REGULATORY LAW & PROCEDURES

Canadian Gas Association

Rate Regulation Course

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for the

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Regulatory decision makers vary greatly. The law endeavors to apply to them all similarly, despite their diversity. The comments which follow relate particularly to the manner in which regulatory proceedings are conducted, and administrative law is applied to those proceedings, within the Canadian natural gas industry. The purpose of this paper is to provide a framework for the hearing simulation to follow and to offer an introduction to the evolving law related to these types of regulatory processes. Those encountering regulatory issues in their day-to-day activities are encouraged to consult legal counsel. Some preliminary guidance, however, can be accessed from resources such as those listed at the end of this paper.

1. INTRODUCTION

"Regulatory procedures" in this context refers to those processes followed by Canadian natural gas regulators (also frequently referred to as "boards", "tribunals" and "agencies"). These processes follow a similar general pattern and are constrained by a common body of Canadian laws called "administrative law", "regulatory law" and sometimes "public law". Administrative law includes the set of laws governing virtually all government delegated decision making.

Governments derive their authority to make decisions affecting different aspects of our lives from the Constitution of Canada. These powers are wielded by Parliament federally and its various equivalents and provincially. However, not all governmental decisions are made by these elected bodies. These elected governments have delegated many of their powers to various other decision makers: to staff, municipalities, ministers, licensing agencies, Royal Commissions, and regulatory boards and tribunals, to name a few.

Governments delegate these powers for a variety of reasons: for efficiency's sake (not every decision about who gets a fishing license requires a filibustered debate in the Legislature, for example), to provide for less politicized and more impartial decision making, to enable for better quality decision making by the involvement of more subject-specific expertise, and to enhance

the fairness of the decision making process by enabling those most directly impacted by potential decisions to participate in the process. Some or all of these reasons have compelled the creation of numerous regulatory tribunals and, at a policy level, have influenced the manner in which administrative laws have developed to govern the practice of such tribunals.

The powers which have been delegated are numerous and diverse. They can be broadly categorized as:

- administrative functions -- such as the licensing of vehicles or the issuance of birth certificates,
- investigative functions -- such as child welfare or environmental inspection and investigation powers,
- Ministerial functions -- such as the enactment of regulations or the appointment of individuals to coveted public offices, and
- quasi-judicial or adjudicative functions -- such as making decisions among competing interests by regulatory tribunals. Some of these are full time or fixed term appointments, such as the AEUB, BCUC, MPUB, OEB, la Régie de L'énergie, and the NEB, while others are single event creations, such as the Somali Inquiry and joint or review panels under the *Canadian Environmental Assessment Act* and the *National Energy Board Act.*

The administrative laws applicable to these various kinds of governmental decisions vary greatly depending on the type of function performed.[1] They require varying degrees of procedural protections for those affected by such decisions. They set the parameters for recourse to the courts if a regulatory decision is believed to be flawed if the process used in reaching that decision is believed to be flawed.

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[1] The laws governing administrative decision makers used to be driven off a threshold decision of identifying which of these types of functions was being performed. Different rights and obligations applied depending on which category the governmental decision maker fell into. More recently the Courts have "eschewed this formalistic approach", preferring instead to identify and accomplish the intention of the legislators that delegated authority to the particular person or board. The courts then look to this intention to ascertain the appropriate rights and obligations governing the situation at hand.

These challenges can proceed to court on appeal or judicial review, depending on the context and the intention of the legislators delegating the authority. In addition to such reviews by, or appeals to, the courts, for certain administrative governmental decisions, the law permits challenges by use of "prerogative writs". These include *habeas corpus* ("you have the body") - which calls for one detained to be brought before a judge, *quo warranto* ("by what authority") - which challenges the exercise of authority not legally conferred on the one exercising it, *mandamus* ("we command") - which compels the performance of a public duty, prohibition - which prevents an inferior tribunal from proceeding further, and *certiorari* ("bring up") - which calls for the record of proceedings before a lower court or tribunal to be brought up, reviewed and quashed, usually on the basis of lack of jurisdiction.

