be developed. The comparative material discussed in this chapter provide a model of common law consultation that can be drawn on in filling out the content of that duty. And, finally, the body of Canadian law on aboriginal consultation suggests that Canada should already be ready to step away from the need for such triggers, and develop a general concept of non-adjudicative procedural fairness (i.e. consultation). This doctrine already utilises administrative law concepts, and its underlying concern with the legitimacy of government action is similar to that of procedural fairness. The element of substantive obligation contained in the duty to accommodate is also a reminder that truly meaningful citizen participation cannot just consist of pro forma ‘box ticking’ consultation. In summary, this chapter demonstrates that Canadian law can do what I argue needs to be done to fully legitimate its administrative state in the terms set out in Chapter II, with only a few incremental reforms. Administrative law can be used to provide opportunities for meaningful citizen control of administrative decision-making. The one remaining question

¹⁹⁷ *R v Electricity Commissioners. Ex parte London Electricity Joint Committee Company (1920), Limited, and Others*, [1924] 1 KB 171 and *R v Legislative Committee of the Church Assembly ex parte Haynes-Smith*, [1928] 1 KB 411. See discussion of this issue in Chapter III.

is how best to put together the tools that already exist in the law to make this control a reality.

CHAPTER VI CONCLUSION: A PATH FORWARD

The argument I have made in this thesis is that the current limitations to the scope of Canadian procedural fairness are unjustifiable. Classification of a decision as legislative completely shields it from judicial scrutiny, unnecessarily denying countless citizens whose rights are affected by the decision the right to have it made fairly. In continuing to apply such an exclusion, the Canadian courts are failing to uphold the underlying purposes of administrative law. As I argued in Chapter III, these underlying purposes are the protection of individual rights and the protection of the administrative state's legitimacy. As detailed in Chapter IV, Canadian administrative law already does a reasonable job of securing individual rights in the procedural area, but falls down when it comes to protecting legitimacy. I argued in Chapter II that the way that such legitimacy ought to be secured is via citizen control of executive decision-making. This is a participatory vision of legitimacy and, as such, it is incumbent upon procedural fairness to achieve it. Facilitating citizen control of executive decision-making should be a normative goal of procedural fairness.

The status quo must change if the law is to approach this goal, and the discussion in the previous two chapters makes it clear that the required changes are easily within the reach of Canadian administrative law. The current law supplies most of what is needed, and the experience of comparative administrative law and cognate doctrines in domestic law discussed in Chapter V provide resources which can be drawn on in reforming the law. This chapter sets out my views on how current law can be pieced together, and in some places reformed slightly, to bring the Canadian doctrine of procedural fairness closer to the normative end-goal of facilitating citizen control of (and thus legitimating) the administrative state.

In order to remedy the unwontedly narrow scope of its version of procedural fairness, Canadian administrative law ought to discard the current approach to the area of law, based

on *Attorney General of Canada v Inuit Tapirisat et al.*,¹ and adopt one of the more promising approaches to fairness already available in the case law. The most prominent of these approaches is to extend procedural protections to anyone individually affected by a decision, as was done in *Wiswell v Winnipeg* and the cases following it.² This is an improvement on the status quo, and has some attractive features, but in my view the better approach is that suggested by *Catalyst Paper v District of North Cowichan*³ and *Canadian Pacific Railway v Vancouver (City)*:⁴ discarding any additional threshold beyond a person's rights, interests, or privileges being affected by an executive decision. Concerns about calibrating the appropriate process in any given circumstances and avoiding judicial overreach can be dealt with by using the inherently flexible nature of procedural fairness to vary content, and ideally by confirming the extension of formal judicial deference, already well-established for substantive review, to procedural review. The practice of procedural review already demonstrates elements of deference, and a formal change in the standard of review has already been suggested by some lower courts. In addition to facilitating what I see as a necessary expansion to the scope of fairness, such a formal change would help contribute to the continued development of a culture of justification in Canadian administrative law.

This expanded, contextual vision of procedural fairness can be given content by extrapolating Canada's current approach to fairness in the adjudicative sphere: calibrating the level of fairness required with the *Baker* synthesis, and picking the procedural features that are required in the circumstances. The procedural features that are typically applied in the adjudicative setting may not always make sense in legislative decision-making, but the non-adjudicative models of participation discussed in Chapter V can be drawn upon to provide meaningful participation in this context. Although there is significant American material that could be drawn on here as well, a brief consideration of rulemaking under the *Administrative Procedures Act*, below, shows that the lightly structured contextual

¹ *Attorney General of Canada v Inuit Tapirisat et al.*, [1980] 2 SCR 735 [*Inuit Tapirisat*].

² *Wiswell v Winnipeg*, [1965] SCR 512 [*Wiswell*].

³ *Catalyst Paper v District of North Cowichan*, [2012] 1 SCR 5 [*Catalyst Paper*].

⁴ *Canadian Pacific Railway v Vancouver (City)*, [2006] 1 SCR 227 [*Canadian Pacific*].

approach I advocate would be preferable to the relatively ossified system of hard look review under the APA which applies in the USA.

By itself, the model of fairness outlined here is not sufficient to provide the sort of citizen control that the model of legitimacy discussed in Chapter II argues is required. For this expanded version of fairness to be anything but window dressing, there must be a link between the process imposed and the result reached. This can be achieved through a reason-giving requirement. This requirement has existed as part of Canadian procedural fairness at least since *Baker v Canada (Minister of Citizenship & Immigration)*,⁵ but currently applies in an ad hoc fashion. Reason-giving also plays a significant part in the modern reasonableness calculation, and reason-giving in this context could also be used to provide the link between process and substance that is necessary for procedure to be meaningful. What is required is for a decision-maker to be obliged to explain their decision, at least in part, in terms of the submissions made to them.

The approach to procedural fairness argued for here is based entirely on existing aspects of Canadian administrative law or cognate and comparative areas of law. While the model does represent a change to the status quo, it is not revolutionary. What is needed for Canadian procedural fairness to fulfil its purpose and better provide for citizen control of executive decision-making is a modicum of initiative from the Canadian courts in taking these evolutionary steps.

A A Better Approach to Procedural Fairness

As discussed in Chapter IV, the dominant approach to defining the scope of fairness in Canada rests on the foundation of *Inuit Tapirisat*. This has resulted in any decision classed as legislative being completely excluded from the scope of fairness. Such distinctions rest on incorrect assumptions about both the nature of delegated legislation and the importance of the adjudicative model to procedural fairness.⁶ These distinctions are unjustifiable.

⁵ *Baker v Canada (Minister of Citizenship & Immigration)*, [1999] 2 SCR 817 [*Baker*].

⁶ See section IV(D) above.

As noted in Chapter V, there are two broad approaches available in the domestic and comparative jurisprudence that would be an improvement on the current approach to procedural fairness. The first is to adopt the test that prevails in Australia and, following *Bank Mellat v Her Majesty's Treasury (No. 2)*,⁷ seemingly in the UK – namely to abandon the legislative/administrative distinction and instead give anyone individually affected by an executive decision a right to be heard. The other, in my view better, approach is to lower the threshold for the application of procedural fairness and deal with the calibration of the doctrine at the level of content. This is the method that appears to have been taken by the SCC in the bylaws cases of *Catalyst Paper* and *Canadian Pacific*, and is similar to the approach suggested by Deane J in *Haoucher v Minister for Immigration and Ethnic Affairs* in Australia.⁸ Neither of these approaches has achieved widespread acceptance at this point, but are available and, in my view, are superior to the status quo. Despite preferring the second approach, I consider that the “individually affected” method has some advantages, and as such also warrants consideration.

1 The “Individually Affected” Approach

As discussed in Chapter IV, using the manner in which people are affected by decisions to define the scope of procedural fairness has a long history in Canada, dating at least from *Wiswell* in 1963. The majority in *Wiswell* said that *de jure* legislative decisions should be treated as *de facto* ‘quasi-judicial’ when they effectively act to resolve a dispute between a limited number of parties, with little wider impact.⁹ The minority judge, Judson J, went further, stating that he did not think the classification of a decision as legislative or quasi-judicial was relevant; if a person’s rights are affected individually by an executive decision, they ought to be afforded a fair process.¹⁰ The majority approach is very similar to that

⁷ *Bank Mellat v Her Majesty's Treasury (No. 2)*, 2013 UKSC 39, [2013] 4 All ER 533 [*Bank Mellat (No. 2)*].

⁸ *Haoucher v Minister for Immigration and Ethnic Affairs* (1989), 169 CLR 648.

⁹ *Wiswell*, *supra* note 2 at 520.

¹⁰ *Ibid* at 525-526.

which now prevails in the UK, while Judson J's views closely mirror current Australian law.

As discussed in Chapter V, this shift took place relatively recently in the United Kingdom, following *Bank Mellat (No. 2)* in 2013. *Bank Mellat (No 2)* held that where a legislative instrument was targeted at specific people, it attracted a duty of fairness.¹¹ A similar approach has prevailed in Australia at least since *Bread Manufacturers of New South Wales v Evans* in 1981.¹² In this case Gibbs CJ rejected the relevance of the distinction between legislative and adjudicative decisions in determining whether procedural fairness applied, instead suggesting that procedural fairness would apply whenever a person was “affected individually”.¹³ Thus the UK approach still maintains the legislative/adjudicative distinction, albeit with only a limited role, while Australia discards it entirely.

While both *Wiswell* approaches have been influential in a number of Canadian cases over the past forty years, neither has received broad acceptance; the hard legislative/administrative/quasi-judicial distinction of *Inuit Tapirisat* is still the dominant approach.¹⁴ In my view, shifting away from this distinction towards either *Wiswell* approach would result in a more coherent doctrine of procedural fairness.

One of the advantages of these approaches based on the manner people are affected is that they arguably reduce concerns about the difficulty of properly defining the scope of procedural fairness, especially when compared to the very low threshold I advocate in the next section.¹⁵ Even those generally supportive of expanding procedural fairness raise these concerns, and they need to be addressed. Particularly relevant are the issues raised by Sedley LJ in *R (on the application of BAPIO Action Ltd) v Secretary of State for the*

¹¹ *Bank Mellat (No. 2)*, *supra* note 7 at paras 44 to 46.

¹² *Bread Manufacturers of New South Wales v Evans*, (1981) 38 ALR 93.

¹³ *Ibid* at 103.

¹⁴ This is discussed further in section IV(C) and (D) above.

¹⁵ See section VI(A)(2) below.

Home Department.¹⁶ As noted in Chapter V, Sedley LJ expressed general support for a broader scope for procedural fairness, but worried that the courts were not well suited to the sort of flexible, individuated approach that a functioning general duty to consult would require: deciding who ought to be consulted and how was, he thought, a difficult task for a court to perform.¹⁷ He worried that the imposition of such a duty risked the courts overstepping their proper constitutional role.

A doctrine of procedural fairness which set its threshold based on whether a person is individually affected could be applied to legislative decisions without falling foul of these concerns. It clearly defines the scope of who ought to be consulted or otherwise have a right to participate. Indeed, *Bank Mellat (No 2)* was decided after *BAPIO* and approvingly cited Sedley LJ's views on the proper scope of procedural fairness in doing so, while adopting an "individually targeted" approach.¹⁸ Such a change would also be a considerable improvement on the status quo, ensuring that those most directly affected by a decision, regardless of its form, would have a chance to provide input into the decision-making process. This is crucial both to ensure that rights are properly protected, and that decision-making is legitimate. As I argued in Chapter II, while an ideal process allows all who wish to do so to participate, we should be most concerned about those most at risk of domination by a particular decision, which in this case is closely aligned with those who are affected individually.¹⁹

The jurisprudence discussed above suggests two ways to grant procedural fairness to those who are individually affected by a decision. The first is to treat decisions which are legislative as a matter of law as *de facto* administrative or 'quasi-judicial' where they are individually targeted while the second is to discard the distinction entirely and focus only on individual effect. Either would be an improvement on the status quo, but in my view

¹⁶ *R (on the application of BAPIO Action Ltd) v Secretary of State for the Home Department*, 2007 EWCA Civ 1139, [2008] ACD 7 [*BAPIO*].

¹⁷ *Ibid* at para 47.

¹⁸ *Bank Mellat (No 2)*, *supra* note 7 at paras 45 and 46.

¹⁹ See section II(A)(3) above.

the latter approach is preferable. The former method, used by the *Wiswell* majority and Lord Sumption in *Bank Mellat (No 2)*, is overly complicated. It allows procedural fairness to be applied to some legislative decisions, but in doing so maintains the relevance of the legislative/administrative/quasi-judicial distinction. This seems to add an unnecessary and somewhat contradictory layer onto the manner in which the approach functions in practice, which is to effectively apply procedural fairness whenever someone is individually targeted, defining any decision which does so as non-legislative.

The approach taken by Judson J in *Wiswell* and followed in Australia removes this extra layer of unnecessary formalism, with virtually the same practical effect. It is simpler and more focused on the rights of the individual affected by the decision. The remaining discussion in this section therefore utilises on this approach.

