The Principles of Fundamental Justice: The Constitution and the Common Law

J. M. Evans
Osgoode Hall Law School of York University, jevans@osgoode.yorku.ca

Follow this and additional works at: https://digitalcommons.osgoode.yorku.ca/ohlj
Part of the Administrative Law Commons, and the Constitutional Law Commons

This work is licensed under a Creative Commons Attribution-Noncommercial-No Derivative Works 4.0 License.

Citation Information
https://digitalcommons.osgoode.yorku.ca/ohlj/vol29/iss1/2

This Article is brought to you for free and open access by the Journals at Osgoode Digital Commons. It has been accepted for inclusion in Osgoode Hall Law Journal by an authorized editor of Osgoode Digital Commons.
The Principles of Fundamental Justice: The Constitution and the Common Law

Abstract
This article examines the application of the principles of fundamental justice in section 7 of the Charter to administrative law, and in particular its relationship to non-constitutional grounds of judicial review. The author argues that in this area of the law the common law should generally be regarded as the source of the basic tenets of our legal system that section 7 has been said to embody. The author suggests that the traditional grounds of judicial review of administrative action represent the courts' accommodation of individual rights and the collective interest, and thus cover much the same ground as the Charter. However, the article also identifies some extensions of the courts' supervisory role over administrative agencies that are attributable to the constitutionally entrenched status of the principles of fundamental justice.

Keywords
Canada. Canadian Charter of Rights and Freedoms; Judicial review of administrative acts; Canada

Creative Commons License
This work is licensed under a Creative Commons Attribution-Noncommercial-No Derivative Works 4.0 License.

This article is available in Osgoode Hall Law Journal: https://digitalcommons.osgoode.yorku.ca/ohlj/vol29/iss1/2
This article examines the application of the principles of fundamental justice in section 7 of the Charter to administrative law, and in particular its relationship to non-constitutional grounds of judicial review. The author argues that in this area of the law the common law should generally be regarded as the source of the basic tenets of our legal system that section 7 has been said to embody. The author suggests that the traditional grounds of judicial review of administrative action represent the courts' accommodation of individual rights and the collective interest, and thus cover much the same ground as the Charter. However, the article also identifies some extensions of the courts' supervisory role over administrative agencies that are attributable to the constitutionally entrenched status of the principles of fundamental justice.

I. INTRODUCTION

Even before the adoption of the Canadian Charter of Rights and Freedoms, public lawyers in Canada understood that there can be a close relationship between the constitution and the common


* Professor, Osgoode Hall Law School, York University. I gratefully acknowledge my indebtedness to friends and colleagues who were good enough to comment on earlier drafts of this paper: Peter Hogg, David Lepofsky, James MacPherson, Rod Macdonald, David Mullan, Richard Risk, Brian Slattery, Eric Tucker, and Alan Young. It is a particular pleasure to thank Douglas Alderson, whose contribution far exceeded that expected of a research assistant, and Carole Trussler and Anita Lee, whose word-processing skills, genial common sense, and sheer professionalism again saw me through.

law. For example, in *Crevier v. A.G. Quebec*, the Supreme Court of Canada invalidated a provincial statutory scheme for the regulation of the professions in Quebec, on the ground that it violated section 96 of the *Constitution Act* by ousting the inherent power of the superior courts to review for jurisdictional error the decisions of the Professions Tribunal — an appellate tribunal composed of provincially appointed members. In effect, this case elevated a common law ground of judicial review to the level of a constitutional limit upon the provinces’ legislative powers to design a system of administrative adjudication. Sometimes, a line of authority first developed in constitutional law is later applied to non-constitutional challenges to administrative action: the liberalization of the law of standing is an important recent example.³

Constitutional law can also be understood to include more than the content of the *Constitution Acts, 1867-1982*. In its broader sense it connotes the laws and legal principles that determine the allocation of decision-making functions amongst the legislative, executive, and judicial branches of government, and that define the essential elements of the relationship between the individual and agencies of the state. A constitutional character in this broad sense can thus be attributed to many of the principles of statutory interpretation the courts use to construe regulatory legislation,⁴ to the doctrine of *ultra vires*,⁵ and to the duty of fairness which provides an opportunity for interested individuals to participate meaningfully in the making of decisions by public bodies.

In areas of concern to administrative law, the *Charter* has undoubtedly expanded the potential intersections of the constitution,

---


⁴ These include the presumptions against sub-delegation and the use of delegated powers to impose taxation and retrospectively to remove substantive rights; the presumption against the grant of legally unlimited governmental power surfaces in the strict interpretation of privative clauses and in the implied limitations read into wide statutory discretion conferred in subjective terms.

in the formal sense, and the common law. The question addressed in this paper is the relationship between the constitutional standard of the principles of fundamental justice when applied to public administration, and the common law doctrines of judicial review, especially the duty of fairness. To date, the Supreme Court of Canada has been notably and somewhat uncharacteristically unforthcoming. Thus in Reference re ss 193 and 195.1(1)(c) of the Criminal Code, Lamer J. said that the legal framework within which regulatory and other statutory programmes are administered

has developed its own regime of common and statutory law dealing with procedural and substantial fairness. The extent to which s. 7 of the Charter can be invoked in the realm of administrative law, its implications for administrative procedures, and its relationship to the common law rules of natural justice and the duty of fairness are not before this court, and it is preferable to develop that jurisprudence on an ongoing case-by-case basis.

Section 7 of the Canadian Charter of Rights and Freedoms reads as follows:

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

Despite the awkward phrasing of this provision, it seems now to be generally agreed that whether a public authority has violated section 7 depends on a two-step analysis.

The first requirement is that an exercise of governmental or statutory power must deprive an individual of the right to life, liberty and security of the person. Section 7's impact upon the administration of regulatory programmes and the delivery of statutory benefits will largely depend on the range of interests that are held to be included within the words "life, liberty and security of the person."

The deliberate omission of property from section 7 is unlikely to deter the courts from concluding that an interest with an economic aspect can also be essential to liberty and security of the

---

6 [1990] 1 S.C.R. 1123 at 1176-77; see also Slaight Communications Inc. v. Davidson, [1989] 1 S.C.R. 1038 at 1049 per Dickson C.J. [hereinafter Slaight Communications].
person. For instance, a licence that is legally required to pursue a profession or vocation may be regarded as a species of property because of its economic value to the licence holder, and, thus, not within the interests protected by section 7. However, a statutory power to revoke such a licence can equally be characterized as authorizing a deprivation of liberty and security of the person of the licensee: revocation may prevent the individual from using her or his skills, knowledge, and experience in order to be self-sufficient, to maintain self-respect, and to contribute to society. Similarly, terminating income support to, or evicting from public housing, a person who depends upon government programmes of assistance for the necessities of life may well be a deprivation of liberty and security of the person. The potentially wide scope of the section has been indicated in other areas of public regulation. Statements have been made at the highest judicial level that the interests protected by section 7 include the individual's freedom to make such fundamental personal choices as the termination of a pregnancy

---

7 See Irwin Toy Ltd v. A.G. Quebec, [1989] 1 S.C.R. 927 at 1003-1004 where, noting that the deliberate omission of "property" from section 7 generally excluded economic rights, the majority judgment did not find it necessary to decide "whether those economic rights fundamental to human life or survival are to be treated as though they are of the same ilk as corporate-commercial economic rights." For a vigorous denunciation of judicial attempts in general to include economic interests within section 7; and the British Columbia Court of Appeal's decision in Wilson v. Medical Services Commission of B.C. (1989), 53 D.L.R. (4th) 171 [hereinafter Wilson] in particular, see M.D. Lepofsky, "Constitutional Law – Charter of Rights and Freedoms, Section 7 – A Problematic Judicial Foray Into Legislative Policy-Making: Wilson v. Medical Services Commission" (1989) 68 Can. Bar Rev. 615.

8 See, in particular, Wilson, ibid; Re Khalig-Kareemi (1989), 57 D.L.R. (4th) 505 (N.S.C.A.). And see Slaight Communications, supra, note 6 at 1054 where Dickson C.J. affirmed the non-material aspects of labour.


and the education of one's children in accordance with the dictates of conscience.\(^\text{11}\)

This article does not attempt a detailed analysis of the ambit of the words "life, liberty and security of the person." However, courts are likely to employ a common methodology to define both the constitutionally protected interests and the principles of fundamental justice: a resort to the basic values of our legal system and its constitutional traditions.

Having established that they have been deprived of life, liberty and security of the person, litigants invoking section 7 of the Charter must also show that their deprivation was contrary to the principles of fundamental justice. These, the Supreme Court of Canada has held, are not limited to procedural fairness,\(^\text{12}\) although they certainly include the common law duty to observe the rules of natural justice or, their more contemporary analogue, the duty to act fairly.\(^\text{13}\) Rather, the principles of fundamental justice embrace the "basic tenets and principles, not only of our judicial process, but also of other components of our legal system."\(^\text{14}\)

Any satisfying approach to the interpretation of the Charter must consider the somewhat unusual circumstances in which the Charter entrenched guarantees of individual rights and freedoms. Unlike many constitutional declarations of rights, the Charter was not the result of a colonial struggle for independence, a crushing military defeat, or a revolution. It was, rather, an important,


\(^{13}\) Singh v. Minister of Employment and Immigration, [1985] 1 S.C.R. 177 [hereinafter Singh].

\(^{14}\) Supra, note 12 at 512, per Lamer J. And see E. Colvin, "Section Seven of the Canadian Charter of Rights and Freedoms" (1989) 68 Can. Bar Rev. 560, where it is argued that section 7 should be regarded as bringing within judicial review, the propriety of the legal means selected by government for the attainment of social objectives, rather than the legitimacy of the ends themselves, especially since the section appears with the cluster of provisions entitled "Legal Rights." See also Reference re ss 193 and 195.1(1)(c) of the Criminal Code, supra, note 6.
incremental step in the growth of Canada's self-definition, adopted contemporaneously with the elimination of the remaining constitutional subservience to the Parliament of the United Kingdom: the power to amend the constitution.

