MODEL STATUTORY POWERS PROVISIONS

FOR ADMINISTRATIVE TRIBUNALS

Administrative Justice Office

Ministry of Attorney General

Victoria, British Columbia

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Preface

This paper has been prepared for the Administrative Justice Office to provide a focus for discussion and consultation on legislation reforming the statutory powers of British Columbia's administrative tribunals. It builds on earlier background papers and reports and on the Administrative Justice Project's White Paper – *On Balance: Guiding Principles for Administrative Justice Reform in British Columbia*.

With the exception of Chapter 3, this paper was prepared by Deborah K. Lovett, Q.C., after a series of internal meetings with government legal counsel and after discussions with many experts in the field of administrative law. Chapter 3 was prepared by Ron Tucker for the Dispute Resolution Office in the Ministry of Attorney General.

We are indebted to all of those who have contributed to our work over the past 12 months. The Legal Services Branch in the Ministry of Attorney General has been a strong, enthusiastic and valued contributor since the inception of the Project. The Circle of Chairs and the British Columbia Council of Administrative Tribunals have encouraged our involvement in their deliberations and have provided an invaluable perspective on our work. Finally, members of the advisory panel have given generously of their time to engage in lively discussions on the issues addressed in this paper. In this respect, we wish to thank the following members of the private bar for their time and commitment to our work: Maureen Baird, Chilwin Cheng, Angus Gunn, Don Jordan, Q.C., Randy Kaardal, Robert Kasting, Roddy MacKenzie, Ron Skolrood, Vicki Trerise (representing the Law Society of British Columbia) and Brian Wallace, Q.C.

The views expressed in this paper are those of the writers and the Administrative Justice Office. They do not necessarily reflect the policies of government nor are they intended to be attributed to the individuals who have participated in the discussions leading up to the formulation of this paper. We have tried to reflect the themes that have emerged through our discussions. However, any errors or omissions and any lack of clarity are entirely our own.

We expect that statutory powers legislation for administrative tribunals will be tabled in the provincial Legislature in the Spring of 2004. We hope that the principles articulated here will also assist those concerned with the scope and design of powers exercised by other statutory decision-makers. Interested readers are invited to provide written comments on the issues raised in this paper to:

Administrative Justice Office
PO Box 9210, STN PROV GOVT
Victoria, BC, V8W 9J1

Website Feedback www.gov.bc.ca/ajp

250-387-0116 (tel) 250-387-0079 (fax)

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1 INTRODUCTION

The Administrative Justice Project's July 2002 White Paper, *On Balance: Guiding Principles for Administrative Justice Reform in British Columbia*, extends an invitation to administrative tribunals and administrative law practitioners to participate actively in the development of the extensive administrative justice reform initiatives discussed in it. One of the areas of reform involves administrative tribunal statutory powers and procedures.

There can be no question that the powers and procedures of administrative tribunals vary greatly from tribunal to tribunal. While there can be sound policy reasons for providing a tribunal with some unique powers, the diversity across tribunals appears to stem more from ad hoc decision-making than from the application of established policy guidelines for determining:

- What types of powers should appropriately be granted a particular tribunal?
- What set of management tools does a particular tribunal need to fulfill its mandate most fairly, efficiently and effectively?
- How can these powers be more consistently described in the enabling legislation of all administrative tribunals?

There is general consensus that many, if not most, administrative tribunals do not have all of the powers they need to make their process and proceedings as fair, consistent, efficient and effective as they could be. There is also consensus that administrative justice reform measures aimed at achieving greater consistency and uniformity should be implemented. Understandably, there is also consensus that these reform initiatives should not sacrifice the unique needs of specific tribunals in pursuit of such consistency and uniformity but rather should be flexible enough to adequately and appropriately take into account tribunal diversity. A one-size-fits-all approach is not appropriate.

The White Paper Report on *Providing Administrative Tribunals with Essential Powers and Procedures*[1] proposes ways in which the goal of achieving greater consistency and uniformity can be achieved. It also recognizes that, to function fairly, effectively and efficiently, administrative tribunals must be given an appropriate range of statutory powers and that the tribunals themselves must have a role in determining what those powers should be.

[1] This White Paper Report follows an earlier discussion paper written by F. Falzon and released by the Administrative Justice Project in February of 2002. That discussion paper, *The Statutory Powers and Procedures of Administrative Tribunals in B.C.*, reviewed a number of studies that have been undertaken in Canada and elsewhere on the subject of statutory powers and procedures, reviewed statutory powers legislation in other Canadian jurisdictions (Alberta, Ontario and Quebec) and explored the critical importance of appropriate powers and procedures to a tribunal's ability to effectively administer its statute while, at the same time, complying with the rules of procedural fairness. Ultimately, this discussion paper identified four options for further consideration. Following release of this discussion paper and public consultation, the White Paper Report on *Providing Administrative Tribunals with Essential Powers and Procedures* was released. This Report contains specific recommendations for implementation of reform initiatives in this area.

