Best Practices in Administrative Decision-Making: Viewing the Copyright Board of Canada in a Comparative Light

A Report Prepared for Canadian Heritage and Innovation, Science and Economic Development Canada

Paul Daly, University of Montreal

This is an independent expert report produced by Paul Daly as commissioned by the Department of Canadian Heritage and the Department of Innovation, Science, Economic Development. The opinions expressed herein are those of the author and do not necessarily reflect those of the Government of Canada.

Paul Daly, 2016
CH44-161/2016E-PDF
978-0-660-06010-1

Introduction and Executive Summary

This report focuses on the decision-making process used by the Copyright Board of Canada for tariff setting. Previous reports have identified delays in tariff setting as a problem to be resolved. Drawing on the decision-making processes of comparable federal administrative tribunals and recent civil justice reforms in Canada, this report makes several recommendations as to how the Copyright Board could improve its tariff-setting process so as to bring the process into line with best practices in administrative decision-making. The general principles of administrative law, which provide the overarching legal framework in which any changes will be implemented, are also laid out.

This report takes as given the current role of the Copyright Board and the resource constraints under which it operates, proceeding on the basis that additional funding will not be made available to the Copyright Board in the near future. Accordingly, the goal of this report is to provide the Copyright Board with additional tools that it can use to improve the efficiency of its decision-making processes. In this regard, this report notes that tariff-setting delays might be due at least in part to the attitudes and expectations of those who participate in the process, in which case the additional tools could usefully be used to effect a culture change in Copyright Board proceedings.

Overview

Section I	*General Background*
Section II	*Functions and Functioning of the Copyright Board*
Section III	*General Principles of Administrative Law*
Section IV	*Comparable Federal Administrative Tribunals*
Section V	*Civil Justice Reform*
Section VI	*Culture Change*
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In Section I, general background is provided about this report, which explains why the report was commissioned and lays out the context in which the report was prepared.

In Section II, the role of the Copyright Board is explained, in order to better understand its current decision-making framework and the challenging environment within which it operates.

In Section III, the general principles of administrative are laid out, with a view to explaining the framework in which the recommendations of this report can be implemented by the Copyright Board.

In Section IV, the decision-making processes of comparable federal administrative tribunals (the selection of which is, in addition, justified) are laid out alongside the tariff-setting process of the Copyright Board.

In Section V, the literature on Canadian civil justice reform, which aims at making court processes more efficient, is examined, with a view to formulating best practice recommendations for administrative tribunals.

In Section VI, a general framework to guide the reform of administrative procedures is proposed, with particular reference to the need to give administrative decision-makers such as the Copyright Board the tools to effect culture change where attitudes and expectations of actors may cause inefficiency in the decision-making process.

Sections IV, V and VI also form a coherent whole, starting with administrative processes in Section IV (with a view to ascertaining how the Copyright Board is placed relative to peer federal administrative tribunals) and moving to civil justice reform in Section V (with a view to drawing inspiration in the administrative context from judicial reforms), before finishing in Section VI with a discussion of the importance of culture (with a view to bringing the lessons learned in Sections IV and V into a theoretical best-administrative-practice framework).

In Section VII, recommendations are made as to the procedural reforms that have the potential to reduce the time the Copyright Board takes to render tariff-setting decisions.

Summary of Recommendations

Recommendation 1	*Legislation to give Copyright Board power to award costs*
Recommendation 2	*Regulations to provide for various steps in Copyright Board's tariff-setting process*
Recommendation 3	*Retention and further development of current Model Directive on Procedure*
Recommendation 4	*Effecting culture change*
Recommendation 5	*Further study of federal administrative decision-makers*

Recommendation 1: Parliament should legislate to provide the Copyright Board with the ability to award costs.

Recommendation 2: the Copyright Board should propose to adopt, with the approval of the Governor in Council, formal rules that provide for various mandatory steps in the tariff-setting process.

Recommendation 3: the Copyright Board should retain its current Model Directive on Procedure, with a view to providing more detail about the mandatory steps in the tariff-setting process.

Recommendation 4: the Copyright Board should continue to attempt to effect culture change through all available means – including 'Best Practices' manuals.

Recommendation 5: the legislative and executive branches of the federal government should undertake a comparative analysis of the decision-making efficacy of selected federal administrative decision-makers, taking account of the resource constraints under which these decision-makers operate, and the complexity of their tasks, with a view to developing a metric which would propose benchmarks for the time periods within which regulatory decisions ought to be rendered.

I. General Background

Section 92 of the *Copyright Act* provides that every five years "a committee of the Senate, of the House of Commons or of both Houses of Parliament is to be designated or established for the purpose of reviewing this Act".[1] In this context, I was asked by Canadian Heritage and Innovation, Science and Economic Development Canada to prepare the present study on the Copyright Board of Canada.

Parliament has held public hearings which culminated in a Report of the Standing Committee on Canadian Heritage, *Review of the Canadian Music Industry*.[2] The Committee held fourteen meetings, hearing from eighty-two witnesses and receiving fifteen written briefs. Though the Committee's Report ranged widely over a variety of issues touching Canada's music sector, it furnished a recommendation relating to the Copyright Board:

> The Committee recommends that the Government of Canada examine the time that it takes for decisions to be rendered by the Copyright Board of Canada ahead of the upcoming review of the *Copyright Act* so that any changes could be considered by the Copyright Board of Canada as soon as possible.[3]

This recommendation was apparently based on "the most common suggestion made by witnesses" in relation to the "launching of new services": "to provide the Copyright Board of Canada with the resources it needs to speed up its decision-making process".[4] It should be noted, however, that a *Complementary Report by the Liberal Party of Canada* prepared by Mr. Stéphane Dion, took issue with this recommendation because "it ignores the main issue raised by many intervenors: an apparent lack of resources":

> The Copyright Board of Canada seems overwhelmed by the number and complexity of the cases it must address. The Board must face a huge workload and constantly analyze complex and massive expert reports dealing with legal, economic and technical issues. Although this is not only a resource issue and the Board's *modus operandi* must also be scrutinized, it is clear that a serious study of the means presently available to the Board must also be included in the Standing Committee's recommendation.[5]

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[1] RSC 1985, c C-42.

[2] 41st Parliament, Second Session, June 2014.

[3] *Review of the Canadian Music Industry*, p. 25. It is worth noting that the Copyright Board's mandate exceeds the music sector, touching many areas of modern Canadian commercial life.

[4] *Review of the Canadian Music Industry*, p. 17.

[5] *Review of the Canadian Music Industry*, p. 40. See also Gilles M. Daigle and J. Aidan O'Neill, "The Evidentiary Procedures of the Copyright Board of Canada" in Ysolde Gendreau ed., *The Copyright Board of Canada: Bridging Law and Economics for Twenty Years* (Carswell, 2009), at p. 52: "the Board has had to deal with particularly complex legal and evidentiary issues over the last decade and a half…This increased workload, without a concomitant increase in underlying financial resources, has severely hampered the Board's efforts to release decisions in short order, regardless of the nature of the tariff"; Daniel J. Gervais, "A uniquely Canadian institution: the Copyright Board of Canada" in Ysolde Gendreau

Subsequently, Professor Jeremy de Beer of the University of Ottawa prepared a report, *Canada's Copyright Tariff Setting Process: An Empirical Review*,[6] which responds in part to the recommendation of the Committee. As Professor de Beer explained, "the aims of the study were to review the existing literature, map the tariff-setting process, develop methods for empirical analysis, and begin to collect and analyze data".[7] The executive summary neatly lays out the key findings of Professor de Beer's analysis of the tariff-setting process:

> The certified tariffs took an average of 3.5 years to certify after filing. The average pending tariff has been outstanding for 5.3 years since filing as of March 31, 2015. On average, tariffs are certified 2.2 years after the beginning of the year in which they become applicable, which is in effect a period of retroactivity. The standard deviation in the time from proposal filing to tariff certification is 2 years. A hearing was held in 28% of tariff proceedings. The average time from proposal filing to a hearing in those proceedings was just over 3 years. The average time from a hearing to tariff certification was almost 1.3 years.[8]

Between the publication of Professor de Beer's report and the publication of the present study, the Supreme Court of Canada has commented unfavourably on the fact that some of the Copyright Board's decisions "have, in recent years, taken on an increasingly retroactive character".[9]

Noting that his study laid the "groundwork for future analysis", Professor de Beer suggested a fruitful next step would be "to analyse the copyright tariff-setting process with other administrative processes".[10]

At the same time, work has been conducted on (to use Mr. Dion's terms) "the means presently available to the Board". The Copyright Board formed a Working Committee on the Operations, Procedures and Processes of the Copyright Board, which produced a *Discussion Paper on Two Procedural Issues: Identification and Disclosure of Issues to be Addressed During a Tariff Proceeding and Interrogatory Process*.[11] The terms of reference provided by the Copyright Board asked the Working Committee "to review the various steps of proceedings before the Board so as to determine how they can be made more efficient and productive, and to propose how these new, more efficient approaches should be implemented and communicated".[12]

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ed., *An Emerging Intellectual Property Paradigm* (Edward Elgar, 2008), at p. 218: "Part of the delays may be due to inadequate and insufficient staffing".

[6] April 16, 2015, available online: http://jeremydebeer.ca/canadas-copyright-tariff-setting-process/

[7] de Beer report, p. 48.

[8] de Beer report, p. 2.

[9] *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, 2015 SCC 57, at para. 109.

[10] de Beer report, p. 48.

[11] February 4, 2015.

[12] *Discussion Paper on Two Procedural Issues*, p. 27.

The Working Committee furnished forty-three recommendations. Some, such as the means of publicizing proposed tariffs, relate more to the treatment of matters falling within the Copyright Board's jurisdiction than to the streamlining of its procedures. Many recommendations do, however, respond to concerns about the length of the Copyright Board's decision-making processes.

In particular, the Working Committee made several procedural recommendations in relation to the identification and disclosure of issues to be addressed during a tariff proceeding. For instance, tariffs proposed for the first time by a collective society should be accompanied by a non-binding statement containing "information about the content of a tariff of first impression and of the nature, purpose and ambit of any proposed material change to an existing tariff".[13] Similarly, those objecting to a tariff "should be required to state in their objection the reasons therefor, either in their notice of objection or as soon as possible thereafter".[14] In addition, the Working Committee made many recommendations in respect of interrogatories, including the convening by the Board of "a preparatory meeting between the parties and the Board after the collective has replied to objections and before interrogatories are exchanged".[15] These recommendations respond, no doubt, to a "concern" about "the sheer number of interrogatories posed" in contemporary Copyright Board proceedings.[16]

The present study takes the resource constraints and legislative objectives of the Copyright Board as givens, focusing like the Working Committee on procedural reforms the Copyright Board might implement to respond to concerns about delays in its tariff-setting process. Accordingly, the goal of the present study is to compare features of the Copyright Board with other Canadian regulatory bodies (judicial and administrative) to gain contextualized insight on the Copyright Board's processes and identify best practices that could potentially be implemented to improve the functioning of the Board. Given that the Working Committee's work is ongoing, the present study takes an approach that is more general in nature, focusing on the general principles of administrative law and efficient administrative decision-making, with a view to providing an overall framework that will assist the Working Committee, the Board and other relevant actors in identifying and implementing helpful reforms.

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[13] *Discussion Paper on Two Procedural Issues*, p. 7.
[14] *Discussion Paper on Two Procedural Issues*, p. 9.
[15] *Discussion Paper on Two Procedural Issues*, p. 16.
[16] Gilles M. Daigle and J. Aidan O'Neill, "The Evidentiary Procedures of the Copyright Board of Canada" in Ysolde Gendreau ed., *The Copyright Board of Canada: Bridging Law and Economics for Twenty Years* (Carswell, 2009), at p. 43.

II. Functions and Functioning of the Copyright Board

Role

The Copyright Board is established by section 66(1) of the *Copyright Act*. It is "an independent administrative tribunal [that] consists of not more than five members, appointed by the government for a set term of up to five years [supported by] a small permanent staff that includes a Secretary General, a General Counsel and a Director of Research and Analysis".[17] In its own words:

> The Board is an economic regulatory body empowered to establish, either mandatorily or at the request of an interested party, the royalties to be paid for the use of copyrighted works, when the administration of such copyright is entrusted to a collective-administration society.[18]

The Board oversees several copyright regimes, the formation of which stems "in part from historical evolution" yet also reflects "policy choices".[19] The administrative structure is marked out in particular by the key players in Canadian copyright: collective societies,[20] which propose tariffs for the use of copyrighted material, and users, who must pay the tariffs. Collective societies and users are generally the highest-profile actors in Copyright Board tariff setting. Indeed, the Copyright Board's function is to "regulate the balance of market power between copyright owners and users".[21]

In general:

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[17] Mario Bouchard, "Collective Management in Commonwealth Jurisdictions: Comparing Canada with Australia" in Daniel Gervais ed., *Collective Management of Copyright and Related Rights*, 2nd ed. (Wolters Kluwer, 2010), at pp. 324-325.

[18] Copyright Board of Canada, "Our Mandate", (July, 2001), available online: http://www.cb-cda.gc.ca/about-apropos/mandate-mandat-e.html

[19] Daniel J. Gervais, "A uniquely Canadian institution: the Copyright Board of Canada" in Ysolde Gendreau ed., *An Emerging Intellectual Property Paradigm* (Edward Elgar, 2008), at pp. 199-200.

[20] Defined as "a society, association or corporation that carries on the business of collective administration of copyright or of the remuneration right conferred by section 19 or 81 for the benefit of those who, by assignment, grant of licence, appointment of it as their agent or otherwise, authorize it to act on their behalf in relation to that collective administration, and

> (a) operates a licensing scheme, applicable in relation to a repertoire of works, performer's performances, sound recordings or communication signals of more than one author, performer, sound recording maker or broadcaster, pursuant to which the society, association or corporation sets out classes of uses that it agrees to authorize under this Act, and the royalties and terms and conditions on which it agrees to authorize those classes of uses, or
>
> (b) carries on the business of collecting and distributing royalties or levies payable pursuant to this Act".