Natural gas regulators perform an ongoing supervisory role as well as an adjudicative role. The primary focus of this paper and the hearing simulation to follow is on the adjudicative role. Even when performing the adjudicative role, however, natural gas regulators are influenced by, and factor into their decisions the impact of the various possible outcomes on, their broader supervisory mandate. And the expertise they gain in discharging that ongoing supervisory mandate is brought to bear in their adjudicative functions.

2. POWERS OF REGULATORY BODIES

Tribunals are created by governmental statute (an "Act" or "enabling legislation"). Their only powers are those which are expressly or implicitly delegated to them through enabling legislation.

There can be more than one Act of a government conferring powers upon a tribunal or agency (e.g., the National Energy Board gains authority from the *National Energy Board Act,* the *Canadian Oil and Gas Operations Act,* the *Canada Petroleum Resources Act*, the *Mackenzie Valley* Resource *Management Act*, and the *Canadian Environmental Assessment Ac*t, among others). Conversely, a single statute may create more than one tribunal (e.g., the *National Energy Board Act* creates the National Energy Board and Pipeline Arbitration Committees).

A regulatory body is permitted to act only within its lawful authority, referred to as its "jurisdiction". Actions outside of this jurisdiction are said to be "*ultra vires*" and are of no force or

effect. This lawful authority or jurisdiction is determined by both the Canadian Constitution and by the scope of the applicable enabling legislation.

In creating enabling legislation a government may only delegate powers that it has pursuant to the *Constitution Act, 1867*. For example, the federal government has the power to make laws in the areas listed in s. 91 of the *Constitution Act, 1867*, such as "trade and commerce" and "criminal law", not the areas listed in s. 92 such as "municipal institutions" and "property and civil rights within the province". Those are the domain of provincial governments. Accordingly, the federal government may only delegate to a tribunal authority found within those s. 91 heads of power. Thus a regulatory body is only permitted to act within the scope of enabling legislation that itself is within the legislative (constitutional) competence of Parliament, or its provincial equivalent, as the case may be.

A tribunal may only act within the scope of its enabling legislation. This is determined with reference to both the explicit and the implicit terms of the enabling legislation. A power may be implied into enabling legislation if exercise of the power is necessary for the tribunal to achieve the aims of the statute. Limitations may also be implied into an enabling statute. A regulatory body may not exercise a power delegated to it other than for the purpose it was given. The failure of a tribunal to act within the scope of its enabling legislation will invalidate its decision.

3. RULES GOVERNING REGULATORY BODIES

In making decisions within their jurisdiction, regulatory bodies are not bound by the same rules and procedures as are courts. For example, whereas courts can be expected to make decisions consistent with past precedent, regulatory bodies are not similarly bound. They are bound to proceed and operate in a manner consistent with any applicable judicial precedent rulings, but are not bound to decide consistent with their own regulatory precedent.

Each regulatory body governs its decision making processes by its own unique set of procedural rules. These rules can be set out in enabling legislation, regulations made under that legislation, guidelines created by the regulatory body, developed over time, or a combination thereof. Some provinces such as Alberta and Ontario have specific acts

establishing procedural guidelines for certain tribunals (in Alberta, the *Administrative Procedures Act*, and in Ontario the *Statutory Powers Procedures Act*).

In the case of Canadian energy regulatory bodies, additional rules of procedure to be adhered to in the specific hearing may also be set out in a "Hearing Order" or "Notice of Proceeding", as some tribunals call them, issued in respect of that hearing. Regardless of these rules, once a particular application is under consideration most Canadian natural gas regulators exercise considerable flexibility in the application (or, more often, in the relaxation) of procedures. In most cases they enjoy the discretion to do so.

Beyond the specific rules of each tribunal, there are several over-arching administrative law principles that all tribunals must follow. These are the duty to conduct a hearing in a fair manner (procedural fairness) and the duty to avoid bias. Each of those will be described further below. Although the exact content of each of these duties continues to evolve and will vary depending upon the nature of the power that the tribunal is exercising and the nature of the rights that the tribunal decision will effect, it is useful to discuss these duties in general terms.

(a) PROCEDURAL FAIRNESS

The doctrine of procedural fairness requires that before a decision which might be adverse to a person's interest is made, that person must (a) be notified of the potential for that impact, (b) be apprised of the case from which that party can determine whether there might be an impact, and (c) be given the opportunity to present a response to the full case against his or her interests.