The first recommendation made in the White Paper Report on *Providing Administrative Tribunals with Essential Powers and Procedures* (White Paper Recommendation No. 18) calls for the development of a policy document addressing model statutory powers provisions for administrative tribunals. This document addresses that recommendation and:

- Discusses the rule-making powers of administrative tribunals (Chapter 2);
- Explores several options for alternative dispute resolution processes (Chapter 3);
- Sets out a comprehensive menu of both procedural and substantive powers that can be selectively applied to individual tribunals with necessary adjustments (Chapters 4 and 6);
- Makes recommendations to address questions about standing (Chapter 5);
- Identifies the policy considerations to be taken into account when deciding, for example, what standard of review should apply and whether a tribunal's decisions should be subject to a privative clause (Chapter 7); and
- Proposes legislation to clarify the jurisdiction of tribunals to hear and decide Charter issues (Chapter 8).

Across the administrative justice community, some support has been expressed for omnibus legislation (e.g. a *Statutory Powers and Procedures Act*) as long as such legislation is flexible enough to allow for some variation in the different types of powers contained in it.[2] Other interested groups have expressed opposition to such legislation, favouring instead tribunal-by-tribunal revisions to each tribunal's enabling statute.

Working from an individual assessment of each tribunal's enabling legislation, this policy document advocates a blended approach. The model framework for statutory powers legislation that is set out in APPENDIX 1 provides a catalogue of powers that would be common to many tribunals and articulates a methodology for determining what powers each tribunal should have and whether (and if so, how), tribunal enabling legislation should be amended to further the goals of greater uniformity and efficiency. The model itself is uniform and consistent, flexible and accommodating.

[2] The White Paper Report suggests that statutory powers legislation could be used to establish a range or "menu" of core powers to be applied, as appropriate, to specific tribunals through Schedules to the Act or cross-referencing in the tribunal's statute. Other Canadian jurisdictions have enacted statutory powers legislation which applies in whole or in part to certain categories or types of administrative tribunals. The advantage of legislated statutory powers is that reform initiatives are mandatory rather than reliant on a commitment to apply guidelines. The disadvantages are that such legislation does not allow for individual powers to be crafted in a way that reflects the unique needs of a tribunal and means that the enabling statute does not provide the only source of the tribunal's powers.

With the exception of the options for alternative dispute resolution in Chapter 3, specific legislative recommendations have been tied to individual tribunals. The tribunals to which this document applies are listed in APPENDIX 2. APPENDIX 3 illustrates how the legislative proposals would be applied to each of the named tribunals. There are a number of tribunal statutes that are currently being considered for amendment, either in Bills that are before the Legislative Assembly at the present time or in drafts that are being prepared for upcoming sessions. The principles articulated in this policy document are intended to apply equally to these proposals for legislative reform.

The legislative language in this policy document is intended to assist administrative law practitioners in understanding more precisely the nature of the reform initiatives that are being proposed. It is also intended to be a tool for use by legislative counsel, ministry policy specialists and administrative tribunals themselves in deciding what powers a particular tribunal needs, in drafting amendments to a tribunal's statute or in drafting legislation establishing a new tribunal. Finally, it is expected that the principles set out here will assist officials responsible for defining the scope of authority and powers of other statutory decision-makers.

2 TRIBUNAL POWERS TO MAKE RULES GOVERNING PRACTICE AND PROCEDURE

This Chapter concerns the power of administrative tribunals to make rules governing practice and procedure. It is important at the outset to distinguish between procedural (or practice) rules and substantive rules which are addressed in a later Chapter. As the courts have observed, the distinction between procedural and substantive rules is not always an easy one to make:[3]

> *It is not always easy to classify rules of law into those which are substantive and those which are procedural, but, generally speaking, it may be said that substantive rules give or define the right which it is sought to enforce and procedural rules govern the mode of proceeding or machinery by which the right is enforced.*

The current approach to rule-making powers for practice and procedure is marked by a lack of consistency. Some administrative tribunals, such as the Labour Relations Board, have express statutory authority to make rules of practice and procedure subject to ministerial authority. In other cases, such as the Expropriation Compensation Board, the express authority to make rules of practice and procedure is subject to the approval of the Lieutenant Governor in Council. Other tribunals, such as the British Columbia Human Rights Tribunal and the Property Assessment Appeal Board, have express rule-making authority which is not subject to any external approval mechanism. Still other tribunals such as the Public Service Appeal Board and Mental Health Review Panels do not have any express rule-making powers at all; instead, the procedures applicable to hearings before these tribunals are set out in regulations.