Copyright Act, s. 2.

[21] *Canadian Association of Broadcasters v. SOCAN* (1994), 58 CPR (3d) 190, at p. 196. See generally Daniel J. Gervais, "A uniquely Canadian institution: the Copyright Board of Canada" in Ysolde Gendreau ed., *An Emerging Intellectual Property Paradigm* (Edward Elgar, 2008), at p. 197; H. Bernard Mayer, "Procedure before the Board" in Ysolde Gendreau ed., *Copyright: Administrative Institutions* (Éditions Yvon Blais, 2002), at p. 37.

> [T]he Board has no explicit policy-making and legislative powers, but performs its functions on a case-by-case basis. Nonetheless, its function is highly specialized and its subject-matter is of a technical nature. The Board's statutory mandate requires it to set the rates of remuneration payable to the collective societies that represent various copyright holders, and to determine what terms and conditions, if any, should be attached to the royalties. In exercising this broad rate-setting discretion, the Board must balance the competing interests of copyright holders, service providers and the public.[22]

Procedures

It is difficult to generalize about the procedures employed to discharge this function. The Copyright Board "prefers to formulate specific rules of procedure appropriate to a particular hearing, which are usually formulated after consultation with the parties".[23] For instance, it has "made full use of its ability to control its own proceedings to allow interventions from persons or groups who are not directly interested but who are likely to provide a useful point of view".[24] The Board has a Model Directive on Procedure,[25] itself drawn in very broad terms[26] and providing, moreover, that "[t]he Board may dispense with or vary any of the provisions of this directive".

The Copyright Board has a significant degree of discretion in approving tariffs. For instance, the *Copyright Act* provides in respect of one regime that "the Board… may take into account any factor that it considers appropriate";[27] having considered these and the specific statutory considerations it is obliged to take into account,[28] the Board "shall certify the tariffs as approved, with such alterations to the royalties and to the terms and conditions related thereto as the Board considers necessary…"[29] Indeed, "[t]he Board is allowed to develop a tariff structure that is completely different from the one proposed by the collective or the users…"[30]

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[22] *Neighbouring Rights Collective of Canada v. Society of Composers, Authors and Music Publishers of Canada*, [2004] 1 FCR 303 (CA), at para. 42.
[23] H. Bernard Mayer, "Procedure before the Board" in Ysolde Gendreau ed., *Copyright: Administrative Institutions* (Éditions Yvon Blais, 2002), at p. 40.
[24] Daniel J. Gervais, "A uniquely Canadian institution: the Copyright Board of Canada" in Ysolde Gendreau ed., *An Emerging Intellectual Property Paradigm* (Edward Elgar, 2008), at p. 210. However, some "delays are caused by the sheer number of parties who wish to be heard, though this problem has been lessened somewhat by combining hearings on certain tariffs". *Ibid.*, at p. 218.
[25] http://www.cb-cda.gc.ca/about-apropos/directive-e.html.
[26] For instance, as to comments: "Anyone may comment in writing on any aspect of the proceedings"; as to interventions: "The Board may allow anyone to intervene in the proceedings"; and as to pre-hearing conferences: "If required, the Board will hold a pre-hearing conference if it may help to simplify or accelerate the presentation of the evidence and the conduct of the proceedings". On other issues, there is greater detail, as discussed further in Section IV.
[27] *Copyright Act*, s. 68(2)(b).
[28] *Copyright Act*, s. 68(2)(a).
[29] *Copyright Act*, s. 68(3). See similarly *ibid.* ss. 70.15, 73(1)(a), 83(8)(a).
[30] Mario Bouchard, "Collective Management in Commonwealth Jurisdictions: Comparing Canada with Australia" in Daniel Gervais ed., *Collective Management of Copyright and Related Rights*, 2nd ed. (Wolters

To some extent, proceedings are controlled by the provisions of the *Copyright Act*. Collective societies file proposed tariffs on or before March 31, in order that the tariff can come into effect the following year.[31] Once a tariff has been approved, it comes into effect at the beginning of the year following the year in which the tariff was proposed – the current delays in the tariff-setting process mean that tariffs that are not approved between March 31 and December 31 of the year in which they are proposed will have retroactive effect.[32]

It has been said that "[a] typical hearing schedule will include the following steps":

- the interrogatory process;
- the filing of the statement of cases (i.e. summary of evidence and arguments) by the collective societies);
- the filing of the statement of cases by the objectors to the proposed tariff;
- the hearing.[33]

Schedules are not necessarily skeletal and may go into significant detail about the process to be followed.[34] Having adopted a schedule that has been approved by the Board,[35] parties exchange interrogatories at an agreed date. These are not sent to the Board but rather are exchanged between the parties. Written objections may then be exchanged, again between the parties, who may in addition wish to reply to particular objections. Once the objections and replies have been exchanged, the parties attempt to negotiate a way forward. Only at this point does the Board become involved to resolve, on a formal basis, any outstanding disagreements. Once this step has been completed, responses to interrogatories are exchanged. Again, the Board becomes involved only if a party requests a formal ruling on a response it considers unsatisfactory. With information received from interrogatories to hand, the parties file their respective statements of case, at which point the Board can proceed to a full hearing.

Kluwer, 2010), at p. 330. See *e.g. Canadian Private Copying Collective v. Canadian Storage Media Alliance*, 2004 FCA 424, at para. 179.

[31] See, for the various regimes, *Copyright Act*, ss. 67.1 (performing rights and communication rights), 70.13 (general/residual), 71 (statutory licences for particular uses) and 83 (private copying).

[32] *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, [2015] 3 SCR 615, at para. 109.

[33] Gilles M. Daigle and J. Aidan O'Neill, "The Evidentiary Procedures of the Copyright Board of Canada" in Ysolde Gendreau ed., *The Copyright Board of Canada: Bridging Law and Economics for Twenty Years* (Carswell, 2009), at p. 41.

[34] For a recent example, see *SODRAC c. SRC* (March 10, 2016) setting out 15 discrete steps in the process, each of which is accompanied by a set date.

[35] This paragraph draws heavily on Gilles M. Daigle and J. Aidan O'Neill, "The Evidentiary Procedures of the Copyright Board of Canada" in Ysolde Gendreau ed., *The Copyright Board of Canada: Bridging Law and Economics for Twenty Years* (Carswell, 2009), at pp. 45-50.

The Board has, through a long series of decisions, "adopted a more nuanced approach to the amount of information which must be provided to the other side during the interrogatory process":[36]

> Participants are reminded of recent statements of the Board relating to what constitutes an acceptable burden of discovery. Counsel representing the participants in these proceedings have often appeared before the Board. They are asked to help their clients show restraint in the amount of information that they will seek from other participants in these proceedings.[37]

Several considerations factor into the Board's formal rulings during the interrogatory process, for instance: "[t]he amount of information requested"; "[t]he generation of new documents" (which should be kept to a minimum); and whether information "is protected by litigation privilege".[38] In addition, the Copyright Board is sometimes at one remove from those who hold relevant materials, "[b]ecause the interrogatories asked by the various collectives are invariably addressed to the association's underlying members, the association has the thankless task of encouraging compliance by its members with the Board's interrogatory process".[39]

Powers

It is important to note that the Copyright Board has "with respect to the attendance, swearing and examination of witnesses, the production and inspection of documents, the enforcement of its decisions and other matters necessary or proper for the due exercise of its jurisdiction, all such powers, rights and privileges as are vested in a superior court of record".[40] Yet it has generally refrained from using the full extent of these powers, preferring to rely on reminding participants that it *could* invoke its powers to ensure compliance. In one difficult case involving a tariff for works used by commercial radio stations, the Board explained its position as follows:

> …many of the targeted stations engaged in what was from all appearances systematic obstruction coupled with inappropriate consultations amongst

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[36] Gilles M. Daigle and J. Aidan O'Neill, "The Evidentiary Procedures of the Copyright Board of Canada" in Ysolde Gendreau ed., *The Copyright Board of Canada: Bridging Law and Economics for Twenty Years* (Carswell, 2009), at p. 43.
[37] *SOCAN Tariff 25* (2005-2007) (July 21, 2006).
[38] Gilles M. Daigle and J. Aidan O'Neill, "The Evidentiary Procedures of the Copyright Board of Canada" in Ysolde Gendreau ed., *The Copyright Board of Canada: Bridging Law and Economics for Twenty Years* (Carswell, 2009), at pp. 46-47.
[39] Gilles M. Daigle and J. Aidan O'Neill, "The Evidentiary Procedures of the Copyright Board of Canada" in Ysolde Gendreau ed., *The Copyright Board of Canada: Bridging Law and Economics for Twenty Years* (Carswell, 2009), at p. 47.
[40] *Copyright Act*, s. 66.7(1). Furthermore, "Any decision of the Board may, for the purposes of its enforcement, be made an order of the Federal Court or of any superior court and is enforceable in the same manner as an order thereof". *Ibid.*, s. 66.7(2). However, "the Board has never issued any subpoenas as it can, as a practical matter, usually rely on the parties to furnish any evidence which it needs. H. Bernard Mayer, "Procedure before the Board" in Ysolde Gendreau ed., *Copyright: Administrative Institutions* (Éditions Yvon Blais, 2002), at p. 38.

> themselves in preparing answers. Despite the many orders that were issued, some of the respondents still refused to the end to answer the questions addressed to them. The Board has means of compelling reluctant respondents to comply with its requests. It chose not to use those means in this case. It would be unwise to assume that the Board will display as much patience in the future.[41]

However, "contrary to most Commonwealth copyright tribunals, the Board does not have the power to award costs",[42] although it has been remarked that "…it is also clear that the inability of the Board to award costs has sometimes resulted in it having to deal with matters that could have been addressed more expeditiously".[43]

Contemporary Challenges

Questions about the management of the tariff-setting process must be addressed against the backdrop of the important contemporary challenges faced by the Copyright Board. Though the Board's work of approving tariffs is primarily of "technical complexity",[44] its decisions also have "polycentric policy aspects"[45] that "can have enormous consequences for widespread industry practices and major copyright law and policy problems".[46] The Copyright Board itself has noted that it may consider "public policy" in discharging its mandate, not simply technical matters;[47] its role "greatly exceeds finding the right 'number' for a given tariff…"[48]

Modern copyright law features a high degree of fragmentation. Users may need permissions from several different rights-holders in respect of several different rights in respect of the same copyrighted material. In particular, the rise of the Internet has increased the complexity of copyright law: "Right fragments such as 'reproduction' or 'public performance' are complex and increasingly a source of frustration for users

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[41] *CMRRA/SODRAC, Reproduction of Musical Works by Commercial Radio Stations* (March 28, 2003).
[42] Daniel J. Gervais, "A uniquely Canadian institution: the Copyright Board of Canada" in Ysolde Gendreau ed., *An Emerging Intellectual Property Paradigm* (Edward Elgar, 2008), at p. 212.
[43] Mario Bouchard, "Collective Management in Commonwealth Jurisdictions: Comparing Canada with Australia" in Daniel Gervais ed., *Collective Management of Copyright and Related Rights*, 2nd ed. (Wolters Kluwer, 2010), at p. 335.
[44] See *e.g.* Stan Liebowitz, "Mission Impossible: Determining the Value of Copyright" in Ysolde Gendreau ed., *Copyright: Administrative Institutions* (Éditions Yvon Blais, 2002), at p. 406: "Instead of just looking at the results from well functioning markets, the copyright Board must resort to using economic logic tempered with empirical facts in order to make a considered and reasonable determination of the tariffs over which it has authority. There isn't any easy answer to be had, although some might be proffered. Determining which facts are most important, and what forms of logic should guide it is probably the Board's most important and difficult task".
[45] *Neighbouring Rights Collective of Canada v. Society of Composers, Authors and Music Publishers of Canada*, [2004] 1 FCR 303 (CA), at para. 44.
[46] Jeremy de Beer, "Twenty Years of Legal History (Making) at the Copyright Board of Canada" in Ysolde Gendreau ed., *The Copyright Board of Canada: Bridging Law and Economics for Twenty Years* (Carswell, 2009), at pp. 10-11.
[47] *Re Statement of Royalties to be Collected for Performance in Canada of Dramatico-musical or Musical Works in 1990, 1991, 1992 and 1993* (1993), 52 CPR (3d) 23, at p. 39.
[48] Daniel J. Gervais, "A uniquely Canadian institution: the Copyright Board of Canada" in Ysolde Gendreau ed., *An Emerging Intellectual Property Paradigm* (Edward Elgar, 2008), at p. 216.

because they no longer map out discrete uses, especially on the Internet".[49] Indeed, "even when reasonably efficient systems are available, rights clearance may prove a difficult task".[50] This is an important factor to bear in mind when assessing the efficiency of the Copyright Board's procedures. Added to this is the significant role the Copyright Board must play in tracing the legal contours of copyright protection:[51] in order to perform its tariff-setting function, the Copyright Board must determine whether a particular action triggers its jurisdiction in the first place, a time-consuming task that typically ends before the courts many years later.[52]

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[49] See *e.g.* Daniel Gervais, "Collective Management of Copyright: Theory and Practice in the Digital Age" in Daniel Gervais ed., *Collective Management of Copyright and Related Rights*, 2nd ed. (Wolters Kluwer, 2010), at p. 10.

[50] Daniel Gervais, "Collective Management of Copyright: Theory and Practice in the Digital Age" in Daniel Gervais ed., *Collective Management of Copyright and Related Rights*, 2nd ed. (Wolters Kluwer, 2010), at p. 11.