The Charter is, therefore, as much the product of relatively stable and mature systems of law and government, as it is an addition to them. Its terms are to be understood in the context of the public law traditions that have shaped the legal relationships among institutions of government, and between the individual and the state. This point was expressed elegantly by La Forest J., when, in the course of considering the role of section 7 in the context of the criminal law, he said:

What is important is that the Charter provisions seem to me to be deeply anchored in previous Canadian experience. By this, I do not mean that we must remain prisoners of the past. I do mean, however, that in continuing to grope for the best balance in specific contexts, we must begin with our own experience.

Of course, traditions themselves evolve, and may appear to point in different directions. Indeed, the adoption of the Charter itself may be regarded as evidence of the enhanced value now assigned by our legal system to the interests that it protects. It is to that extent forward-looking. Nonetheless, to read the Charter as a blueprint for a new social and political ordering is to tear it from its historical and constitutional contexts. Like the emergence of Canadian sovereignty itself, our domestic public law has been characterized more by evolution than by revolution.

It would be most unfortunate if the Charter came to be regarded as the only relevant source of non-statutory law regulating the relationship between individuals and the government whenever the legality of administrative action is challenged for impinging on

---

15 Compare O.P.S.E.U. v. A.G. Ontario (1988), 65 O.R. (2d) 689 (H.C.) and Osborne v. Canada (Treasury Board) (1988), 52 D.L.R. (4th) 241 (Fed. C.A.), where it was said that the constitutional convention of political neutrality of the civil service provided an essential limitation on the Charter's guarantees of freedom of speech and association when applied to statutory restrictions on civil servants' political activities.

a Charter-protected interest. The common law principles of judicial review, and the presumptions developed by the courts as aids to interpreting legislation that empowers or imposes duties on public authorities, already constitute a legal framework for determining the legality of governmental dealings with individuals; they also often afford priority to many of the values and interests that have now been elevated to the constitutional plane. It should only be necessary to resort directly to the Charter when a ground of judicial review that would otherwise have been available at common law has clearly been abrogated by statute, or when the existing common law of judicial review does not give to a Charter right the degree of protection that the applicant is seeking.

II. LEGISLATION AND SECTION 7

Unless the power to override the Charter has been invoked, statutory provisions that authorize the violation of an interest protected by section 7, other than in accordance with the principles of fundamental justice, are of no legal force or effect. There are at least three kinds of case in which an appeal may be made to the principles of fundamental justice when a statute, either expressly or by necessary implication, precludes resort to the common law as a source of administrative justice.

---

17 But see the statement of Dickson C.J. in Slaight Communications, supra, note 6 at 1049 that "in the realm of value inquiry" (i.e. in cases where the exercise of a statutory power impinges on a Charter right) courts should determine the legality of the decision by applying section 1 of the Charter, and not by the less well structured common law test of patent unreasonableness.

18 Section 7 is not the only Charter provision relevant to ensuring the fairness of administrative adjudication. For example, a statutory exclusion of members of the public from a hearing may be an infringement of freedom of the press guaranteed by section 2(b): see Pacific Press Ltd v. Canada (Minister of Employment and Immigration), [1990] 1 F.C. 419 (C.A.); Toronto Star Newspapers Ltd v. Kenney, [1990] 1 F.C. 425 (T.D.). And the administration of a statutory regime that includes consequences of a penal nature for non-compliance may be subject to section 11: see R. v. Wigglesworth, [1987] 2 S.C.R. 541; R. v. Shubley, [1990] 1 S.C.R. 3.
A. Statutory Exclusion or Limitation of the Duty of Fairness

First, legislation may directly exclude or curtail the right to be heard which the common law would otherwise normally imply. A good example is the provision in the Immigration Act that was the subject of litigation in Singh v. Minister of Employment and Immigration.19 The legislation was held invalid because it denied those applying for a redetermination of their claims to be refugees the opportunity to appear in person before the Immigration Appeal Board, and the right to be informed of, and to respond to, the Minister's reasons for rejecting their claims.

Before the adoption of the Charter, courts from time to time faced the argument that a specific statutory code of administrative procedure precluded the court from implying additional procedural rights from the common law duty of fairness.20 When the legislature has obviously turned its attention to the procedures appropriate for making particular administrative decisions, they should be regarded as a complete code which, by implication, excludes any additional procedural rights otherwise conferred by the common law. Sometimes this argument has succeeded, and sometimes it has failed. Much depends upon the detail with which the legislature or its delegate21 has elaborated the agency's rules, and the seriousness of the injustice which may result if the reviewing court holds that it

---

19 Supra, note 13.


21 When the procedural code is in subordinate legislation made under a general power to make rules of practice and procedure, the argument that the regulations are exhaustive of procedural rights may also be defeated on the ground that the legislature is presumed not to have intended the rule-making power to be exercised so as to exclude a right otherwise implied by the common law duty of fairness. See, for example, Joplin v. Chief Constable of the City of Vancouver (1982), [1983] 144 D.L.R. (3d) 285 (B.C.S.C.), aff'd. (1985), 20 D.L.R. (4th) 314 (B.C.C.A.).
cannot supply an omission of the legislature from the justice of the common law. Courts should continue to interpret statutory rules of procedure against the background of the common law duty of fairness. They should only resort to the Charter if it would plainly be inconsistent with the terms or structure of the statutory provisions establishing the administrative scheme to grant the procedural right claimed by the applicant.\textsuperscript{22}

When a statute is held to exclude a particular aspect of the right to be heard that would otherwise be implied by the common law,\textsuperscript{23} a court may have to choose between two possible interpretations of the principles of fundamental justice. They could be interpreted as entrenching in the constitution the common law duty of fairness \textit{in its entirety}, or as entrenching only those aspects that are essential to ensuring a right to participate in the administrative process that is compatible with minimally acceptable levels of procedural decency, accountability, and rationality in the state's dealings with individuals. In Jones, Wilson J. suggested that the principles of fundamental justice were only a distillation of the common law rules of natural justice,\textsuperscript{24} although she gave no example of a procedural right which might be excluded from the constitutional standard.

It is probably undesirable, however, for the courts to develop in this way two sets of procedural standards applicable to any given decision-making context: common law fairness and constitutional fairness. Fairness is fairness, and it would unduly complicate the law

\textsuperscript{22} For an unduly broad notion of the concept of implied statutory exclusion in this context, see the judgment of Pratte J. in Gallant v. Canada (Deputy Commissioner, Correctional Service Canada), [1989] 3 F.C. 329 (C.A.) [hereinafter Gallant]; this case is discussed below, section III. For another recent example, see Chiarelli v. Canada (Minister of Employment and Immigration) (1990), 67 D.L.R. (4th) 697 (Fed. C.A.), where the court invalidated section 48(2) of the Canadian Security Intelligence Act S.C. 1984, c. 21 because it gave an excessive protection to information supplied by the R.C.M.P. to the Security Intelligence Review Committee at the expense of individual rights.

\textsuperscript{23} As it was in Singh, supra, note 13.

\textsuperscript{24} Supra, note 11 at 322.
to introduce gradations into the same situation. In any event, the procedural requirements introduced by the courts into statutory and other administrative schemes reflect a residual concept of justice, not an ideal standard. To attempt to reduce them to an even smaller constitutional core of procedural fairness is difficult to support as a matter of either principle or practicality.

That section 7 does not use the words "duty of fairness" or "the rules of natural justice" is not an indication that the principles of fundamental justice should be interpreted as prescribing a lower procedural standard on an issue within the scope of the common law. Rather, employing a phrase that is not rooted in the common law requirements of a fair hearing could equally be an indication that the concerns of section 7 are not limited to traditional issues of procedural propriety. It could also be an attempt to avoid the historical baggage that at one time burdened the term, "the rules of natural justice."

If it would be a mistake to define the principles of fundamental justice as a stripped-down version of the common law duty of fairness, it would be equally misguided to define the principles of fundamental justice as the constitutional embodiment of the common law doctrine of fairness, circa 1982. A recognition that the content of the principles of fundamental justice may be found in the common law as it develops over time is consistent with the generally accepted notion that the constitution is capable of growth: that it takes into account changing social and political imperatives, and ideas about the appropriate relationship between the individual and the state. Each component of our public law — the constitution, statutes, and the common law — should contribute to the development of the whole by responding to, and blending

---

25 Compare Slaight Communications, supra, note 17, where the relationship between common law and Charter grounds for reviewing the exercise of discretion is discussed. The Chief Justice seems to suggest that an intrusion on an interest protected by section 2 of the Charter that passes muster under the more developed approach to section 1 should not be held to be patently unreasonable at common law.

26 For example, the distinctions drawn between judicial and administrative functions, and between rights and privileges; see further, infra, note 72.
Harmony is more satisfying than either unison or discord.

B. Statutory Authorization

It may also be possible to invoke the principles of fundamental justice to override the statutory provisions governing the administration of a programme of regulation or benefit-delivery, even though it may require an extension of an existing common law ground of review. For instance, restrictions placed upon the scope of the rule against bias by the doctrine of statutory authorization mean that some instances of unfairness cannot be raised at common law. Thus, if a power is conferred on a prosecuting authority to appoint the members of the adjudicative body that will hear the cases that authority prosecutes, the power is liable to be held inoperative as a violation of the principles of fundamental justice.

In the absence of statutory authorization, it would be a breach of the present common law duty of fairness for a prosecutorial authority to exercise control over an agency with the trappings and

---

27 The development of procedures legally required in connection with prison administration, and the refusal and revocation of parole, is a good example: see A.W. MacKay, "Inmates' Rights: Lost in the Maze of Prison Bureaucracy?" (1987-88) II Dalhousie L.J. 698. There is surely also some connection between the constitutional guarantee of equality and the dramatic change over the last few years in the judicial approach to the interpretation of human rights legislation, especially by the Supreme Court of Canada.

There is a policy of judicial restraint in reviewing the interpretation by administrative agencies of their enabling legislation in the context of economic regulation, including labour relations. This policy is echoed in the reluctance of the courts to find in the Charter constitutional limitations on legislative power to regulate or restrict economic rights. For parallels in the constitutional and administrative law jurisprudence of the Supreme Court of the United States, see A.C. Aman Jr., "Administrative Law in a Global Era: Progress, Deregulatory Change, and the Rise of the Administrative Presidency" (1988) 73 Cornell L. Rev. 1101.