It is recognized that administrative tribunals should be encouraged to set uniform standards for hearing procedures through a rule-making power and that there should be greater consistency in the approach to rule-making powers. To that end, the White Paper Report, *Providing Administrative Tribunals with Essential Powers and Procedures,* recommends that, as a general rule, administrative tribunals be given the power to make their own rules of practice and procedure. This recommendation contemplates that tribunals will develop the details of their broad statutory powers through rules which are tailored to suit their unique needs and responsibilities.

[3] *Sigurdson v. Garrow* (1981), 15 Alta. L.R. (2d) 180 (Q.B.), citing Halsbury's and referred to by Macaulay in his text *Practice and Procedure before Administrative Tribunals*, Volume 1, p. 9-6. The author there acknowledges the practical difficulties in distinguishing between these concepts and suggests that "the test is the effect of the rule in question. Things which operate to increase or decrease the jurisdiction of a body, or to create, terminate or extend rights are not procedural in nature. Things which stream, control or shape the manner in which existing rights are pursued are procedural." See also: *Materna v. Materna* (1983), 145 D.L.R. (3d) 624 (Sask. Q.B.), where the Court observed that the distinction is a functional one: "If the function of the rule is to provide the vehicle or method for the vindication of some right, then it is a matter of procedure only; but where the rule provides for the assertion of a substantive right or encroaches on or revives a substantive right, it goes beyond procedural and is substantive".

In addition to providing administrative tribunals with a general statutory rule-making power, the White Paper recommends that most administrative tribunals be given the express power to issue practice directives. Where appropriate, the directive-making power would identify the subjects that must be addressed in them.

The White Paper also recommends that the tribunal rule-making powers be subject to ministerial approval in order to ensure an appropriate balance between tribunal input into its rules and ministerial accountability. The White Paper contemplates that safeguards would be built in to the approval process to counteract tribunal concerns regarding potential ministry "self interest" through establishment of rules tailored to suit its own needs. Additionally, the approval requirement would serve the important purpose of ensuring that the rules of an administrative tribunal are, to the greatest extent possible, consistent with the rules of other administrative tribunals exercising similar functions.

The British Columbia Council of Administrative Tribunals and the Circle of Chairs raised two concerns with respect to the proposed requirement for ministerial approval. The first concern was that such a requirement would give rise to a perception that tribunals are not independent of government (and in particular their host ministries). The second concern was that such a requirement could result in delays in implementing rules or changes to rules. The Circle of Chairs suggested that individual tribunals be required under a Memorandum of Understanding to consult with the Administrative Justice Office in respect of proposed rules but, beyond that, tribunals would have rule-making autonomy.

Issues

At common law (absent contrary or overriding statutory direction) an administrative tribunal is master of its own procedure. However, it is not always easy to differentiate between those types of powers that are considered to be more procedural than substantive in nature (and therefore do not require express statutory authority) on the one hand, and those powers that must be grounded in legislation, on the other. Examples of the types of powers that likely fall into the substantive category include powers to summarily dismiss appeals, grant interim relief, compel production of documents, require the attendance of witnesses and order costs.

To minimize the scope for debate about whether a particular power requires express statutory authority or whether it is procedural in nature, the White Paper recommends that the rule-making power of a tribunal be codified in the enabling statute and that the statute set out the types of matters that fall within the scope of that power.

Specifically, the White Paper recommends:

> 18. … As a general rule, administrative tribunals will be given the power to establish rules of practice and procedure (subject to ministerial approval) and to issue practice directives.

Some administrative tribunals will require more extensive rule-making powers than other tribunals. For example, the British Columbia Human Rights Tribunal, Labour Relations Board, Environmental Appeal Board and Forest Appeals Commission all require extensive rule-making powers because of the complexity of the issues that come before them and the need for procedures more akin to a judicial process. However, tribunals such as the Employment and Assistance Tribunal and Mental Health Review Panels require less extensive rule-making powers because they deal with more narrowly defined issues within significantly shorter timeframes prescribed by legislation.

