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How Civil Procedure Fails (And Why Administrative Justice is Better)

ALLAN C. HUTCHINSON*

The demand for more and better procedural fairness is a rallying-cry that receives almost universal support. All participants in the legal process – litigants, judges, legislators and lawyers – maintain that the justice of any outcome can be both affected by the quality of the procedures relied upon and offset by the failure to provide access to appropriate and balanced procedural opportunities. Indeed, unless losing litigants or applicants think that they are getting a fair shake when it comes to the procedures used, there will be even greater dissatisfaction with losing than otherwise might be the case. However, while good or fair procedures will not guarantee satisfaction, let alone fair decisions, they will go some of the way to placating people’s sense of dissatisfaction.¹ As such, in a complex and disputatious society like Canada, there seems to be more agreement, although far from unanimous, on what might count as a fair procedure than on what would be treated as a fair result. This explains the attention that lawyers and judges pay to the fairness of different procedures in different areas of dispute. Getting procedure right obviates the more thorny challenge of getting substance right.

In this reflective provocation, I want to explore a little more critically the whole idea and practice of procedural fairness. Although there is ample rhetoric on the importance and nature of procedural fairness across

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¹ There is a large socio-legal literature on this. See, for example, Tom. R. Tyler *et al.*, *Social Justice In A Diverse Society* (Boulder: Westview Press, 1997).

the legal landscape and by its various protagonists, there is little attention paid to the unevenness and availability of the actual procedures recommended and institutionalized. One way to come at this issue is to compare and contrast how procedural fairness is treated in the jurisprudence on civil procedure and on administrative law; commentators and judges are too easily blinded to the benefits of such a comparative analysis. Despite a shared commitment to procedural fairness and its ideal centrality to each, there are some glaring inconsistencies between how civil procedure and administrative law operationalize this critical idea. The basic thrust of my critique, as this essay's title suggests, is that civil procedure comes a poor second to administrative law in its willingness to take seriously and implement a basic structure and doctrine of procedural fairness. Although administrative law in practice is far from perfect, it seems to have an edge over the practice of civil procedure. There is much in this to ponder and change because, to paraphrase Lon Fuller,² if we get things wrong procedurally, we are much less likely to get things right substantively.

PROCEDURAL FAIRNESS

It seems axiomatic that the amount and quality of procedure that a person is entitled to will vary depending on the dispute and its informing context. As a rule of thumb, the more serious and weighty the dispute and the consequences of its resolution, the more procedural options and opportunities a person can expect to receive. There is no one set of procedural entitlements that can be offered or resorted to in any formulaic or absolutist way. As with so many other things, there will need to be a balancing of factors and considerations – rights, resources, expectations, reliances, remedies, consequences, etc. – to achieve, as the Ontario Rules of Civil Procedure put it, “the just, most expeditious and least expensive determination of every civil proceeding on its merits.”³ In particular, the central challenge will be how to trade-off and square these four vital

² Lon L. Fuller, “What the Law Schools Can Contribute to the Making of Lawyers” (1948) 1 J Legal Educ 189 at 204 (“If we do things the right way, we are likely to do the right thing”). I will concentrate on the situation in Ontario, but, in doing so, I think that my observations and conclusions have relevance across Canada.

³ *Rules of Civil Procedure*, O Reg 575/07, s 6 (1), r 1.04 (1) [Rules].

dimensions of procedural fairness – the justice of outcomes reached, the time spent litigating, the funds invested in litigating, and resolution on the merits of the dispute. As is often the case, there is no tried-and-true basis on which to address and meet that conundrum. Unfortunately, nor is there any consensus about how to go about doing that.