28 Compare MacBain v. Lederman, [1985] 1 F.C. 856 (C.A.), where section 2(e) of the Canadian Bill of Rights was used for this purpose. For some statistical support for the hypothesis that members of human rights tribunals who tend to find in favour of complainants are more likely than others to be reappointed, see T. Flanagan, R. Knopff & K. Archer, "Selection Bias in Human Rights Tribunals: An Exploratory Study" (1988) 31 Can. Pub. Admin. 483.
functions of a judicial tribunal such that a reasonable person would apprehend the possibility of bias.

When a statute confers on members of an administrative agency powers of investigation, prosecution, and adjudication, the courts have been reluctant to require them to arrange the work of the agency so as to ensure that members who have participated in the investigation or decision to prosecute do not also sit at the adjudicative stage in the same case.29 The courts have explained their non-intervention on the ground that it cannot be a breach of the common law duty of impartiality for members to do what they are clearly authorized by statute to do. Therefore, in respect of a multi-functional agency with power over life, liberty and security of the person, it can be argued, in principle, that the agency's enabling legislation is contrary to the principles of fundamental justice insofar as it authorizes members to adjudicate a case where their involvement at an earlier stage of the proceeding would give rise to a reasonable apprehension of bias.30

Arguments available in principle do not always prevail in practice, however. It is difficult to avoid the conclusion that courts have accepted that statutory authorization has ousted the common law rule against bias in these cases because they regard the establishment of regulatory agencies with multiple functions as a reasonable legislative choice.31 The institutional design is not inherently likely to produce such unfairness as to require the judicial importation of restrictions on the apparent breadth of the statutory powers conferred on the members of the agency. Administrative


30 Ibid. The appellant in Brosseau, did not pursue in the Supreme Court of Canada the argument, rejected below, that the statute denied him the hearing before an impartial and independent tribunal to which he was entitled under section 11(d) of the Charter. He appears not to have argued that the administrative arrangements authorized by the legislation were contrary to the principles of fundamental justice, presumably because the cease trading order did not deprive him of liberty or security of the person.

31 Thus in Brosseau, ibid., the Court was prepared to apply the doctrine of statutory authorization to conduct that the legislation did not expressly authorize.
arrangements that have not shocked the common law conscience may not disturb constitutional sensitivities either.\textsuperscript{32}

Nonetheless, the nature of the individual interests at stake is an important determinant of the threshold of judicial intervention. Courts are more likely to conclude that procedural fairness requires a clearer separation of investigation and prosecution from adjudication in an agency with power to deprive individuals of the right to life, liberty and security of the person, than they are in respect of a tribunal that is engaged in purely economic regulation.\textsuperscript{33} But even so, it may be unnecessary to resort to the \textit{Charter} to satisfy these concerns. The content of the duty of fairness at common law is not monolithic. The legislature should be presumed only to authorize administrative arrangements that meet minimum standards of procedural propriety. Thus, a court could reason that if a member unnecessarily performs prosecutorial and adjudicative functions in the same case, this may give rise to a reasonable apprehension of bias that invalidates the agency's decision on administrative law grounds.

A more difficult question is whether the principles of fundamental justice impose a positive obligation on the legislature to provide, within an administrative scheme that potentially threatens a section 7 right, an opportunity for a determination (at first instance or on appeal) by a body that is independent of the government department responsible for enforcement. An inquiry along these lines would lead the courts to ask questions that the doctrine of statutory authorization puts beyond the scope of the common law requirement of impartiality.

For instance, they might have to consider whether the decisions of an apparently independent administrative tribunal whose members hold office at the pleasure of the Minister are consistent

\textsuperscript{32} In the United States, it is settled that it will not normally be a breach of the Due Process clause for a legislature to vest prosecutorial and adjudicative functions in the same agency: see Evans, \textit{supra}, note 29.

\textsuperscript{33} It will not always be clear into which category a particular tribunal's powers fall: see \textit{supra}, notes 7 & 8.
with the principles of fundamental justice. They might also have to determine whether section 7 requires an appeal to an independent body from a decision by an official within a government department, and if it does, how wide the grounds of appeal must be to ensure a degree of scrutiny by an impartial and independent body that satisfies the principles of fundamental justice.

While these latter questions can be regarded as direct outcrops of the common law duty of fairness, they cannot be answered on the basis of existing case law. It is perhaps not surprising that the courts have so far upheld administrative schemes that have been attacked as violating the principles of fundamental justice because the legislation did not provide for a determination of a person’s rights by an independent decision-maker. Judicial

---

34 Compare Sethi v. Canada (Minister of Employment and Immigration), [1988] 2 F.C. 53 (T.D.); rev’d. 2 F.C. 552 (C.A.). See also Alex Couture Inc. v. A.G. Canada (1990), 69 D.L.R. (4th) 635 (Qué. S.C.), where the Competition Tribunal Act, R.S.C. 1985 (2d Supp.), c. 19 was held to violate section 2(e) of the Canadian Bill of Rights, because, inter alia, lay members’ five-year term of appointment during good behaviour was revocable for cause, they were not full time, and remained members of the Restrictive Trade Practices Commission in the transitional period. This decision seems unlikely to survive on appeal.

For a somewhat sceptical view of the more expansive claims for independence sometimes made by and on behalf of administrative tribunals, see R.W. Macaulay, Directions: Review of Ontario’s Regulatory Agencies (Toronto: Queen’s Printer, 1989) at 2.6 & 5.1.5. Contrast with the Report of the Canadian Bar Association Task Force, Independence of Federal Administrative Tribunals and Agencies in Canada (Ottawa: Canadian Bar Association, 1990) (Chair: E. Ratushny) at 43, where it is recommended that all full-time members of designated agencies “exercising adjudicative functions” should be appointed during good behaviour until retirement age.

35 But see Jones, supra, note 11 which seems inconsistent with the proposition that the principles of fundamental justice invariably require an independent administrative adjudication. Compare Mohammad v. Canada (Minister of Employment and Immigration), [1988] 3 F.C. 308 (T.D.); see also Satiacum v. Minister of Employment and Immigration, [1985] 2 F.C. 430 (C.A.) (Canadian Bill of Rights). And see Vanguard Coatings and Chemicals Ltd v. Minister of National Revenue, [1988] 3 F.C. 560 (C.A.) [hereinafter Vanguard Coatings] (right of appeal from Minister’s assessment of fair market value of goods not required by section 7).

36 It can be said that the duty of fairness is concerned with the impartiality of the decision-maker, not institutional independence, and that impartiality and independence are distinct concepts: see Valente v. R., [1985] 2 S.C.R. 673 at 685-87. However, a tribunal’s lack of independence from the government, especially when the government is a party to a dispute before the tribunal, can be regarded as a particular manifestation of bias: a reasonable person might suspect that a tribunal whose members are dismissable at will, or whose appointments are renewable at the instance of a party, may be biased in favour of that party.
intervention in such cases would undoubtedly be a very significant extension of the courts' involvement in issues of institutional design.

In assessing the claim that the principles of fundamental justice guarantee an element of independence at the administrative decision-making level, it is important to remember that the constitution provides a right to judicial review, of somewhat uncertain scope, of the proceedings of administrative agencies. Thus, neither provincial legislatures, nor, perhaps, Parliament can insulate their administrative tribunals from judicial review for jurisdictional error. In addition, it is inherent in the supremacy of the constitution that the courts cannot be excluded from reviewing decisions by a public body that has either violated a right protected by the Charter, or exceeded the legislative powers exercisable by the level of government at which the body operates.

The principles of fundamental justice are more likely to be held to include a right to an effective opportunity to obtain judicial review on non-constitutional grounds of the proceedings of any tribunal that has the power to remove the right to life, liberty and security of the person. Given the Crevier decision, and the notoriously elastic concept of jurisdictional error, it would hardly be a radical departure from our existing constitutional traditions to use the Charter to effect this relatively modest reordering of the relationship between the courts and the administration. The limited

37 See Crevier, supra, note 2.


39 See Constitution Act, 1982, s. 52(f). Section 7 of the Charter may, like most other provisions of the Charter, be excluded by the exercise of the override provision contained in section 33. However, because the constitutional power of the courts to review at least provincial tribunals for jurisdictional excess is derived from section 96 of the Constitution Act, 1867, legislatures cannot directly insulate agencies from judicial scrutiny.

40 An argument may be made along these lines to challenge the validity of the provisions recently added to the Immigration Act 1976-77 requiring leave to apply for judicial review to be obtained from a single judge, with no right of appeal from a refusal of leave, and without the guarantee of an oral hearing: Immigration Act, R.S.C. 1988, c. 52, ss 82.1-82.3 & 83.

There is, however, no judicial support for the proposition that a right of appeal against a valid decision is included within the principles of fundamental justice: see Vanguard Coatings, supra, note 35; R. v. Robinson (1989), 63 D.L.R. (4th) 289 (Alta. C.A.) (criminal conviction).
right of review thus provided may well be less satisfactory to an individual who has received an adverse decision on a matter of life, liberty and security of the person, than a right to appeal on the merits from a departmental official to an independent administrative tribunal or to a court. Nonetheless, it may suffice to provide that minimum guarantee of impartiality in the decision-making process that is inherent in the principles of fundamental justice, especially considering the limitations on the institutional competence of courts in matters of public administration.\footnote{Compare Jones, supra, note 11 where La Forest J. refused to second-guess the legislature's exercise of discretion in choosing between independence and expertise in allocating the power to decide whether children not attending a main-stream school were receiving an adequate education. See further, K. Delwaide & M. Walker, "Access to Courts and Administrative Tribunals" in N.R. Finkelstein & B.M. Rogers, eds, Administrative Tribunals and the Charter (Toronto: Carswell, 1990) c. 3.}

C. Beyond Procedures

Section 7 does not confine the principles of fundamental justice to issues of procedure typically included within the rules of natural justice and the duty to act fairly.\footnote{See supra, notes 10 & 12. "Natural justice" may be taken for this purpose to include the right to a decision that is minimally responsive in its findings of fact to the evidence tendered, and in its conclusions of law to the legal arguments submitted: compare Re O.P.S.E.U. and the Queen (1984), 5 D.L.R. (4th) 651 at 659 (Ont. H.C.); Syndicat des employés de production du Québec v. Canada Labour Relations Board, [1984] 2 S.C.R. 412 at 420; Howard v. Stony Mountain Institution, Inmate Disciplinary Court, [1984] 2 F.C. 642 at 661 (T.D.) [hereinafter Howard].} A statute establishing a programme of regulation or benefit-delivery, and the administrative structures created to implement it, may be impugned under section 7 of the Charter on grounds other than those of procedural fairness. These may be more or less closely related to one of the existing common law grounds of judicial review, or they may represent radical departures from the kinds of issue that have so far been regarded as justiciable.