[51] See generally Jeremy de Beer, "Twenty Years of Legal History (Making) at the Copyright Board of Canada" in Ysolde Gendreau ed., *The Copyright Board of Canada: Bridging Law and Economics for Twenty Years* (Carswell, 2009).

[52] The title of a recent edited collection neatly captures the interplay between the Copyright Board and – once legal proceedings have been initiated – the courts: Michael Geist ed., *The Copyright Pentalogy: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law* (University of Ottawa Press, 2013).

III. General Principles of Administrative Law

Judicial Oversight

Decisions of the Copyright Board that affect individuals' "rights, privileges or interests"[53] are subject to judicial review. Ordinarily, judicial review remedies are available from the provincial superior courts, but the Copyright Board is a "federal board, commission or other tribunal" subject to the jurisdiction of the Federal Court of Appeal.[54] In this section, I explain the practical implications of this superintending jurisdiction for any proposed reforms to the Copyright Board's procedures.

Judicial review is concerned with the legality, reasonableness and procedural fairness of administrative decision-making.[55] The principles of legality and reasonableness apply to the substantive matters addressed by the Copyright Board, such as the scope of copyright protection[56] and the calculation of tariffs,[57] whereas the principle of procedural fairness applies to its decision-making processes.[58] On substantive matters, Canadian judges generally defer to expert agencies. In the case of the Copyright Board Canadian courts have in recent years exercised close control over strictly legal questions addressed by the Copyright Board[59] whilst according it a greater margin of appreciation on matters of mixed fact and law, policy and discretion.[60] On procedural matters, on which I will focus, the state of the law is similarly nuanced.[61]

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[53] *Cardinal v. Director of Kent Institution*, [1985] 2 SCR 643, at para. 14.
[54] *Federal Courts Act*, RSC 1985, c F-7, ss. 1, 18, 28(1)(j).
[55] *Canada (Attorney General) v. TeleZone Inc.*, [2010] 3 SCR 585, at para. 24.
[56] See *e.g. Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, [2012] 2 SCR 283
[57] See *e.g. Canadian Association of Broadcasters v. Society of Composers, Authors and Music Publishers of Canada* (1994), 58 CPR (3d) 190 (FCA), at p. 197: "the Board is in a better position than this court to strike a proper balance between the interests of copyright owners and users and this court will not interfere unless the result reached is patently unreasonable"; *AVS Technologies Inc. v. Canadian Mechanical Reproduction Rights Agency* (2001), 7 CPR (4th) 68 (FCA), at p. 71: "The Board…should know the industry it is regulating better than the Court".
[58] See *e.g. Re:Sound v. Fitness Industry Council of Canada*, 2014 FCA 48.
[59] See *e.g. Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, [2004] 2 SCR 427*; Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, [2012] 2 SCR 283.
[60] See *e.g. Society of Composers, Authors and Music Publishers of Canada v. Canadian Association of Broadcasters* (1999), 1 CPR (4th) 80 (FCA); *Shaw Cablesystems G.P. v. Society of Composers, Authors and Music Publishers of Canada* (2010), 86 CPR (4th) 239 (FCA); *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*, [2012] 2 SCR 345 (reasonableness standard applied, but decision held to be unreasonable).
[61] See generally, Paul Daly, "Canada's Bi-Polar Administrative Law: Time for Fusion" (2014), 40(1) *Queen's Law Journal* 213. It is fair to say that contemporary Canadian administrative law is characterized by a high degree of uncertainty. See *e.g.* David Stratas, "The Canadian Law of Judicial Review: A Plea for Doctrinal Coherence and Consistency" (February 2016): http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2733751 It is often unpredictable how administrative decisions will be assessed on judicial review. It may even depend on the composition of the panel of judges that hears the case. This is an unfortunate situation, which, all things being otherwise equal, acts as a disincentive to administrative innovation, because it is very difficult to determine in advance how the courts will react to novel decisions on matters of procedure or substance.

Fairness and Deference

There exists in Canadian administrative law a "a general right to procedural fairness, autonomous of the operation of any statute…"[62] What will be required by way of procedure in any given case depends on the interplay of several contextual factors set out by the Supreme Court of Canada.[63] In general, however, as long as an interested party has not been deprived altogether of a procedural right – such as notice or making submissions – courts will be slow to intervene to correct a decision-maker's choice as to the appropriate process to follow.

Administrative decision-makers such as the Copyright Board do not need to employ trial-type procedures in the exercise of their functions.[64] As has been said, the principles of fairness in administrative law are not "engraved on tablets of stone":[65] "Although the duty of fairness applies to all administrative bodies, the extent of that duty will depend upon the nature and the function of the particular tribunal".[66] Fairness is "eminently variable and its content is to be decided in the specific context of each case"[67] and, in the context of economic regulatory bodies such as the Copyright Board, does not require them to copy the processes used by the courts: "Court procedures are not necessarily the gold standard…" for administrative decision-makers.[68]

Canadian courts long have adopted a deferential posture in respect of administrators' procedural policy choices. While the courts retain the final word on whether administrative procedures comply with the duty of fairness, they must "take into account and respect the choices of procedure made by the agency itself":[69] "The determination of the scope and content of a duty to act fairly is circumstance-specific, and may well depend on factors within the expertise and knowledge of the tribunal, including the nature of the statutory scheme and the expectations and practices of the [relevant] constituencies".[70] Indeed, "a degree of deference to an administrator's procedural choice may be particularly important when the procedural model of the agency under review

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[62] *Knight v. Indian Head School Division No. 19*, [1990] 1 SCR 653.

[63] *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817. These were summarized as follows in *Canada (Attorney General) v. Mavi*, [2011] 2 SCR 504, at para. 42:

> Some of the elements to be considered were set out in a non-exhaustive list in *Baker* to include (i) "the nature of the decision being made and the process followed in making it" (para. 23); (ii) "the nature of the statutory scheme and the 'terms of the statute pursuant to which the body operates'" (para. 24); (iii) "the importance of the decision to the individual or individuals affected" (para. 25); (iv) "the legitimate expectations of the person challenging the decision" (para. 26); and (v) "the choices of procedure made by the agency itself, particularly when the statute leaves to the decision-maker the ability to choose its own procedures, or when the agency has an expertise in determining what procedures are appropriate in the circumstances" (para. 27).

[64] *Université du Québec à Trois-Rivières v. Larocque*, [1993] 1 SCR 471.

[65] *Lloyd v McMahon*, [1987] 1 AC 625, at p. 702 (Lord Bridge of Harwich).

[66] *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 SCR 623, at p. 636.

[67] *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, at para. 21.

[68] *Kelly v. Nova Scotia Police Commission*, 2006 NSCA 27, at para. 21.

[69] *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, at para. 27.

[70] *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, [2007] 1 SCR 650, at para. 231.

differs significantly from the judicial model with which courts are most familiar".[71] For instance, in respect of procedural choices made during proceedings – for instance, whether to merge several tariff proposals – deference will be due.[72] A recent decision of the Federal Court of Appeal with respect to the National Energy Board is instructive, as that body was accorded "a significant margin of appreciation" in respect of its own process, because it "is master of its own procedure" with "considerable experience and expertise in conducting its own hearings and determining who should not participate, who should participate, and how and to what extent…[and] in ensuring that its hearings deal with the issues mandated by [law] in a timely and efficient way".[73]

So-called "soft law" permits administrative decision-makers to regulate by means of "nonlegislative instruments such as policy guidelines, technical manuals, rules, codes, operational memoranda, training materials, interpretive bulletins, or, more informally, through oral directive or simply as a matter of ingrained administrative culture".[74] Administrative decision-makers may adopt soft law instruments even in the absence of a statutory provision expressly permitting them to do so.[75] Such instruments "can assist members of the public to predict how an agency is likely to exercise its statutory discretion and to arrange their affairs accordingly, and enable an agency to deal with a problem comprehensively and proactively, rather than incrementally and reactively on a case-by-case basis".[76] Care must be taken in drafting such instruments, however, as they may not be used to fetter a discretionary power[77] and may, in some circumstances, create enforceable legitimate expectations that have the practical effect of binding the decision-maker.[78]

Overall, "the Board has the general authority, consistent with its statutory role, to provide for its own procedures".[79] Accordingly, modifications to the Copyright Board's procedures are likely to be treated deferentially on judicial review. Recent jurisprudence, especially from the Federal Court of Appeal,[80] indicates that the Copyright Board will

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[71] *Re:Sound v. Fitness Industry Council of Canada and Goodlife Fitness Centres Inc.*, 2014 FCA 48, at para. 42.
[72] *Neighbouring Rights Collective of Canada v. Society of Composers, Authors and Music Publishers of Canada*, [2004] 1 FCR 303 (CA), at paras. 64-68.
[73] *Forest Ethics Advocacy Association v. Canada (National Energy Board)*, 2014 FCA 245, at para. 72.
[74] Lorne Sossin, "Discretion Unbound: Reconciling the Charter and Soft Law" (2002), 45 *Canadian Public Administration* 465, at pp. 466-467.
[75] *Ainsley Financial Corp. v. Ontario Securities Commission* (1994), 21 OR (3d) 104 (C.A.), at pp 108-109.
[76] *Thamotharem v. Canada (Minister of Citizenship and Immigration)*, [2008] 1 FCR 385, at para. 55.
[77] *Maple Lodge Farms v. Government of Canada*, [1982] 2 SCR 2.
[78] See *e.g. Canada (Attorney General) v. Mavi*, [2011] 2 SCR 504.
[79] *SOCAN v. Canada* (1993), 47 CPR (3d) 297 (FCTD), at p. 316.
[80] *Re:Sound v. Fitness Industry Council of Canada and Goodlife Fitness Centres Inc.*, 2014 FCA 48; *Maritime Broadcasting System Limited v. Canadian Media Guild*, 2014 FCA 59; *Forest Ethics Advocacy Association v. Canada (National Energy Board)*, 2014 FCA 245. *Cf. Netflix, Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2015 FCA 289, where an intrusive standard of review was surprisingly applied to a decision of the Copyright Board that had both procedural and substantive aspects. Based on *Forest Ethics*, a deferential approach would have been more appropriate, but the judges in *Netflix* were able to rely on a different line of authority to support their non-deferential approach. This is a concrete example of the uncertain state of contemporary Canadian administrative law.

have a significant margin of appreciation in which it can reformulate its procedures to better achieve its policy goals.

There are some pitfalls for the unwary, however, that must be avoided. For instance, courts are unlikely to look kindly on sub-delegation of authority[81] or the accumulation of functions in a single officer (which is liable to raise a perception of bias, in its administrative law sense).[82] As a matter of common law such arrangements are likely to be viewed as unlawful. However, where they are authorized by positive law, the courts will not interfere.[83] Finally, a power to award costs would have to be provided for expressly in the *Copyright Act*,[84] consistent with the general proposition that "no pecuniary burden can be imposed upon the subjects of this country, by whatever name it may be called, whether tax, due, rate or toll, except upon clear and distinct legal authority".[85]

Reforming Judicial Review?

More generally, while it might be theoretically possible to oust judicial review of the Copyright Board altogether,[86] thereby eliminating any delays caused by judicial proceedings, it is highly unlikely that any such effort would be successful. The Supreme Court of Canada has recognized that judicial review of administrative action is constitutionally guaranteed as a matter of interpretation of s. 96 of the *Constitution Act, 1867*.[87] Accordingly, the courts would either circumvent (by permitting the superior courts to assume jurisdiction[88]) or disregard (by holding to be unconstitutional[89]) any such attempt to insulate the Copyright Board from judicial oversight.

Even a legislative attempt to ensure a higher level of deference to decisions of the Copyright Board on matters of law is unlikely to have an appreciable impact on the length of time it takes to complete the tariff-setting process. This sort of attempt would specify a deferential standard of review by inserting a clause in the *Copyright Act* to the effect that "the standard of review of decisions of the Copyright Board is

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[81] *Vine v. National Dock Labour Board*, [1957] AC 488.
[82] *MacBain v. Lederman*, [1985] 1 FC 856.
[83] *Brosseau v. Alberta Securities Commission*, [1989] 1 SCR 301.
[84] See generally, *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, [2011] 3 SCR 471.
[85] *Gosling v. Veley* (1850), 12 QB 328, 116 ER 891, at p. 407, cited in *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, 2015 SCC 57, at para. 107.
[86] By analogy to *Pringle v. Fraser*, [1972] SCR 821 (lawful for Parliament to give the Immigration and Refugee Board exclusive jurisdiction over deportation orders).
[87] 30 & 31 Vict, c 3. See *Dunsmuir v. New Brunswick*, [2008] 1 SCR 190, at para. 31, citing *Crevier v. Attorney General of Quebec*, [1981] 2 SCR 220, at pp. 237-238. Moreover, in *Pringle v. Fraser*, [1972] SCR 821, at p. 825, Laskin J. noted that the constitutionality of ousting superior court jurisdiction had not been challenged; put simply, *Fraser* is not authority for the proposition that judicial review of federally established bodies can be ousted completely.
[88] See *e.g. Mission Institution v. Khela*, [2014] 1 SCR 502; *Chaudhary v. Canada (Public Safety and Emergency Preparedness)*, 2015 ONCA 700.
[89] See *e.g. Crevier v. Attorney General of Quebec*, [1981] 2 SCR 220; *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 SCR 725.

reasonableness".[90] While a change in the standard of review might act as a disincentive against launching proceedings in the Federal Court of Appeal, it bears noting that reasonableness review "is not unduly deferential" and "does not take anything away from reviewing courts' responsibility to enforce the minimum standards required by the rule of law".[91] In particular, the "range" of reasonable outcomes[92] "can be narrow, moderate or wide according to the circumstances",[93] depending on a variety of contextual factors.[94] The practical effect of specifying in legislation that reasonableness is the standard of review of decisions of the Copyright Board would most likely be that appellants would focus their efforts on arguing that the Copyright Board's decisions fell outside a narrow range of reasonable outcomes. Turning the clock back to an era in which the Copyright Board's predecessor "enjoyed a considerable degree of deference" would be very difficult in current conditions.[95]

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[90] See similarly *Administrative Tribunals Act*, SBC 2004, c 45, which in ss. 58 and 59 specifies standards of review, legislative choices that the courts have respected. See *British Columbia (Workers' Compensation Board) v. Figliola*, [2011] 3 SCR 422; *McCormick v. Fasken Martineau DuMoulin LLP*, [2014] 2 SCR 108. I doubt that resort to legislation would decrease the level of uncertainty in contemporary Canadian administrative law, because the uncertainty has been caused by the same courts that would have interpret any such legislation: see *e.g.* Paul Daly, "The Scope and Meaning of Reasonableness Review" (2015), 52 *Alberta Law Review* 799.