The judges and jurists who deal with civil procedure matters too often get lost in the doctrinal and interpretive details; there is little reflection on the overall scheme and objectives of the civil justice system. However, administrative lawyers and judges have devoted considerable time and attention to developing a broad matrix within which this balancing task can be approached and answered; they have grappled with not only what is meant by the principles of procedural fairness generally, but also what is the better way to operationalize those principles across the vast spectrum of different administrative tribunals, decision-making, and institutional contexts. As was said by Justice Le Dain in *Cardinal* in 1985, “the right to a fair hearing must be regarded as an independent, unqualified right which finds its essential justification in the sense of procedural justice which any person affected by an administrative decision is entitled to have.”⁴ Although there is still much work to be done within administrative law, the basic framework is in play; it is now as much about its more detailed elaboration, practical orientation and doctrinal fine-tuning as anything else.⁵

The key and most expansive judgment on procedural fairness remains that of the Supreme Court in 1999 in *Baker*.⁶ In regard to a deportation case, the Court took the occasion to lay out a two-part approach to procedural fairness; the duty and the content. First, the Court explained how the context of any particular case or hearing would be determinative in deciding the degree of flexibility that would be allowed in shaping the particular application of a fair procedure. In particular, the Court laid down five factors that should be considered: (1) the nature of the decision; (2) the nature of the statutory scheme; (3) the importance of the decision

⁴ *Cardinal v Kent Institution (Director)*, [1985] 2 SCR 643 [*Cardinal*].

⁵ I do not want to leave the impression that I think that administrative law is thoroughly or decisively in good shape. See Allan C. Hutchinson, “Why I Don’t Teach Administrative Law (And Perhaps Why I Should?)” (2016) 53 *Osgoode Hall LJ* 1033.

⁶ *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817.

to the affected person; (4) the presence of any legitimate expectations; and (5) the choice of procedure made by the decision-maker. These considerations are not intended to be exhaustive and they are not meant to be in any order of priority. The idea was that different levels of procedure made available would be calibrated in line with these factors. So, while one situation might demand a full and trial-like process with all the bells and whistles associated with such occasions, another situation might warrant a more relaxed, informal and lesser set of procedural avenues. The court has encouraged tribunals and adjudicators to adopt a suitably pragmatic mentality in modelling this adaptable sliding-scale in fulfilling their administrative mandate.

In the second part of *Baker*, in its judgment on content, the Court outlined what is meant by treating a litigant or applicant in a procedurally fair way. It emphasized that individuals should have the opportunity to present their case fully and fairly; that any decision affecting their rights, interests, or privileges should be the product of using a fair, impartial and open process; and that the statutory, institutional and social context of the decisions should be considered. As such, the Court introduced a level and content of procedural fairness that left little doubt that the government had an obligation in the creation, establishment, operation, and populating of tribunals that, even if courts might be willing to defer on matters of substance, they would insist that the basic tenets of procedural justice should be closely followed and respected.

Over the past two decades, the courts have begun to flesh out what the duty of procedural fairness demands in terms of its content and parameters. In general, there has been an acknowledgment that participation alone is insufficient and that *meaningful* participation is required.⁷ As such, although still based on and derived from the two key principles of the right to be heard (*audi alteram partem*) and lack of bias (*nemo iudex in sua causa*), they have been deepened and broadened to include a range of sub-principles that include:

- *right to notice* – there should be no surprises or ambushes;

⁷ See, for example, *Charkaoui v Canada (Citizenship and Immigration)*, 2008 SCC 38 [Charkaoui]. For a good summary of this, see Colleen Flood and Lorne Sossin, *Administrative Law In Context*, 2nd ed (Toronto: Edmond Montgomery Publications, 2013) at 147-84. Of course, without state-funded counsel, this right does not amount to much.

- *right to a hearing* – there should be an open and public setting for decision-making;
- *right to make submissions* – there should be opportunities to participate meaningfully;
- *right to counsel* – there should be the possibility of professional advocacy and help;
- *right to cross-examine* – there should be the chance to challenge witnesses and evidence;
- *right to reasons* – there should be reasonable explanation given for any decision made.