Examples of the former might include statutory authorization to infringe retrospectively an interest protected by section 7, an unduly broad statutory delegation of discretion to an administrative
agency, or an unrestricted power to expropriate a person's home. A section 7 Charter challenge to a statutory scheme could be sustained on any of these grounds without any significant departure from our constitutional traditions, because each ground is related to a presumption of statutory interpretation already employed by the courts to construe regulatory legislation. Since these presumptions reflect certain fundamental values about the appropriate relationship of the individual and agencies of the state, it would be a relatively modest innovation to elevate them from the level of "a common-law Bill of Rights" to that of the formal constitution.

The Supreme Court of Canada has not yet provided much of an analytical framework for determining which aspects of the common law of judicial review of administrative action, including the relevant principles of statutory interpretation, are included within the principles of fundamental justice. Of course, many of the rights entrenched by the Charter — such as freedom of speech and religion, and freedom from arbitrary arrest and discrimination on such grounds as race and ethnic origins — have received a measure of recognition at common law, either in specific rules or presumptions of statutory interpretation, or in a less clearly articulated judicial conception of individual liberty. A search for the non-procedural content of the principles of fundamental justice in "the basic tenets of our legal system" will often be a difficult exercise.

The potential problems can be glimpsed by considering whether the statutory delegation of standardless discretionary power authorizing an agency to infringe a right will trigger the application of section 7 of the Charter. There are undoubtedly reasons for thinking that it would be consistent with our constitutional and legal traditions for the courts to conclude that the principles of fundamental justice limit the undue delegation of discretion.

43 To use John Willis's wonderfully felicitous description of the common law grounds of judicial review of administrative action and the presumptions of statutory interpretation: J. Willis, "Administrative Law and the British North America Act" (1939) 53 Harv. L. Rev. 251 at 274.

44 Compare Morgentaler, supra, note 10 where Dickson C.J. and Lamer J. impugned the Criminal Code, section 251(4)(c) on the ground that, to empower therapeutic abortion committees to determine whether to approve an abortion by reference to threats posed by the pregnancy to a woman's "health," was too vague to satisfy the principles of fundamental justice.
First, the objections to excessive delegation of power at any level in our government touch upon values that are sufficiently important to rank as constitutional in nature: for example, governmental accountability, limitation of the potential for the abuse of power, and individuals' interest in certainty in their dealings with the government. Secondly, the common law grounds of judicial review already reflect these concerns in a variety of doctrines. Thirdly, a concern about the dangers of the delegation of discretion to public officials is apparent in the writings of legal and constitutional commentators. In particular, Dicey stated that one meaning of the Rule of Law, itself an underpinning of civil liberties, was that individuals should suffer in their goods or person only for distinct breaches of the law, and not at the discretion of some public official. Indeed, only twenty-five years ago the notion that governmental discretion should be kept to a minimum received a stamp of approval in Ontario in the McRuer Report and the legislation that it inspired. Finally, section 1 of the Charter provides

Compare Wilson, supra, note 7. In Reference re ss 193 and 195.1(1)(c) of the Criminal Code, supra, note 6 the Court affirmed that the principles of fundamental justice require that criminal sanctions be imposed only for conduct that is sufficiently precisely defined as to give fair notice and not to confer undue discretion on law enforcement authorities and courts. But see Vanguard Coatings, supra, note 35 where the delegation to a minister of the power to assess fair value for the purpose of tax liability, without any right of appeal, was said not to contravene the Rule of Law.

See, for example, the cases holding that, in exercising a statutory power to enact delegated legislation, the rule-making body cannot sub-delegate to another, or to itself, the power to make significant policy decisions on an ad hoc basis: R v. Joy Oil Co. Ltd (1963), 41 D.L.R. (2d) 291 (Ont. C.A.); Verdun (City of) v. Sun Oil Co. Ltd, [1952] 1 S.C.R. 222; Bratt Dairy Co. v. Milk Commission of Ontario, [1963] S.C.R. 131; Canadian Institute of Public Real Estate Companies v. Toronto (City of), [1979] 2 S.C.R. 2 [hereinafter C.I.P.R.E.C.]. And see Re Garden Gulf Court Motel Inc. and Island Telephone Co. (1981), 126 D.L.R. (3d) 281 (P.E.I.S.C.) and Re Irving Oil and Public Utilities Commission (1986), 34 D.L.R. (4th) 448 (P.E.I.S.C.) for examples of judicial disapproval of the exercise of unstructured discretion by a regulatory agency.


that any limitations on Charter rights must be "prescribed by law." 48 This may illustrate the preference of our constitutional culture for rules over discretion.

On the other hand, a preference for government by rules rather than by discretion can easily be characterized as a surrogate for a direct attack upon the substantive content of legislation enacted to curb the abuse of economic power, to redistribute wealth, and to tackle other social problems that private law and the market have not resolved. Dicey himself was certainly no friend of "collectivism"; 49 however, no industrialized nation subscribes to this version of economic laissez-faire and the minimalist state. Discretion has been essential in creating and administering regulatory programmes when legislators could identify only the broad outline of the problem the agency was to tackle, and even less of the solution. Despite the enthusiasm for reducing discretion evident in the McRuer Report and its aftermath, and more recently in federal programmes of "re-regulation", 50 it is difficult to assert that statutory grants of wide discretion to administrative agencies are contrary to our constitutional and governmental traditions.

It may be suggested that the kind of regulatory legislation that requires broad discretionary powers will not be subject to the principles of fundamental justice because section 7 does not apply to property rights. It is much more difficult to justify subjecting to official discretion the narrower range of fundamental individual freedoms denoted by the right to life, liberty and security of the person. This is certainly a relevant consideration, although it is not


50 Some licensing decisions must now be made primarily by reference to the fitness of the applicants to provide the service, without regard to wider considerations of "public necessity and convenience": see, for example, National Transportation Act, R.S.C. 1985 (3d Supp.), c. 28, s. 3 (statement of national transportation policy), s. 72 (domestic air services licences), s. 201 (extra-provincial trucking licences).
conclusive. For instance, some statutory schemes that clearly impinge upon section 7 interests are riddled with discretion: the administration of criminal justice, the penal system, and immigration control are examples. Moreover, we are still in the early stages of defining the scope of interests protected by section 7; the indications so far are that the courts will be neither able nor willing to deny that an interest can qualify as a right to liberty and security of the person merely because it has an economic aspect.51

It should also be noted that the interests protected by section 2(e) of the Canadian Bill of Rights52 ("rights and obligations") are much broader than those that trigger the application of section 7. It is true, of course, that the protection afforded seems more obviously limited to the procedural ("a fair hearing in accordance with the principles of fundamental justice"). However, it is quite possible that the kind of thinking about essential notions of justice in which the courts have engaged under the Charter may well lead to an interpretation of section 2(e) that extends beyond the traditional concerns of the common law rules about procedural fairness. For example, a person whose rights are subject to the decision of an unlimited and unstructured statutory discretion has less opportunity to influence the decision-maker than one whose rights may only be infringed in clearly defined circumstances — a reality that is reflected in a lower level of procedural protection.53 And reasons for decision may be required to demonstrate that the evidence and arguments advanced at the hearing really were heard by the tribunal.

51 See supra, note 7 for example; see also Reference re ss 193 and 195.1(1)(c) of the Criminal Code, supra, note 6 at 1174-78 where, in lengthy obiter dicta, Lamer J. limits the scope of the rights protected by section 7 to those that have traditionally been within the "judicial domain": physical liberty, control over one's physical and mental integrity, and freedom from the threat of punishment for non-compliance with the provisions of a regulatory scheme.

52 R.S.C. 1970, Appendix III.

53 See, for example, Knight, supra, note 20 at 683, where L'Heureux-Dubé J. said, "Since the respondent could be dismissed at pleasure, the content of the duty of fairness would be minimal." And see Idziak v. Canada (Minister of Justice) (1989), 63 D.L.R. (4th) 267 (Ont. H.C.), where the discretionary nature of the Minister's power to extradite similarly reduced the procedural content of the principles of fundamental justice.
As is so often the case in public law, there may not be a universal answer to the question posed. Whether a statute authorizing, in wide discretionary terms, an official or body to deprive someone of the right to life, liberty and security of the person is inconsistent with the principles of fundamental justice may depend on particular circumstances. Whether or not the argument is made through section 1 of the Charter, it is likely that courts will take into consideration practical necessities when deciding if a particular scheme satisfies the principles of fundamental justice.

For example, discretion may be more acceptable at the investigative, recommendatory, and prosecutorial stages of the administrative process than in the final determination of an individual's rights. A power in the Cabinet to decide whether to give effect to a positive decision or recommendation made by another body after a hearing is also likely to survive a challenge based on the standardless delegation of discretion. Moreover, some kinds of "liberty" within section 7 may be regarded as more fundamental than others, and will require greater specificity in the definition of the circumstances in which they may be infringed.

---

54 It has been emphasized that the precise content of the principles of fundamental justice varies with the context to which they are to be applied; see, for example, Singh, supra, note 13 at 213; Gallant, supra, note 22 at 341-42.