Notification requirements are usually determined by the tribunal. Sometimes an advertisement in a newspaper will be a sufficient method of notification. Other times, such as when the tribunal or applicant knows already that a certain party will be affected by the decision, it may be necessary for that party to be individually notified, by whatever manner the tribunal considers sufficient. The notice should communicate the subject matter of the hearing in sufficient detail that the recipient can determine whether it might affect them. Generally, any person whose rights might by affected by a tribunal's decision has a right to be heard.

Notice should be given sufficiently in advance to allow potentially interested parties to assess the impacts, decide whether or not to attempt to influence the outcome and, if so, prepare for the hearing. Generally the more complex the matter in dispute the longer will be the required notice period.

In order to respond to the case against it, a party must be made aware of what that case is. The extent of the information that a party is entitled to receive in respect of the case against it will depend upon the circumstances. For example, the greater the adverse effect a decision might have upon a party, the greater the requirement for disclosure of the case against that party prior to the hearing. Generally a party will be entitled to all information the active participants have that is relevant to the issues to be determined. The objective is to permit affected parties the opportunity to meaningfully and properly understand the potential impact of the proposed decision upon their interests and have opportunity to respond as they see fit.

Many tribunals have procedures enabling participants to supply information to the regulator on a confidential basis -- that is, available to the regulator but not any of the participants (e.g., s. 16.1 *National* Energy *Board Act*). Regulators use great caution relying on such mechanisms, needing to carefully balance one party's desire for confidentiality against the interests of other participants in having sufficient information to participate fairly in the process. Access to information and privacy protection legislation can also come into play in such balancing.

A hearing may be conducted in writing, in person or both. As a result there are a variety of ways in which a party may present its case and respond to the case against it: by letter, by evidence in writing and/or through witnesses, by formal written argument, by oral argument or through multi-party meeting(s) with the regulatory body presiding. Sometimes the required method of communication will be dictated by the tribunal rules, other times it will be in the discretion of the tribunal and may follow suggestions from the parties on an appropriate process. Tribunals determine the appropriate process for any hearing on an assessment of which method will best enable the parties to give a fair and adequate presentation of their case, will best inform the regulator of the information that

will assist it in deciding the issues, and upon which format is most appropriate given both the nature of the information to be received and the nature of the decision(s) to be made.

(b) BIAS

The duty to avoid bias requires at a minimum that the decision-makers have no direct financial or other material interest in the outcome of the hearing. Such an interest constitutes the first category of bias, an "actual" or "personal" bias. In addition, the conduct and background of the decision-makers must not cause a reasonable person to regard them as biased. This second category of bias is usually referred to as a "reasonable apprehension" of bias. Since it is easier to prove than actual bias, it is the far more common challenge for bias. A final kind of bias which causes a Board to lose its jurisdiction is "institutional bias". This is bias resulting from the Board's processes, structure or systemic predisposition rather than by virtue of any one Board member.

The tribunal must not only be impartial, but must also appear to be impartial, thereby engendering confidence in its decision-making ability. Recall that this is one of the reasons elected legislators delegate some of their powers to tribunals -- to provide for more impartial and independent decision making. A decision made by a tribunal which is found to be biased is invalid and not enforceable.

4. WHO PARTICIPATES IN A HEARING?

One of the main participants in a hearing is the tribunal. A tribunal is composed of the tribunal members and the tribunal staff. "Members" are the ones charged with the actual decision-making responsibilities. The tenure and number of tribunal members is ordinarily established by the enabling statute. It is customary that only a portion of the tribunal members will sit at any particular hearing, and that the Chairman of the tribunal decides which members will sit at each hearing.

Tribunal staff, like the members, are people with expertise in matters within the tribunal's jurisdiction. Their primary functions are to advise the tribunal members and to facilitate the process. Tasks performed by tribunal staff include reviewing and summarizing evidence, objective expert analysis of the parties' positions and evidence, helping the tribunal members to

frame the issues in dispute, formulation of the tribunal's questions to the witnesses, and assistance with the production of written reasons for the Members' decisions.