Taken together these requirements, while admittedly applied and adjusted in a loose and selective situation-specific manner, amount to a relatively rich and detailed account of procedural fairness. Although the Supreme Court has managed to tie itself in knots over the standard for review,⁸ it has been consistent and concerted in its efforts to give the right to a fair hearing in administrative law some real substance and bite. It has, in a manner of speaking, been prepared to put its doctrinal money where its principled mouth is. Of course, while there are some encouraging signs, whether these statements of law have reaped practical rewards in the actual and quotidian operation of administrative tribunals and decision-making remains a largely open question: the practice often fails to live up to the theory. Having said that, the extent and sophistication of judicial efforts to take seriously procedural fairness in administrative law stands in sharp contrast with similar efforts in civil procedure.

FORMAL SLIPS

When it comes to civil actions, the applicable Rules offer a wide range of procedural devices and openings to ensure that the best effort is made to facilitate a fair and just result for actions brought. Many of the features of procedural fairness are incorporated into the Rules so as to enable litigants, both plaintiffs and defendants, to have the fairest and most conducive means through which to resolve their dispute and obtain substantive justice. By way of comparison to administrative law, the Rules provide crafted solutions to notice-giving, disclosure, timeliness,

⁸ See Hutchinson, *supra* note 5 at 1043-47.

participation, order, evidence-presentation, cross-examination, motions, and the like; the limits to these procedural mechanisms are as important as their original design and purpose. Different levels of procedure are available for different disputes and venues; the amount in dispute is often the decisive criterion. However, the Rules seem to have taken on a very technical life of their own: they have become the framework for a sophisticated and distracting game of litigational cat-and-mouse. Apart from occasional exhortations to act expeditiously and fairly, there is little of an underlying theory or philosophy of procedural fairness that animates and guides their application in civil actions.

As far as the courts' Rules jurisprudence is concerned, there is no overarching or developed account of procedural justice in civil procedure.⁹ There are judicial snippets here and there, but the basic view seems to be that the Rules of Civil Procedure set out the general framework and there is no need for such an elaboration: the role of the courts is often restricted to discrete, technical and narrow acts of statutory interpretation. Moreover, even in pursuing this limited and self-imposed task, the courts have worked by and large in a formalistic and unimaginative way. There are very few instances in which judges have taken the opportunity to recommend or develop a more integrated account of what procedural fairness is and how it might be put into play in civil actions. This shortcoming is especially apparent when civil procedure is compared to the dense doctrine that has been assembled in administrative law. The judge has considerable discretion under the Rules to construe the Rules liberally so as to achieve just outcomes.¹⁰

However, when the courts have taken a less cramped and more expansive approach to procedural fairness, the focus and product has been less than encouraging. Indeed, the stance taken runs almost opposite to that of a *Baker*-like doctrine in administrative law. A strong and recent

⁹ One of the few serious and convincing Canadian efforts to offer such an account is by Trevor Farrow. He seeks to critique existing approaches and offer alternatives ways of thinking about and advancing access to justice. See Trevor Farrow, *Civil Justice, Privatization, And Democracy* (Toronto: University of Toronto Press, 2014). See also See Roderick MacDonald, "Access to Justice in Canada Today: Scope, Scale and Ambitions" in Julia Bass, William A. Bogart And Frederick H. Zemans, eds, *Access To Justice For A New Century: The Way Forward* (Toronto: Law Society of Upper Canada, 2005).

¹⁰ See, for example, Rules, *supra* note 3.

example of this is the Supreme Court of Canada's decision in *Hryniak*. The case was about the role and responsibilities of judges in hearing motions for summary judgment – could and should they take a more active role and make decisive findings that will dispose of actions at a relatively early stage in the proceedings? The traditional approach had been that judges should only grant such motions where there was no genuine issue for trial and there were no significant issues of credibility. The rationale was that litigants should only have their right to a fair trial curtailed and denied in the most compelling of circumstances. The *Hryniak* decision changed all that.