[91] *Maritime Broadcasting System Limited v. Canadian Media Guild*, 2014 FCA 59, at para. 57.

[92] *Catalyst Paper Corp. v. North Cowichan (District)*, [2012] 1 SCR 5, at para. 18.

[93] *Delios v. Canada (Attorney General)*, 2015 FCA 117, at para. 26.

[94] *Canada (Minister of Transport, Infrastructure and Communities) v. Jagjit Singh Farwaha*, 2014 FCA 56, at para. 91:

> In some cases, Parliament has given a decision-maker a broad discretion or a policy mandate – all things being equal, this broadens the range of options the decision-maker legitimately has. In other cases, Parliament may have constrained the decision-maker's discretion by specifying a recipe of factors to be considered – all things being equal, this narrows the range of options the decision-maker legitimately has. In still other cases, the nature of the matter and the importance of the matter for affected individuals may more centrally implicate the courts' duty to vindicate the rule of law, narrowing the range of options available to the decision-maker.

[95] Y.A. George Hynna, "Evolution of Judicial Review of Decisions of the Copyright Board" in Ysolde Gendreau ed., *Copyright: Administrative Institutions* (Éditions Yvon Blais, 2002), at p. 59. This assumes that the Copyright Board was paid greater deference by the courts in previous eras, but I am not in a position to judge whether this assumption is warranted.

IV. Comparable Federal Administrative Tribunals

The Spectrum of the Administrative State

One can perceive the various organisms of the modern administrative state as lying along a spectrum:[96]

> The categories of administrative bodies involved range from administrative tribunals whose adjudicative functions are very similar to those of the courts, such as grievance arbitrators in labour law, to bodies that perform multiple tasks and whose adjudicative functions are merely one aspect of broad duties and powers that sometimes include regulation‑making power. The notion of administrative decision‑maker also includes administrative managers such as ministers or officials who perform policy‑making discretionary functions within the apparatus of government.[97]

Federal administrative agencies form a "heterogeneous group" and are therefore difficult to categorize.[98] For instance, in its *Working Paper 25: Independent Administrative Agencies*, the Law Reform Commission distinguished between different types of economic decision-maker: "regulatory agencies" like the Canadian Radio-television and Telecommunications Commission and the National Energy Board, designed to "regulate private firms in a given sector of the economy" (in contradistinction to "regulative agencies" like the Competition Tribunal, asked to "further the interests of the state in regulating commercial or industrial undertakings in general as opposed to regulating a particular economic sector"); "Crown enterprises" charged with "promoting commercial and industrial endeavours"; "labour relations board[s]"; "administrative tribunals" which "adjudicate questions regarding commercial or industrial matters"; and the Tax Review Board, which seems to have been considered *sui generis*.[99] Plainly, however, these are not watertight compartments and many agencies draw their characteristics from several of the Law Reform Commission's ideal types.

Benchmarking the Copyright Board's Procedures

For the purposes of the present study, it is necessary to make a choice based on the overall goal of benchmarking the Copyright Board's procedures against similarly situated

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[96] *Martineau v. Matsqui Disciplinary Board*, [1980] 1 SCR 602, at pp. 628-629. On the general range of administrative decision-makers, the discussion in Gilles Pépin, *Les tribunaux administratifs et la Constitution : Étude des articles 96 à 101 de l'A.A.N.B.* (Les Presses de l'Université de Montréal, Montréal, 1969), at pp. 48-69 remains instructive.

[97] *Imperial Oil Ltd. v. Quebec (Minister of the Environment)*, [2003] 2 SCR 624, at para. 31.

[98] Law Reform Commission of Canada, *Report 26: Independent Administrative Agencies* (Law Reform Commission, 1985), at p. 49. Note, however, that the Commission distinguished between "formal bipolar adjudicative proceedings" and those involving "numerous interveners". *Ibid.*, at p. 69.

[99] (Law Reform Commission, 1980), at pp. 39-40. See also the essays by Patrice Garant, Roderick A. Macdonald and David J. Mullan collected in Ivan Bernier and Andrée Lajoie eds., *Regulations, Crown Corporations and Administrative Tribunals* (University of Toronto Press, 1985).

bodies. Of interest are what might be described as economic regulatory bodies marked by the following characteristics:

- their decisions are made after an evidence-gathering process (though not necessarily one with the trappings of a trial);
- many parties may participate in the decision-making process, with varying levels of enthusiasm, expertise and procedural protections;
- their decisions are based on consideration of expert evidence;
- their decisions take into account economic and social factors to a larger extent than judicial tribunals that are concerned solely with the application of objective legal standards to established facts;[100] and
- their decisions are often "polycentric" in nature, designed to "strike[] a reasonable balance among…competing interests".[101]

At the federal level in Canada, the Competition Tribunal, the National Energy Board, the Canadian Radio-television and Telecommunications Commission and the Patented Medicine Prices Review Board meet these criteria, as bodies that are "more…economic or commercial…than…legal"[102], marked out by their "independence, permanent nature, the legal and other expertise available to [them], [their] participatory procedures and the broad discretion conferred on [them]…"[103]

For instance, of the CRTC it has been said that it has a "broad mandate of implementing…various different policy objectives, both cultural and economic" found in the broadcasting and telecommunications legislation.[104] Of the Competition Tribunal, which adjudicates matters arising under the *Competition Act*, the Supreme Court of Canada has written:

> The aims of the Act are more "economic" than they are strictly "legal". The "efficiency and adaptability of the Canadian economy" and the relationships among Canadian companies and their foreign competitors are matters that business women and men and economists are better able to understand than is a

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[100] These are bodies that "are closer to the judicial end of the spectrum: their primary purpose is to adjudicate disputes through some form of hearing" (*Bell Canada v. Canadian Telephone Employees Association*, [2003] 1 SCR 884, at para. 21).
[101] *SOCAN v. CAIP*, [2002] 4 FC 3 (CA), at para. 75.
[102] *Réseaux premier choix v. Canadian Cable Television Association* (1997), 80 CPR (3d) 203 (FCA), at p. 210. That is obviously not to suggest that these bodies never have to address legal issues. Complex points of law will inevitably arise in regulatory regimes; here, the rapid technological change caused by the rise of the Internet has probably resulted in a greater burden on the Copyright Board than on other bodies, in terms of the resolution of legal questions.
[103] *SOCAN v. CAIP*, [2002] 4 FC 3 (CA), at para. 76.
[104] *Telecommunications Workers Union v. Canadian Radio-television and Telecommunications Commission*, [2004] 2 FCR 3 (CA), at para. 28; see also *Bell Canada v. Bell Aliant Regional Communications*, [2009] 2 SCR 764, at para. 38.

> typical judge. Perhaps recognizing this, Parliament created a specialized Competition Tribunal and invested it with responsibility for the administration of the civil part of the Competition Act.[105]

However, the Tribunal "is different from multi-functional administrative agencies, such as securities commissions" because "policy-making, investigative and enforcement functions" are vested in the Competition Bureau, while the Tribunal "performs the adjudicative functions".[106] Nonetheless, its adjudicative role "requires it to project into the future various events in order to ascertain their potential economic and commercial impacts. The role of the Tribunal is thus to identify and remedy market problems that have not yet occurred. This is a daunting exercise steeped in economic theory and requiring a deep understanding of the economic and commercial factors at issue".[107] These functions go well beyond simply resolving disputes *inter partes* by applying rules to facts. Of the National Energy Board, it has been said, "the Board has a large policy-based role and makes polycentric decisions on a variety of different energy issues".[108] Finally, the Patented Medicine Prices Review Board has a "consumer protection purpose",[109] which enables it to modify "technical commercial law definition[s]"[110] so as to better achieve its mandate, which "includes balancing the monopoly power held by the patentee of a medicine, with the interests of purchasers of those medicines".[111]

	Evidence-gathering Process	**Broad Participation**	**Reliance on Expert Evidence**	**Economic and Social Factors**	**Polycentric Decisions**
Competition Tribunal	X	X	X	X	X
CRTC	X	X	X	X	X
PMPRB	X	X	X	X	X
NEB	X	X	X	X	X
Copyright Board	X	X	X	X	X

[105] *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 SCR 748, at para. 48.
[106] Jeremy de Beer, Michael Drake, Warren Hoole, Neil McGraw and Guy Régimbald, *Standards of Review of Federal Administrative Tribunals*, 4th ed. (Lexis Nexis Canada, 2012), at p. 193.
[107] *Tervita Corporation v. Commissioner of Competition*, 2013 FCA 28, at para. 61.
[108] Jeremy de Beer, Michael Drake, Warren Hoole, Neil McGraw and Guy Régimbald, *Standards of Review of Federal Administrative Tribunals*, 4th ed. (Lexis Nexis Canada, 2012), at p. 276.
[109] *Celgene Corp. v. Canada (Attorney General)*, [2011] 1 SCR 3, at para. 28.
[110] *Celgene Corp. v. Canada (Attorney General)*, [2011] 1 SCR 3, at para. 25.
[111] PMPRB-07-D1-Thalomid, January 21, 2008, at para. 5. More specifically, the Patented Medicine Prices Review Board has the power "to influence the pricing of patented medicines to much the same extent that the competition fostered by compulsory licensing used to influence it" before the regulatory model was changed. *ICN Pharmaceuticals, Inc. v. Canada (Staff of the Patented Medicine Prices Review Board)*, [1997] 1 FC 32 (CA), at para. 12.

Competition Tribunal

The Competition Tribunal is established by section 3 of the *Competition Tribunal Act*,[112] which also sets out its jurisdiction[113] and provides that it may, with the approval of the Governor in Council, adopt rules "regulating the practice and procedure of the Tribunal and for carrying out the work of the Tribunal and the management of its internal affairs".[114] The Competition Tribunal has the authority of a superior court of record as to "to the attendance, swearing and examination of witnesses, the production and inspection of documents, the enforcement of its orders and other matters necessary or proper for the due exercise of its jurisdiction"[115] and it also has the power to award costs.[116]

Pursuant to its rule-making authority, the Competition Tribunal has adopted the *Competition Tribunal Rules*.[117] These make detailed provision for discovery of documents,[118] pre-hearing management,[119] interventions,[120] expert evidence,[121] and service and filing of documents.[122] Notably, discovery is limited to "relevant" documents,[123] which must be produced by both parties unless the Tribunal orders otherwise,[124] a schedule is to be finalized approximately a month after affidavits of documents have been filed,[125] and significant details as to the management of the process may be set out in the pre-hearing conference:

> (a) any pending motions or requests for leave to intervene;
>
> (b) the clarification and simplification of the issues;
>
> (c) the possibility of obtaining admissions of particular facts or documents;
>
> (d) the desirability of examination for discovery of particular persons or documents and the desirability of preparing a plan for the completion of such discovery;
>
> (d.1) in the case of applications referred to in subsection 2.1(2) and if warranted by the circumstances, the matters referred to in paragraph (d);

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[112] RSC 1985, c 19 (2nd Supp).
[113] *Competition Tribunal Act.*, s. 8.
[114] *Competition Tribunal Act.*, s. 16(1).
[115] *Competition Tribunal Act.*, s. 8(2).
[116] *Competition Tribunal Act.*, s. 8.1.
[117] SOR/94-290.
[118] *Competition Tribunal Rules*, ss. 13-16.
[119] *Competition Tribunal Rules*, ss. 17-22.
[120] *Competition Tribunal Rules*, ss. 27-37.
[121] *Competition Tribunal Rules*, ss. 47-48.
[122] *Competition Tribunal Rules*, ss. 52-60.
[123] *Competition Tribunal Rules*, s. 13(2)(a).
[124] *Competition Tribunal Rules*, ss. 14, 16.
[125] *Competition Tribunal Rules*, ss. 18-20.