Tribunal staff are often present throughout the portion of the hearing which pertains to their area of expertise. Canadian law permits significant interaction "off the record" among Board Members and between Members and their staff, so long as in the end the decision is that of the individual Member(s) in accordance with his or her "opinion and conscience".

Some regulatory tribunals have two sets of staff, one to assist the Members and the other to perform an adversarial role within the hearing. An example is the Ontario Energy Board. To ensure a fair process the staff performing the adversarial role (actively representing the "public interest") need to be separate from the Board Members, just as would any other party litigant.

In addition to the tribunal members and staff there are generally four sorts of participants in regulatory hearings: the party requesting a particular ruling or decision, the party or parties against whom the application is brought, any party who will be seriously affected by the decision, and the witnesses (if any) of these parties. Most often parties are represented by counsel but it is not a requirement.

Rules regarding who may participate in a hearing differ between tribunals. The determination of who may participate in a hearing is usually at the discretion of the tribunal. At some it is unusual for a tribunal to deny any party with even the slightest purported interest in the decision the opportunity to be heard. At others there is an overt encouragement for the parties to form associations of like interests and otherwise avoid duplicative participation. The standard to be met to be permitted to participate in a regulatory hearing (for determining what the law refers to as "standing") is most often lower than the standard that must be met in order for one to gain standing to bring an action or otherwise participate in court.

The party requesting a particular order, approval, license, decision or ruling is called the "Applicant". If there is a particular party against whom the Applicant is bringing the case, it is referred to as the "Respondent". Parties who might be affected by the decision and are permitted to participate in the hearing process are called "Intervenors". It is common in gas utility company hearings for Intervenors to espouse positions both supporting and opposing the

Applicant and other Intervenors, depending upon the particular issue, in any one hearing. Intervenors in such proceedings include local landowners, corporations, governments, gas producers, gas marketers, trade associations and public interest groups.

5. THE BASIC STEPS TO A HEARING

(a) PRE-HEARING

Application. A written application is sent to the tribunal by the applicant. The form of an application will vary from one tribunal to the next. Some applications may be very brief and merely state the nature of the application and the order requested, others might already include extensive evidence supporting the Applicant's request. In cases where an application is incomplete, the tribunal may correspond with the Applicant and invite it to remedy any deficiencies before it can be set down for hearing.

Notification. On occasion the tribunal will invite comment on the appropriate process for considering the application. Nevertheless, once the tribunal has decided that the application is complete it will issue a public notice stating that an application has been made, the subject matter of the application, how parties affected can learn more and decide whether to participate, and either the process the tribunal will follow for deciding the request or inviting comment from parties on what that process should be. For most applications the process is conducted in writing. Where the regulator considers the issues to require a policy decision, the impacts on others to be more significant, the diversity or intensity of positions to warrant it, or credibility to be an issue, the regulator may elect to proceed by oral hearing. Then either the applicant or the tribunal, depending upon the rules of the tribunal, will be required to communicate the notice to those who might have an interest in or be affected by the decision requested. In most cases such communication must be written. In accordance with the doctrine of procedural fairness, the notice must describe the application such that its recipient would be able to determine whether or not the matter is likely to affect them.

Interventions. Any parties who wish to participate in the hearing process must notify the tribunal of their desire to intervene in the proceedings. Some tribunals will require

only a letter stating the nature of the Intervenor's interest in the hearing and its position on the matter; others will require those requesting intervenor status to submit far more extensive written evidence or justification. All such submissions can, of course, be contested by other participants. The degree of effort required can be related to whether or not funding is available to Intervenors. Intervenors are usually entitled to receive copies of all relevant information filed with the tribunal, including the application.

Discovery. Discovery is the process by which the parties to a proceeding learn the facts known by other parties that are relevant to the issue(s) under consideration. Generally discovery is accomplished by requesting production of relevant documents and asking relevant questions of other parties to the proceeding. Some tribunals call these "interrogatories", others "information requests" or "IRs". Although it has become expected that parties will be entitled to information prior to the commencement of a hearing, a party to a hearing does not automatically have a right to discover relevant information prior to the commencement of the hearing. Access to such information prior to the hearing can be important as it allows the parties to better prepare their cases and focus the nature of their participation.