55 Wilson J. in Singh, supra, note 13 at 218-19 suggested that it would be very difficult to justify a violation of section 7 by reference to a utilitarian weighing of the administrative costs of compliance with the principles of fundamental justice. Compare the statement of Spence J. in C.I.P.R.E.C., supra, note 45 at 10-11 that "practical difficulties" in limiting a discretion were not relevant to the legal question of whether the city's by-law was invalid because it contained standards that were no more precise than those in the statute.

56 Compare R. v. Paul Magder Furs Ltd (1989), 69 O.R. (2d) 172 (C.A.) (no onus on Crown to establish that the criminal law is being enforced equally in accordance with section 15 of the Charter); R. v. Beare, [1988] 2 S.C.R. 387 at 410-12 (power to require fingerprints). In contrast, it is accepted that it is a fundamental tenet of our legal system that criminal offences must not be defined so vaguely that individuals cannot be sure whether their conduct is unlawful: Reference re ss 193 and 195.1(1)(c) of the Criminal Code, supra, note 6.

57 For example, the power of the Lieutenant-Governor in Council to decide whether it is in the public interest to release from custody a person found unfit to plead, or a person found not guilty by reason of insanity.

58 Thus the interest in freedom from imprisonment or other form of physical constraint
If the principles of fundamental justice extend to this issue, then a lot can be said for adopting a cautious approach, in which the courts see their primary role as prodding the agency to consider appropriate ways for structuring and confining the discretion given to it. Provided that the agency has made good faith attempts to strike a balance at the administrative level between rule and discretion, the courts should be very slow to intervene by means of the principles of fundamental justice. This approach ensures that primary responsibility for this exercise rests with the body most able to perform it, and that constitutional review takes the form of a dialogue, rather than a judicial monologue delivered from inside a black box.

III. THE COMMON LAW AND BEYOND

This part considers the question of whether, and in what circumstances, the courts are justified in finding in the principles of fundamental justice, a ground of review that is inconsistent with, or not included in, the common law rules that regulate the legality of administrative action. Again, important clues to the answer are to be found in those "basic tenets of our legal system" that relate to the scope of judicial review of administrative agencies.

Some courts appear to have proceeded on the premise that the Charter has made the common law duty of fairness redundant when the tribunal under scrutiny has the power to deprive someone of life, liberty and security of the person, and that a reviewing court need only consider whether the agency acted in accordance

is almost certain to attract maximum protection, whereas a power to revoke a driver's licence in the interest of public safety may permit more discretion.

See, in particular, the cases dealing with prison discipline and parole revocation where courts appear to have regarded pre-Nicholson decisions (see supra, note 20) as precluding common law procedural rights: R v. Smith (1988), 34 Admin. L.R. 148 (Ont. H.C.) provides a good illustration. And compare, Slaight Communications, supra, note 6 where Dickson C.J. suggested that, when an exercise of discretion impinges on a Charter-protected right, such as freedom of speech, a reviewing court should consider whether it can be upheld under section 1, rather than whether it is "patently unreasonable" at common law. Curiously, Dickson C.J. seems here to be using the Charter to uphold a discretionary decision that might have been found invalid at common law.
with the principles of fundamental justice. In my view, courts should still first consider whether the applicant has established a ground of review at common law, and only resort to the Charter if the answer is negative, or if the remedy sought is not available at common law or under statute.  

First, keeping the Charter as a last resort reminds the court that it is being asked to intervene (or to grant a remedy) in circumstances where judges have previously thought that they should not. When there are no authorities upholding the right claimed, as a matter of common law, or, more telling still, when judicial decisions actually deny that the right or remedy is part of the common law of judicial review, clearly the Charter is being invoked as a source of a new legal right. While novelty is not a conclusive argument for rejecting a Charter challenge, it should certainly signal that judicial caution is appropriate, especially since the right, if recognized, will have the preferred status of a constitutional right and thus, to a large extent, be immune from legislative modification or repeal. For this latter reason also, constitutional law should be a last resort in the resolution of disputes to which public authorities are party.  

Secondly, there is a danger that, if courts by-pass the common law and go straight to the Charter for a solution, a rich source of thought and experience about law and government will be overlooked or lost altogether, and will eventually atrophy. The common law of judicial review of administrative action represents the results of courts’ grappling, case by case, and often only inferentially, with issues of administrative justice and the appropriate allocation of roles between courts and agency in administrative law.  

---

60 For a suggestion that section 24(1) of the Charter grants courts more flexibility in the choice of remedy that is "appropriate and just in the circumstances," see Smith, ibid.; compare Saskatchewan Human Rights Commission v. Kodellas (1989), 60 D.L.R. (4th) 143 (Sask. C.A.) [hereinafter Kodellas].  

61 For an early and perceptive consideration of the application of the principles of fundamental justice to administrative law, see L. Tremblay, "Section 7 of the Charter: Substantive Due Process?" (1984) 18 U.B.C. L. Rev. 201 at 247ff. The apparent inconsistency between the Charter and the policy of judicial restraint towards administrative tribunals that the courts have intermittently pursued since 1979 has been identified and discussed by Professor David Mullan; see, in particular, D.J. Mullan, "Judicial Deference to Administrative Decision-Making in the Age of the Charter" (1985-86) 50 Sask. L. Rev. 203, and D.J. Mullan,
If the ground of review claimed by the applicant is not available at common law, a reading of the relevant jurisprudence and literature may indicate that the reasons relate, for example, to issues of institutional competence, or legitimate political choice, and are equally applicable when the Charter is invoked to provide a legal basis for the right. To attempt to attribute meaning to the principles of fundamental justice without first carefully considering the scope and limits of other legal bases of judicial review, and their rationales, is to interpret the Charter in a legal, political, and historical vacuum. Conversely, it would impoverish the development of the common law, if the Charter became virtually the only non-statutory source of law protecting the fundamental individual rights described in section 7.

It is my contention that the common law pertaining to the judicial review of administrative action reflects courts’ notions of procedural fairness, legality, and rationality in administrative decision-making. Therefore, section 7 of the Charter should normally not be interpreted to confer additional protection on individuals, or to alter significantly the relationship of courts and tribunals. It is appropriate to presume that procedural duties not imposed by the common law duty of fairness are not among the basic tenets of our legal system, and are thus not included in the principles of fundamental justice. However, there will be circumstances in which this presumption is displaced by countervailing considerations.62

The judgments delivered in the Federal Court of Appeal in Howard v. Stony Mountain Institution, Inmate Disciplinary Court63

---

62 There are analogies between the appropriateness of judicial expansions of existing grounds of judicial review of administrative action through section 7 of the Charter, and of the courts’ reconsideration of the substantive and procedural elements of the criminal law that are attributable to the judiciary, rather than to Parliament. The Supreme Court of Canada has expressed views about the impact of the Charter on criminal law jurisprudence consistent with the relationship between section 7 and administrative law grounds of review suggested in this paragraph.

63 Supra, note 42.
appear to claim for the Charter more than the modest role suggested above. In this case, the court apparently concluded that a tribunal’s exercise of discretion to refuse the applicant’s request to be legally represented was not unfair at common law, but was contrary to the principles of fundamental justice in section 7 of the Charter. This conclusion is not easy to justify. After all, the procedural content of both standards is largely judicially defined, and both address the same concerns: the accommodation of individual dignity, reliability in decision-making, and governmental accountability on the one hand, with the practical exigencies of administration on the other.

The assumption underlying Howard is that the Charter inevitably increases the role played by the courts in the supervision of administrative agencies; and, in particular, that section 7 requires the courts to determine for themselves whether, in a given case, the applicant should have been permitted legal representation. At common law, the courts’ role was more residual: to ensure that the tribunal recognized that it had a discretion, and that it exercised it on the basis of relevant considerations, and not in a way that was patently unreasonable.64

Another difference between the procedural standard set by the common law and the principles of fundamental justice was identified in the Federal Court of Appeal by Pratte J. in Gallant v. Canada (Deputy Commissioner, Correctional Service Canada).65 In this case a prisoner challenged the legality of his transfer to a higher security institution. He argued that the reasons given for his proposed transfer had been lacking in detail and specificity. Thus, he was denied a meaningful opportunity to rebut the allegation that he had been involved in a criminal conspiracy in prison to extort money from other inmates, which he used to pay for drugs smuggled into the prison for his use.

---

64 R. v. Secretary of State for the Home Department, ex parte Tarrant, [1985] Q.B. 251 (Div. Cq). It is possible that the text somewhat overstates the distinction drawn in the Federal Court of Appeal between the common law and the Charter on the question of legal representation. Thus, Thurlow C.J. in Howard, ibid. at 663 seems to say that section 7 only guarantees a right to counsel in cases where, in England, a court would hold that a refusal was an unreasonable exercise of discretion.

65 Supra, note 22.
Recognizing the difficulty that the applicant would have, if innocent, in responding to allegations that were so lacking in particulars, Pratte J. nonetheless held that the respondent had not breached the common law duty of fairness. To require additional information might well reveal the identity of the prison authorities’ informants. This might put at risk the personal safety and lives of inmates, and discourage others from providing similar intelligence in the future, thus making it much more difficult to maintain order in prisons. To accede to the applicant's request, Pratte J. concluded, would be inconsistent with the statutory objective in conferring powers upon those responsible for our prisons: efficient and effective prison administration.

Turning to the applicant's argument that the terms of the notice were too imprecise to satisfy section 7, Pratte J. held that, while the content of the principles of fundamental justice was not the same in every situation, it could not be reduced by virtue of an incompatibility between the particular procedural right claimed by an individual and the statutory scheme. The constitutional status of the principles of fundamental justice, he argued, makes it impossible to maintain that an essential requirement of procedural fairness has been impliedly excluded or attenuated by the legislature.

Pratte J. held that the prison authorities had violated section 7 of the Charter by serving a notice that did not give the applicant a meaningful opportunity to respond. However, he concluded that government’s legitimate concerns for the physical safety of inmates and the requirements of prison administration clearly pointed to the need to shield the identity of informers. Without requiring evidence or argument from the respondent, he held that this limitation on the principles of fundamental justice was justifiable under section 1.