(e) any witnesses to be called at the hearing and the official language in which each witness will testify;

(f) a timetable for the exchange of summaries of the testimony that will be presented at the hearing;

(g) the procedure to be followed at the hearing and its expected duration; and

(h) such other matters as may aid in the disposition of the application.[126]

These rules are, however, subject to the overriding consideration that "[a]ll proceedings before the Tribunal shall be dealt with as informally and expeditiously as the circumstances and considerations of fairness permit".[127]

National Energy Board

The National Energy Board is established by the *National Energy Board Act*.[128] Its general powers are similar to those of the Competition Tribunal, with the rider that "all applications and proceedings before the Board are to be dealt with as expeditiously as the circumstances and considerations of fairness permit…"[129] One interesting difference is that there is express provision for sub-delegation of authority by the National Energy Board to one or more of its members,[130] in which case the power, duty or function in question "is considered to have been exercised or performed by the Board".[131] Pursuant to its statutory authority to do so,[132] the National Energy Board has adopted detailed procedural rules,[133] relating to such matters as service and filing of documents and affidavits,[134] production of documents,[135] the formulation of issues to be considered (including provision for a conference of the parties),[136] interventions,[137] and the conduct of hearings.[138] These are augmented by soft law instruments such as detailed application forms which must be filled out by interested parties.[139] Procedural rules may be dispensed

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[126] *Competition Tribunal Rules*, s. 21(2).
[127] *Competition Tribunal Act*, s. 9(2).
[128] RSC 1985, c N-7, s. 3.
[129] *National Energy Board Act*, s. 11(4).
[130] *National Energy Board Act*, s. 14(1).
[131] *National Energy Board Act*, s. 14(2).
[132] *National Energy Board Act*, s. 8.
[133] *National Energy Board Rules of Practice and Procedure*, 1995, SOR/95-208.
[134] *National Energy Board Rules of Practice and Procedure*, ss. 8-11.
[135] *National Energy Board Rules of Practice and Procedure*, ss. 17, 32-34. The Board may in addition "require a party to provide such further information, particulars or documents as may be necessary to enable the Board to obtain a full and satisfactory understanding of the subject-matter of the proceeding" (*ibid.*, s. 18).
[136] *National Energy Board Rules of Practice and Procedure*, ss. 25-27.
[137] *National Energy Board Rules of Practice and Procedure*, ss. 28, 30-31.
[138] *National Energy Board Rules of Practice and Procedure*, ss. 35-39, 41-42.
[139] *Forest Ethics Advocacy Association v. Canada (National Energy Board)*, 2014 FCA 245, at paras. 70-77.

with "where considerations of public interest and fairness so require".[140] Indeed, in general the rules of the National Energy Board are more skeletal than those adopted by the Competition Tribunal and provide more scope for the National Energy Board to elaborate on them incrementally over time. Information about the National Energy Board's procedures is accessible via its website, parts of which are evidently geared towards non-expert members of the public who may wish to participate in a matter.

Patented Medicine Prices Review Board

The Patented Medicine Prices Review Board draws its authority from the *Patent Act*.[141] It has "with respect to the attendance, swearing and examination of witnesses, the production and inspection of documents, the enforcement of its orders and other matters necessary or proper for the due exercise of its jurisdiction, all such powers, rights and privileges as are vested in a superior court"[142] and, again, may, with the approval of the Governor in Council, make rules "regulating [its] practice and procedure…"[143] It may also issue non-binding guidelines.[144] As with the National Energy Board, all proceedings "shall be dealt with as informally and expeditiously as the circumstances and considerations of fairness permit".[145] Interestingly, the Patented Medicine Prices Review Board has chosen to regulate its procedures by way of soft law,[146] in the form of guidelines that speak to filing requirements, confidentiality and the Board's review processes.[147]

Canadian Radio-television and Telecommunications Commission

Finally, the CRTC is established by the *Canadian Radio-television and Telecommunications Commission Act*;[148] it is responsible for the administration of several pieces of legislation,[149] which also empower it to adopt rules of procedure.[150] These are set out in the *Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure*.[151] The CRTC may "dispense with or vary" the Rules where it

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[140] *National Energy Board Rules of Practice and Procedure*, 1995, SOR/95-208, s. 4(1). See *e.g.* Jody Saunders and Jessica Lim, "The National Energy Board's Participation Framework: Implementing Changes Resulting from the Jobs, Growth and Long-Term Prosperity Act" (2014), 52 *Alberta Law Review* 365, at p. 380.
[141] RSC 1985, c P-4, s. 91.
[142] *Patent Act*, s. 96(1).
[143] *Patent Act*, s. 96(2)(b).
[144] *Patent Act*, ss. 96(4), (5). See generally, *Teva Neuroscience G.P.-S.E.N.C. v. Canada (Attorney General)*, 2009 FC 1155. As seen in Section III, however, it is not necessary to provide expressly for the adoption of such guidelines.
[145]*Patent Act*, s. 97(1).
[146] See also the materials, including an *Interpretation Policy*, available on the Board's website: http://pmprb-cepmb.gc.ca/en/legislation/act-and-regulations
[147] *Compendium of Policies, Guidelines and Procedures* (June, 2015).
[148] RSC 1985, c C-22, s. 3(1).
[149] *Bell Canada Act*, SC 1987, c 19; *Broadcasting Act*, SC 1991, c 11; *Telecommunications Act*, SC 1993, c 38.
[150] *Broadcasting Act*, SC 1991, c 11, s. 21; *Telecommunications Act*, SC 1993, c 38, ss. 57, 67(1)(b).
[151] SOR/2010-277.

"is of the opinion that considerations of public interest or fairness permit"[152] and may in addition "provide for any matter of practice and procedure not provided for in these Rules by analogy to these Rules or by reference to the *Federal Courts Rules* and the rules of other tribunals to which the subject matter of the proceeding most closely relates".[153] Nonetheless, the Rules are comprehensive, providing for filing and service of documents,[154] applications,[155] interventions,[156] disclosure of documents,[157] public hearings,[158] and pre-hearing conferences.[159] The CRTC may also award costs, according to fixed criteria.[160] Interestingly, the evidence at the hearing is circumscribed: "Only evidence submitted in support of statements contained in an application, answer, intervention or reply, or in documents or supporting material filed with the Commission,

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[152] *Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure*, s. 7.
[153] *Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure*, s. 5(2).
[154] *Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure*, ss. 13-20.
[155] *Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure*, s. 22, which must, moreover:

- (a) set out the name, address and email address of the applicant and any designated representative;
- (b) set out the applicant's website address or, if the application is not posted on their website, the email address where an electronic copy of the application may be requested;
- (c) be divided into parts and consecutively numbered paragraphs;
- (d) identify the statutory or regulatory provisions under which the application is made;
- (e) contain a clear and concise statement of the relevant facts, of the grounds of the application and of the nature of the decision sought;
- (f) set out any amendments or additions to these Rules proposed by the applicant; and
- (g) include any other information that might inform the Commission as to the nature, purpose and scope of the application, and be accompanied by any supporting documents.

Ibid., s. 22(2).
[156] *Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure*, s. 26.
[157] *Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure*, ss. 28-29. Here, the documents referred to are those the Commission "considers necessary to enable the Commission to reach a full and satisfactory understanding of the subject matter of the proceeding". *Ibid.*, s. 28(1)(a).
[158] *Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure*, ss. 35-36, 38, 40, 42-43.
[159] *Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure*, s. 37, at which the issues are to be formulated and at which the Commission and the parties may also consider:

- (a) the simplification of the issues;
- (b) the necessity or desirability of amending the application, answer, intervention or reply;
- (c) the making of admissions of certain facts, the proof of certain facts by affidavit or the use by a party of matters of public record;
- (d) the procedure to be followed at the hearing;
- (e) the mutual exchange by the parties of documents and exhibits that the parties intend to submit at the hearing; and
- (f) any other matters that might aid in the simplification of the evidence and disposition of the proceedings.

[160] *Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure*, s. 70.

is admissible at a public hearing".[161] These official documents are supplemented by readily accessible information about the CRTC available on its website and social media.

Summary of Benchmarking Exercise

Some general comments can be made on administrative best practice based on the commonalities in the procedural frameworks surveyed:

- **First**, flexibility is prioritized. Even those procedural rules adopted by regulation (and with the approval of the federal cabinet) may be dispensed with where it would be efficient to do so. This obviates the need to seek approval for *ad hoc* modifications to procedural rules. The CRTC's model, which permits the decision-maker to look to analogous regulatory regimes where necessary, structures this flexibility in a novel way. Moreover, in several regimes, a loose requirement of proportionality has been introduced, with a view to tailoring procedures to the matter at hand.

- **Second**, detailed procedures usually provide for the management of the decision-making process from the very beginning to the very end. They highlight key stages, such as discovery (which generally seems to follow the filing of a document setting out the key issues) and pre-hearing conferences, which may turn into bottlenecks if not properly managed. Setting out detailed procedures, it ought to be noted, does not compromise flexibility: as long as the rules are understood as a baseline, the decision-maker may depart from them in appropriate circumstances, especially where it would be in the interests of efficiency to do so.

- **Third**, where there are limits on the disclosure of documents, these are generally couched in terms of relevance to the subject matter of the proceeding, with some decision-makers providing for a more stringent test of necessity.

The Copyright Board's Model Directive on Procedure[162] describes the entirety of its decision-making process, from the filing and service of documents,[163] to the distribution of a final decision "to all participants".[164] At some points the Directive is cast in very broad terms. For instance, as to comments: "Anyone may comment in writing on any aspect of the proceedings"; as to interventions: "The Board may allow anyone to intervene in the proceedings"; and as to pre-hearing conferences: "If required, the Board will hold a pre-hearing conference if it may help to simplify or accelerate the presentation of the evidence and the conduct of the proceedings". But at other points, the Directive delves into the details. The criteria for interventions are laid out at length,[165] as are the

[161] *Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure*, s. 41.
[162] Available online: http://www.cb-cda.gc.ca/about-apropos/directive-e.html.
[163] Model Directive on Procedure, A1.
[164] Model Directive on Procedure, B10.
[165] Model Directive on Procedure, A3:

instructions for the filing of cases.[166] However, although significant detail is given on the discovery process,[167] there is no obvious sign in the *Copyright Act*, the Model Directive, or any individual official document prepared by the Copyright Board of any limiting principle of relevance.[168] Moreover, the discovery process precedes the filing of a

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- The Board may allow anyone to intervene in the proceedings. The intervention is allowed insofar as the Board finds it useful, given the interest of the person requesting to intervene and the nature of the participation contemplated by that person.
- Anyone who intends to intervene must file with the Board a request to that effect. The request describes the person's interest in the proceedings and the manner in which the person intends to participate; it must specify whether the person only intends to file written comments, or also wishes to file evidence and cross-examine witnesses.
- A request to intervene should be filed as early as possible. The Board normally will deny leave to intervene if granting the request would unduly postpone the proceedings.
- The Board will advise participants of any request to intervene. A participant may object to the request.
- Intervenors have the same rights and obligations as other participants, unless the Board directs otherwise, and must comply with the rules and deadlines as set out in this directive.
- Intervenors and other participants who support the position of a collective must comply with the deadlines that apply to that collective. At the hearing, they will be asked to submit any evidence they may be allowed to put forward immediately after that collective.

[166] Model Directive on Procedure, B5:

- A case is filed with the Board in electronic version and in **10 copies**, and served on all other participants on the date set for that purpose. A case will contain the following documents:
  (i) a statement of case setting out the participant's arguments and how he or she intends to establish it. The statement will be in the form of a written opening statement and will contain a list of witnesses and an estimate of the time required to present their evidence. It will also contain a detailed explanation of any proposed changes to the current tariff;
  (ii) a statement for each non-expert witness. The statement must be detailed enough to allow the Board to follow easily the evidence as it is presented and to determine, in advance of the hearing, any issue that the evidence and arguments might raise;
  (iii) all expert reports; and
  (iv) all other evidence upon which the participant intends to rely.
- Participants file as evidence only those responses to interrogatories to which they know they intend to refer.
- A modified version of the statement of case may be filed in the course of the proceedings.
- To the extent possible, exhibits are submitted in a three-ring binder. Exhibits are separated by consecutively numbered tabs. Each exhibit bears the abbreviation of the name of the participant producing it, as assigned in Appendix I, together with its consecutive number. Exhibit No. 1 is the statement of case.
- Extremely voluminous source documentation used to prepare derived exhibits is filed **in one copy** with the Board and is not served on participants. The Board will arrange for reasonable access to such documentation.
- Participants who fail to file a statement of case are deemed to have withdrawn from the proceedings.

[167] Model Directive on Procedure, B1-B4. These are referred to as interrogatories in the world of the Copyright Board. I use the term "discovery" for the sake of consistency with the other bodies surveyed.

[168] Some can be found in the "long series of decisions" referred to in Section II, but these have not been made available in a readily accessible format.

statement of case; on this point, the Copyright Board is out of line with comparable bodies.[169]

In general, however, viewed from a comparative perspective, the Copyright Board's choice of 'soft law' rather than regulations to regulate its decision-making process is defensible; its preference for procedural flexibility is widely shared, even by those bodies that set out their procedures in binding regulations; and its Directive is as comprehensive in its breadth as the instruments used by comparable agencies. However, the Directive is not as deep in several potentially critical areas – such as disclosure and case management.

It is worth noting that the Copyright Board is the only one of the bodies surveyed subject to time constraints directly imposed in its parent legislation. The provisions of the *Copyright Act* requiring tariffs to be filed on or before the March 31 preceding the proposed effective date do not have equivalents in the regulatory regimes surveyed. Although these provisions doubtless produce some salutary benefits in terms of agenda-setting, they also limit the Copyright Board's ability to set priorities based on its view of how best to achieve its statutory objectives.

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[169] Information asymmetries between the parties about the value of the use of copyrighted works may account for this difference. However, it is worth noting (without necessarily endorsing), the comments of Mark Hayes, Kathleen Simmons and Gabriel van Loon, "The Perils of Collective Administration – Finding a Better Way Forward in the Digital Economy" in Ysolde Gendreau ed., *The Copyright Board of Canada: Bridging Law and Economics for Twenty Years* (Carswell, 2009), at p. 176:

> We believe that requiring some level of up-front justification by collectives for proposed tariff rates and structures would be an important first step. If the collectives and their advisors were required to actually understand the use that they were targeting and develop a plausible justification for the level of royalties being sought, this would tend to significantly decrease the cost and uncertainty endemic in the tariff approval process.

I note also that the Working Committee has recommended that a non-binding statement should be required at the outset, from proponents of and objectors to a tariff. *Discussion Paper on Two Procedural Issues*, at pp. 7-9.