The case involved a fraud action in which the defendant Hryniak had allegedly and fraudulently induced some people to invest in a dubious off-shore investment opportunity. The plaintiffs brought a motion for summary judgment. The judge utilised powers under Ontario's Rule 20 to hear and weigh evidence, test Hryniak's credibility, and make factual findings. He decided that a trial was not required and Hryniak had committed the tort of fraud. The Supreme Court approved of this way of proceeding. On behalf of the Court, although she emphasized that the apparent need to maintain timely and uncompromised procedural fairness, Justice Karakatsanis contended that "undue process and protracted trials, with unnecessary expense and delay, can prevent the fair and just resolution of disputes."¹¹ Encouraging the use of alternative processes instead of full trials to resolve cases, she considered that a proportionate and working balance should be struck between full access to courts and the costs and dilatoriness of such access: "the proportionality principle means that the best forum for resolving a dispute is not always that with the most painstaking procedure."¹²

While it would be foolish to pretend that time and money were not important factors to be weighed in the balance of justice, it is surely throwing out the baby with the bathwater to deny litigants (against whom judgment is given) a right to a hearing without all the usual protections and procedures of a conventional trial: the truncated and narrow opportunity afforded by a motion is not always adequate. Indeed, the

¹¹ *Hryniak v Mauldin*, [2014] 1 SCR 8 at para 24 [*Hryniak*]. For a strong analysis, see Barbara Billingsley, "Hryniak v. Mauldin Comes To Alberta: Summary Judgment, Culture Shift, And The Future Of Civil Trials," (2017) 55:1 Alta L Rev 1.

¹² *Hryniak*, *ibid* at para 28. On the powerful impact of costs and fees, see *infra* pp.

thrust of Justice Karakatsanis's argument is that the connection between procedural fairness and merits-based adjudication is weak and that the full right to be heard is not always the gold standard of procedural fairness. In contrast to the rigorous arguments in favour of procedural fairness in administrative law, the Supreme Court in *Hryniak* seemed to be almost cavalier in its regard to its importance in civil actions. For Justice Karakatsanis, time and costs were the guiding lights of her analysis, not procedural fairness as a valuable and valued end in itself.

Indeed, in an early pre-*Baker* administrative law case in 1985, the Supreme Court took the strong line that the values of procedural fairness should not be traded off against utilitarian concerns (e.g., the costs of providing such fair procedures). Justice Wilson held that:

No doubt considerable time and money can be saved by adopting administrative procedures which ignore the principles of fundamental justice but such an argument, in my view, misses the point.... The principles of natural justice and procedural fairness which have long been espoused by our courts implicitly recognize that a balance of administrative convenience does not override the need to adhere to these principles.¹³

In most administrative law contexts, of course, these resources will be those of the government; they are providing the institutions and personnel of administration. In civil actions, while the government underwrites the costs of courts and judges, the main sources of expense and funding lie with the litigants; the primary and largest cost is for lawyers' services and fees. This is no small difference. Nevertheless, except in circumstances where there is a frivolous and vexatious claim being made, it seems wrong-headed to relegate procedural fairness to a second-level consideration. Justice Karakatsanis's insistence that "the best forum for resolving a dispute is not always that with the most painstaking procedure"¹⁴ seems to

¹³ *Singh v. Minister of Employment and Immigration*, [1985] 1 SCR 177 at 218-19 [Singh] per Wilson J.

¹⁴ *Hymiak*, *supra* note 11. In fairness, it should be added that *Hryniak* has been used in the administrative context to justify there being no need for a full hearing. For example, in rejecting the need for a full hearing in regard to a human rights complaint, the court held, relying upon the logic of *Hryniak*, that "what is true for the traditional civil trial system is even more applicable to the administrative tribunal system, which was designed to be a more expeditious and cost-effective process for the resolution of disputes.... Principles of natural justice and procedural fairness do not always require a full trial-like hearing." See *Aiken v. Ottawa Police Services Board*, 2015 ONSC 3793 (Div Ct) at paras 33-34 per Molloy J.

run counter to the basic rationale behind the need for procedural fairness – that fair procedures will more likely lead to fairer results. While not all cases need to be given the first-class treatment that the Rules would confer and recommend, it is a large step to relegating procedural fairness to an also-ran in the journey to substantive justice.