Defining the scope of procedural fairness on the basis of who is individually affected has some significant advantages. It is a minimalist change to the current doctrine, building directly on existing Canadian precedent. It better aligns the scope of procedural fairness with its underlying purpose of protecting individual rights and legitimating executive decision-making than does the status quo. It also arguably avoids many of the problems with line-drawing that some broader approaches might have. In short, its appeal is that it is a seemingly simple improvement on the status quo. However, while the individually affected approach resolves some of the contradictions in the status quo, it also raises some new complications of its own.

A key practical problem is working out exactly how to draw the line between being affected individually as opposed to generally by a decision. There is little or no discussion of how to draw this line in the Canadian jurisprudence; it is simply asserted in the line of cases descending from *Wiswell* discussed in Chapter IV. All of these cases are admittedly relatively simple cases where one or two persons are obviously targeted by an apparently legislative decision, so little discussion of the issue was actually needed. Similarly, this approach is newly introduced in the UK, so there is little discussion of how to define

“individual” there. The “individually affected” approach has been used in Australia for decades, however, and there is some engagement with the issue there, in particular in Aronson, Dyer, and Groves’ well regarded treatise, *Judicial Review of Administrative Action*.²⁰ That said, no firm conclusion on the question has been reached over these decades of engagement, suggesting that it is not as easy a line to draw as one might initially suspect.

a What is an individual?

The first question that needs to be asked is what “individually” means in the context of determining who is afforded procedural fairness. Obviously if a decision is targeted specifically at a single named person, he or she will be individually targeted. This was the case in *Bank Mellat (No 2)*, for example, and effectively also the case in *Wiswell*. But beyond these obvious cases, how does one tell if a person is affected, in the words of Deane J in *Kioa v West*, “in his individual capacity (as distinct from a member of the general public or of a class of the general public)”?²¹ Putting aside the issue of whether legal bodies like unincorporated societies count as an individual for these purposes, what constitutes a “class”? Two or three specifically targeted individuals would seem to count as individual targeting, but how many more is required before a “class” is created, and an obligation to provide procedural fairness avoided?²²

Aronson, Dyer and Groves cite *King Island Council v Resource Planning and Development Commission* as an example of a case where a larger group was found to be individually affected.²³ In that case, a planning amendment affected an identifiable group of 10-15 landowners on King Island, constituting approximately 1% of the people living on the

²⁰ Mark Aronson, Bruce Dyer, and Matthew Groves *Judicial Review of Administrative Action*, 4th ed, (Pymont, NSW: Thomson Reuters, 2009)

²¹ *Kioa v West*, [1985] HCA 81, (1985) 159 CLR 550 [*Kioa*].

²² Aronson, Dyer and Groves, *supra* note 20, at note 409.

²³ *King Island Council v Resource Planning and Development Commission*, [2007] TASSC 42, Blow J at paras 17 and 18.

island.²⁴ In a bylaw affecting 1% of a large city, or a regulation affecting a whole jurisdiction, thousands of people would be implicated, and this would obviously seem to be enough people to constitute being affected as a class rather than as an individual. Beyond this, the case law has not been at all clear on how many people must be affected by a proposed regulatory change before they will count as a class. The issue thus remains unsettled.

b Gauging individual effect

Even if the issue of what constitutes an individual for the purposes of procedural fairness is resolved, there is also significant uncertainty about how to judge whether those individuals are targeted or affected more than the general public. Aronson, Dyer, and Groves suggest there are four ways to approach the issue.²⁵ The first, and closest to the words of Deane J above, is to look at the actual effect of the decision.²⁶ If its eventual effect falls primarily on identifiable individuals, then they are individually affected. While appealing in principle, this approach has significant practical difficulties. In particular, when making a broad policy or legislative decision, it is almost impossible for a decision-maker to know ahead of time who will be affected and to what degree they will be affected, thus rendering it almost impossible for the correct people to be offered a chance to participate in the decision-making process.²⁷

Another approach is to look at whether a decision is *likely* to affect individuals. This, however, would seem to be a replication of the administrative/legislative distinction in all but name: decisions which are likely to affect people individually are administrative or quasi-judicial, and decisions which are not likely to affect people individually are

²⁴ The population of King Island in the most recent Australian Census was 1,599: Australian Bureau of Statistics, *King Island: Region Data Summary*. Online: http://stat.abs.gov.au/itt/r.jsp?RegionSummary®ion=604031093&dataset=ABS_NRP9_ASGS&geoconcept=REGION&measure=MEASURE&datasetASGS=ABS_NRP9_ASGS&datasetLGA=ABS_NRP9_LGA®ionLGA=REGION®ionASGS=REGION

²⁵ Aronson, Dyer and Groves, *supra* note 20 at 452-460.

²⁶ *Ibid* at 452.

²⁷ *Ibid* at 452-453.

legislative. As such, this approach would not constitute a substantive change to the status quo.²⁸

A different way of addressing the issue is not to look at the decision's effect but at whether the interests of identifiable individuals are a permissible consideration during the decision-making process. As Brennan J put it in *Kioa*:²⁹

If a power is apt to affect the interests of an individual in a way that is substantially different from the way in which it is apt to affect the interests of the public at large, the repository of the power will ordinarily be bound or entitled to have regard to the interests of the individual before he exercises the power. ... When the repository is bound or is entitled to have regard to the interests of an individual, it may be presumed that observance of the principles of natural justice conditions the exercise of the power, for the legislature can be presumed to intend that an individual whose interests are to be regarded should be heard before the power is exercised.

Brennan J's comments here interestingly tie the doctrine of relevant considerations to the existence of a duty of fairness. He states that where a repository of statutory power is "bound or entitled" to consider the interests of an individual, natural justice ought to apply. This makes it clear that Brennan J sees a need to apply procedural fairness not only where considering individual interests is mandatory, but also where it is permissible. Aronson, Dyer, and Groves succinctly explain the justification for this approach when individual interests are a mandatory consideration as follows:³⁰

If the circumstances of an individual are to be taken into account, affording a hearing to that individual is very likely to increase the accuracy and overall quality of the decision. In contrast, the instrumental benefits of hearing individuals will usually be more limited where a decision is taken in the interests of the public (or a section of the public) as a whole, without regard to its effects on particular individuals.

They also note, and I agree, that expanding this duty to situations where considering individual interests is a merely permissible (rather than mandatory) relevant consideration,

²⁸ *Ibid* at 453.

²⁹ *Kioa*, *supra* note 21 at 619, quoted in Aronson, Dyer, and Groves, *ibid* at 454.

³⁰ Aronson, Dyer, and Groves, *ibid* at 455.

as this approach would, is more problematic.³¹ It would seem to involve the same sort of prescience required by the actual effect approach – working out which individuals might be relevant to consider in the decision-making process before the impact and reach of the decision is known. Again, this would make it impossible for decision-makers to know whether they have followed the law.

The final method for defining individual effect is requiring a fair hearing for any individual whose interests have *actually* been considered in the decision-making process (the “actual consideration” approach). This is really a modified version of the previous approach, and has a certain logical appeal: people will be treated as individually affected if those interests were actually considered as part of the decision-making process. If only general principles or the general interests of broad classes were considered, then they are not individually affected and no procedural fairness is required.³² Aronson, Dyer, and Groves identify several cases where this approach has been followed to grant procedural fairness rights where a general rule is passed but relies on particular matters related to a specific individual.³³

There is no consensus in the case law as to which of these four approaches is authoritative. Aronson, Dyer, and Groves argue that the actual consideration approach is most practical, and is largely consistent with most case law.³⁴ I agree. While still retaining the difficulty of defining the exact line between a collection of individuals and a class, it is the simplest test of the four outlined above, and retains a strong link to the core point: whether an individual’s rights are affected by a decision.

³¹ *Ibid* at 456.

³² *Ibid* at 456-457.

³³ *Ibid* at 457-8.

³⁴ *Ibid* at 459-460.

c Conclusion on the “individually affected” approach

Changing from the current legislative/administrative/quasi-judicial distinction to a test of whether someone is actually affected by any given administrative decision would be an improvement on the status quo. However, this thesis is predicated on the argument that administrative law has two broad purposes: the protection of individual rights and the legitimation of the administrative state. No approach based on individual effect would properly fulfil the second requirement. This is because, as is discussed in Chapter II, the model of legitimacy I am using requires the ability for all interested citizens to be given the chance to participate in the decision-making process. This requirement applies whether or not people are individually affected or not. As such, a threshold requirement predicated on individual effect will necessarily exclude some people who ought to be given participatory rights.

Further, even the actual consideration approach involves replacing the arbitrary and difficult to define legislative/administrative/quasi-judicial distinction with the somewhat less arbitrary and still difficult to define individual/class/general public distinction. It also retains the status quo’s fixation on adjudicative procedures. The only way to avoid this arbitrary line-drawing and adjudicative fixation, which inevitably excludes some people who ought to be afforded participatory rights, is to define the scope of procedural fairness extremely widely, obviating the need to draw these sorts of lines.

2 The “No Threshold” Approach

The above discussion shows that the apparent simplicity of the individually affected approach is at least partly illusory. It also fails to cover a significant section of administrative decision-making, meaning that the legitimacy benefits that are the very reason for broadening the doctrine do not fully accrue. This being the case, we should take the other – better – approach available. As noted above, this involves removing any requirement for the application of procedural fairness beyond a right, interest, or privilege being affected, individually or not.

While at first glance this change appears to be a much larger departure from the status quo than the “individually affected” approach, elements of it already appear in current case law and it is certainly consistent with the Canadian courts’ general method of administrative review. By the Canadian method of administrative review I mean the broad, contextual method the Canadian courts have taken to procedural review – as discussed in Chapter IV – but also the similar approach taken in substantive review.

Substantive review in Canada has seen a continuous trend away from prescriptive correctness review towards a heavily contextual reasonableness standard “that takes its colour from the context”.³⁵ *Dunsmuir v New Brunswick* collapsed the previously applicable three standards of review into two: correctness remains, but patent unreasonableness and reasonableness *simpliciter* were collapsed into a single, broad standard of reasonableness.³⁶ *Dunsmuir* sets out a two-step test to determine the appropriate standard of review. The first step *Dunsmuir* proposes is the consideration of previous case law. If the standard of review has been determined in a materially similar previous case, that standard should be adopted and no further analysis needs to be conducted. The SCC also distilled the pre-*Dunsmuir* case law into a series of broad categories of legal decisions which suggest one standard of review or the other.³⁷

³⁵ *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 at para 59, Binnie J [*Khosa*].

³⁶ *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*].

³⁷ This approach is well summarised by Fish J in *Smith v Alliance Pipeline Ltd*, 2011 SCC 7, [2011] 1 SCR 160 at para 26:

Under *Dunsmuir*, the identified categories are subject to review for either correctness or reasonableness. The standard of correctness governs: (1) a constitutional issue; (2) a question of “general law ‘that is both of central importance to the legal system as a whole and outside the adjudicator’s specialized area of expertise’” (*Dunsmuir*, at para. 60 citing *Toronto (City) v C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, at para. 62); (3) the drawing of jurisdictional lines between two or more competing specialized tribunals; and (4) a “true question of jurisdiction or *vires*” (paras. 58-61). On the other hand, reasonableness is normally the governing standard where the question: (1) relates to the interpretation of the tribunal’s enabling (or “home”) statute or “statutes closely connected to its function, with which it will have particular familiarity” (para. 54); (2) raises issues of fact, discretion or policy; or (3) involves inextricably intertwined legal and factual issues (paras. 51 and 53-54).

This categorical approach is clearly the primary test, but the old pragmatic and functional approach that applied pre-*Dunsmuir* remains, albeit retitled “the standard of review analysis”. This involves a consideration of various factors to try to determine the level of deference the legislature intended the decision-maker to be granted in the particular context of the decision. These factors are:³⁸

- (1) the presence or absence of a privative clause; (2) the purpose of the tribunal as determined by interpretation of enabling legislation; (3) the nature of the question at issue, and; (4) the expertise of the tribunal.

Subsequent case law has confirmed that the types of decision to which correctness applies fall into a relatively small number of narrow, exceptional categories.³⁹ The effect of these developments is that, currently, reasonableness is generally seen as the default standard of review in procedural matters.⁴⁰ Legislative decisions, even those without identifiable individual effect, are undoubtedly subject to substantive review, and at least arguably have been integrated into this reasonableness-dominated framework.⁴¹

As is discussed further below, the specifics of the *Dunsmuir* approach have attracted significant criticism, with many commentators being of the view that far from its goal of providing “a principled framework that is more coherent and workable,” it is difficult to apply and provides little guidance for litigants or for government officials on what is

See also Paul Daly, “Dunsmuir’s Flaws Exposed: Recent Decisions on Standard of Review” (2012) 58 *Queens LJ* 483.

³⁸ *Dunsmuir*, *supra* note 36 at para 64.

³⁹ *Alberta (Information and Privacy Commissioner) v Alberta Teachers’ Association*, 2011 SCC 61, [2011] 3 SCR 654, at paras 30 to 47 and the cases discussed therein.