Pratte J.’s analysis did not attract the support of the other members of the court, Marceau and Desjardins JJ. However, it raises this interesting question: are factors that tend to limit the

---

66 Ibid. Marceau J. held that the notice breached neither the common law, nor section 7. In a powerful dissenting judgment, Desjardins J. held that the need to protect the identity of prison informants did not excuse the sparse terms of the notice given to Gallant. Drawing upon constitutional cases in the United States, Desjardins J. said at 350-51: “when confidential information is relied on by prison authorities so as to justify a disciplinary measure, the record must contain some underlying factual information from which the authorities can reasonably conclude that the informer was credible or the information reliable.”
content of the common law duty of fairness in a particular statutory and administrative context irrelevant when deciding whether the procedures followed comply with the principles of fundamental justice? Of course, courts may continue their retreat from the demanding burden and standard of proof that they seemed originally to impose on those invoking section 1. If they do, it may not make much difference in most cases whether governmental concerns, such as resource allocation, expeditiousness, and administrative efficiency, are factored into the definition of how much process is due in order to satisfy the principles of fundamental justice, or into the justification for limiting a constitutionally required procedural right.

Nonetheless, Pratte J.'s judgment poses an important theoretical question about the roles of legislation, the common law, and the Charter in establishing the legal standards with which administrative procedures must comply. It is one thing to determine the content of the duty of fairness in a particular situation by asking whether the procedural right claimed would frustrate the proper administration of the statutory programme in question. It is quite another, however, to ask whether the structure or language of the agency's enabling legislation has expressly or impliedly reduced or excluded a procedural protection that, given the other elements of the administrative and statutory contexts, the common law otherwise would have imposed.

The relationship between the common law duty of fairness and the statute under which the administrative body operates is symbiotic. It is certainly both unrealistic and unilluminating to ascribe the application and content of the duty of fairness primarily to legislative intention and statutory interpretation.67 Indeed,

---

67 Statutory interpretation cannot account for the application of the duty of fairness to the exercise either of governmental powers that are not derived from statute [see, for example, Council of Civil Service Unions v. Minister for the Civil Service (1984), [1985] 1 A.C. 374 (H.L.)], or of disciplinary powers against members and non-members by non-statutory bodies, such as sporting associations and self-regulatory groups, whose authority flows from contract and de facto control over the activity in question [see, for example, McInnes v. Onslow - Fane, [1978] 1 W.L.R. 1520 (Ch); R v. Panel on Take-overs and Mergers, ex parte Datafin plc (1986), [1987] Q.B. 815 (C.A.)]. More importantly, to describe the courts as merely engaged in the interpretation of the statute obscures the extent to which the principles of statutory construction are themselves the creation of the judiciary.

The opposite view has been propounded recently in the High Court of Australia, where Brennan J. said in Koa v. West (1985), 159 C.L.R. 551 at 610: "[t]here is no free-
delivering the majority's reasons for judgment in the recent case of Knight v. Indian Head School Division No. 19, L'Heureux-Dubé J. suggested that the right to procedural fairness is "autonomous of the operation of any statute," and depends on a consideration of the nature of the decision to be made, the relationship between the individual affected and the public authority, and the effect of the decision on the interests of the individual. That legislation may, of course, exclude or vary the duty in particular situations by express words or necessary implication does not support the view that statute is the ultimate source of the duty. However, it is also true that, beyond a certain level of generality, it is unprofitable, in the absence of a context, to attempt to define the circumstances in which the duty of fairness applies and, more importantly, what is its content.

Thus, whether the notice Gallant received gave him a reasonable opportunity, as a matter of fairness, to rebut the allegations made against him must be determined by reference to all the circumstances. This involves striking a balance amongst a number of interests: some may support his resistance to a proposed deterioration in his conditions of imprisonment (the public interest in accurate decision-making, and his interest in mounting an effective defence, for instance); others point in the opposite direction (the safety of other inmates, and prison security). The standing common law right to be accorded natural justice by the repository of a statutory power. There is no right to be accorded natural justice which exists independently of statute. Referring to Civil Service Unions at 611, he left open the question whether "the common law determines not only the scope of the prerogative but the procedure by which it is exercised."

68 Supra, note 20. For a perceptive analysis, see D.J. Mullan, Remarks (1990) 43 Admin. L.R. 230.

69 Knight, supra, note 20 at 668.

70 These factors had previously been identified in Cardinal v. Director of Kent Institution (1984), [1985] 2 S.C.R. 643 at 653 as the principal determinants of the existence of the right to be heard.

71 Having concluded that the common law did not normally subject the exercise of a power to dismiss without cause to the duty of fairness, the minority, in Knight, supra, note 20, did look to the terms of the statute for an indication of legislative intention to supply the omission of the common law, as it were.
authorizing prison officials to transfer inmates are as much a part of the determination of what constitutes fair notice as an assessment of the deprivations of those who are transferred. As the majority of the court seems to have accepted, there is no basis for stating that, unlike the common law duty of fairness, the content of the constitutionally entrenched principles of fundamental justice is to be determined without reference to statutory objectives and the workability of the administrative scheme.

There is little reason for supposing that the Charter should be interpreted as an invitation to the judiciary to rethink the relationship between courts and administrative agencies in the way suggested by Howard, or to redefine the factors relevant to determining procedural fairness, as Pratte J. proposed in Gallant. It is at least as plausible to maintain that the reference point for defining the content of the principles of fundamental justice — the basic tenets of our legal system — includes a recognition that courts have a limited institutional competence to design procedural detail for the wide variety of administrative agencies that they supervise; that the content of fairness is the result of balancing often competing factors; and that the perspective of the agency can be as valuable to the elaboration of the requirements of fairness in specific contexts as that of a reviewing court. These considerations do not lose their relevance simply because the standard of fairness being applied has its source in the constitution rather than the common law.

A possible response to this general line of argument is that the constitutional entrenchment of certain rights in section 7 of the Charter gives them a preferred legal status, and that the principles of fundamental justice should accordingly be interpreted as providing more extensive procedural protection than that afforded by the common law. In particular, it can be contended, the courts have historically played a central role in the interpretation of the constitution and its application to specific situations. Administrative agencies have not enjoyed the same latitude in deciding questions of constitutional significance that they have been given when interpreting their own enabling legislation.

These are undeniably substantial arguments for the view that, in a Charter challenge to an administrative agency's procedure, a reviewing court is not confined to the procedural protections
provided by the common law when determining the content of the principles of fundamental justice. However, for the following reasons the arguments are probably not conclusive.

First, it is a truism that the procedural content of the duty of fairness varies according to context, including the seriousness for the individual of an adverse decision by the agency. The more important the interest at stake, the more extensive the procedural rights normally afforded by the common law. While the courts may have been slow in the past to protect the interests in personal liberty of such typically powerless groups as inmates of prisons and psychiatric facilities, parolees, and those subject to immigration control and deportation, they ought to see in section 7 evidence of the high societal value placed on the individual interests there described, and give them their due weight when determining the procedural protections appropriate as a matter of common law.

Secondly, the fact that an issue has a constitutional dimension does not necessarily mean that a reviewing court should invariably substitute its judgment for that of the administrative agency that decided it at first instance. For instance, some recent cases indicate that, despite earlier judicial pronouncements to the contrary, courts may be prepared to review by a standard of reasonableness, rather than correctness, agencies' findings of fact

72 Wilson J. in Singh, supra, note 13 at 209-11 was no doubt referring to such cases when she said that distinctions once drawn at common law and under the Canadian Bill of Rights between rights and privileges, and between refusals and revocations, would not form the basis of the definition of the constitutional right to life, liberty and security of the person. However, it has been some time since our appellate courts determined the application of the rules of natural justice, and more particularly the duty of fairness, by the unhelpful conceptual categories used before Nicholson, supra, note 20. The emergence of the duty of fairness enables courts to distinguish older cases that were decided on the assumption that implied procedural rights attached only to tribunals exercising "judicial" powers, and had to resemble a trial. The nature of the interest affected, and the seriousness of the impact of the decision upon it, may still be relevant to the content of the procedures due, whether at common law or under the Charter.

Compare the statement by Lamer J. in Reference re ss 193 and 195.1(1)(c) of the Criminal Code, supra, note 6 at 1176 that, whatever the relationship between section 7 and administrative law, section 7 is engaged by statutory "bodies, such as parole boards and mental health review tribunals, that assume control over decisions affecting an individual's liberty and security of the person ... because they involve the restriction to an individual's physical liberty and security of the person, where the judiciary has always had a role to play as guardian of the administration of the justice system."
with constitutional significance in division of powers questions.\textsuperscript{73} The reasons for judicial restraint in reviewing agencies' decisions on matters in which their expertise is relevant do not lose their cogency simply because the question in issue also has a constitutional dimension. This observation is equally applicable to the choice of administrative procedure.

There is a third, and related, indication that the courts' supervisory role is not necessarily different in kind because a constitutional question arises in the course of an administrative proceeding. Most judicial opinion supports the proposition that many administrative tribunals, regardless of whether they are "courts of competent jurisdiction" for the purpose of section 24(1) of the \textit{Charter}, have implied authority to rule on the validity of any provision in their enabling legislation, or procedure, that is challenged on \textit{Charter} grounds in order to dispose of a proceeding otherwise within its mandate.\textsuperscript{74} In \textit{Cuddy Chicks Ltd v. Ontario (Labour Relations Board)},\textsuperscript{75} the issue was whether it was contrary to section 15 of the \textit{Charter} to exclude agricultural workers from the protection provided by representation by a trade union certified as their sole bargaining agent under the \textit{Labour Relations Act}.\textsuperscript{76} Counsel for the Board conceded that any ruling on the question would be subject to judicial review for correctness, not merely reasonableness. Although the majority of the court noted this concession, with apparent approval, this point was not argued by the parties and should not necessarily be regarded as settled. For example, it may be appropriate, when applying section 1 of the \textit{Charter}, for a court to defer to (or be informed by) the Board's assessment of the probable social and economic impact on employers and employees of extending the Act's protection to agricultural workers.