	Competition Tribunal	PMPRB	CRTC	NEB	Copyright Board
Procedural rules adopted	X		X	X	
Informal procedural rules only		X			X
Ability to waive procedural requirements			X	X	X
Powers of compulsion	X	X	X	X	X
Costs	X		X		
Formal limits on discovery	X		X	X	
Provision for sub-delegation				X	
Proportionality Requirement	X		X	X	
Best Practices Manuals		X	X	X	

Coda

I should like to add here a final comment about the primarily paper-based analysis undertaken in this section and throughout the present study. Such an analysis may not necessarily capture important differences between regulatory bodies. In particular, different bodies may be faced by different levels of complexity in different fields of regulation. A comprehensive comparative analysis would benefit from a metric developed to differentiate complexity. Such a metric would also take account of resource constraints. Otherwise, one tribunal might complain that oranges are not being compared with oranges – that the complexity of its work is so much greater than that of its nominal peers that comparisons simply cannot be drawn – and outsiders would not be able to judge whether the complaints were justifiable or not.

Halting steps are being taken towards quantifying complexity in the legal world,[170] but these methods, still in an early stage of their development,[171] would have been difficult to apply fruitfully in the present study. A comparative study of the resources available to the various administrative tribunals surveyed in this section would, in my view, add little of

[170] See *e.g.* Daniel Martin Katz and Michael James Bommarito II, "Measuring the Complexity of the Law: The United States Code" (2014), 22 *Artificial Intelligence and Law* 337.
[171] See generally, Richard A. Posner, *Reflections on Judging* (Harvard University Press, 2013).

substance to the analysis without a metric for considering complexity. Further work could certainly usefully be undertaken to develop metrics for administrative-tribunal-benchmarking exercises that take complexity and resource constraints into account in calculating appropriate time periods for decision-making. This work might also assist in identifying decision-makers that are comparatively under-resourced.

Nonetheless, the conclusions of this section and the present study more generally develop a strong *prima facie* case about administrative best practice. The choice of comparators, explained in detail above, is robust enough to withstand both sustained scrutiny and complaints – if any – about relative complexity and resource constraints. Put simply, the burden is on those whose decision-making processes are subject to important delays to demonstrate cogently why they should not bring their procedures into line with those of their peers.

V. Civil Justice Reform

What emerges from the recent Canadian literature on reform of the judicial process is that providing greater detail about points in the process liable to turn into bottlenecks, allied to close supervision by the responsible decision-maker, has the potential to improve the efficacy of decision-making.

Civil justice reform has been a preoccupation for the Canadian legal community since at least the early 2000s.[172] The general goal has been to design "a civil justice system that assists citizens in obtaining just solutions to legal problems quickly and affordably",[173] with proportionality generally the dominant criterion; "the idea that we should match the extent and scope of pre-trial process, and the trial itself, to the magnitude of the dispute".[174] In Ontario, for instance, the *Rules of Civil Procedure*[175] "received an extensive overhaul in response to concerns about the inadequacies of the litigation system in Ontario, including inefficient procedure, excessive cost, lack of civility among

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[172] See *e.g.* Réjeanne Lalonde, *The Canadian Forum on Civil Justice: Project Evaluation – Final Report* (Department of Justice, 2002), CBA Access to Justice Committee, *Reaching Equal Justice Committee: An Invitation to Envision and Act* (Canadian Bar Association, 2013) and, earlier, Quebec Task Force on Accessibility to Justice, *Steps Toward a Greater Accessibility to Justice* (Department of Justice, 1991). This is not a uniquely Canadian phenomenon. See also Lord Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (July 1996). See generally, Jane Bailey, Jacquelyn Burkell and Graham Reynolds, "Access to Justice for *All*: Towards an 'Expansive Vision' of Justice and Technology" (2013), 31 *Windsor Yearbook of Access to Justice* 181.

[173] B.C. Justice Review Task Force, *Effective and Affordable Civil Justice: Report of the Civil Justice Reform Working Group to the Justice Review Task Force* (November 2006), at v.

[174] Advocates' Society, *Streamlining the Ontario Civil Justice System, a Policy Forum: Final Report* (March 2006), at p. 3. Proportionality requirements now have a prominent place in Canadian civil procedure rules. In Quebec:

> The parties to a proceeding must observe the principle of proportionality and ensure that their actions, their pleadings, including their choice of an oral or a written defence, and the means of proof they use are proportionate, in terms of the cost and time involved, to the nature and complexity of the matter and the purpose of the application.
>
> Judges must likewise observe the principle of proportionality in managing the proceedings they are assigned, regardless of the stage at which they intervene. They must ensure that the measures and acts they order or authorize are in keeping with the same principle, while having regard to the proper administration of justice.

Code of Civil Procedure, CQLR c C-25.01, s. 18. And in Ontario:

> In applying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding.

Rules of Civil Procedure, RRO 1990, Reg 194, s. 1.04(1.1). There is a vast literature on proportionality, which I do not think it helpful to summarize here: suffice it say that the main objective of proportionality in this context is to tailor procedures to the matter at issue, by particular reference to the value of the matter and the complexity of the underlying issues.

[175] RRO 1990, Reg 194.

advocates, long delays and a backlogged, insufficiently resourced judiciary".[176] Some of these reforms have met with great success.[177]

These reforms should be of interest to administrative decision-makers. As explained in Section III, administrative tribunals need not ape judicial procedures: flexibility is prioritized in the administrative context, not as an end in itself, but to permit front-line decision-makers to make judgement calls about the types of procedure that would best facilitate the achievement of their statutory objectives. It is notable in this regard that the point of recent civil justice reform initiatives has been to increase the flexibility of the court process. The Supreme Court of Canada has accepted the need for a "culture shift" which "entails simplifying pre-trial procedures and moving the emphasis away from the conventional trial in favour of proportional procedures tailored to the needs of the particular case".[178] Administrative decision-makers, with their ability to use flexible procedures to better achieve their statutory objectives, can usefully draw on the reform literature.

An overarching theme of civil justice reform has been "litigation culture", as the Consultation Paper prepared by Ontario's *Civil Justice Reform Project* put it: "Numerous studies in Canada and abroad have identified the adversarial nature of litigation as a key factor contributing to cost and delay in the civil justice system…This emphasis on adversarialism results in demands for more disclosure, more experts, more discovery, more interlocutory motions, and longer trials".[179] That "many problems…arise from a culture of litigation that rule amendments would not be able to remedy"[180] makes it necessary to "shift…ingrained cultural beliefs and practices".[181] Of course, "rule changes must be accompanied by strong, consistent and long-term leadership" if they are to succeed in "stimulat[ing] a cultural shift".[182]

The reform literature targets several areas, beginning with the adoption of simplified procedures, which give parties "the ability to bring motions without filing full motion records and affidavits, a relaxed summary judgment test and early disclosure of documents and witness names".[183] However, "the creation of multiple procedural tiers for

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[176] Carole J. Brown and Steven Kennedy, "Changing the Rules of the Game: Rewinding the First Ten Months of the New Rules of Civil Procedure" (2010-2011), 37 *Advocates' Quarterly* 443, at p. 443.
[177] Canadian Bar Association, Quebec Branch, *Report of Working Group on Civil Justice* (1996), at p. 7. For a more sceptical take, see Julie Macfarlane, "The Future of the Civil Justice System: Three Narratives About Change" (2008-2009), 35 *Advocates' Quarterly* 284.
[178] *Hryniak v. Mauldin*, [2014] 1 SCR 87, at para. 2.
[179] Coulter A. Osborne, *Civil Justice Reform Project* (Ministry of the Attorney General, 2007), Appendix B. See similarly, Advocates' Society, *Streamlining the Ontario Civil Justice System, a Policy Forum: Final Report* (March 2006), at pp. 3-4; Discovery Task Force, *Report of the Task Force on the Discovery Process in Ontario* (November 2003), at p. 80.
[180] Coulter A. Osborne, *Civil Justice Reform Project* (Ministry of the Attorney General, 2007), at p. 56.
[181] B.C. Justice Review Task Force, *Effective and Affordable Civil Justice: Report of the Civil Justice Reform Working Group to the Justice Review Task Force* (November 2006), at p. 11.
[182] B.C. Justice Review Task Force, *Effective and Affordable Civil Justice: Report of the Civil Justice Reform Working Group to the Justice Review Task Force* (November 2006), at p. 44.
[183] Coulter A. Osborne, *Civil Justice Reform Project* (Ministry of the Attorney General, 2007), at p. 23.

different kinds of actions increases the complexity of the rules and often fosters confusion"[184] and is unlikely to be of great utility in the administrative context (where the courts prefer for the whole process to have concluded before adjudicating preliminary or interlocutory issues[185]).

More promising for administrative decision-makers are reforms relating to case management, expert evidence, discovery and costs.

Case management

This is "the systematic management process by which a court supervises the progress of its cases from beginning to end",[186] perhaps involving "telephone or in-person case conference[s] or a simplified process for motions to be made in writing with or without affidavits…"[187] It has been noted, however, that "[i]n those cases where counsel can effectively move the case forward, case management adds layers of cost that some convincingly say are unnecessary".[188] Some flexibility should ideally be baked into case management,[189] but an "initial case management conference" designed to set out a road map for progress in the underlying matter would typically include discussion of:

- settlement possibilities and processes
- narrowing of the issues
- directions for discovery and experts
- milestones to be accomplished
- deadlines to be met, and
- setting of the date and length of trial.[190]

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[184] Coulter A. Osborne, *Civil Justice Reform Project* (Ministry of the Attorney General, 2007), at p. 29.
[185] See *e.g. Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, [2012] 1 SCR 364.
[186] Sub-committee on Access to Justice (Trial Courts) of the Administration of Justice Committee, *Access to Justice: Report on Selected Reform Initiatives in Canada* (Canadian Judicial Council, 2008), at p. 15.
[187] Coulter A. Osborne, *Civil Justice Reform Project* (Ministry of the Attorney General, 2007), at p. 88.
[188] Coulter A. Osborne, *Civil Justice Reform Project* (Ministry of the Attorney General, 2007), at p. 87.
[189] Coulter A. Osborne, *Civil Justice Reform Project* (Ministry of the Attorney General, 2007), at p. 89: "The criteria contained in [the Ontario *Rules*], in my view, provide an appropriate and non-exhaustive list of factors that the court should consider when deciding which cases are likely to need and benefit from individualized management".
[190] B.C. Justice Review Task Force, *Effective and Affordable Civil Justice: Report of the Civil Justice Reform Working Group to the Justice Review Task Force* (November 2006), at p. 10. The Task Force also suggested that the judge presiding over this initial "case planning conference" should have "extensive powers", to order the following:

- limits on discovery of all types;
- the delivery of summaries of facts, issues and relief requested;
- limits on the amount of time the parties have for completion of steps standing in the way of resolution, if any, including examinations for discovery, document discovery, delivery of "will say" statements and expert reports, if any;

Discovery

Ontario's Task Force on Discovery outlined the concept of "Discovery management", which has two key features: "discovery planning", where there is a meeting "early in the case to map out the discovery process", and "judicial intervention" where there is no "consensus" between the parties, both of which seek to "promote cooperation, ensure complete, timely, and orderly production of documents, clarify the scope of discovery and reduce the potential for protracted disputes".[191] This concept of discovery management maps onto two trends in discovery reforms: "The most common trend…is the adoption of rules which place time limits on discovery and even prohibit discovery outright for simplified procedure cases".[192] Another trend "involves the statement of a principle encouraging judges to intervene with discovery if it appears to be 'abusive, vexatious or futile'".[193]

As to discovery planning, the creation of a discovery plan, usually pursuant to an initial case conference, can "reduce or eliminate discovery-related problems by encouraging parties to reach an understanding early in the litigation process, on their own or with the assistance of the court if needed, on all aspects of discovery".[194] A general "Practice Direction" can also be adopted:

- directions with respect to experts, if any, including:
  - the number of experts the parties may call
  - whether an expert may be called on certain issues
  - whether the parties must use a single joint expert on a certain issue
  - when expert reports and the facts upon which the expert's opinion is based must be disclosed;
- mediation, a neutral case evaluation or other dispute resolution process;
- delivery of offers to settle;
- limits on the length of trial; and
- any other orders to produce an efficient and proportional resolution of the case.

Ibid., at p. 14. This process is to be conducted on a "without prejudice" basis: *ibid.*, at p. 16.

[191] Discovery Task Force, *Report of the Task Force on the Discovery Process in Ontario* (November 2003), at p. 84. Implementing these concepts would "assist in reducing many of the key problems identified in the Task Force's review, including late delivery of affidavits of documents, incomplete and untimely production, excessive requests for information and documents, difficulties and delays in scheduling discoveries, improper refusals, delays in fulfilling undertakings, and disagreements as to the scope of discovery". *Id*.

[192] Sub-committee on Access to Justice (Trial Courts) of the Administration of Justice Committee, *Access to Justice: Report on Selected Reform Initiatives in Canada* (Canadian Judicial Council, 2008), at p. 12.

[193] Sub-committee on Access to Justice (Trial Courts) of the Administration of Justice Committee, *Access to Justice: Report on Selected Reform Initiatives in Canada* (Canadian Judicial Council, 2008), at p. 13.