⁴⁰ See generally Daly, *supra* note 37, and Audrey Macklin, “Standard of Review: Back to the Future?” in Lorne Sossin & Colleen Flood, eds, *Administrative Law in Context*, 2d ed, (Toronto: Emond Montgomery, 2013) 279.

⁴¹ McLachlin CJ in *Catalyst Paper* seems to indicate that legislative decisions are integrated into the *Dunsmuir* approach, while Abella J in *Katz Group Canada Inc. v Ontario (Health and Long-Term Care)* 2013 SCC 64, [2013] 3 SCR 810 suggests that a separate approach applies.

required.⁴² There certainly is force to these criticisms, and it is not my intention in this thesis to uncritically defend *Dunsmuir*. The reason I consider that the experience of substantive review is useful to consider is the broad approach it uses – a wide, generally applicable and contextual standard that applies across the administrative state. This is in general the approach to procedural review under *Baker* as well. When viewed in this way, it is the status quo – excluding legislative decisions and only legislative decisions from the scope of procedural review – that is out of step with Canadian administrative law. The change I suggest is *more* consistent with both the general approach of procedural review and the overarching method used in the administrative law more broadly.⁴³

In terms of signals in the case law pointing towards an extremely low threshold to apply procedural fairness, the SCC cases of *Canadian Pacific* and *Catalyst Paper* are particularly noteworthy.⁴⁴ In *Canadian Pacific*, writing for the unanimous SCC, McLachlin CJ stated that there was “little doubt” that the city of Vancouver owed Canadian Pacific a duty of fairness before it imposed a bylaw negatively affecting the company.⁴⁵ This was despite the fact that she specifically identified the bylaw as a legislative decision and noted that it affected many people other than Canadian Pacific.⁴⁶ Similarly, in *Catalyst Paper*, McLachlin CJ, again writing for a unanimous Court, stated (obiter) that:⁴⁷

A municipality’s decisions and bylaws, like all administrative acts, may be reviewed in two ways. First, the requirements of procedural fairness and legislative scheme governing a municipality may require that the municipality comply with certain procedural requirements, such as notice or voting requirements...

⁴² *Dunsmuir*, *supra* note 36 at para 32. See discussion in section VI(B)(2) below. See also scholarly criticism of the way substantive review has developed since *Dunsmuir*: Daly, *supra* note 37; Matthew Lewans, “Deference and Reasonableness Since *Dunsmuir*” (2012) 38 *Queen's LJ* 59; Hilary Evans Cameron, “Substantial Deference and Tribunal Expertise Post-*Dunsmuir*: A New Approach to Reasonableness Review” (2014) 27 *CJALP* 1, and Diana Ginn, “New Words for Old Problems: The *Dunsmuir* Era” (2010) 37 *Advocates' Q* 317.

⁴³ As is discussed further below, the approach of substantive review also includes an element that points in what could be a useful direction for procedural review: the clear separation of the intensity of scrutiny to be employed by a court in applying the relevant legal test from the test itself.

⁴⁴ *Canadian Pacific*, *supra* note 4 and *Catalyst Paper*, *supra* note 3.

⁴⁵ *Canadian Pacific*, *ibid* at para 40.

⁴⁶ *Ibid* at para 48.

⁴⁷ *Catalyst Paper*, *supra* note 3 at para 12.

This can either be read as a statement that bylaws are administrative – not legislative – acts, or that regardless of classification bylaws are subject to the same procedural fairness requirements as other municipal decisions. I consider that the second is a better interpretation because it is more consistent with the earlier precedent in *Canadian Pacific*, but either is a significant departure from the status quo.

Neither *Canadian Pacific* nor *Catalyst Paper* engages at all with *Inuit Tapirisat*. Neither engages with *Wiswell*. This is a completely different way of thinking about procedural fairness from that taken in both *Inuit Tapirisat* and *Wiswell*, where neither the type of power exercised nor the degree of individual effect are of primary importance. One comment along these lines could be seen as a slip, but two suggests that the SCC is ready to move in the direction indicated by *Canadian Pacific* and *Catalyst Paper*, even if it has not yet formally stepped away from *Inuit Tapirisat*. This is, in my view, the best direction for the Canadian courts to take in developing procedural fairness. The SCC should clarify the situation by formally overruling *Inuit Tapirisat*, and it and the lower courts should then take up the invitation presented by *Canadian Pacific* and *Catalyst Paper* to extend procedural fairness to all persons whose rights, interests, or privileges are affected, individually or not, by any executive decision.

Such a change is not as simple as abolishing any threshold requirement and continuing on in the same way otherwise. A full hearing for every person affected by a change to broadly applicable delegated legislation would be impractical, and would likely paralyse executive government. There is still a need to calibrate the content of fairness in any given situation, and the next section discusses how this can be done using the existing tools available in Canadian administrative law.

B Calibrating Fairness

It is well established that procedural fairness has variable content depending on the context, and Canada has already developed a sophisticated jurisprudence on appropriate judicial

deference to public officials in the substantive review context. This is increasingly being seen as applicable to procedural fairness. This ability to calibrate what judges will require in the name of procedural fairness is important to ensure that the expansion of the doctrine I advocate does not impose impracticable burdens on administrators or extend judges beyond their sphere of institutional competence. But it still imposes the sorts of procedures that can lead to the sort of citizen control that is necessary to address the legitimacy deficit in the administrative state.

The two issues are somewhat muddled currently. The SCC is comfortable with the idea of procedural fairness being contextual, but has thus far resisted lower courts' push to explicitly adopt a reasonableness standard in the procedural arena. Despite this resistance, the contextual approach endorsed by the SCC in *Baker* inarguably includes elements which provide for varying depth of judicial scrutiny. For the reasons discussed below, I consider that rolling the deference calculation into the legal test for a fair process is undesirable. A better approach is to separate questions of depth of scrutiny out from the application of the substantive test for a fair process. This is already the approach taken in substantive review, with a separate standard of review analysis, and adopting a similar approach in the procedural sphere may help ensure that the expansion of fairness that I argue for does not result in the over-judicialisation of executive government.

1 Variable Content

There are two broad ways that the expanded duty of fairness I propose can be calibrated. The first is by varying its content depending on the circumstances. This is already the way fairness is calibrated in adjudicative contexts and is also broadly consistent with the general approach administrative law in Westminster systems use to vary the intensity of review. As Mark Elliott states, “modern administrative law's standard *modus operandi* is to address such concerns [about undue judicial interference] not by limiting the *scope of application* of relevant principles of good administration, but by moderating their *intensity* (in the sense

of the precise extent and content of the obligations which they impose upon decision-makers).”⁴⁸

The modern Canadian doctrine of procedural fairness can accommodate this necessary flexibility. The contextual nature of procedural fairness has been very clear since at least *Knight v Indian Head School Division No. 19*.⁴⁹ As reiterated in *Baker*, there are (at least) five factors used in determining what fairness requires in any given circumstances:

- (a) the nature of the decision being made and process followed in making it (i.e. how close the process is to a trial);
- (b) the nature of the statutory scheme and the terms of the statute under which the body operates;
- (c) the importance of the decision to the people affected;
- (d) the legitimate expectations, if any, of the person challenging the decision; and
- (e) the choices of procedure made by the agency.⁵⁰

The flexibility these factors give the doctrine can accommodate a wide range of procedures appropriate to persons with different levels of interest in any particular decision. The *Baker* model can provide for a wide range of processes depending on the degree to which a person is affected by a decision. This could range from one-on-one, in-person hearings for those directly affected on critical issues (which the status quo arguably already provides), through consultative procedures in the United Kingdom/New Zealand vein in the middle,

⁴⁸ Mark Elliott, “Has the common law duty to give reasons come of age yet?” [2011] PL 56 at 60 (emphasis in the original). Elliott makes this statement in the context of advocating for a generally applicable duty to give reasons, but the argument applies here as well. Further, it should be noted that he does not seem to see procedural fairness’ limitation to adjudicative contexts as the sort of undesirable limit he identifies, but in my view the two situations are clearly very similar. Dean Knight also wrote extensively of the omnipresence of variable intensity of scrutiny in administrative review, regardless of whether such variation is explicitly acknowledged by doctrine, see Dean Knight, *Vigilance and restraint in the common law of judicial review: scope, grounds, intensity, context* (PhD thesis, The London School of Economics and Political Science, 2014) [unpublished].

⁴⁹ *Knight v Indian Head School Division No. 19*, [1990] 1 SCR 653 [Knight].

⁵⁰ *Baker*, *supra* note 5 at paras 23-27.

to mere public notice of a regulatory change for those who are barely affected. To reiterate: the reason that this change is necessary is that the status quo does not adequately protect individual rights or bolster the legitimacy of legislative executive decision-making – the two purposes I argued in Chapter III that procedural fairness serves. What is required to fulfil the latter part of this requirement is an opportunity for citizen control of decision-making, as was discussed in Chapter II.

The approach to procedural fairness discussed here would not provide the same access to all citizens with an interest in the decision, as participatory rights in this model would vary from person to person depending on the relevant contextual factors. However, the republican vision of citizen control I use can accommodate these variations. While citizen control is necessary to legitimate executive decision-making, an exactly equal set of participatory rights may not be required for citizen control. Citizen control helps legitimate executive authority because it avoids arbitrary law-making, which has the potential to dominate citizens. As discussed in Chapter II, however, different degrees of domination are possible.⁵¹ Where the risk of domination is lower – i.e. where a person is only peripherally affected by a decision or it is not a decision of importance to them – then we need not be as concerned when the most onerous forms of process able to be imposed under the *Baker* approach (e.g. an in-person hearing) are not afforded to the person concerned. As such, the variable approach set out here still brings Canadian administrative law closer to the normative end goal of a version of procedural fairness that provides for citizen control of executive decision-making.

2 *Variable Intensity*

The second way that procedural fairness can be better calibrated in a legislative context is through adjusting the intensity of review that applies. This method of calibration means that in contexts where significant deference is required it can be given, while still not excluding close scrutiny when required. Whether done via taking a flexible approach to

⁵¹ See discussion in section II(A)(3) above.

the intensity of review required by the requirement that a process be fair in any given context or via extending the explicit standard of review analysis which is conducted in substantive review into the procedural realm, the mechanisms exist within Canadian administrative law to modulate the depth of scrutiny applied to decision-makers' procedural choices. As is discussed further below, my preference is for the second approach, but either of these would give courts the tools they need to mediate between the vigilance required by the rule of law and the restraint demanded by the legitimate role of an executive headed by elected officials in executing policy.⁵²

While this is a live issue in procedural fairness generally, my proposal to expand the reach of the doctrine to executive law-making means it requires particular attention. The legislative sphere, executive or otherwise, is an area where judges are right to be humble about their level of expertise vis à vis those responsible for making laws. That applies to matters of process just as much as matters of substance. The adoption of the deferential reasonableness standard in substantive review followed the SCC's move to subject the majority of executive decisions to judicial scrutiny following *CUPE, Local 963 v New Brunswick Liquor Corporation*.⁵³ As the reach of substantive review was expanded it was accompanied by judicial recognition of their limited expertise in many areas of executive responsibility. As the SCC said in *Dunsmuir*:⁵⁴

Courts, while exercising their constitutional functions of judicial review, must be sensitive not only to the need to uphold the rule of law, but also to the necessity of avoiding undue interference with the discharge of administrative functions in respect of the matters delegated to administrative bodies by Parliament and legislatures.

⁵² As discussed in Chapter IV, the intertwined relationship between the rule of law and democracy is recognized by the SCC: see *Reference re Quebec Secession*, [1998] 2 SCR 217 at para 67. The useful terminology of vigilance in contrast to restraint comes from Knight, *supra* note 48, who in turn adopted it from Michael Fordham – see Michael Fordham, “Surveying the Grounds” in Peter Leyland and Terry Woods, eds, *Administrative Law Facing the Future* (Oxford: Blackstone, 1997) 184 and Michael Fordham, *Judicial Review Handbook*, 5th ed, (Oxford: Hart, 2008) at paras 12 to 13.

⁵³ *Canadian Union of Public Employees, Local 963 v New Brunswick Liquor Corp* [1979] 2 SCR 227 [CUPE].

⁵⁴ *Dunsmuir*, *supra* note 36 at para 27.

The same sort of judicial humility ought to accompany the expansion of procedural review I advocate here.

Currently, questions of procedural fairness are reviewed on a correctness basis. Although this was a matter of controversy for some time, recent SCC decisions in *Khosa* and *Mission Institution v Khela* have explicitly confirmed a correctness standard.⁵⁵ However, as noted briefly in Chapter IV, the way procedural fairness is in fact applied looks suspiciously like reasonableness review.

The mechanism for this back door method of granting decision-makers curial deference is the fifth factor from the *Baker* test, discussed above. While supposedly about the nature of the process required to constitute fairness in any given circumstances, this fifth factor – the decision-maker’s choice of process – reads a lot more like a deference inquiry. In *Baker*, L’Heureux-Dubé J noted that this fifth factor was very important:⁵⁶

...particularly when the statute leaves to the decision-maker the ability to choose its own procedures, or when the agency has an expertise in determining what procedures are appropriate in the circumstances: *Brown and Evans*, *supra*, at pp. 7-66 to 7-70. While this, of course, is not determinative, important weight must be given to the choice of procedures made by the agency itself and its institutional constraints: *IWA v Consolidated-Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282, *per* Gonthier J.