\textsuperscript{74} See generally \textit{ibid.}


\textsuperscript{76} R.S.O. 1980, c. 228, s. 2(b).
One reason for permitting administrative agencies to determine Charter challenges at first instance is that their members' experience and accumulated understanding of the subject-matter of their mandate, broadly understood, may be relevant to the Charter's application to the statutory scheme. If the judiciary is not prepared to defer to agencies' procedural choices when challenged under section 7, even though they do not violate the duty of fairness, reviewing courts should nonetheless carefully take into account the reasons given by tribunals for their conduct. The difference between being educated by, and deferring to, an agency is one of degree.

In the decade since Nicholson, the courts have used the greater flexibility apparently possessed by the duty of fairness to determine some minimal requirements for administrative procedures. This has often involved the need to strike a balance of justice between individuals adversely affected by the exercise of a statutory power, and beneficiaries of the legislative programme. Courts have increasingly recognized that the knowledge and insights of the members of the agency may be very relevant to this task. The constitution's inclusion of an open-textured duty upon government to observe the principles of fundamental justice does not necessarily mean that judges are totally at liberty to re-evaluate the scope of the procedural protections that are already required as a matter of fairness.

A better response to the enhanced status conferred by section 7 of the Charter upon the right to life, liberty and security of the person may be to extend the common law procedural entitlements connected with these interests. In other words, the

---

77 Supra, note 20.

78 This point was very clearly put recently in R. v. Norfolk County Council, ex parte M., [1989] 2 All E.R. 359 (Q.B.), where the court held that the duty of fairness required that an individual be given notice and an opportunity to respond to allegations that might result in that individual's name being entered on a non-statutory child abuse register. However, designing procedures that would adequately balance fairness to the alleged abuser and the protection of children required the experience of those engaged in child welfare. A court should be reluctant to invalidate for unfairness any procedures adopted by the agency after a good faith consideration of these competing claims. See also Toronto Independent Dance Enterprise v. Canada Council, [1989] 3 F.C. 516 at 527 (T.D.).
Charter should be regarded as an additional factor for courts to consider when deciding whether to develop the common law in a particular direction, or to reverse a previously settled question. Three points can be made in favour of this approach.

First, it will help to contain the uncertainty introduced by the Charter to subject to the doctrine of precedent the courts' power to rewrite public law. Thus, a judge should not normally be free to reconsider in the light of section 7 of the Charter a higher court's decision that the procedural entitlement claimed by the applicant was not available at common law. For instance, consider the well-established rule that the common law duty of fairness does not apply to the exercise of purely legislative powers. A trial judge ought not to decide that this rule, although endorsed by the Supreme Court of Canada, is contrary to the principles of fundamental justice and is inapplicable, therefore, to the making of rules that threaten the right to life, liberty and security of the person.

A second advantage of resorting first to the common law for an appropriate procedural protection for a right included in section 7 of the Charter is that it does not preclude a legislative response to

---

79 Compare the suggestion by McIntyre J. in R.W.D.S.U., Local 580 v. Dolphin Delivery Ltd, [1986] 2 S.C.R. 573 at 603 that, even where the Charter does not apply directly to the common law governing the relationship of private parties, its values should influence the courts' development of the law. But see R. v. Hébert [1990] 2 S.C.R. (S.C.C.) [hereinafter Hébert], where the Court based a new rule for excluding unfairly obtained confessions directly on section 7 of the Charter. Since the restricted nature of the Canadian common law in this area had provoked criticism from commentators, was disliked by some judges, and was out of line with more recent developments in the Commonwealth and the United States, it would have been quite easy for the Court to modify the common law itself, citing section 7 as an additional reason for re-thinking the issue.


81 Compare the judgment of Muldoon J. in National Anti-Poverty Organization v. A.G. Canada (1988), [1989] 1 F.C. 208, where he held that he was not bound by the decision in Inuit Tapirisat, ibid., because the Supreme Court of Canada had decided the case before the adoption of the Charter, and the consequent revival of the Canadian Bill of Rights, including the guarantee in section 2(e) of a fair hearing in accordance with the principles of fundamental justice. The Federal Court of Appeal reversed ([1989] 3 F.C. 684), stating that it was not open to the trial judge to conclude that Inuit Tapirisat was not binding because the Supreme Court had overlooked section 2(e) of the Bill of Rights. Contrast Stelco Inc. v. Canada (A.G.) (1987), [1988] 1 F.C. 510 (T.D.), where an earlier holding by the Supreme Court of Canada on a fairness issue was regarded as virtually conclusive when the same point was raised under section 7.
a judicial solution that the administration regards as incomplete or misguided. The courts may thus be presented with an opportunity to reconsider the issue in the light of a statutory modification to the impugned procedure, and any additional arguments about fairness and efficacy. In contrast, to resort to the Charter for a solution at the earliest opportunity is less likely to open a fruitful dialogue between the different branches of government about a question of administrative procedure than to bring it to an abrupt halt.

Thirdly, there is a particular reason for not attributing directly to the Charter procedural standards applicable to federal administrative agencies with power over the right to life, liberty and security of the person. It has been assumed, although not definitively settled, that a Charter challenge to federal administrative action can always be made in the superior court of a province, despite the wide and generally exclusive jurisdiction conferred on the Federal Court in matters of federal administrative law. Whenever possible, courts should avoid a solution to a problem that is likely to fragment the Federal Court's jurisdiction. Opportunities for issue-splitting, forum shopping, and multiple proceedings should not be increased by setting aside a decision of, for example, a disciplinary tribunal of a federal penitentiary, an immigration adjudicator, or the National Parole Board, on the ground that it was not made in accordance with the principles of fundamental justice, when the same result could equally well have been reached through the common law duty of fairness.

Nonetheless, there may be circumstances where the common law does not adequately reflect those basic tenets of our legal system captured by the principles of fundamental justice. Occasionally a judge may have to reconsider, in the light of the Charter, the validity of a common law rule established by a higher

---

court before the adoption of the Charter. An analogy is provided by a criminal case decided by the Supreme Court of Canada. In this case, the accused argued that a recent, but pre-Charter, decision of the Court should no longer be followed because it was inconsistent with section 7. The earlier case had held that drunkenness was normally irrelevant to the mens rea required for an offence of general intention, and that evidence that the accused was drunk when the actus reus was committed should accordingly be withheld from the jury. In a substantively dissenting judgment, La Forest J. agreed that the requirement of mens rea in "truly criminal offences is ... so fundamental that it cannot, since the Charter, be removed on the basis of judicially developed policy." However, he also said:

Established common law rules should not, it is true, lightly be assumed to violate the Charter. As a repository of our traditional values they may, in fact, assist in defining its norms. But when a common law rule is found to infringe upon a right or freedom guaranteed by the Charter, it must be justified in the same way as legislative rules.

These observations are equally apposite to administrative law. Courts should normally conclude that the content of the principles of fundamental justice is to be found in the common law principles of judicial review. However, they should also acknowledge that the common law is not the only source of the "basic tenets" of our legal system. Sometimes, the growth of the common law may have been


84 Leary v. R (1977), [1978] 1 S.C.R. 29, where the Court held that the accused's drunkenness at the time of the actus reus is generally only relevant as a defence to crimes that require a specific intent.

85 Bernard, supra, note 83 at 891.

86 Ibid. at 891-92. In dissent, Dickson C.J. stated that the adoption of the Charter enabled him to reconsider the correctness of Leary, which he would otherwise not have done, even though he had dissented in that case. He held that the rule established in Leary abrogated the requirement of mens rea, one of the basic tenets of our legal system, and thus violated the principles of fundamental justice contrary to section 7 of the Charter.

The Chief Justice has also said that courts are not bound to interpret a word or phrase in the Charter in the way that the same word or phrase has been interpreted in the Bill of Rights. This is because of the constitutional status of the Charter: see R. v. Whyte, [1988] 2 S.C.R. 3 at 14-15.
stunted by historical circumstances so that it no longer represents contemporary notions of administrative justice, at least when the interests protected by section 7 are in jeopardy. Other indications that the common law no longer reflects widely accepted contemporary notions of fundamental justice may be found in legislation, reports of law reform bodies, academic commentary, and other sections of the Charter.\(^7\)

Perhaps the most obvious example is the common law rule that, with few exceptions and in the absence of a statutory obligation, administrative tribunals are not legally required to give reasons for their decisions or to make findings of fact.\(^8\) A number of explanations may be offered for this rule. First, it was firmly established before it became common for statutes to require the giving of reasons, and before the courts "discovered" the duty of fairness. The duty of fairness both expanded the scope of the courts' supervision of agencies' procedures, and required them to determine the adequacy of administrative procedures by an overt balancing of interests. Secondly, the rule was settled well before recent indications that decisions by judges at first instance may be set aside on appeal because they do not include reasons. Thus, it is no longer easy to justify the rule on the ground that administrative tribunals should not be required to give reasons when courts of law are not. Thirdly, to the extent that the rule is based

---

\(^7\) For instance, the section 11(b) guarantee of the right of a person charged with a criminal offence to a trial "within a reasonable time" has been the basis of the view that it may be contrary to the principles of fundamental justice to institute administrative proceedings after an unreasonable delay: see, for example, Misra v. College of Physicians and Surgeons of Saskatchewan (1988), 52 D.L.R. (4th) 477 (Sask. C.A.); Kodellas, supra, note 60.