Pre-Hearing Conference. The tribunal might convene a pre-hearing conference to determine the procedure to be followed during the hearing or to establish facts upon which the parties agree and thereby narrow the issues to be determined. As well, the tribunal may decide some issues are better deferred to a subsequent proceeding.

(b) PUBLIC HEARING

Location. Tribunals endeavor to have their process as accessible as possible to those affected by their decisions. That can mean hearings take place not just in the city in which the tribunal's head office is located. In the natural gas industry, facility expansion hearings are occasionally held in the area where the facilities are proposed to be built. This allows those people who will be most directly effected by the decision a greater opportunity to participate or observe.

Registration of Appearances and Preliminary Matters. A public hearing will usually commence by the Chair introducing the matter and apprising parties on points of process such as sitting times and participation expectations. Then the Board will invite the parties to register their appearance and address any matters requiring determination before commencement of the hearing (called "preliminary matters"). Common examples of preliminary matters are requests (or "motions") of one party to adjourn the hearing to a later date, for the board to compel further answers to discovery questions or for the board to schedule its hearing to accommodate the availability of certain witnesses.

Opening Statements. After any preliminary matters are addressed, the Applicant may give an opening statement that briefly summarizes the facts of the case and the party's position on the issues under consideration. At some tribunals, other parties are also accorded this opportunity at this time or upon the commencement of their evidence.

Presentation of Evidence.[2] The opening statement is followed by the presentation of evidence by the Applicant. In natural gas regulatory hearings, evidence consists almost exclusively of corporate data and the opinions of expert witnesses. It is often presented by a series of panels of expert witnesses. One way in which the expert witnesses may present their evidence is by adopting under oath written evidence that they have prepared and filed ahead of time. This facilitates evidence that is especially voluminous. This has become the standard practice now at most Canadian natural gas regulatory tribunals. Alternately the evidence of the expert witnesses can be brought out through questions posed by the party that the witnesses are aiding.

Once the Applicant has submitted its evidence, the Intervenors will then be permitted to cross-examine the witnesses on it, followed by the tribunal examining on it. Although all Intervenors have the right to cross-examine witnesses presenting positions adverse to their interests, due to the time and cost involved it is often only those Intervenors with a particularly great interest in the outcome of the issue or hearing that will do so. In order to keep hearings from becoming too lengthy, tribunals sometimes restrict the length of

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[2] The NEB issued an information letter to participants in GH-1-2004, its process to consider the Mackenzie Gas Project applications. That letter seeks to explain to those new to the NEB process the nature of evidence, its filing, adoption and cross-examination. You may find it a helpful overview of the process.

cross-examination of a witness, although this practice may not survive judicial challenge. Once a witness has been available for cross-examination by all of the parties and examined by the tribunal the Applicant will be permitted to re-examine its witnesses. During re-examination the applicant may clarify any issues raised in cross-examination or address something raised for the first time in cross-examination, but may not present anything brand new. That would deny the other parties opportunity to test the new information.

This process is repeated until each party has presented their evidence, an opportunity is given others to test it by cross-examination, followed by an opportunity for the presenting party to re-examine. Next the Applicant may present evidence to rebut the evidence of the other parties. The Intervenors will be permitted to cross-examine on this new evidence (if any) and again the Applicant will be permitted to re-examine.

Argument. Once the evidence has been dealt with each of the parties presents its argument as to why the tribunal should decide in its favour. The Applicant presents its argument first followed by each of the Intervenors. Once all parties have presented their argument, the Applicant is permitted to 'reply' to the Intervenors' arguments. To cut down on the length of a hearing a tribunal might require that argument be time limited or submitted in writing as opposed to being heard orally. Written argument can also assist the board by providing it points of reference as it deliberates and generates any reasons for its decision.

(c) POST-HEARING

At the end of the hearing or, more commonly, sometime after the end of the hearing, the tribunal releases its decision. The tribunal's decision has the force of law. Most enabling statutes also provide for some means of enforcing the tribunals decisions.

If the enabling legislation allows, a tribunal may issue a decision which is subject to certain conditions. For example, the National Energy Board may issue a "certificate of public convenience and necessity" on condition of the Applicant utilizing certain

construction techniques or providing evidence of site specific environmental impact mitigation measures prior to commencing construction.