While not determinative, the decision-maker’s choices play a crucial role in the court’s analysis of what the law requires. This is very similar to the role that a decision-maker’s choices play in the reasonableness analysis, a position which is particularly odd because under a correctness standard the courts have the final say on what is legally required, so the decision-maker’s interpretation of the law plays no role in a reviewing court’s assessment of the required procedure. The court may ultimately agree that the decision-

⁵⁵ See *Khosa*, *supra* note 35 at para 41, Binnie J and *Mission Institution v Khela*, 2014 SCC 24, [2014] 1 SCR 502 at para 79, Lebel J [*Khela*]. Somewhat confusingly, at para 89 of *Khela*, Lebel J states that the decision-maker is entitled to “a margin of deference” on the procedural matter at issue. However, this comment relates to a statutory discretion based on the “reasonable belief” of the decision-maker; the deference comes from the wording of the statute, not the common law of procedural fairness.

⁵⁶ *Baker*, *supra* note 5 at para 27.

maker's interpretation is correct, but this comes about as a result of a de novo assessment of the required legal standard, with no weight given to the decision-maker's initial view. The way the *Baker* synthesis is applied does not reflect this correctness standard. This is made especially clear by McLachlin CJ's restatement of the fifth *Baker* factor in *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v Lafontaine (Village)* (several years after *Baker*) as "the nature of the deference accorded to the body."⁵⁷ The test for what is fair is, in part, an explicitly deferential one.

In fact, the analysis of fairness as a whole is structurally very similar to the judicial method on substantive review. The act of working out what is fair under the *Baker* test involves the consideration of various contextual factors, which are weighed in order to determine what fairness requires in the circumstances. This standard – what is fair in the circumstances – is then used to assess whether or not the specific procedure used by the decision-maker has met the requirements of fairness.

Where this differs structurally from substantive review as conducted under *Dunsmuir* is only in the location of the deference calculation. Substantive review potentially calibrates deference in two places: the choice of standard of review and, if reasonableness is chosen, the application of the reasonableness standard. The deference calculation is conducted in a structured manner at the first step, and a contextual, unstructured manner at the second.

Procedural review, on the other hand, concentrates the whole of its deference calculation at the stage of determining what fairness requires in the circumstances. In contrast to substantive review, however, this step contains both structured and contextual forms of modulation of intensity. As noted above, the consideration of the various factors that go into determining what is fair in the circumstances is structured in the same way as the standard of review analysis, but one of these factors is "the nature of the deference accorded to the body," which imports an unstructured deference inquiry into the fairness analysis.

⁵⁷ *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v Lafontaine (Village)*, [2004] 2 SCR 650 at para 5 [*Lafontaine*].

The second step of the fairness inquiry is not a deferential one: the courts will strictly apply the standard they determine at the first stage, but that is somewhat beside the point: the deference has already been ‘baked in’ at the first stage. Courts are directed to, along with the other *Baker* factors, give weight to the choice of decision made by the decision-maker in determining the standard to which they will hold decision-makers. Thus, the elements that are in form strictly applied to the decision-maker at the second stage will in effect be more lenient in situations where more deference is owed.

There is thus only a slightly conceptual difference in the two approaches: in procedural review, the analysis of what is fair in the circumstances both determines and crystallises the appropriate level of deference, whereas in substantive review the standard of review analysis sets the level of deference, which is then crystallised in its application. Functionally, they are almost identical: all other elements being equal, the courts will be more lenient on procedural issues where the statutory scheme and the relative expertise of the decision-maker suggest that Parliament intended the decision-maker to have the primary control over the process by which a decision is made, and more lenient on substantive issues where the statutory scheme and the relative expertise of the decision-maker suggest that Parliament intended the decision-maker to have primary responsibility for the outcomes in its area of authority. This is not to say that in fact reasonableness has been applied all along under the *Baker* approach and no one noticed, but the methods of review for process and substance are, in practical terms, already very close.

This similarity in method can be seen in the way L’Heureux-Dubé J applied the *Baker* synthesis in *Baker* itself. She found that the nature of the decision and the statutory scheme suggested a lower level of fairness was required (though the lack of an appeal process mitigated this somewhat), as did the broad discretion left to the decision-maker, while the extreme importance of the decision to Mrs Baker suggested a higher level of fairness.⁵⁸ Legitimate expectations were not in play.⁵⁹ Weighing these factors, L’Heureux-Dubé J

⁵⁸ *Baker*, *supra* note 5 at para 31

⁵⁹ *Ibid* at para 29.

concluded that the procedural rights were more than “minimal”.⁶⁰ What was required was:⁶¹

a full and fair consideration of the issues, and the claimant and others whose important interests are affected by the decision in a fundamental way must have a meaningful opportunity to present the various types of evidence relevant to their case and have it fully and fairly considered.

L’Heureux-Dubé J then went on to consider whether the actual process used by the decision-maker – which allowed Mrs Baker to make written representations but did not include an oral hearing – met this general requirement, and ultimately concluded that it did.⁶² Thus in *Baker* we see a two-step process with modulation of the requirements that the decision-maker’s choices of procedure will be assessed against, based on the context. This is extremely similar to the structure of substantive review.

a A shift in standard of review?

As a matter of judicial practice, then, procedural fairness can currently accommodate the sort of variable intensity review that is necessary to expand procedural fairness in the way I recommend. However, the continued application of correctness in the area – which allows for no deference to executive decision-making – means that as a matter of doctrine it cannot. This poor match between stated standard of review and actual judicial method has recently begun to be noted by both judges and academic commentators. The most notable of these is Stratas JA of the Federal Court of Appeal.⁶³ He noted that the idea of giving

⁶⁰ *Ibid* at para 32.

⁶¹ *Ibid*.

⁶² *Ibid* at para 34.

⁶³ The earlier observations of Bich JA in the Quebec Court of Appeal in *Syndicat des travailleuses et travailleurs de ADF - CSN c Syndicat des employés de Au Dragon forgé inc* 2013 QCCA 793 should also be noted. In this case, the primary issue was whether or not the Commission des relations du travail had denied procedural fairness to a union that appeared before it. The alleged denial of procedural fairness turned on the Commission’s interpretation of its empowering statute. Bich JA found that the process applied by the Commission was fair, and that it should be assessed under a reasonableness standard (at para 47: translation from *Rezmuves v Canada (Citizenship and Immigration)*, 2013 FC 973 (CanLII) at para 16):

...I am of the view that the reasonableness standard must also apply to questions of natural justice in the context of the interpretation by an administrative tribunal of its constituent statute and also to the provisions which the tribunal must interpret and apply, as is the case here.

weight to executive interpretations of their legal obligations (i.e. what a fair process is) while applying a correctness standard of review seems incoherent. As he said in *Maritime Broadcasting System Ltd v Canadian Media Guild*, “[c]orrectness review has always been review without any deference. “Correctness with a degree of deference” is a *non-sequitur*. It would be like describing a car as stationary but moving.”⁶⁴ *Maritime Broadcasting* was a case which involved a dispute between the parties over whether a particular position could be included within a labour bargaining unit. The Canada Industrial Relations Board found that it could be so included. *Maritime Broadcasting* exercised its statutory right to have the case reconsidered, alleging both substantive and procedural errors in the Board’s decision. Upon reconsideration, the Board confirmed its decisions, and *Maritime Broadcasting* appealed to the Federal Court of Appeal on the same grounds.

The appeal was dismissed unanimously on both substantive and procedural grounds. Of particular interest, however, are the comments of Stratas JA on the proper standard of review for procedural fairness. The other two judges on the case did not agree with his views on this issue, but Stratas JA later found a unanimous bench to sign on to his approach in *Forest Ethics Advocacy Association v Canada (Attorney General)* (without adding anything further to his *Maritime Broadcasting* analysis).⁶⁵ His views in *Maritime Broadcasting* have thus already proved influential, and are likely to continue to be so.

In *Maritime Broadcasting*, Stratas JA stated simply: “[i]n my view, the standard of review is reasonableness as that is understood in the current jurisprudence.”⁶⁶ He then goes into

Clearly it is unnecessary to state that an interpretation which is counter to a clear legislative provision would be unreasonable. [unofficial translation]

This is not a wholesale adoption of reasonableness for matters of procedural fairness. Rather, *Syndicat des travailleuses* represents an extension of *Dunsmuir*’s presumption of reasonableness when a tribunal is interpreting its home statute to include matters of procedure under that statute. Even this, however, is a significant carve-out from the correctness standard which the SCC insists applies to matters of procedure.

⁶⁴ *Maritime Broadcasting System Ltd v Canadian Media Guild*, 2014 FCA 59 (available on CanLII) [*Maritime Broadcasting*].

⁶⁵ *Forest Ethics Advocacy Association v Canada (Attorney General)*, 2014 FCA 245 (available on CanLII).

⁶⁶ *Maritime Broadcasting*, *supra* note 64, at para 48.

why he thinks this standard of review is consistent with what he sees as the first principles of Canadian procedural fairness.⁶⁷

Looking at the matter from first principles, there is a case for the application of the reasonableness standard. As is often said, the concept of procedural fairness is “eminently variable and its content is to be decided in the specific context of each case” (*Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 SCR 817 at paragraph 21). The Board is best placed to decide this. It, not the reviewing court, is the fact-finder. It knows the circumstances in particular proceedings before it. It has expertise in the dynamics of labour relations and has policy appreciation. Armed with these advantages, the Board is master of its own procedure, free to design, vary, apply and, in reconsideration proceedings, assess its procedures to ensure they are fair, efficient and effective: *Re Therrien*, 2001 SCC 35 (CanLII), 2001 SCC 35, [2001] 2 SCR 3 at paragraph 88; *Knight v Indian Head School Division No. 19*, 1990 CanLII 138 (SCC), [1990] 1 SCR 653 at page 685.

This approach is entirely consistent with the general approach to reasonableness review under *Dunsmuir* – giving deference to the interpretations of decision-makers, legal and factual, in areas in which they are expert. Stratas JA also pointed out that the adoption of reasonableness review need not mean that executive discretion on matters of process will run amok.⁶⁸

Does reasonableness review undercut the ability of this Court in appropriate circumstances to enforce fundamental matters of procedural fairness? Definitely not. Reasonableness review does not take anything away from reviewing courts’ responsibility to enforce the minimum standards required by the rule of law. In other words, it is not unduly deferential. ...

Given the well-defined legal standards set by the existing case law on procedural fairness, the range of acceptable and defensible options or margin of appreciation open to the administrative decision-maker often will be constrained. There will be cases, however, where the nature of the matter and the circumstances before the administrative decision-maker should prompt the reviewing court to give the decision-maker a wider margin of appreciation.

⁶⁷ *Ibid* at para 50.

⁶⁸ *Maritime Broadcasting*, *supra* note 64, at paras 57-58.

The adoption of reasonableness cannot be equated with relinquishing the judicial role in checking executive power. Judicial review remains available and potent, and correctness review remains available for situations where no deference is warranted.⁶⁹ Neither am I suggesting that judges ought always to defer to the process chosen by decision-makers. If, for example, an official responsible for a new Regulation on the subject of auto production failed to consult a major auto-worker's union with no justification, I would expect the decision to be overturned on review. Particularly in the immediate aftermath of any common law duty to consult being adopted, such results may well be common. The opportunity for affected citizens to participate in, and ultimately control, executive decision-making is still at the core of what I propose in this thesis; a flexible standard of review merely acknowledges that administrators may in some cases know better than courts how this ought to be achieved.

An alternative approach to accommodating variable intensity into procedural review was suggested by John Evans shortly after his retirement from the FCA. Building on one of his last judgments, *Re:Sound v Fitness Industry Council of Canada*,⁷⁰ he argued that the best approach to fairness is to move away entirely from questions of standard of review and just assess “what is fair in all the circumstances.”⁷¹ This position also has support from Simon

⁶⁹ I entirely agree with Stratas JA's analysis here. However, he also argues that doctrinally, the standard of review for procedural fairness has been reasonableness since *Dunsmuir (Maritime Broadcasting)*, at paras 51-56). I think Stratas JA's interpretation of *Dunsmuir* is mistaken. The text of the *Dunsmuir* did not suggest an intention to change the prevailing correctness standard, and no other case preceding *Maritime Broadcasting* interpreted *Dunsmuir* as changing the standard of review. Further, as noted above, *Khela* (released only weeks after *Maritime Broadcasting*) makes it quite clear (at para 79) that “...the standard for determining whether the decision maker complied with the duty of procedural fairness will continue to be “correctness””. Thus, while I entirely agree with the principled position Stratas JA takes, I do not think that the SCC's current approach to procedural fairness allows a shift to reasonableness review. If change is to come, it must come from the SCC. Indeed, although he has not changed his mind on the correct legal position, Stratas JA appears to have recognised the necessity of SCC intervention as a practical matter. Commenting on the conflicted standard of review jurisprudence of the FCA in *Bergeron v Canada (Attorney General)*, 2015 FCA 160, he notes at para 71: “...what we have right now is a jurisprudential muddle. And now is not the time to try to resolve it. For one thing, we have not received submissions on the issue in this case. For another, with so many conflicting decisions, perhaps only a reasoned decision of the Supreme Court can provide clarity.”