[194] Coulter A. Osborne, *Civil Justice Reform Project* (Ministry of the Attorney General, 2007), at p. 64. These would include:

a) The scope of documents to be preserved;
b) The issue of proportionality (i.e., the scope of discoverable documents and the associated costs of searches and production, balanced with the discovery-related needs of the case)
c) Dates for the exchange of sworn affidavits of documents;
d) Number of experts and timing of delivery of expert reports;
e) Time, cost, and manner of production of documents from the parties and any third parties who may have relevant documents; and

> It would state that the court may refuse to grant discovery relief or may make appropriate cost awards on a discovery motion where parties have failed to produce a written discovery plan addressing the most expeditious and cost-effective means to complete the discovery process proportionate to the needs of the case…[195]

More generally, the old "semblance of relevance" test, traceable to a late 19th century English decision known as *Peruvian Guano*,[196] and which subjects a broad range of documents to discovery, has been supplanted by "a stricter test of relevance", with a view to providing "a clear signal to the profession that restraint should be exercised in the discovery process…"[197] Generous discovery rules appropriate to a bygone era are no longer apposite: "'trial by ambush,' the original concern, has been replaced by 'trial by avalanche'".[198] Accordingly, the parties have a general duty to ensure that the discovery process is proportionate,[199] a duty potentially backed up by costs sanctions.[200] This could in part be achieved by the adoption of a best practices manual.[201]

Expert Evidence

The increasing complexity of litigation has made reliance on experts commonplace. With the proliferation of expert reports, however, come challenges for the smooth functioning of judicial decision-making processes:

> A commonly adopted expert evidence reform is the stipulation of time limits for the submission of expert reports. The purpose of such reforms is to give parties sufficient time before trial to examine and respond to expert evidence. Furthermore, to increase efficiency, many jurisdictions have standardized the

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> f) Names of individuals proposed for oral discovery and the expected date and duration of examinations, along with any agreement to examine a party for more than one day.

Id.

[195] Coulter A. Osborne, *Civil Justice Reform Project* (Ministry of the Attorney General, 2007), at p. 64. This might also include "a requirement that, prior to hearing motions related to unanswered undertakings and refusals, a form must be completed by both parties setting out the basis of the refusal and why the information is relevant to the issues in the action", something that already seems to be present in the administrative decision-making processes referred to in Section IV. Sub-committee on Access to Justice (Trial Courts) of the Administration of Justice Committee, *Access to Justice: Report on Selected Reform Initiatives in Canada* (Canadian Judicial Council, 2008), at p. 13.

[196] (1882), 11 QBD 55 (CA).

[197] Coulter A. Osborne, *Civil Justice Reform Project* (Ministry of the Attorney General, 2007), at p. 58.

[198] Coulter A. Osborne, *Civil Justice Reform Project* (Ministry of the Attorney General, 2007), at p. 57. See similarly, Discovery Task Force, *Report of the Task Force on the Discovery Process in Ontario* (November 2003), at p. 92.

[199] Coulter A. Osborne, *Civil Justice Reform Project* (Ministry of the Attorney General, 2007), at p. 63.

[200] It is worth noting, however, that some scepticism has been expressed about the utility of relying on the semantic difference between semblance of relevance and relevance *simpliciter* in scaling back the scope of discovery: Megan Marrie, "From a 'Semblance of Relevance' to 'Relevance': Is It Really a New Scope of Discovery for Ontario?" (2010-2011), 37 *Advocates' Quarterly* 520. A test of materiality might be a more successful means of limiting discovery. *Ibid.*, at p. 538.

[201] Discovery Task Force, *Report of the Task Force on the Discovery Process in Ontario* (November 2003), at pp. 149-153.

format of expert reports. Reports are also increasingly acceptable at trial in lieu of oral testimony...[202]

As for joint expert reports, the "trend has been to not automatically mandate joint experts, but instead, grand the parties or the court discretion to use a joint expert if desired".[203]

Pre-hearing conference

Pre-hearing conferences generally involve the preparation of "a detailed trial brief that includes":

- a summary of the issues
- a list of witnesses and the summary of each witness's evidence
- copies of the expert reports to be relied on at trial, and
- a list of documents to be introduced at trial.[204]

At the conference, a presiding judge ought to be present[205] and "may make orders to enhance the fairness and efficiency of the trial process, including":

- orders limiting time for direct or cross-examination of a witness, opening statements, and final submissions; and
- orders requiring that the direct evidence of certain witnesses be presented by affidavit.[206]

Costs

These provisions for the smooth unfolding of litigation have to be backed by sanctions: "costs rules should be amended to clearly direct courts to consider, in awarding costs at the conclusion of a proceeding, not only what time and expense may be involved in the proceeding but also what time and expense were justified, given the circumstances of the

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[202] Sub-committee on Access to Justice (Trial Courts) of the Administration of Justice Committee, *Access to Justice: Report on Selected Reform Initiatives in Canada* (Canadian Judicial Council, 2008), at p. 8.
[203] Sub-committee on Access to Justice (Trial Courts) of the Administration of Justice Committee, *Access to Justice: Report on Selected Reform Initiatives in Canada* (Canadian Judicial Council, 2008), at p. 9.
[204] B.C. Justice Review Task Force, *Effective and Affordable Civil Justice: Report of the Civil Justice Reform Working Group to the Justice Review Task Force* (November 2006), at p. 37.
[205] Coulter A. Osborne, *Civil Justice Reform Project* (Ministry of the Attorney General, 2007), at p. 94: "Pre-trials should, in my view, be held in all actions set down for trial. I also believe the pre-trial would generally be more effective if the parties attended and if the pre-trial judge spoke to them at some point in the process, as determined by the pre-trial judge with advice of counsel".
[206] B.C. Justice Review Task Force, *Effective and Affordable Civil Justice: Report of the Civil Justice Reform Working Group to the Justice Review Task Force* (November 2006), at p. 37. See also Coulter A. Osborne, *Civil Justice Reform Project* (Ministry of the Attorney General, 2007), at p. 95: "Where settlement is not achieved, I think that pre-trial judges should be more aggressive in setting out timetables for any remaining steps needed to get the action ready for trial. Judges should also make whatever orders are reasonably necessary to identify and narrow the trial issues and promote the most efficient use of trial time".

case".[207] Efficient case management would be much more difficult to achieve if no means existed of punishing non-complaint parties.

Alternative Dispute Resolution

I have not considered the recent move towards Alternative Dispute Resolution in the present study.[208] In my view, caution needs to be exercised with measures such as arbitration, mediation and negotiation, especially where organs of the state are involved. Where public power is being exercised, its exercise ought in principle to be public and open to scrutiny by politicians, lawyers, the media, civil society and members of the community: "open justice is a fundamental aspect of a democratic society".[209] Regulatory power ought to be exercised in a way that is justifiable, intelligible and transparent.[210] It is also worth bearing in mind the comments of the Supreme Court of Canada, regarding the need for more supple judicial procedures, that private dispute resolution procedures are not a panacea, for "without an accessible public forum for the adjudication of disputes, the rule of law is threatened and the development of the common law undermined".[211] Accordingly, there is good reason for significant caution in extending alternative dispute resolution procedures to the administrative setting. It is notable in this regard that the Competition Tribunal's consent orders regime is public[212] and that agreements of the parties may not simply be rubber-stamped by the Tribunal.[213] If administrative tribunals are to take steps to foster alternative dispute resolution, these steps should be taken publicly, subjected to informed debate and carefully scrutinized by members of the legal and wider communities.

Summary

Civil justice reform is of interest to the present study for two reasons:

- **First**, the reforms discussed above represent a relaxation of traditional methods of management of the judicial process; inasmuch as administrative decision-makers prioritize flexibility, they should take note of judicial moves away from tradition and towards more innovative approaches.
- **Second**, the reforms provide templates that administrative decision-makers can build upon, giving further guidance to those charged with managing various stages of a decision-making process.

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[207] Coulter A. Osborne, *Civil Justice Reform Project* (Ministry of the Attorney General, 2007), at p. 134.
[208] See generally Access to Justice Committee, *Reaching Equal Justice Committee: An Invitation to Envision and Act* (Canadian Bar Association, 2013). See also Fabien Gélinas, Clément Camion, Karine Bates, Siena Anstis, Catherine Piché, Mariko Khan & Emily Grant, *Foundations of Civil Justice: Toward a Value-Based Framework for Reform* (Springer, 2015).
[209] *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 SCR 522, at para. 81.
[210] *Dunsmuir v. New Brunswick*, [2008] 1 SCR 190, at para. 47.
[211] *Hryniak v. Mauldin*, [2014] 1 SCR 87, at para. 26.
[212] *Competition Tribunal Rules*, SOR/94-290, ss 76-96.
[213] See generally *Canada (Director of Investigation and Research) v. Palm Dairies Limited* (1986), 12 CPR (3d) 540 (Competition Tribunal).

In terms of setting out a guide to administrative best practice, administrative decision-makers in general (and the Copyright Board in particular) should provide for the following steps in their decision-making processes:

- **Case management**: Administrative decision-makers should make generous provision for comprehensive case management processes, especially an initial conference at which the issues in dispute could be narrowed and agreement sought on how best to move through the discovery process. A person could be assigned to case manage a matter as soon as it has been commenced. Care would have to be taken in the administrative context to avoid the common law prohibitions on sub-delegation of power to and accumulation of functions in one single decision-maker, but as long as case management is expressly provided for in statute or regulation, this sort of internal administrative arrangement is unlikely to be undone by the courts.

- **Discovery**: Administrative decision-makers should restrict the scope of discovery to documents that are necessary to the exercise of their functions,[214] to ensure that discovery takes place after the filing of a document that sets out the issues to be decided and to develop a best practices manual that would guide parties in their requests for disclosure.

- **Expert Evidence**: Administrative decision-makers should provide expressly for written rather than oral reports, for the possibility of joint experts being appointed by the parties and for timelines within which expert reports should be filed.

- **Pre-Hearing Conference**: Administrative decision-makers should hold a pre-hearing conference to attempt to narrow the issues in dispute and develop a timetable for the presentation of evidence and arguments.

- **Costs**: Administrative decision-makers should have the power to award costs against those who abuse their procedures or otherwise unjustifiably slow down the administrative process.[215]

In my view, such reforms could be implemented with existing resources, though these may have to be reallocated.

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[214] As is the case in the CRTC's rules – documents the Commission "considers necessary…to reach a full and satisfactory understanding of the subject matter of the proceeding" (SOR/2010-277, s. 28(1)(a)) – and those of the National Energy Board – "such further information, particulars or documents as may be necessary to enable the Board to obtain a full and satisfactory understanding of the subject-matter of the proceeding" (SOR/95-208, s. 18), though it is worth noting that the Board's rules also provide that information requests can be made, as of right when based on written evidence filed by a party, and with leave in other circumstances (*ibid.*, ss. 32-34).

[215] I am not persuaded by the objection that because there are no 'winners and losers' in the regulatory context, costs awards would be inappropriate. See *e.g. Bell Canada v. CRTC*, [1984] 1 FC 79 (CA), concurring reasons of Urie J. If the administrative process is slowed down unduly, significant losses are imposed on regulated entities and members of the public. Those responsible should, in appropriate circumstances, be asked to pay.

VI. Culture Change

The Importance of Culture

Sections IV and V of the present study are useful in identifying benchmarks, first in terms of the stages in decision-making processes and second in terms of the tools available to decision-makers who wish to speed up their processes. In this section, I put these benchmarks in a broader theoretical context, explaining how they might be deployed and to what ends.

Beyond particular reforms which may be of utility to administrative decision-makers, the civil justice reform literature repeatedly emphasizes the importance of culture which may, beyond the formal processes provided for in regulations or 'soft law' instruments, explain why some decision-making processes are more effective than others. In short, it may be necessary to find ways of changing the culture of participants. This too is an aspect of administrative best practice.

In general, it is doubtful that there is a magic formula for efficient decision-making, at least as far as procedural rules are concerned. If there are relevant differences in how efficiently equivalent federal tribunals discharge their respective mandates, it is unlikely that these differences are to be found in procedural rules alone. Indeed, my review of the literature on civil justice reform leads me to conclude that *culture* is critical. That is, where there are bottlenecks in decision-making processes, these may well be caused by the prevailing attitudes of key actors about what is acceptable and what is not. For instance, lengthy periods may be spent in discovery of documents because the parties to a particular matter have a very broad view of what might legitimately be disclosed in advance of a hearing. The task, then, is to equip the Copyright Board with the tools to effect a culture change and give some guidance on how to use them.[216]

I propose that the Copyright Board, Parliament and the Governor in Council expand the range of procedural tools at the Board's disposal, tools that the Copyright Board can use to craft more effective procedures and shift the prevailing attitudes of the actors that are involved in its decision-making process.[217]

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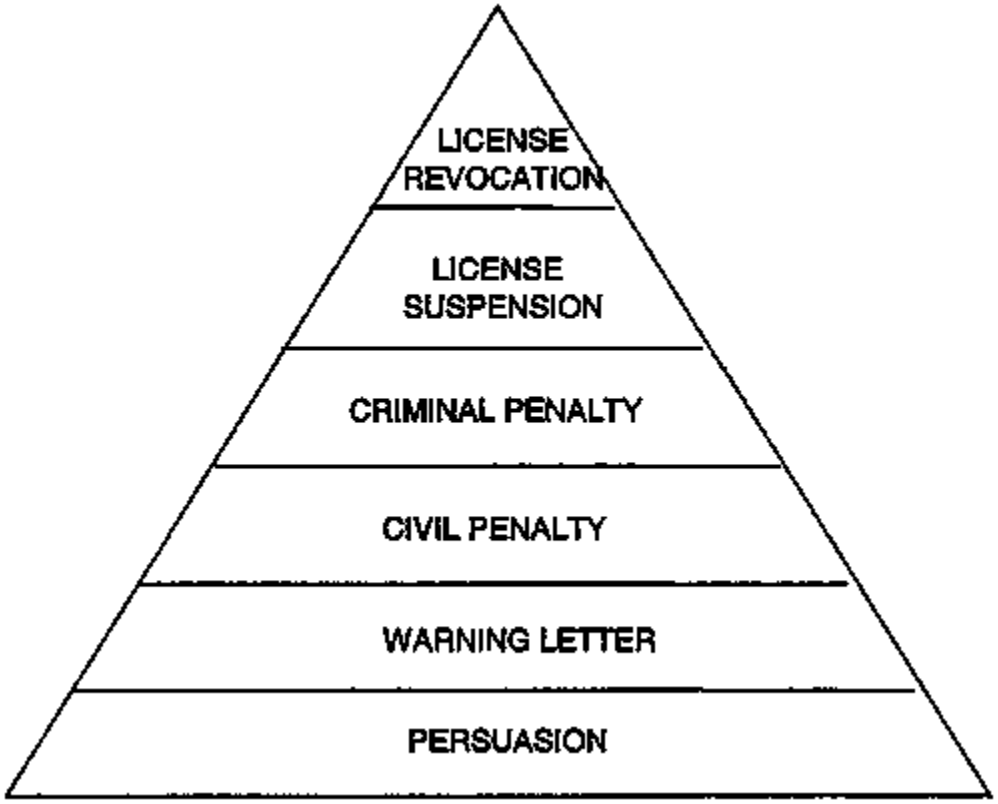
[216] My point here is not that the Copyright Board or any other administrative tribunal is afflicted by problems created by adversarialism to the same extent as judicial processes. Indeed, in a paper-based study like the present, it would be inappropriate to make sweeping claims about the prevailing culture amongst stakeholders in a particular regulatory regime. My point is that the delays before the Copyright Board may well be caused, at the very least in part, by a prevailing culture that tends to drag out decision-making processes, and that the Copyright Board should be given the tools to shift the prevailing culture.