After all, access to civil justice is heavily constrained by the costliness and dilatoriness of the process. If this is to be improved, these features must be tackled directly. The *Hryniak* approach is more about responding to and reducing the harm caused by such problems; it does not address or focus on the causes of that harm – the civil process is breaking under its own costly weight and that load needs to be significantly lightened. Judicial measures to tackle costliness and dilatoriness must be taken. It is insufficient that judges, like Justice Karakatsanis and her colleagues, are simply content to adjust other components of the process, like summary judgment, to accommodate the costly and delayed nature of the civil process. As such, constraining even further the quality of procedural fairness is not the way to go. While justice delayed is a genuine problem that can lead to justice being denied, it is also true that justice rushed and reduced can also lead to justice being denied. *Hryniak* turns many litigants into hostages of systemic fortune.

INFORMAL EFFECTS

Of course, the fact that the whole process of procedural justice is governed by broad utilitarian and economic concerns, as reflected in *Hryniak*, should come as no surprise to seasoned participants in the civil justice process. Although judges and lawyers insist that justice is not for sale, any reasonable observer would be hard pressed to disagree that the costs of justice are often the main determinants of its availability and distribution. Although Ontario's Rule 1.04 lists justness, expeditiousness and merit-based determination as leading factors, it is the expense factor that drives the process. Indeed, the formal scheme of civil justice is underpinned and dominated by the informal scheme of economic dynamics in which civil justice becomes a negotiable commodity. Unfortunately, to paraphrase the great William Blake, 'the price of

fairness can be bought for a song or dance in the street'.¹⁵ As such, the song-and-dance of the civil process is an expensive gambol (and gamble) that comes at a high price that few can afford and with high costs that many cannot.

In any system, including the administrative process, there will be economic expenses. There is usually a set of fees for initiating the process and filing documents in both administrative and litigation schemes. Fortunately, the courts have been relatively conscientious in ensuring that these are kept to a minimum and not exploited by government as a source of revenue.¹⁶ However, it is the costs of lawyers that consumes most of people's budgets. Lawyers' fees are high (an average of at least \$350-400 *per* hour in Toronto). In both the administrative and litigation context, these amounts can soon become prohibitive for most people; a trial can easily cost \$50,000. This situation is only exacerbated by a set of costs rules that are generally based upon the notion of fault – the loser is to pay a significant portion of the winner's costs. The effects of these costs rules are hardly conducive to encouraging notions of procedural fairness. Whatever the original rationales for a fee-shifting regime (that is, deterring frivolous cases, settling disputes, and broader access), these are no longer viable. Too often, litigation costs are out of all proportion to the value of most disputed matters. This is not helped by the unpredictability of costs awards. As a result, procedural costs are the real driver of litigation, not the resolution of substantive disputes.¹⁷

In the civil justice system, a basic force of the loser-pays cost system is that the mutual costs of litigation will almost always exceed those of settlement. This means that it is reasonable to expect that it will nearly always be in the best interests of the parties to settle their dispute rather

¹⁵ William Blake, "The Four Zoas" in David Erdman and Harold Bloom, ed, *The Complete Poetry And Prose Of William Blake* (Berkeley: University of California Press, 1982) at 54. One of the first articles that I wrote took such a stance. See Allan Hutchinson, "The Formal and Informal Schemes of the Civil Justice System: A Legal Symbiosis Explored" (1981) 19:4 *Osgoode Hall LJ* 473. I hold to most of those views decades later.

¹⁶ See, for example, *British Columbia (Attorney General) v Christie*, [2007] 1 SCR 873 [*Christie*] and *Trial Lawyers Association of British Columbia v British Columbia (Attorney General)*, [2014] 3 SCR 31 [*Trial Lawyers Association*].