⁷⁰ *Re:Sound v Fitness Industry Council of Canada*, 2014 FCA 48.

⁷¹ John M Evans, “Fair's Fair: Judging Administrative Procedures” (2015) 28 CJALP 111 at 115.

Ruel (another judge writing extra-judicially), who noted that returning to this era without an explicit standard of review for matters of procedure would allow “the discretion granted to administrative bodies on procedural matters...[to] properly be considered”.⁷² Both Evans and Ruel considered that the SCC’s turn in *Khosa* and *Khela* to an explicit correctness standard for procedural review was a mistake, and that the previous approach, where weight could be given to the procedural choices of the decision-maker, worked better. Equally, Evans considered that “...importing reasonableness introduces standard of review analysis (which, goodness knows, has not exactly been trouble-free) into an area of judicial review — procedural fairness — where the law is well settled and the outcomes are widely regarded as satisfactory.”⁷³

There are a number of responses to this argument. First, this thesis demonstrates that there are a number of aspects of procedural fairness which do not have satisfactory outcomes. The current shape of fairness does not allow it to completely fulfil the ideals set for it by decades of SCC jurisprudence, and holds the doctrine back from stretching towards the goal of citizen control of executive decision-making. Secondly, an explicit standard of review is not the only method for calibrating intensity of review.⁷⁴ Questions of intensity of review are resolved in Canada and elsewhere through a range of different methods, and the explicit requirement for the choices of the decision-maker to be given weight in determining “what is fair in the circumstances” is an example of contextual calibration. Further, as discussed above, the *Baker* synthesis as a whole functions in a structurally similar way to the judicial method on substantive review. The questions asked by the standard of review analysis in substantive review are already being asked in procedural review (albeit in a slightly different manner); refusing to name that series of questions a standard of review analysis does not mean they are not being considered.

⁷² Simon Ruel, “What Is the Standard of Review to Be Applied to Issues of Procedural Fairness” (2016) 29 CJALP 260 at 282.

⁷³ Ruel, *ibid* at 281-282 and Evans, *supra* note 71 at 121.

⁷⁴ See generally Knight, *supra* note 48.

Finally, and building on the previous two critiques, it makes no sense in my view to use “what is fair in all the circumstances” as a special standard of review which applies only to procedural decisions, has no application anywhere else, and functions essentially as an ersatz form of reasonableness. If we are to give weight to decision-makers’ choice of process, as I agree we should, there is already a deferential standard in Canadian administrative law – as Stratas JA has noted, this is reasonableness.

The above discussion may suggest that there is little practical difference between Evans JA’s suggested return to pre-*Khela* procedural fairness and Stratas JA’s suggested move to reasonableness. There is some truth to this contention. From a functional perspective it would work, allowing us a method to calibrate the intensity of procedural review so that the expansion in scope I argue for would not result in excessive judicial intrusiveness in the executive sphere. However, Evans’ and Ruel’s approach continues a problem that has always been inherent in the *Baker* approach, namely that a test designed to calibrate the required content of fairness is also effectively used to calibrate the level of deference given to decision-makers. The nature of this problem can be highlighted by drawing a distinction between the standards of *review* that the courts apply in reviewing a decision, and the standards of *legality* which govern the process a decision-maker must use. This distinction is not formally expressed in the law, but Tom Hickman suggests, and I agree, that it is useful in understanding the different tasks each type of legal standards at issue performs.⁷⁵

Hickman describes the distinction as follows:⁷⁶

On the one hand, public law standards demarcate the boundaries of the High Court’s supervisory jurisdiction. They are the rules and principles that dictate the degree of scrutiny, or lack thereof, that the courts will give to decisions made by the executive and inferior tribunals. Public law standards are in this sense avowedly directed to *the courts*, and not to inferior tribunals or public officials. On the other hand, some public law standards are not directed at the courts but at public officials. They are rules and

⁷⁵ See Tom Hickman, *Public Law after the Human Rights Act* (Oxford: Hart, 2010) at 98-101. A similar though not identical distinction between justificatory and evaluative principles of review was suggested by David Dyzenhaus in “Law as Justification: Etienne Mureinik’s Conception of Legal Culture” (1998) 14 SAJHR 11 at 22-23.

⁷⁶ Hickman, *ibid* at 99.

principles that set the legal standards that apply to public officials and inferior tribunals when making their decisions.

To apply this general pronouncement of Hickman's to the specifics of procedural review, the standard of legality – the standard the law demands that public officials abide by – is that the process be fair. The *Baker* synthesis lets the officials designing a process know the factors that will be considered in determining whether the process followed is fair in any given circumstances. The standard of review – the standard that tells courts how strictly the requirement that the process be fair ought to be applied – is, according to *Khosa* and *Khela*, correctness. The standard of review directs that, in the particular case of procedural fairness, public officials should not be given much latitude in determining what is fair (i.e. the standard of review directs that no deference be given to public officials' interpretation of the standard of legality).

In my view, the current Canadian approach to procedural fairness wrongly uses the standards of legality developed in *Baker* to get around the inflexible correctness standard the law directs them to apply to procedural review. The *Baker* test is applied strictly, yes, but it includes an element which demands deference. As discussed above, this effectively results in courts deferring to public officials in a very similar manner to that required under the standard of reasonableness. This practice blurs the line between standards of review and standards of legality, allowing the courts to insist that they are reviewing on a correctness standard while conducting something closer to reasonableness review.

Conducting judicial review in this manner obscures a lot of the intellectual work that judges are actually doing. By this I mean that in claiming to be applying a correctness standard while using the fifth *Baker* synthesis factor to introduce some elements of deference, the courts currently dissuade litigants from making the sort of arguments that would be advanced if reasonableness was being applied openly – what the relevant contextual factors are, the coherence of the chain of logic leading to a procedural choice, and the quality of the reasons provided. These arguments will not typically be relevant in correctness review, so if that is the standard of review being applied, litigants will not make them. The current

approach also leaves decision-makers unsure if and when they can expect deference for their procedural choices.

Even if we take Evans JA's approach and look at "what is fair in the circumstances", questions of standard of review inevitably intrude into the analysis. Reasonableness, or any other standard of review, is a methodology, not a test. How the question of "what is fair in the circumstances" is answered will depend on the methodology used in applying it – i.e. the standard of review. Simply asserting that questions of fairness are *sui generis* in relation to standard of review does not successfully sidestep the question. It is a semantic argument which effectively just applies a restricted version of reasonableness to questions of fairness.

Judicial confusion in this area can be illustrated by Ruel's conclusion to his article on the standard of review that applies to procedural fairness. He asserted:⁷⁷

A careful review of the Supreme Court jurisprudence over the last thirty years demonstrates that procedural fairness review and merits review serve different objectives, which justify the application of two distinct analytical frameworks.

For the fairness review, it is the nature of process *vis à vis* the person concerned that is the focus of the inquiry. An unfair procedure is a jurisdictional flaw which renders the administrative action or decision void.

The merits review focuses on the relationship between the court and the administrative body. Administrative bodies will often be experts in their fields, which justify applying a deferential approach on judicial review.

Ruel's assessment is not correct. Procedural and substantive review are both directed at remedying an incident of maladministration that has negatively affected a citizen's rights. Both are directed at the relationship between decision-maker and citizen, though as discussed in Chapter III, both forms of review also act more broadly to set the internal norms of the administrative state as well. What is directed primarily at the relationship between court and decision-maker – in both circumstances – is the calibration of intensity of review. In procedural fairness this is done by the *Baker* test (including its explicitly

⁷⁷ Ruel, *supra* note 72 at 282.

deferential element), in substantive review via the standard of review analysis. Saying substantive review is not directed at the citizen-government relationship and procedural review is not directed at the court-government relationship shows that Ruel has elided standard of review with standard of legality. His assessment of substantive review in fact only speaks to its standard of review (typically reasonableness), while his assessment of procedural review fails to take into account the deference calculation required both implicitly and explicitly by the *Baker* test. The fact that the current approach can be this badly misinterpreted by a sitting Superior Court judge is another indication that change to a clearly separated standard of review analysis for procedural review is to be preferred.

As discussed above, the adoption of an explicit standard of review analysis for procedural review – defaulting, as does substantive review, to reasonableness – would not likely result in significant changes to the outcomes reached in procedural fairness cases, because fairness review is already *de facto* deferential. Further, decision-makers are assessed under a reasonableness standard for the vast majority of their substantive legal interpretations and a number of prominent appellate-level judges have suggested that reasonableness be applied to procedural decisions. Extending this approach to legal interpretations of procedure is certainly a change, but it is not a radical one. It is, however, still important.

A shift to a default standard of reasonableness would improve upon the status quo because, unlike correctness review, a reasonableness analysis starts with the decision-maker's interpretation of the standard of legality.⁷⁸ This gives decision-makers the certainty that the justification they offer for their choice of procedure will be the starting point for a reviewing court, which is not currently the case. From this starting point, courts will look to see if the justification reveals a coherent line of reasoning from the initial premise (the requirement that the process be fair in the statutory context) to the conclusion (the process actually imposed), and see whether it lies within the reasonable range of outcomes in the

⁷⁸ The process of reasonableness review is canvassed well by Sheila Wildeman in “Pas de Deux: Deference and Non-Deference in Action” in Lorne Sossin & Colleen Flood, eds, *Administrative Law in Context*, 2d ed, (Toronto: Emond Montgomery, 2013) 323.

circumstances (i.e. was the process fair?).⁷⁹ This provides significantly more certainty than the current approach, where any disagreement with the court's assessment risks a decision-maker's procedural choices being struck down.

For these reasons, the best way to reflect the limits of judicial expertise when it comes to the executive law-making process (and executive decision-making processes in general) is to, in appropriate cases, adopt the reasonableness standard on review. Evans suggestion that a return from an explicit correctness standard for procedural fairness to the old "fair in all the circumstances" test could also sustain the expansion to the doctrine that I argue for, but as discussed above is needlessly complicated and, in my view, the risk of undermining government decision-making and undue intrusion into areas in which the court is inexpert (the primary objections to court intervention in the legislative sphere) are better dealt with by a shift to reasonableness. The adoption of an explicit standard of review analysis is also more conceptually satisfying and more consistent with the general Canadian method of judicial review, from which procedural fairness is currently the notable current outlier.

This is not to say that the introduction of a standard of review analysis would solve all the difficult issues in the procedural arena. Indeed, the adoption of this standard would likely bring its own complications. Substantive review has struggled deeply with its standard of review for decades. A full exploration of these problems is far beyond the scope of this thesis, but from a historical point of view, *CUPE* was the first step away from a formalistic "preliminary questions" approach to jurisdictional review.⁸⁰ Later cases such as *UES*, *Local 298 v Bibeault* moved further from the jurisdictional question, and crystallised substantive review into two standards – patent unreasonableness and correctness.⁸¹ *Canada (Director of Investigation and Research) v Southam Inc* then decided that a third

⁷⁹ This approach to reasonableness review is set out by Abella J in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708, at paras 11-17 [*Newfoundland Nurses*].

⁸⁰ *CUPE*, *supra* note 53.

⁸¹ *UES, Local 298 v Bibeault*, [1988] 2 SCR 1048.

standard of review – reasonableness simpliciter – was required.⁸² However, the “pragmatic and functional” analysis used to determine which of the three standards would apply was criticised as unwieldy and confusing, and in response to such criticism the SCC in *Dunsmuir* reduced the standards back down to two – reasonableness and correctness. This was supposed to simplify the task of substantive review, but both the allocation of the standard and, especially, the determination of what reasonableness review *means* remain somewhat opaque. As noted above, the specifics of *Dunsmuir*’s application have been the subject of significant criticism.

This frustration recently reached boiling point, with Abella J in *Wilson v Atomic Energy Canada* suggesting *obiter* that the post *Dunsmuir* approach had become difficult to apply, and floating the idea that a shift to a single standard of reasonableness might be a solution:⁸³

[27]... an argument can be made, as Prof. David Mullan has, that this Court too has blurred the conceptual distinctions in a number of cases, this time between correctness and reasonableness standards of review, and has sometimes engaged in “disguised correctness” review while ostensibly conducting a reasonableness review. Others too have expressed concerns about inconsistency and confusion in how the standards have been applied. The question then is whether there is a way to move forward that respects the underlying principles of judicial review which were so elegantly and definitively explained in *Dunsmuir*, while redesigning their implementation in a way that makes them easier to apply.

[28] The most obvious and frequently proposed reform of the current system is a single reviewing standard of reasonableness. ...

[31] ...I see nothing in its elaboration of rule of law principles that precludes the adoption of a single standard of review, so long as it accommodates the ability to continue to protect both deference *and* the possibility of a single answer where the rule of law demands it

Courts have thus been struggling with how to determine standards of review and how to apply reasonableness for over thirty years, and still have not reached an entirely satisfactory conclusion. Substantive review, and in particular the version that has developed in the

⁸² *Canada (Director of Investigation and Research) v Southam Inc.*, [1997] 1 SCR 748.