[217] I should be clear at this point that my goal is not to distribute blame. The starting point for the present study was the empirical analysis conducted by Professor de Beer, which highlighted lengthy delays in the Copyright Board's processes. It may be that these delays are unavoidable in an increasingly complex copyright world, which features a Copyright Board with limited resources. It may also be that there is nothing especially wrong with the culture in which the Copyright Board operates. In this regard, the creation of a metric for performance measurement that takes account of complexity and resource constraints, as suggested in the *Coda* to Section IV, would be a welcome development.

Responsiveness

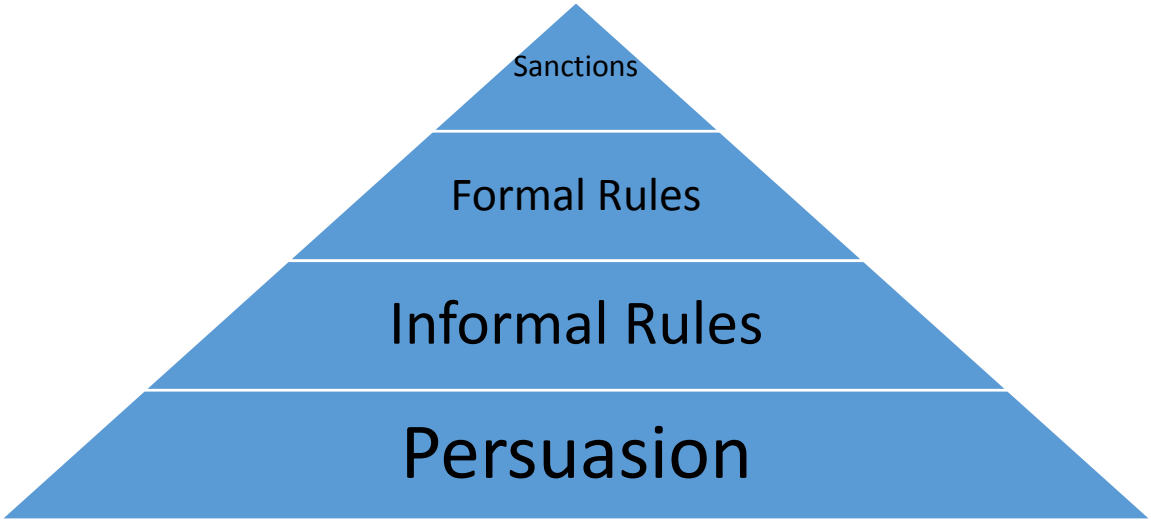
Relevant here is the notion of "responsive regulation",[218] in particular the notion of an "enforcement pyramid":[219]



The point here is that a regulator can try to punish (top of the pyramid) or to persuade (bottom of the pyramid) or use methods in between these extremes to cause actors to change their attitudes and actions. Punishment, however, is a more expensive option, because the procedures required to impose a punishment are generally more onerous and because there is a risk that ready resort to punishment will alienate the actor in question. Persuasion, by contrast, is relatively cheap but, on its own, may not prompt the culture shift sought by the regulator. Accordingly, a responsive approach, with the regulator able to move up and down the enforcement pyramid as circumstances require, is a better means of changing attitudes.

[218] See generally Robert Baldwin and Julia Black, "Really Responsive Regulation" (2008), 71 *Modern Law Review* 59.
[219] Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992), at p. 35.

Adapted to an administrative decision-maker's procedural choices, an enforcement pyramid might look like this:



- At the bottom level, an administrative decision-maker can attempt to improve the efficacy of its procedures by means of persuasion: it could make statements in decisions, for instance, about best practices in the discovery process or what factors individual decision-makers will look to in setting schedules in the context of case management, or it could exhort actors to conduct themselves in a particular way by using its decisions to communicate its expectations;
- Moving up to informal rules, administrative decision-makers can adopt, in the form of 'soft law', general frameworks for their decision-making processes, or best practices manuals; these would usually serve as baselines or starting points onto which details of individual cases could be built; indeed, it would be possible to adopt several frameworks, each of which would be adapted to the different types of decision to be taken;
- Moving further up to formal rules, administrative decision-makers could decide to set certain aspects of their procedures in stone; it would be possible for these to function as baselines or starting points, but the general idea would be that certain procedures have to be rigorously respected, with severe consequences – such as inability to proceed any further in the process – following from a failure to comply, unless procedural steps are waived in the interests of efficiency;
- Finally, sanctions, such as costs awards, can be used to punish those who do not comply with the administrative decision-maker's expectations about culture and conduct.[220]

[220] I should emphasize here that I would not anticipate costs awards being the norm in an administrative setting. The possibility, however, that a decision-maker might issue a costs award is nonetheless a salutary reminder that the decision-maker's expectations as to conduct are backed up by potential sanctions.

	Persuasion	Informal Rules	Formal Rules	Costs
Competition Tribunal	X	X	X	X
PMPRB	X	X		
CRTC	X	X	X	X
NEB	X	X	X	
Copyright Board	X	X		

Based on my comparative analysis, all the decision-makers studied in Section IV are able to use persuasion and informal rules (though some have had greater recourse to them than others), most of them have adopted formal rules setting out their decision-making processes, and some of them have the ability to award costs. This suggests that administrative best practice would be to permit decision-makers to range all the way up and down the pyramid.

The Copyright Board cannot currently do so. It has no authority to award costs against actors that contribute to inefficient decision-making processes. It has not yet adopted formal rules governing its procedures. It can rely only on its informal rules and its general ability of persuasion – which it has exercised in several of the decisions mentioned in Section II – to improve the efficacy of its decision-making. The Copyright Board's current efforts, through its Working Committee, reflect the resources currently available to it: acting to change the culture in which it operates, possibly by formulating recommendations for revisions to its informal rules. In my view, expanding the range of tools to formal rules and costs sanctions would better equip the Copyright Board to reduce the tariff-setting delays documented by Professor de Beer.

VII. Summary and Recommendations

Summary

Parliament often grants significant decision-making authority to administrative bodies because of the flexibility these bodies have relative to courts and legislatures.[221] However, flexibility in administrative decision-making is not an end in itself: it is a device which permits administrative decision-makers to better achieve their statutory objectives in an efficient and effective manner.

All of the bodies surveyed in Section IV have provided for some sort of structured decision-making process, usually ranging from an initial statement of case, through discovery of relevant information,[222] to a final hearing and decision. What emerges is that the procedural flexibility of the bodies studied is bounded, in the sense that a general structure is provided for, along with a power to waive requirements and, sometimes, a duty to tailor the procedures employed to the complexity and stakes of the matter at hand.

The utility of a general structure that emphasizes the importance of managing a matter at various points in a decision-making process is underscored by the discussion of civil justice reform in Section V; in civil procedure, the recent focus has been on providing judges with tools to manage matters efficiently and effectively. The discussion in Section VI emphasizes the importance of equipping decision-makers with a variety of tools that allow them to modify prevailing attitudes. Providing a variety of tools, in a structured yet flexible framework, is an excellent means of capitalizing on the ability of front-line decision-makers to make procedural choices that help them to achieve their objectives in a timely fashion.

Administrative best practice, based on the insights gained from Sections IV, V and VI, requires the adoption of procedural reforms that **first**, set out various milestones in the tariff-setting process (running from an initial statement of case and case management to a pre-hearing conference and hearing) but that also, **second** allow for the Copyright Board to modify those procedures where it would be appropriate and efficient to do so would marry the best of (a) common practice among the Copyright Board's peers and (b) innovations in civil justice reform with (c) the flexibility that characterizes administrative decision-making. Put simply, it would provide a detailed yet flexible structure, within which the Copyright Board could use all available tools, ranging from persuasion to formal sanctions, to reduce delays in tariff setting.

Beyond the recommendations of the present study, it would also be helpful if the legislative and executive branches of the federal government were to commission studies which aimed to develop metrics, sensitive to complexity and resource constraints, to measure the performance of federal administrative tribunals. With such metrics in hand, it

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[221] See generally Paul Daly, *A Theory of Deference in Administrative Law: Basis, Application and Scope* (Cambridge University Press, 2012), at pp. 89-93.

[222] As explained above, the Copyright Board differs in generally requiring a case to be stated after the discovery phase of the tariff-setting process.

would in principle be possible to determine whether providing additional resources would assist in reducing the time taken to render decisions. I am nonetheless confident that the recommendations made in the present study are sound and would decrease the time period for the Copyright Board's tariff-setting decisions.

Recommendations

First, Parliament should legislate to provide the Copyright Board with a broadly drawn discretion to award costs, along the lines of the provision contained in the *Competition Tribunal Act*.[223]

Second, the Copyright Board should propose to adopt, with the approval of the Governor in Council, formal rules that provide for various mandatory steps in the tariff-setting process:

(a) Filing of Proposed Tariff;

(b) An initial Case Management Conference;

(c) Exchange of Statements of Case;[224]

(d) The elaboration of a Discovery Plan (accompanied by a restriction on the scope of discovery);

(e) Discovery of Documents/Interrogatories;

(f) A further Case Management Conference post-discovery to determine whether expert evidence is necessary and the means through which this evidence should be received;

(g) A Pre-Hearing Conference to identify the issues to be determined at the hearing.

It would be prudent to ensure that the Copyright Board has some flexibility to depart from this model where appropriate (especially because transitioning immediately from a flexible process to a tariff-setting process with fixed steps might be difficult to accomplish). Here, the example of the Competition Tribunal, with its power to "dispense with, vary or supplement the application of any of [its] Rules in a particular case in order to deal with all matters as informally and expeditiously as the circumstances and

[223] RSC 1985, c 19 (2nd Supp), s. 8.1.

[224] I appreciate that information asymmetries may make it difficult for parties to file conclusive statements of case at the outset of the tariff-setting process. These statements of case would not be definitive and could be revisited in response to information revealed during discovery. Providing statements of case at the outset would nonetheless contribute to narrowing the issues liable to cause disputes. The fact that collective societies, who suffer most from the information asymmetries, are repeat players in proceedings before the Copyright Board, with significant experience of the tariff-setting process, suggests that they would be capable of framing their cases at the outset. See similarly *Discussion Paper on Two Procedural Issues*, at pp. 7-9.

considerations of fairness permit",[225] is instructive. It would also be prudent to make express provision for sub-delegation to permit a member – or perhaps even officers and employees – to act in an official capacity in the management of a tariff-setting proceeding.[226]

Third, the Copyright Board should retain its current Model Directive on Procedure, with a view to providing more detail about the mandatory steps in the tariff-setting process, in particular, the role of the case management official and the scope of orders that may be made in the pre-hearing conference; in providing additional detail, the Copyright Board could usefully look to regulations and soft-law instruments prepared by its peers.

Fourthly, the Copyright Board should continue to attempt to effect culture change through informal changes – including a 'Best Practices' manual for (a) conducting discovery, (b) introducing expert evidence and (c) conducting a hearing – and persuasion.

Fifthly, the legislative and executive branches of the federal government should undertake a comparative analysis of the decision-making efficacy of selected federal administrative decision-makers, taking account of the resource constraints under which these decision-makers operate, and the complexity of their tasks, with a view to developing a metric which would propose benchmarks for the time periods within which regulatory decisions ought to be rendered.

[225] *Competition Tribunal Rules*, SOR/2008-141, s. 2(1).
[226] See *e.g. National Energy Board Act*, s. 14(2).

Biographical Information

Paul Daly is Associate Dean for Faculty Affairs and Continuing Education, and Faculty Secretary at the Faculty of Law, University of Montreal, where he is an Assistant Professor. One of Canada's leading scholars of administrative law, Professor Daly is a prolific writer who has published articles and book chapters in many leading law journals and edited collections. His book, *A Theory of Deference in Administrative Law: Basis, Application and Scope*, was published by Cambridge University Press in 2012. He also maintains the award-winning, internationally-read blog, *Administrative Law Matters*.

Professor Daly's primary area of expertise is administrative law, the body of rules that sets out a framework for the operations of Canada's administrative agencies. He has already applied these principles to Canadian copyright law, in "Courts and Copyright: Some Thoughts on Standard of Review", published in Michael Geist ed., *The Copyright Pentalogy: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law* (2013).

Professor Daly holds an LL.M. degree from the University of Pennsylvania Law School, which he attended as a Fulbright Scholar, and a Ph.D. from the University of Cambridge, funded by the National University of Ireland and the Modern Law Review. Since his arrival in Canada he has taught at the University of Ottawa and the University of Montreal and worked in a Bay Street litigation boutique. Professor Daly's years of study, teaching and academic reflection have given him an intimate knowledge of Canada's legal landscape, knowledge further enhanced by his wide range of contacts in the Canadian administrative law community.