The tribunal may issue reasons along with its decision or sometime after the decision has been given. Until recently tribunals were not obliged to do so unless expressly mandated in the enabling legislation, where the known facts did not appear to support the decision, or where the tribunal failed to provide adequate reasons from which the court could determine the basis of the decision. If reasons were provided, though, they had to meet some nominal levels of sufficiency. A 1999 decision of the Supreme Court of Canada (*Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817) expanded the occasions when written reasons are required. It established a duty upon tribunals to provide written reasons where there is a statutory right of appeal or a decision has important significance for the individual affected by the decision and left open the possibility that the courts may require reasons in other circumstances. A subsequent decision of the Supreme Court of Canada (*Suresh* v. *Canada* (2002), 208 DLR (4th) 1) expanded the obligation, requiring that the reasons "emanate from" the decision maker[3] and that they "articulate and rationally sustain" the decision.

6. WHEN YOU DON'T LIKE THE RESULT

Rarely is a tribunal or board decision the final word on the matter, technically. Recourse is available in some cases to have the decision reviewed by a larger group of that board (usually commenced by an application for "review and variance") or referred to an appellate tribunal created by the same statute. Parties can also seek to have a court review the legality of the decision or, if permitted by the statute, hear an appeal. In practice however, the success of these efforts has been more limited. In Canada considerable deference is accorded most energy tribunals. In other words, they have the jurisdiction to make a bad decision; the courts will not interfere on that basis alone.

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[3] In *Baker* the Court imposed the obligation to provide reasons (in certain circumstances, such as, when the decision would be on a matter of importance to the individual) but concluded that the obligation in that case had been satisfied by the notes on the file of the investigator that handled the matter before it transferred up to the decision maker. *Suresh* effectively said that would not be good enough.

(a) JUDICIAL REVIEW

Although the distinction between a judicial review and an appeal is diminishing, the proceedings are still substantially different. In a judicial review proceeding, the court reviews the legality of the decision and of the process that the tribunal followed in reaching its decision. The reviewing court determines whether the tribunal erred in respect of: (1) procedural fairness (for example, the tribunal has not given a party the opportunity to be heard), (2) bias, or (3) consistency with the terms of its enabling legislation (i.e. the tribunal misinterpreted the scope of its enabling legislation and exceeded its jurisdiction or exercised its delegated power for an improper purpose).

When judicially reviewing a decision, the court is not particularly interested in whether the tribunal's determination of the facts in the case was correct or whether, in considering those facts, it came to the same decision that the court would have made. Provided that the tribunal acted in accordance with the law in its factual determinations, with its enabling statute and with the duties relating to procedural fairness, the reviewing court will generally defer to the findings of the tribunal.

If upon judicial review a court finds that the tribunal acted improperly, then the court typically sets aside the decision. The Court may refer the issue back to the tribunal for rehearing with specific instructions to be implemented.

(b) APPEAL

If an appeal from a tribunal decision is available, the right to appeal and the person to whom the appeal must be made will be explicitly set out in the statute. Appeals can be made to another statutory decision maker, the cabinet, a Minister or the courts, depending on the statutory scheme. An appeal to the cabinet or a Minister is normally made in respect of policy or political issues. The cabinet and Ministers are not inclined to deal with matters of law, as this is the role of the courts. Even when the appeal relates to policy or political matters the cabinet and Ministers are unlikely to interfere with a tribunal decision unless the tribunal made a very great public interest error or the decision on its face is clearly contrary to public policy.

Courts consider appeals relating to matters other than policy. In an appeal the threshold for success can be lower than in a judicial review. Depending upon the provisions of the enabling statute the court may be entitled to consider not only errors of law and jurisdiction but also errors of fact, or at least errors on questions of mixed fact and law. An example of an error of fact is a tribunal's finding that is not supported by the evidence presented and is then relied upon in the decision, if not determinative of the decision. Generally courts do not defer to the findings of the tribunal in an appeal proceeding as much as in a judicial review. However, the more complex and technical the evidence is, the less likely the courts are to interfere with factual findings. In assessing the level of deference to accord the tribunal, courts consider a number of factors including the degree of expertise enjoyed by the tribunal relative to a court to make the impugned complex and technical findings.