⁸³ *Wilson v Atomic Energy Canada*, 2016 SCC 29 (available on CanLII) at paras 27-31.

wake of *Dunsmuir*, is clearly not without problems, and should not be seen as a panacea for the problems in procedural fairness. All this said, I am still of the view that a shift in the standard of review for procedural fairness is justified. Reasonableness is a more intellectually honest standard of review to apply to procedural fairness, compared to the current (and incoherent) standard of “correctness with weight”. It is certainly not perfect, but it is a definite improvement on the status quo and, importantly, as discussed above, *de facto* deferential review is already going on.

Judges are already undertaking the same sort of analysis as is required by reasonableness: my suggestion is simply that we make this explicit. Refusing to acknowledge that deference calculations are being made as part of the *Baker* synthesis will not make them go away, and the existence of this *de facto* reasonableness assessment mean that many of the problems identified in reasonableness review are already happening to some extent in fairness review. They are simply hidden behind a cloak of correctness review that the discussion above has revealed to be mostly illusory.

With the greatest of respect to Evans, I do not agree that procedural fairness is settled or entirely adequate. Chapter IV demonstrates the extent to which the current system excludes from its scope people who ought to be afforded fairness, and Chapter V shows the extent to which other jurisdictions have gone further to extend that scope without crippling their administrative states. As noted above, not much movement is required extend Canada’s doctrine of procedural fairness to the extent that is necessary for a fully legitimate administrative state. All the tools exist within Canadian administrative law to do so, it is simply a matter of employing them. An explicit calculation of the standard of review as part of procedural review is one of these important tools, and while the current method of application might in some cases be problematic, the instinct underlying the calculation – that as with other questions of law and fact, decision-makers might in some circumstances know better than the courts what the appropriate procedure is – is correct.

That judicial instinct to defer when appropriate is one which must be cultivated if procedural fairness is to be extended to executive law-making (as I argue it must be) without risking judicial overreach. It is correct, and it is already being effectively applied in fairness review. McLachlin CJ's restatement of *Baker* in *Lafontaine* made this clear. The overall judicial method on procedural review is startlingly close to that of substantive review already. Even if we do not think the current iteration of reasonableness is perfect, the fact that it is for all intents and purposes being applied to procedural review needs to be formally acknowledged. A shift to reasonableness review both better reflects the actual practice of procedural review, and allows some of the undoubted flaws in the reasonableness standard to be confronted directly, as opposed to simply assuming that they need not be dealt with in the procedural sphere.

b Deference as respect

A final reason I consider that Canada should move to reasonableness review of process questions is because this would embrace fully the implications of the SCC's adoption of "deference as respect."

The idea of deference as respect, developed by David Dyzenhaus, was explicitly adopted by the SCC in *Baker*, relied upon again in *Dunsmuir*, and expanded upon in *Newfoundland Nurses*.⁸⁴ The concept has been at the core of the SCC's standard of review jurisprudence for the last fifteen years, albeit only for substantive review. At the same time, one gets the impression that the concept is relied upon mostly for the pronouncement that deference requires "not submission but a respectful attention to the reasons offered or which could be offered in support of a decision."⁸⁵ The Canadian courts have taken this to mean that in the substantive context, courts ought to look at whether they think a decision was justifiable (i.e. the agency's justification, or possible justification, for a decision was cogent in its own

⁸⁴ See *Baker*, *supra* note 5 at para 65; *Dunsmuir*, *supra* note 36 at paras 47-49 [*Dunsmuir*]; *Newfoundland Nurses*, *supra* note 79 at paras 11 to 18.

⁸⁵ David Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy" in Michael Taggart, ed, *The Province of Administrative Law* (Oxford: Hart, 1997), 279 at 286.

terms) rather than justified (i.e. whether the agency's justification was, in the court's own judgment, the correct one). As Dyzenhaus points out, this approach makes the reasons offered for a decision of crucial importance (because they set out the case for justifiability),⁸⁶ a position that was confirmed in *Dunsmuir* and *Newfoundland Nurses*.⁸⁷ The starting point in assessing the legal validity of an executive decision-maker's action then becomes the decision-maker's own interpretation of the law.

Dyzenhaus suggests that there is no reason not to apply "deference as respect" to procedural decisions, and I agree.⁸⁸ If we accept that decision-makers ought to be able to make rational judgments about their substantive decisions, there is no real reason why they ought not be afforded the same respect for their procedural choices. The corollary of this is that the courts ought to require justifications from decision-makers as to their choice of process, the same way they do for substantive decisions. In a way, this simply elevates the natural contextuality of the standards of legality in fairness to apply to the standard of review as well.

As Stratas JA alluded to in *Maritime Broadcasting*, it may be that there are few practical changes in what procedures are acceptable, but a change in the way the court assesses this is extremely important. It makes clear the work the courts do when they do administrative law, and it properly allocates authority among the relevant branches of government. I would also argue that this deference as respect-based approach increases the legitimacy of both judicial review and the administrative state: requiring justification is part of the matrix of citizen control which legitimates the administrative state, and assessing said justifications with appropriate deference is what legitimates judicial review. Refusing point blank to look at certain areas does not, and neither does completely sidelining the decision-makers' views on what they are doing. A style of review that is broadly applicable

⁸⁶ Dyzenhaus (1998), *supra* note 75 at 27-28.

⁸⁷ *Dunsmuir* at para 47, *Newfoundland Nurses* at paras 11 to 18.

⁸⁸ See Dyzenhaus (1997), *supra* note 85 at 287-288, and Dyzenhaus (1998), *supra* note 75 at 29.

but capable of deference where appropriate is ideal, and the adoption of reasonableness review would provide this to procedural fairness.

C The Content of Fairness in Non-Adjudicative Contexts

The above discussion concerns the scope of fairness and the intensity of review. The next question that must be considered is what the content of fairness might look like in a non-adjudicative context. In more adjudicative contexts, determining content is relatively simple: the *Baker* synthesis is conducted to calibrate how intense the requirements of fairness are in the circumstances, then several trial-like elements are picked from a ‘menu’ of procedural elements to satisfy these requirements. Procedural questions such as whether representation by counsel is required or not, whether cross-examination is required, whether a hearing ought to be oral or on the papers, and the length and detail of notice required are all common when determining what a fair process before an adjudicative tribunal requires. Procedures imposed under the *Baker* approach range from the full oral hearing with an opportunity to make submissions in person and respond to adverse findings at the high end of the scale to mere notice and the opportunity to respond in writing at the low end.⁸⁹

Things become slightly more complicated, however, if fairness is extended to legislative decision-making, as I advocate. Many of the sorts of procedural elements just discussed make little sense in this context. Individual, court-style hearings are virtually impossible if many people wish to be heard and will in the case of polycentric decisions be an inappropriate method for hearing from interested parties anyway. As discussed in Chapter III, the traditional response has been to say that this fact shows the natural limits of the doctrine, and that procedural fairness ought not be applied more widely. This is one way of approaching the issue but, in my view, it is overly conservative and inconsistent with

⁸⁹ See for example the stringent process imposed in *Khan v University of Ottawa* (1997), 34 OR (3d) 535 (CA) (a case about grade appeals) compared to the minimal process imposed in *Public Service Alliance of Canada v Canada (Attorney General)*, 2013 FC 918 (a case about the Minister’s power to force a union vote under the Public Service Labour Relations Act).

the underlying purposes of procedural fairness. If administrative law is to protect individual rights and ensure legitimate decision-making across the administrative state, courts ought to adapt the existing ‘a la carte’ approach to fairness, and look for different procedures that still further this underlying rationale but make sense in a wider context.⁹⁰ Failure to do so risks the courts failing to meet their constitutional role in protecting the rule of law.

One does not have to look far to find a wealth of law on such non-adjudicative procedures. There is a substantial amount of consultation jurisprudence in the UK and New Zealand, where it is seen merely as the non-adjudicative expression of procedural fairness.⁹¹ This law on consultation sets out a number of qualitative, context-dependent factors for calibrating the appropriate content in any given circumstances that can readily be adapted to the Canadian context. These were discussed in detail in Chapter V, and I do not intend to revisit them here. Similarly, the aboriginal law duty to consult, also discussed in Chapter V, has some aspects which could be adapted to develop meaningful non-adjudicative content for procedural fairness. Aboriginal law consultation also draws on administrative law concepts in setting out the content of meaningful consultation, demonstrating that administrative law can be adapted in this way.

The other option for helping to define fairness is to move away from expanding the *Baker* approach to fairness and instead look at a separate framework that applies only to consultative participation in delegated law-making. The American *Administrative Procedures Act* is probably the most well-developed and prominent example of such a

⁹⁰ In my view, it is better to see adjudicative and non-adjudicative decision-making as two points on a continuum than hard-edged categories. There will clearly be middle ground which contains aspects of both. Even adjudicative decision-making has polycentric aspects; any exercise of discretion which has implications for government resource allocation affects persons far beyond the parties actually given a hearing. The closer a decision is to being truly individuated, the more appropriate court-like procedures will be. As the scope and effect of a decision moves away from that pole, something more closely resembling consultation will become appropriate.

⁹¹ G D S Taylor, *Judicial Review: A New Zealand Perspective*, 2d ed, (Wellington: LexisNexis, 2010) at paras 3.15 and 3.74.

system.⁹² Indeed, Henry Richardson, one of the two writers my model of legitimacy in Chapter II draws upon heavily, suggests that the administrative state requires, at the very least, something similar to the APA to be legitimate.⁹³ He states: “although there are important national variations, I will assume that democracy requires such a process of inviting public comment regarding proposed rules to be published in furtherance of statutes that have themselves been made public.”⁹⁴ Briefly stated, the most widely invoked process for rulemaking under the APA – informal rulemaking under s 553 – requires the following:⁹⁵

- 1). Administrators draft and propose rules with or without consultation with representative parties;
- 2). Proposed rules are then published in the Federal Register;
- 3). All interested parties can file “written data, views, or arguments” on the proposed agency rules;
- 4). Agency then evaluates feedback and decides whether rules should be rewritten in light of comments. Agency may request oral commentary. If substantial revisions are planned, the proposed revisions must be published in the Federal Register and steps 3 and 4 repeated; and
- 5). The final draft is published in the Federal Register at least 30 days before it takes effect, accompanied by a “concise general statement of their basis and purpose.”

These relatively skeletal obligations have been extended by the American courts by interpreting the requirements for proper “notice” and “comment” extremely broadly, as well as strengthening the requirement for a “statement of basis and purpose”, however “general” or “concise.”⁹⁶

⁹² *Administrative Procedures Act* 5 USC s 553.

⁹³ Henry Richardson, *Democratic Autonomy* (New York: OUP, 2002) at 219.

⁹⁴ *Ibid* at 220.

⁹⁵ List adapted from Kenneth F Warren, *Administrative Law in the Political System*, 3d ed, (Upper Saddle River, NJ: Prentice Hall, 1996) at 251-252.

⁹⁶ For proper notice to be given, and thus for there to be proper opportunity to comment, the courts have required that the rulemaking agency release all information upon which it is relying, indeed, any other

The advantage of looking at the American experience is that it is almost certainly the most studied system of administrative law in the world – there is a wealth of qualitative and quantitative scholarship on virtually all aspects of the APA. The disadvantage is that much of this scholarship is equivocal and contradictory. Of particular note is the concern that the APA has made American rulemaking unwieldy and unresponsive to the needs of government. There have been worries of this sort since the APA was passed in 1946, and even before it was in force.⁹⁷ Concern intensified as the courts developed the judicial glosses on the APA requirements discussed above. The general concern is that the APA, and judicial elaborations on it, have “ossified” the regulatory process.⁹⁸ The idea behind the ossification thesis is that judicial review forces administrative agencies to make a “Herculean effort of assembling the record and drafting a preamble capable of meeting judicial requirements for written justification.”⁹⁹ As a result “the process of assimilating

information it is aware of that bears on its proposed rule (see Peter L Strauss, *Administrative Justice in the United States* (Durham: Carolina Academic Press, 1989) at 167-168). ‘Comment’ must allow an opportunity to challenge the data relied upon (Strauss at 168). Finally, a “concise” statement of basis and purpose must be full enough to show the agency’s reasoning in some detail, including its response to the important comments made (Strauss at 168). It is also important to note that if a rule has been changed substantially after the comment period, a fresh period for notice and comment may be required (Stephen G Breyer et al, *Administrative Law and Regulatory Policy: Problems, Text and Cases*, 6th ed, (New York: Aspen, 2006) at 533). This is required if a rule change is not a “logical outgrowth” of the original proposal (Breyer at 533-534).

⁹⁷ See for example Ralph F Fuchs, “Procedure in Administrative Rule-Making” (1938) 52 Harv L Rev 259 at 280; E Blythe Stanson, “Administrative Law—Developments 1940-45” (1946) 44 Mich L Rev 797 at 803.