¹⁷ See Erik Knutsen, "The Cost of Costs: The Unfortunate Deterrence of Everyday Civil Litigation in Canada" (2010) 36:1 *Queens LJ* 113.

than litigate. Although this is by no means a bad thing, it is a somewhat perverse system of procedural justice that creates powerful incentives not to use it. Moreover, the predominant costs rule exacerbates the already harsh consequences of the all-or-nothing character of litigation. While it may serve to discourage frivolous litigation, the costs rule may result in meritorious and novel claims not being pursued or pressed. Also, a litigant stands to receive more when successful, but to lose more when unsuccessful. This fact has considerable effect upon the parties' attitudes to risk; there will be a greater variance of returns between winning and losing. Mindful that most litigants tend to be risk-averse, this greater variance will encourage more litigants to settle (or, more accurately, bring their claim to a close) than litigate. Again, the primary emphasis is on utilizing costs as a way of avoiding litigation. This can only work to disadvantage poorer litigants who will be under enormous pressure to settle as the costs of losing are so high.

By way of example, if P sues D for \$100,000 (and both parties think that they have an equal chance of success), the deciding factor will likely be the costs. Assuming costs of about \$25,000 each (and this is very low for any kind of trial) and a 50% indemnity of the costs to the winning party, the variance for P will be +\$87,500 for a win (i.e., \$100,000 less 50% of their own costs of \$25,000) and -\$37,500 (their own cost of \$25,000 and \$12,500 of D). This means that P has to be prepared to lose \$37,500 (as well as not getting their \$100,000) in order to gain \$87,500. For poorer and more risk-averse litigants, this does not seem to be a very sensible gamble; they likely do not have a further \$37,500 to lose. Also, the possibility of indemnifying at a rate of more than 50% is a daunting prospect.¹⁸ Moreover, if D is a corporation or richer litigant (who can afford to be much less risk-averse), P will be in an even tighter spot. All in all, civil justice seems to resemble more of a game of roulette in which the house or wealthy defendant has the odds very much in their favour. This does not encourage confidence that the system is devoted to or even interested in achieving substantive justice, let alone providing procedural fairness.

¹⁸ While partial indemnity is the standard cost award, substantial indemnity can be ordered in certain circumstances. See Rules, *supra* note 3, R 57. If this did occur at 80%, the figures in my example would be +\$95,000 and -\$45,000.

For instance, while the right to a hearing is front-and-centre in the administrative jurisprudence (even if not always available in all circumstances), this entitlement is simply beyond the realistic reach or expectation of the ordinary litigant in the civil justice system. Although much of the Rules is based on the assumption that there ultimately will be a trial, this is simply not a viable prospect or likelihood for most litigants in the civil justice system. Unlike their administrative counterparts, litigants do not get the valued experience of making their case before an impartial adjudicator. This is not because the stakes are too low in litigation or that the matters involved are not serious or weighty enough (e.g., custody disputes or home re-possession), but because the system is constantly pressurising litigants to bring their dispute to an early conclusion, often without regard to the merits or justice of the situation.

In doing this, the main ambition of the civil justice system is to terminate rather than resolve disputes; a system-wide quantitative measure takes precedence over an individualised qualitative evaluation. All of this is thrown into even sharper and more pessimistic relief when it is appreciated that more and more litigants do not have lawyers, but are self-represented. In recent years, it is estimated that over 60% (and rising) of litigants are trying to make their own way through a system that is designed to be populated and utilised by legal professionals.¹⁹ It is a major flaw of the civil justice system and of the lawyering process generally that it assumes most participants have lawyers when they do not. The challenge is not simply to make the procedural structure more welcoming to non-lawyers, but to re-design the whole process so that it is usable by the bulk of its self-represented participants. Without such a transformative shift (of a different kind than that recommended by Justice Karakatsanis in *Hryniak*), any notion that procedural fairness is taken seriously within civil litigation is simply so much smoke and mirrors. If the courts lived up to their own administrative law pronouncement that “the denial of a right to a fair hearing must always render a decision invalid”²⁰ in the civil justice system, then almost all litigants would have a case for having adverse judgments set aside.