Another section of the Charter may also tend to limit the content of the principles of justice. In Thomson Newspapers, supra, note 16 there was majority support for the proposition that ss 11(c) & 13 provide important, but not necessarily conclusive evidence of the extent to which an accused person's right to remain silent forms part of the principles of fundamental justice; however, section 7 performs the residual role of enabling courts to extend the scope of the protection beyond the terms of the specific guarantees as circumstances require. Compare Hébert, supra, note 79 where it was held that it is contrary to the principles of fundamental justice for the police to override a suspect's refusal to provide a statement by obtaining an admission through deception, even though the specific protections against self-incrimination apply only to court proceedings, and the statement would have been admissible under the common law rules applied in Canada to confessions.

on judicial procedure, it wrongly assumes that the courts of law provide the sole procedural paradigm for administrative tribunals. However, the tasks and structure of many tribunals are sufficiently different from those of the courts. Thus, it may be perfectly appropriate to require administrative tribunals to give and to publish reasons for their decisions, regardless of the obligations of a judge in a court of law.\(^8\)

In these circumstances it is appropriate to consider other evidence of the basic tenets of our legal system.\(^9\) For example, Ontario's general statutory code of administrative procedure imposes on many tribunals a duty to give reasons when requested.\(^9\) A growing number of particular statutes in other jurisdictions do the same. Law reform bodies have recommended a requirement of reasons,\(^9\) and legal commentators have generally deplored the shortcomings of the common law in this regard.\(^9\) The Supreme

---

\(^8\) For example, an administrative agency that normally delegates to panels the task of hearing and deciding individual cases may still regard itself as generally responsible for the quality of the decisions made by its members. A requirement of reasons may be vital to quality control, and to members' education. Reasons may also inform unsuccessful applicants for a licence, or some other benefit, what they must do to succeed in a future application.

\(^9\) Compare R. v. Rowbotham (1988), 41 C.C.C. (3d) 1 at 62 (Ont. C.A.), where the court indicated that the constitutional claim of an indigent accused to counsel is more appropriately considered against the background of the modern evolution of the right to counsel into "a social right or a human right" and of international guarantees of human rights, than of the older common law.

Many of the procedural rights included in section 11 of the Charter that apply directly only to criminal and quasi-criminal proceedings, may be applicable through section 7 to administrative proceedings. See, for example, M. Eberts, "Section 7 of the Charter Plus Natural Justice: An Administrative Justice Section 11?" in Finkelstein & Rogers, supra, note 41, c. 7 at 101, for a discussion of cases where delay in instituting administrative proceedings is alleged to violate the principles of fundamental justice.

\(^9\) Statutory Powers Procedure Act, R.S.O. 1980, c. 484, s. 17. The Supreme Court of Canada has referred to the "principles and policies that have animated legislative and judicial practice in the field" as evidence of the content of the principles of fundamental justice: see, for example, R. v. Lyons, [1987] 2 S.C.R. 309 at 327, and R. v. Beare, supra, note 56 at 402.


Court of the United States includes the giving of reasons and findings of fact within the Due Process requirement applicable to tribunals that are constitutionally obliged to hold an evidentiary hearing before deciding a dispute in which life, liberty and property are at stake. Indeed, there are indications that Canadian courts may use the Charter to supply this particular omission of the common law. Moreover, one of the functions of a reasons requirement is to ensure that the decision is responsive to the evidence and argument presented at the hearing. Therefore, a duty to give reasons, when requested, may be included within the concept of a "fair hearing in accordance with the principles of justice" to which section 2(e) of the Canadian Bill of Rights entitles a person whose rights and obligations are being determined.

Nor would it be surprising if the courts held that the principles of fundamental justice impose a positive obligation upon a tribunal with power over the right to life, liberty and security of the person to ensure that an individual is not deprived by poverty of the assistance of counsel. A recently added section in the Immigration Act confers on claimants to refugee status the right to be provided with counsel before the screening panel. Both this section, and general statutory schemes for legal aid, are evidence that a right to legal representation, regardless of financial means, is recognized as an essential attribute of justice when individual liberty is at stake.

---


95 See Re D. & H. Holdings Ltd and City of Vancouver (1985), 21 D.L.R. (4th) 230 at 237-38 (B.C.S.C.); Wilson, supra, note 7; see also Re Khaliq-Kareemi, supra, note 8 at 504, where it was said that, since the grounds of the decision were obvious, reasons were not required by section 7 "in the circumstances." Contrast Osmond v. Public Service Board of New South Wales (1986), 159 C.L.R. 656 (Aust. H.C.), where the court refused to find in either the duty of fairness or statutory developments the bases for a common law requirement of reasons.

96 R.S.C. 1985, c. I-2, s. 30(2) as am.; when read with the regulations, provided counsel is only available to those who make their claim at the port of entry. The failure to extend the right to inland claimants was attacked unsuccessfully as a denial of equality contrary to section 15 of the Charter: Canada (Minister of Employment & Immigration) v. Borowski (1990), 32 F.T.R. 205 (F.C.T.D.).

97 In a quite different context, intervenors in certain administrative proceedings in Ontario now have a statutory right to receive funding before the hearing to pay for legal and other expertise: Intervenor Funding Project Act, 1988, S.O. 1988, c. 71.
Perhaps the common law duty of fairness has never included a positive right to be provided with counsel because the primary function of the common law grounds of review has historically been to limit the exercise of public power by imposing negative obligations on government. However, it would surely be consistent with the basic tenets of the modern legal system if courts today required the state to ensure that no one is prevented by poverty from exercising a right considered important to the protection of fundamental individual freedoms. Judicial familiarity with the administration of legal aid suggests that such a development would not be beyond the traditional institutional competence of courts. Additional support for this argument may be found in the Charter's guarantee of equality, which the Supreme Court has said is particularly aimed at protecting historically disadvantaged members of society, including, presumably, the poor. There may even be enough flexibility in the common law for a court to hold that, when fundamental rights (such as those protected by section 7) are threatened, fairness can require that the right to counsel includes the right of an indigent person to be provided with a lawyer at public expense.

It will only be necessary for a court to derive the right to be provided with counsel directly from the Charter if existing statutory legal aid schemes are regarded as exhaustive. The Ontario Court of Appeal has held that the existence of legal aid schemes makes it unnecessary to find that the Charter confers upon indigent accused persons a general constitutional right to be provided with counsel at trial. However, the court also said that a legal aid administrator's decision to refuse legal aid because the accused has the necessary financial means is subject to judicial review. It further held that a fair trial in accordance with the principles of


99 R v. Rowbotham, supra, note 90. In R v. Robinson, supra, note 40 it was held that the Charter gives no general right to be provided with counsel in criminal appeals, largely because a right of appeal is not a basic tenet of the legal system: this is surely a questionable proposition today, and in any event when a right of appeal is created by statute, the accused is entitled to fairness.
fundamental justice may only be possible if the court ensures that the accused is legally represented.

IV. CONCLUSION

This paper has attempted to identify some issues that the courts are likely to encounter as they give content, case by case, to the principles of fundamental justice in administrative decision-making. I have argued that, since the principles of fundamental justice are a constitutional entrenchment of the basic tenets of our legal system, they should normally be interpreted to correspond to the common law grounds of review, especially the duty of fairness. However, because of its constitutional status, section 7 allows questions to be raised about the fairness of administrative arrangements that, by virtue of statutory authorization, are beyond the scope of common law scrutiny. In addition, the constitutional significance afforded to the right to life, liberty and security of the person may sometimes justify increasing the procedural protection afforded to these interests. This should be accomplished, whenever possible, through the common law, rather than the Charter.

This paper has emphasized the influence of the common law in shaping the content of the principles of fundamental justice. It has argued that it is no longer a part of the basic tenets of our legal system that administrative tribunals should aspire to a procedure that is as close as possible to that of the courts of law. Nor should a reviewing court invariably feel at liberty to determine the content of the duty of fairness in a given situation without first carefully considering the views of the agency that are likely to be informed by the administrative experience of its members. However, if the interests protected by section 7 are given a relatively narrow interpretation, arguments for judicial restraint will be less compelling than if the right to life, liberty and security of the person is held to intrude significantly into areas of economic regulation, such as professional discipline, licensing, land use planning, and labour relations.

Nonetheless, the impact of the Charter on the relationship between the courts and the administration is certain to be considerable, even if the principles of fundamental justice prove to
be the relatively modest addition to existing standards for determining the legality of administrative action, or inaction, that has been advocated here. Section 7 challenges have already required the judiciary to widen its traditional field of vision beyond the resolution of complaints by individuals claiming to be victims of a particular administrative injustice. Instead, the courts have been asked to scrutinize institutions, and the administrative arrangements made by statute for the delivery of a government programme, in an attempt to identify basic design flaws likely to produce injustice, or features that have no rational relationship to implementing the substantive aims of the scheme. As Singh and Morgentaler indicate, the Supreme Court of Canada has not shrunk from employing the principles of fundamental justice to force the legislature to make radical reforms to the structure, and operating mandates, of public institutions. It would challenge traditional understandings of courts’ institutional competence and legitimacy to include within the principles of fundamental justice a general requirement that administrative structures be designed and financed in a manner, and to a level, that enables decisions to be made without undue delay.

If the common law should help inform the content of the principles of fundamental justice, it is likely that the courts’ elaboration of this constitutional standard of review will in turn shape the development of the common law grounds of judicial review of public administration. Charter challenges may make indisputably justiciable such issues as administrative inefficiency and delay; the exercise of discretion to limit individual rights or to impose sanctions disproportionate to the gravity of the apprehended mischief;\(^\text{100}\) or the failure of an agency to establish and publish policy guidelines, and a statement of goals and objectives. If the line dividing legality from good administrative practice is shifted in favour of legality under the influence of the Charter, it is unlikely to be moved back when review is sought on non-constitutional grounds.

In addition, Charter litigation has increased courts’ familiarity with the language of rights, and prompted the development of a

\(^{100}\) See Slaight Communications, supra, note 6. In the context of criminal law, the principles of fundamental justice have been held to include a requirement that the severity of the stigma and the punishment "must be proportionate to the moral blameworthiness of the offender": R. v. Martineau (13 September 1990), No. 21122 (S.C.C.) at 8 per Lamer C.J.
purposive approach to their delineation, and a structured accommodation of competing interests.\textsuperscript{101} The modes of reasoning and expression developed in Charter cases are likely to drive reviewing courts to consider the constitutional fundamentals raised by the law of judicial review of administrative action in cases where the Charter is not directly relevant, and to frame their judgments accordingly. The Charter has undermined the artificial barriers that have for too long separated administrative and constitutional law, and revealed the concerns and methodology that they share as components of our public law.

\textsuperscript{101} These points are made very well by Colvin, supra, note 14.