⁹⁸ The term rose to prominence through its use in Thomas O McGarity’s 1992 article, “Some Thoughts on “Deossifying” the Rulemaking Process” (1992) 41 Duke LJ 1385, but similar ideas had existed before being termed ossification. Prominent examples of ossification scholarship include Martin Shapiro *Who Guards the Guardians? Judicial Control of Administration* (Athens, GA: Georgia University Press, 1988) at 44-54; Robert L Rabin, “Federal Regulation in Historical Perspective” (1986) 38 Stan L Rev 1189 at 1295-1315, and William S Jordan, III, “Ossification Revisited: Does Arbitrary and Capricious Review Significantly Interfere with Agency Ability to Achieve Regulatory Goals Through Informal Rulemaking?” (2000) 94 Nw U L Rev 393. Two of the core empirical works upon which the ossification thesis is based are R Shep Melnick, *Regulation and the Courts: The Case of the Clean Air Act* (Washington DC: Brookings Institution, 1984) and Jerry L Mashaw & David L Harfst, *The Struggle for Auto Safety* (Cambridge, MA: HUP, 1990).

⁹⁹ McGarity, *ibid* at 1401.

the record and drafting the preambles to proposed and final rules may well be the most time-consuming aspect of informal rulemaking.”¹⁰⁰

The exact degree of ossification, as well as its exact causes, are still matters of considerable dispute among American scholars.¹⁰¹ Because the material is so equivocal, and because the APA regime is essentially a “one size fits all” approach, I do not think the American experience would be as useful a resource for the Canadian courts to draw on in developing a duty of fairness as the material discussed in Chapter V. Extending the existing doctrine of procedural fairness using the familiar approach of picking the elements of fairness required in the circumstances is more consistent with current Canadian law, more consistent with the common law method, and provides a degree of flexibility lacking in the APA’s rigid structure. In allowing for variable content based on the *Baker* synthesis, off-point submissions from those with little interest in the decision can be dealt with more efficiently, while extended justifications for not exploring every possible route may not be necessary. Further, a reasonableness standard of review gives decision-makers, particularly those making high policy decisions, more leeway in justifying their choice of process before the courts will intervene.

¹⁰⁰ *Ibid.* See also discussion in Jason Webb Yackee and Susan Webb Yackee, “Testing the Ossification Thesis: An Empirical Examination of Federal Regulatory Volume and Speed, 1950-1990” (2012) 80 *Geo Wash L Rev* 1414 at 1427-1428.

¹⁰¹ Yackee and Yackee, *ibid.*, dispute the prevailing view that ossification due to hard look review is a significant problem. The equivocal nature of the American material can be illustrated by considering two articles by Mark Seidenfeld. In 1997, he concluded that hard look review did to some extent cause ossification, but that drastic changes to the mode of review were not required: see Mark Seidenfeld, “Demystifying Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking” (1997) 75 *Tex L Rev* 483 at 489 and 514. In a 2009 article, he reassessed this conclusion, noting that many other factors could contribute to ossification, and that judicial review may well play only a minor role: see Mark Seidenfeld, “Why Agencies Act: A Reassessment of the Ossification Critique of Judicial Review” (2009) 70 *Ohio St LJ* 251. He notes (at 252) that “the Article is intended as a modest foray into a vast and complex subject”, and narrowly tailors the scope of his inquiry. The article is still seventy three pages long. Clearly, the root causes of any agency ossification are extremely complex.

As noted above,¹⁰² Richardson talks of “national variations” on the general principles of participation, and for Canada, the appropriate national variation seems to me to be the variable approach set out in this chapter. This model, building on Canada’s general approach to fairness and using the New Zealand, UK, and aboriginal law doctrines of consultation to add detail, contains most of the same broad elements as the process under the APA. It would impose a general, though contextually variable, consultation requirement, and ensure sufficient information was provided for a response to be meaningful. It will not be perfect, but perfection is not required. The common law employs an iterative approach to law, and the courts will learn as more cases come before them.

D A Nexus Between Process and Substance

Shifting to a low threshold approach broadens the scope of procedural fairness so that it has sufficient coverage to facilitate citizen participation across the range of administrative decision-making. Calibrating the intensity of fairness using variable content and variable intensity ensures that the expansion is practicable and does not unduly impinge on executive decision-making, and comparative material can be drawn upon in developing the content of fairness in non-adjudicative contexts. By themselves, however, these doctrinal changes do not ensure that administrative law properly legitimates the decisions it regulates. As discussed briefly above, what the model of legitimacy I am using requires is citizen control of decision-making. A mere opportunity to be heard will not necessarily provide this.

As set out in Chapter II, Pettit says that what is required is an opportunity for members of the public to influence government decision-making in a way that can actually direct the decision in the direction each person prefers. In order to provide this opportunity for genuine influence, the procedural rights imposed by procedural fairness must be more than window dressing. The input of the citizenry is supposed to matter to the eventual decision. Indeed, if it does not matter, the citizen control required by Pettit is impossible; a process

¹⁰² See note 93 and accompanying text, above.

can be extremely elaborate and still provide no opportunity to influence decision-making if decision-makers simply refuse to acknowledge what was said. The difficult balance that needs to be reached here is ensuring that there is a link between the process imposed by procedural fairness and the substantive outcome while not unduly restricting the decision-making power that has been conferred on the decision-maker. It is a question of the proper *extent* of executive power; executive decision-makers are entitled to act as authorized, but they are not entitled to act illegitimately. Some sort of nexus is required between process and result, one which gives decision-makers freedom to act within their mandate but also ensures that public participation has real meaning.

Canadian jurisprudence suggests two potential routes to explore in trying to provide this sort of link. The first of these, the duty to accommodate in aboriginal law (discussed in Chapter V), is superficially appealing. It requires government to accommodate the concerns raised by the First Nations it has consulted, at least in some circumstances.

Decision-makers are given a considerable amount of discretion as to the form accommodation will take.¹⁰³ The duty to accommodate still allows decision-makers to judge what should be done, and does not draw hard lines as to what is required for adequate accommodation. It is variable in both content and scope, providing a link between process and substance while refraining from hobbling the decision-maker. However, it applies only to stronger rights claims in the aboriginal context, and as such would have only ad hoc coverage if adapted to apply to procedural fairness. This is undesirable when the goal is to facilitate citizen control across the range of administrative decision-making. Further, the doctrine is still in its infancy and its exact shape and scope are still undefined. The value of the duty to accommodate in the context of this thesis is that it shows that Canadian law already encompasses an institution that insists on a link between procedural input and policy output. The differences in the aboriginal law context, and the relatively ad hoc nature of the doctrine, however, render it less than ideal as a specific model for administrative law to build on.

¹⁰³ *Beckman v Little Salmon/Carmacks*, 2010 SCC 53, [2010] 3 SCR 103 at para 47.

Fortunately, Canadian administrative law already contains a doctrine that is fit for this purpose: the duty to give reasons. There are many bases for wanting public reasons in decision-making. Notably, reasons encourage rationality and provide a record for reviewing or appellate courts to examine the decisions. However, arguably the most important reason for reasons is democratic – reason-giving is a core part of the culture of justification discussed above. As Dyzenhaus puts it, “The difference between mere legal subjects and citizens is the democratic right of the latter to require an accounting for acts of public power.”¹⁰⁴ It is treating those affected by decisions as true citizens that helps legitimate administrative decision-making.

Properly tailored, a requirement for government to explain itself provides a real link between the process the law requires and the outcome the executive is entitled to choose: it provides for citizen control. This can be achieved if we require the result, in part, to be explained in terms of the government’s responses to the submissions it receives. This would provide a link between citizen input and the decisions ultimately made by government without hobbling executive government or crossing the line into judges substituting their views for those of decision-makers. A reason-giving requirement is already part of Canadian administrative law as an element of the reasonableness analysis in substantive review, and this can already do a lot of the work required to link process and substance. That said, I also believe a general duty to give reasons as part of procedural fairness is consistent both with existing Canadian doctrine and the broader changes this thesis argues for.

A duty to give reasons in some circumstances had been part of procedural fairness since *Baker*. In that case, L’Heureux-Dubé J stated that:¹⁰⁵

...it is now appropriate to recognize that, in certain circumstances, the duty of procedural fairness will require the provision of a written explanation for a decision. The strong arguments demonstrating the advantages of written reasons

¹⁰⁴ Dyzenhaus (1997), *supra* note 85 at 305.

¹⁰⁵ *Baker*, *supra* note 5 at para 43.

suggest that, in cases such as this where the decision has important significance for the individual, when there is a statutory right of appeal, or in other circumstances, some form of reasons should be required. This requirement has been developing in the common law elsewhere. The circumstances of the case at bar, in my opinion, constitute one of the situations where reasons are necessary. ...It would be unfair for a person subject to a decision such as this one which is so critical to their future not to be told why the result was reached.

This passage fairly clearly grounds a duty to give reasons in the doctrine of procedural fairness.¹⁰⁶ The rationale is not only facilitating review by the courts (though that is clearly part of it). It is not designed to discipline decision-makers in a manner that ensures rational decisions. Rather, it is grounded in the importance to an individual of being informed of why a decision that affects them is decided in a particular way. As Mullan has noted, this looks very much like a dignity-based right to reasons.¹⁰⁷

The role of reasons in administrative review became somewhat clouded following *Dunsmuir*. While procedural fairness was a minor issue in the case, the focus was on the correct standard by which to review an adjudicator's substantive decision. In that case, the SCC stated that reasonableness review "is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process."¹⁰⁸ This

¹⁰⁶ The conclusion that a duty to give reasons is grounded in procedural fairness is given further weight by L'Heureux-Dubé J's conclusion, at para 44 of *Baker*, that the informal written notes taken by an immigration officer at the time of Ms Baker's deportation hearing could count as written reasons in the circumstances:

The notes were given to Ms. Baker when her counsel asked for reasons. Because of this, and because there is no other record of the reasons for making the decision, the notes of the subordinate reviewing officer should be taken, by inference, to be the reasons for decision. Accepting documents such as these notes as sufficient reasons is part of the flexibility that is necessary, as emphasized by Macdonald and Lametti, *supra*, when courts evaluate the requirements of the duty of fairness with recognition of the day-to-day realities of administrative agencies and the many ways in which the values underlying the principles of procedural fairness can be assured. It upholds the principle that individuals are entitled to fair procedures and open decision-making, but recognizes that in the administrative context, this transparency may take place in various ways.

The emphasis on the need for flexibility in the doctrine of procedural fairness, and that said flexibility applies to the duty to give reasons L'Heureux-Dubé J is creating here, makes it very clear that said duty is founded in procedural fairness rather than reasonableness.

¹⁰⁷ David Mullan, "*Baker v Canada (Minister of Citizenship & Immigration)* – A Defining Moment in Canadian Administrative Law" (1999) 7 Reid's Adm. Law 145 at 151.

¹⁰⁸ *Dunsmuir*, *supra* note 36 at para 47.

was, quite reasonably, subsequently interpreted by lower courts to mean that reasons (i.e. justification) have an important role in reasonableness review at well.

Two approaches to this development came to light in the wake of *Dunsmuir*. One thought that adequacy of reasons was just one part of a holistic reasonableness analysis, while the other advocated separate analyses for adequacy of reasons and reasonableness of result.¹⁰⁹ The two takes on reasons are quite different, with the latter essentially introducing inadequate reasons as a standalone ground of review. Clarification on the meaning of that short passage from *Dunsmuir* was therefore needed. This clarification was provided by the SCC in *Newfoundland Nurses*. The case involved a dispute between the Province and the Nurses' Union about the calculation of vacation entitlements. An arbitrator ruled in favour of the province, and his decision was appealed on the basis that it was unreasonable due to insufficient reasons. The decision was set aside by the trial court, but then reinstated by the Court of Appeal. The case was then appealed again to the SCC.

Abella J made it clear that adequacy of reasons was not a freestanding ground of judicial review.¹¹⁰ Instead, she stated that *Dunsmuir*'s approach is better seen as a "more organic exercise — the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes."¹¹¹ Most importantly for the purposes of this chapter, she then addressed the role of reasons in procedural review. This was not argued in the trial court or the Court of Appeal, but was floated somewhat oddly before the SCC as an attempt to have the arbitrator's reasons assessed under a correctness standard.¹¹² Abella J gave this argument a short shrift – understandably, as it

¹⁰⁹ See Shaun Fluker, "The Measure of Deference Owed to Administrative Decision-Makers in Giving Adequate Reasons for Decision" (Working Paper, 1 May 2011) Available on SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1921624.

¹¹⁰ *Newfoundland Nurses*, *supra* note 79 at para 14.

¹¹¹ *Ibid.* I have some reservations about Abella J's reading of *Dunsmuir*; it seems to mostly ignore *Dunsmuir*'s insistence that reasonableness review is concerned *mostly* with justification, transparency and intelligibility, relegating these to secondary factors in determining the range of permissible outcomes. This, however, is not directly relevant to the concerns covered in this chapter, so will not be discussed further.