¹⁹ See Jennifer Leitch, “Lawyers and Self-Represented Litigants: An Ethical Change of Role?” (2017) 95:3 Can Bar Rev 669.

²⁰ *Cardinal*, *supra* note 4 at para 23.

In contrast to civil litigation, the courts in administrative proceedings have been prepared on occasion to order state-funded counsel; this is not a common situation and only occurs where the applicant's interest are serious and weighty.²¹ They have also been prepared to order that filing fees and the like be set aside in cases of hardship. As regards the costs rules in play in the administrative process, they are much less draconian and, if not user-friendly, then at least not too paralyzing for applicants of modest or even middle-class means. As with most things administrative, the enabling statute usually lays out a framework for paying and recovering costs; this might occasionally allow for a losing party to pay the tribunal's costs. For instance, before the Landlord and Tenant Board, lawyers' fees are usually only awarded if there has been unreasonable conduct by the other party. Also, the amount awarded is often limited to the time spent at the hearing; preparation time is restricted to cases of unreasonable conduct. Finally, an order for a losing party to pay another party's fees and the Board's costs is only made in very exceptional circumstances.

The effect of these rules and regulations in the administrative process is that costs awards, unlike in civil litigation, are not regularly used or have the effect of depriving people of their right to a hearing or pressuring them to settle, whatever the fairness of the settlement. There seems to be a much greater willingness to limit the award and use of fees to deterring and curbing of unreasonable behaviour; they are not deployed as a chilling device, but as compensatory measures. Indeed, the whole force of the rules in the administrative process are more sensibly attuned to allowing people to exercise their rights, not to contain them. As such, the informal dynamics of economic pricing do not drive and occasionally subvert the formal scheme of justice as they do in civil litigation. In short, it is more about inherent fairness than it is about utilitarian calculations. Civil litigation has much to learn from administrative law.

CONCLUSION

The upshot of all this is that the system of civil procedure fails short of any reasonable standard or expectation of procedural fairness. The core problem in civil procedure is that 'the best has become the enemy of the good'. The procedural justice instantiated by the Rules is an extensive and

²¹ See, for example, *New Brunswick v G(J)*, [1999] 3 SCR 46 [*New Brunswick*].

thorough elaboration of what a close-to-ideal system might look like. However, the problem is that only the privileged few (e.g., the rich and corporations) can afford full access to it: everyone else is very much on the outside looking in. There is little point in having a Lamborghini in the garage if no one can afford to drive it and people have little money to live after keeping such an extravagant machine in working order. As administrative law indicates, the government must become a more significant guarantor of the civil justice system if it is to function and be available in a way that allows more, not less people to avail themselves of it. *De jure* civil justice cannot simply be a glossy wrapping on a *de facto* package that offers little or no procedural fairness to the great majority of people.

When talking about the administrative process, Lorne Sossin summed it best when he said that, in terms of procedural justice, “fairness always matters, but what matters most is not always fairness.”²² This assessment is doubly applicable to civil procedure; what matters most seems to be the termination and reduction in litigation, not its fair resolution. It is not only the Rules and their practical operation that take such a stance, but the courts and judges themselves. As the Supreme Court in *Hryniak* confirmed, due process and fair procedures are something that can be set to the side or, at least, placed a distant second in evaluating and implementing a procedural process that is supposed to be fair. There seems to be little concern for offering a set of procedural rights to litigants that have worth and value in themselves and that actually matter in the daily practice of civil procedure. This is, to say the least, an unfortunate turn of events in civil actions – the institutional promise of procedural fairness remains a relatively empty and unfulfilled pledge.

²² Lorne Sossin, “The Promise of Procedural Justice” in Adam Dodek and David Wright, eds, *The McLachlin Court's First Ten Years: Reflections of the Past and Projections of the Future* (Toronto: Irwin Law, 2010).