On appeal the remedial options are greater than on judicial review. In addition to the power to quash the tribunal decision, the appeal body may send the matter back to the tribunal for reconsideration in accordance with certain instructions or may substitute its own decision for that of the tribunal. This third remedy, though somewhat less common, is particularly beneficial as it allows the appellant to receive a decision in its favour without the added time, cost and uncertainty involved in a rehearing.

(c) STANDARDS APPLIED UPON REVIEW OR APPEAL

Standards of review refer to the level of scrutiny the Court will apply when considering a tribunal's decision.

The law relating to standards of review has been evolving over the past few years. Now there are only two possible standards of review, not a spectrum of standards as was the case before 2008 (*Dunsmuir* v. *New Brunswick, 2008 SCC 9*), and the reviewing Court must select one of them. The two standards available to a reviewing Court are referred to as: "correctness," the more exacting standard of review, and "reasonableness," the more deferential standard. The standards of review apply to both appeals and judicial reviews (*Pushpanathan, infra)*.

The Supreme Court of Canada has been further attempting to streamline the administrative law around judicial reviews and appeals, for example by permitting Courts to adopt the result of the standards of review analysis conducted in previous comparable cases and to focus more on the merits of specific cases (*Dunsmuir, supra*). For issues where the standard of review has not been previously determined, the Court will revert to the pre-*Dunsmuir* process of considering a "constellation of factors" (*Pezim* v. *B.C.*, [1994] 2 S.C.R. 557). Specifically, the Court will consider the following four factors: any privative clause[4] or statutory right of appeal, the purpose of the statute, the expertise of the tribunal relative to the Court on the particular issue and the nature of the problem (*Pushpanathan* v. *Canada*, [1998] 1 S.C.R. 982). By assessing these factors the reviewing court will determine the standard by which it will review the tribunal decision (as stated above, either for correctness - that is, the Court determining on its independent assessment whether or not it agrees with the tribunal, or for reasonableness - that is, whether the decision falls within a range of possible acceptable outcomes which are defensible in respect of the facts and law).

Justice Binnie in *Dunsmuir* in fact advocated for more far reaching change to bring coherence to this area of law. As he put it:

> "Judicial review is an idea that has lately become unduly burdened with law office meta-physics." [¶. 122]

In a review of the process followed by a tribunal in reaching its decision, as opposed to a review of the correctness or reasonableness of the decision itself, Courts do not talk of the extent they will defer to the tribunal but of the degree of procedural fairness accorded by the tribunal. The degree of procedural fairness (also referred to as the "principles of natural justice") required in any given regulatory decision is determined following consideration of (1) the nature of the decision made and the procedures followed in making it, that is, "the closeness of the administrative process to the judicial process"; (2) the role of the particular decision within the statutory scheme; (3) the importance of the decision to the individual affected; (4) the legitimate expectations of the persons

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[4] A privative clause is a provision in the enabling legislation by which the legislators attempt to limit the ability of parties to seek an appeal or review of that board's decision before the courts.

challenging the decision where undertakings were made concerning the procedure to be followed; and (5) the choice of procedure made by the agency itself (*Baker*, *supra*, as summarized in *Suresh*, *supra*).

7. SOURCES OF FURTHER INFORMATION ABOUT REGULATORY LAW & PROCEDURES

As indicated at the outset, this presentation is intended to provide introductory information. Far more detailed treatments of Canadian regulatory procedures and administrative law are available, though rarely in respect of a particular tribunal. I have listed below a recommended selection of the many resources available in the event that you wish to learn more generally about this area of the law or commence more in-depth study of any one particular issue.

The selections below are relatively recent publications, the Brown & Evans loose-leaf publication updated regularly. You might find Andrew J. Roman's text particularly useful; it too is introductory in nature, written for the participant as opposed to the administrative lawyer. It contains sections dealing with case management, case strategies, testifying before tribunals and minimizing the cost of your participation.

Brown & Evans. Judicial Review of Administrative Action in Canada. Toronto, Ontario: Canvasback Publishing, 1998.

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Kerans, Roger P. and Willey, Kim M. Standards of Review Employed by Appellate Courts. 2nd ed. Edmonton, Alberta: Juriliber, 2006.

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