¹¹² *Ibid* at para 19.

appears to mostly be an attempt by the appellants to re-litigate their reasonableness arguments under a more favourable standard of review. However, in doing so, Abella J also seemed to dismiss the clear dignitary aspects of *Baker*'s reason-giving requirement, stating:¹¹³

Baker stands for the proposition that “in certain circumstances”, the duty of procedural fairness will require “some form of reasons” for a decision (para. 43). It did not say that reasons were *always* required, and it did not say that the *quality* of those reasons is a question of procedural fairness. In fact, after finding that reasons were required in the circumstances, the Court in *Baker* concluded that the mere notes of an immigration officer were sufficient to fulfil the duty of fairness (para. 44).

It strikes me as an unhelpful elaboration on *Baker* to suggest that alleged deficiencies or flaws in the reasons fall under the category of a breach of the duty of procedural fairness and that they are subject to a correctness review. As Professor Philip Bryden has warned, “courts must be careful not to confuse a finding that a tribunal’s reasoning process is inadequately revealed with disagreement over the conclusions reached by the tribunal on the evidence before it”...

If these passages are simply stating that the existence of a contextual duty to give reasons in procedural fairness should not be used as a pretext to apply correctness review to what are really substantive matters, then I would agree.¹¹⁴ If, however, they are intended to say that the duty to give reasons laid down in *Baker* is completely unconcerned with substance, then I would disagree.

If *Newfoundland Nurses* is read in this way, misleading or even false reasons provided to those affected by a decision would be enough to satisfy the requirements of procedural fairness.¹¹⁵ As noted above, one of the core motivations behind *Baker* creating a duty to give reasons was to ensure that individual dignity is respected.¹¹⁶ It seems incompatible with individual dignity to argue that ‘reasons’ which did not actually motivate the decision in question can vindicate an affected person’s right to a fair process. For this reason, I

¹¹³ *Ibid* at paras 20-21.

¹¹⁴ I would agree in the sense that it was an accurate description of the prevailing approach to the standard of review used for procedural fairness. However, I have been clear that I consider fairness should be reviewed on a reasonableness standard, which would make Abella J’s concern here moot.

¹¹⁵ *Newfoundland Nurses*, *supra* note 79 at paras 21 to 22.

¹¹⁶ See notes 105 to 107 above and accompanying text.

think it is better to read this part of *Newfoundland Nurses* as refusing to accept a spurious argument about standard of review than as a significant reading down as *Baker*. If the latter was intended, I disagree that such a reading down is justified.

That said, for the purposes of this thesis, a reason-giving requirement still does much of the work I believe it can do in linking process and substance if it is, as *Newfoundland Nurses* suggests, seen as an element of substantive reasonableness rather than fairness. Indeed, using reasons in such a fashion arguably provides a stronger link between process and result. Properly construed, the requirement for reasons under the *Newfoundland Nurses* approach to reasonableness will have the effect of linking the process imposed by procedural fairness to the eventual decision.

Dunsmuir requires an assessment “justification, transparency and intelligibility within the decision-making process” when conducting reasonableness review.¹¹⁷ The reasons offered (i.e. the justification) for the decision must be read together with the outcome of the decision to determine whether it “falls within a range of possible outcomes.”¹¹⁸ Where there is a legal requirement to hear submissions from the public – as I argue should be imposed by procedural fairness in most circumstances – the government’s response to those submissions forms part of the chain of reasoning that goes to determining whether the decision was reasonable. As *Newfoundland Nurses* makes clear, deficient reasons will not by themselves render a decision unreasonable if the ultimate result is within the range of reasonable outcomes. However, these reasons, including responses to submissions by members of the public, will always be assessed by the court. Decision-makers will therefore know that their responses to submissions – their response to *process* – will be used to determine the *substantive* validity of their decisions. In this way, the link between submission and outcome that is required for Pettit’s vision of citizen control and legitimacy can be created.

¹¹⁷ *Dunsmuir*, *supra* note 38 at para 48.

¹¹⁸ *Ibid.* See also *Newfoundland Nurses*, *supra* note 79 at paras 11 to 13.

Conceptually, I consider that there is still some utility in retaining a distinct role for reasons in procedural fairness. If the substance of reasons can be adequately assessed under reasonableness, it is surely incompatible with the dignitary approach to fairness taken in *Baker* for there to be no guarantee of genuine reasons, where reasons are required to vindicate fairness. This should not be the case, and I think there is value in thinking about the specific role reasons play in vindicating the right to a fair process, both in the adjudicative and non-adjudicative realms. However, for the purposes of this thesis, the reason-giving requirement set out as part of substantive review in *Newfoundland Nurses* does the work needed to meaningfully link process and substance, which is what is needed to ensure citizen control of executive decision-making.

E Final Remarks

To conclude, I should reiterate *why* I think these changes to Canadian administrative law are necessary. They are necessary to ensure that Canadian administrative law does its job in upholding the rule of law and that the administrative state – indispensable to modern society – in fact discharges the burden of legitimacy it operates under. Chapter II set out the broadly republican vision of legitimacy I use; one based on the idea that to be legitimate, a state must avoid dominating its citizens. The only way to avoid such domination is to have decisions be non-arbitrary: to ensure that government decisions track the public interest (rather than the decision-maker's interest) and that there is some measure of citizen control over said decisions. The current political institutions in Canada do not provide for the appropriate level of citizen control in relation to executive law-making, something that is necessary both in its own right and as an essential element of the legitimate state as a whole, and I suggested in Chapter III that administrative law is both able and obliged to fill the gap. An examination of the principles underlying administrative law reveal that it asks the courts to speak to two audiences – citizens and government – and serves different roles in relation to each. It both protects the rights of citizens and reinforces, through being an outside arbiter of lawfulness, the legitimacy of the administrative state. Further, the doctrinal history of procedural fairness – the sector of administrative law most likely to further the largely procedural version of legitimacy I employ – shows that a concern with

decision-making legitimacy was at the core of the doctrine for centuries, before becoming sidetracked with an adjudicative fixation in the early 20th century.

As discussed in Chapter IV, this adjudicative fixation limits procedural fairness' utility as a mechanism for providing citizen control, and was unfortunately replicated when Canada adopted the modern doctrine of procedural fairness in *Nicholson v Haldimand-Norfolk Regional Police Commissioners*.¹¹⁹ Canada also, via the case of *Inuit Tapirisat*, rapidly excluded legislative decisions from the scope of procedural fairness, an exclusion which is inconsistent with Canadian administrative law's generally broad, contextual approach to procedural review. Doctrinal and principled arguments in favour of the exclusion are weak, and Canadian administrative law also contains a dissident thread of bylaws jurisprudence which does not follow *Inuit Tapirisat*'s bar on process rights for executive decisions which are legislative in form. Although it has yet to find acceptance outside the bylaws context, I consider that this line of cases provides the starting point for a better approach to procedural fairness.

From this starting point, Chapter V argues that comparative administrative law and cognate doctrines in domestic law, notably aboriginal law, provide material which can be drawn upon to craft a doctrine of procedural fairness that abandons *Inuit Tapirisat*'s adjudicative fixation. Comparative material from other Commonwealth jurisdictions show that it is possible to go further than Canada, arguably with weaker legal tools, in providing procedural rights to those affected by executive law-making. New Zealand and the United Kingdom use legitimate expectations, while Australia (and to some extent the United Kingdom as well) provides rights to anyone individually affected by a decision, regardless of how it is classified. These Commonwealth jurisdictions also have a wealth of material on common law consultation that could be drawn on in designing the content of procedural fairness outside the adjudicative context. Similarly, the aboriginal law doctrine of consultation, which operates in a similar though not identical context to administrative law,

¹¹⁹ *Nicholson v Haldimand-Norfolk Regional Police Commissioners*, [1979] 1 SCR 311 [*Nicholson*].

shows that Canadian courts have already worked out when and how a consultation obligation can be applied without a statutory trigger.

The line of bylaws jurisprudence detailed in Chapter IV and the comparative material in Chapter V suggest two approaches to expanding procedural fairness and bringing Canadian administrative law closer to the normative end-goal of citizen-controlled executive law-making, while still allowing the administrative state to function without inappropriate levels of judicial intervention. One option would be for the scope of the doctrine could be shaped by providing procedural rights to anyone who has been individually affected by a legislative decision. The other is for this sort of threshold requirement to be discarded entirely, and the level of procedural rights required instead be controlled by varying the content of those rights and/or the level of scrutiny exercised by courts in reviewing the procedural decisions of public officials.

Either of these approaches would bring Canadian administrative law closer to the goal of facilitating citizen control, although my preferred model – the “no threshold” approach – would get much closer. Neither model will provide for a perfect utopia where citizen input determines all executive decision-making, but that is no reason not to act. As Lon Fuller has suggested, “the common law works itself pure and adapts to the needs of a new day.”¹²⁰ In terms of the role of the administrative state, we are very much in a new day compared to *Bagg’s Case*,¹²¹ *Ridge v Baldwin*,¹²² and even *Nicholson*, and it is past time for the Canadian doctrine of procedural fairness to adapt to the reality of the modern administrative state. The choices are not only the status quo or perfection, and any move towards improvement is to be welcomed. The common law is an iterative institution and, given time, it has the potential to work its way closer to the goal of full citizen control.

¹²⁰ Adapted from *Omichund v Baker*, (1744) 1 Atk 21 at 33 which contains the rather more grandiloquent statement that “the common law... works itself pure by rules drawn from the fountain of justice”.

¹²¹ *Bagg’s Case*, (1615) 11 Co Rep 95b [77 ER 1271].

¹²² *Ridge v Baldwin* [1964] AC 40.

I argued above that the doctrinal shifts I recommend will not significantly change results in judicial review cases. Why, then, is it important? The first reason was discussed immediately above – the state operates under a burden of legitimacy, and extending procedural fairness to all administrative decisions helps discharge that burden. Similarly, incorporating a reason-giving requirement (whether via the reasonableness analysis or a revival of a standalone right to reasons as a matter of procedural fairness) provides the link between citizen input and policy output required for meaningful citizen control. The administrative state is an indispensable part of modern society, and yet neither the legal nor political systems currently engage sufficiently with its democratic legitimacy. The changes I suggest should remedy that neglect.

The second reason is one of intellectual honesty and judicial openness. Although the courts do currently find ways to classify apparently legislative decisions as ‘non-legislative’ and thereby apply fairness, litigants cannot know ahead of time that this will be the case. As such, unfair decisions that appear legislative may not be challenged even if, under the status quo, there may be some way to bend the law. Similarly, even though the *Baker* synthesis is sometimes used to *de facto* grant deference to decision-makers, they cannot know whether deference will be granted when making their procedural choices. This renders any deference illusory. In order for decision-makers to understand the legal standards which apply to them, and for litigants to know whether an unfair process is amenable to review, these elements that currently exist as judicial nods and winks must be brought forward to the level of doctrine. The changes put forward in this thesis are important.

It may well be that the common law cannot, by itself, reach perfection in this context. Critics of expanding procedural fairness in the way I recommend (such as Sedley LJ) do have a point. As the thesis makes clear, I do not think these issues are insurmountable, but they are real. The iterative nature of the common law and the courts’ natural focus on adjudicating disputes between parties do limit the extent to which the courts can set out a coherent framework for citizen participation across the administrative state. I have put

forward a model that I believe does that to the greatest possible extent, and it is counterproductive to ask the courts to do more than they are equipped to do.

That said, the common law is not Canada's only source of law. If the common law developments I advocate come about, it is entirely possible that Provincial legislatures, or the Federal Parliament, will respond by passing legislation which codifies and possibly constrains participation rights in non-adjudicatory situations: something like the American *Administrative Procedures Act*. In general terms, such legislative intervention would be perfectly acceptable. In order to secure the legitimacy of the administrative state, it must be allow for citizen control in how its norms are created. Whether this is done via the common law or statute is immaterial, although one could argue that the involvement of all three branches of government in doing this is actually preferable to a common law only approach. As discussed above, however, the *APA* has significant problems with inflexibility, and many have argued that heavy-handed judicial review under the *APA* cripples administrative rulemaking. Any statute that is too rigid risks repeating that experience, and should be avoided. As such, a skeletal framework of statute law with flexible common law elaboration may be the most desirable end result in the Canadian context.

Ultimately, I see this thesis as a challenge to the courts to begin a conversation with Parliament about how executive discretion ought to be shaped to accommodate public participation. As I made clear in Chapter III, this is not just about control of maladministration to secure individual rights, but also about finding a decision-making structure which supports and enhances the legitimacy of administrative actions. All three branches *ought* to be interested in contributing to this project. In the absence of statutory intervention, though, the common law may not remain silent. Unless and until it is overtaken by legislation, the common law of procedural fairness ought to work to bring its doctrine in line with its underlying rationale. For too long Canadian administrative law has been comfortable thinking that it is inappropriate or impossible to apply procedural fairness to delegated law-making. This accepted wisdom leaves rights in an important area

unprotected, and also fails to provide an answer to the legitimacy deficit executive law-making suffers from. It is in fact entirely consistent with the rationale of fairness for such decisions to be covered, and it is past time for the Canadian courts to work out how this might be achieved.

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