It is clear that rules of practice and procedure must be carefully tailored for each tribunal. The rules of practice and procedure must be consistent with the tribunal's enabling legislation. As Mr. Justice Estey observed in *Innisfil (Township) v. Vespra (Township),* [1981] 2 S.C.R. 145, the language of the constituent legislation is paramount:

> *The procedural format adopted by the administrative tribunal must adhere to the provisions of the parent statute of the Board. The process of interpreting and applying statutory policy will be the dominant influence in the workings of such an administrative tribunal. Where the Board proceeds in the discharge of its mandate to determine the rights of the contending parties before it on the traditional basis wherein the onus falls upon the contender to introduce the facts and submissions upon which he will rely, the Board technique will take on something of the appearance of a traditional court. Where, on the other hand, the Board, by its legislative mandate or the nature of the subject-matter assigned to its administration, is more concerned with community interests at large, and with technical policy aspects of a specialized subject, one cannot expect the tribunal to function in the manner of the traditional Court. This is particularly so where Board membership is drawn partly or entirely from persons experienced or trained in the sector of activity consigned to the administrative supervision of the Board. Again where the Board in its statutory role takes on the complexion of a department of the executive branch of Government concerned with the execution of a policy laid down in broad concept by the Legislature, and where the Board has the delegated authority to issue regulations or has a broad discretionary power to license persons or activities, the trappings and habits of the traditional Courts have long ago been discarded.*

The process of tailoring rules of practice and procedure for each tribunal thus requires an examination of the nature of the subject matter in dispute, the hearing, the parties and any prescribed timelines for the hearing and decision-making process.

In order to maintain the integrity of their statutory mandates and processes, tribunals should also be provided with power to make such orders as may be necessary to ensure compliance with their orders and rules of practice and procedure.

Powers to make rules and orders respecting practice and procedure

The following statutory rule-making power is proposed.[4] It contains a virtual shopping list of rule-making powers. The specific powers appropriate for each tribunal would be selected from those enumerated in paragraphs (a) to (u) of subsection 1(2).

General power to make rules respecting practice and procedure

1(1)Subject to this Act and the tribunal's enabling Act and any regulations made under them, the tribunal may make rules respecting practice and procedure to facilitate the just and timely resolution of the matters before it.

(2) Without limiting subsection (1), the tribunal may make rules as follows:

(a) requiring the parties to attend a confidential, without prejudice, pre-hearing case management conference in order to consider the simplification of the issues, facts or evidence that may be agreed upon, and any other matter that may assist in the just and most expeditious disposition of the proceeding, and for this purpose, the tribunal may order that the conference not be open to the public;[5]

(b) respecting disclosure of evidence, including but not limited to pre-hearing disclosure and pre-hearing examination of a party on oath or solemn affirmation or by affidavit;

(c) respecting mediation and other dispute resolution processes, including, without limitation, rules that would permit or require mediation of any matter to be determined, whether the mediation is provided by a tribunal member or by a person appointed, engaged or retained by the tribunal;[6]

(d) respecting exchange of records by parties;

(e) respecting the filing of written submissions by the parties;

(f) respecting the filing of admissions by parties;

(g) specifying the form of notice to be given to a party by another party or by the tribunal requiring a party to diligently pursue an [application/appeal/complaint] and specifying the time within which and the manner in which the party must respond to the notice;[7]

(h) respecting service of notices and orders, including substituted service;

[4] This model provision is based on the powers of the Human Rights Tribunal under section 27.3 of the *Human Rights Code*.

[5] Chapter 3, Dispute Resolution Processes, offers some more detailed variations on similar case management powers.

[6] Chapter 3 also offers a number of different dispute resolution powers.

[7] In the *Human Rights Code*, this power refers specifically to the form of notice "to be given to a party by another party or by the tribunal requiring a party to diligently pursue a complaint and specifying the time within which and the manner in which the party must respond to the notice". It is complemented by a power to dismiss a complaint for failure to pursue it. Section 27.5 of the Code provides: "If, under the rules, a party has been given notice requiring the party to diligently pursue a complaint and the party fails to act on the notice within the time allowed, then on the request of another party or on its own initiative, a member or panel may dismiss the complaint".

(i) requiring a party or an intervener to provide an address for service or delivery of notices and orders;

(j) providing that a party's or an intervener's address of record is to be treated as an address for service;

(k) respecting procedures for preliminary or interim applications;

(l) respecting procedures for formal settlement offers;

(m) respecting procedures for the withdrawal or settlement of an [application/appeal/complaint];

(n) respecting amendments to an[application/appeal/complaint] or responses to it;

(o) respecting the addition of parties to the [application/appeal/complaint];

(p) respecting adjournments;

(q) respecting the extension or abridgement of time limits provided for in the rules;

(r) respecting the transcribing or recording of its proceedings;

(s) establishing the forms it considers advisable;

(t) respecting the joining of [applications/appeals/complaints]; and

(u) respecting exclusion of witnesses from proceedings.

(3) The tribunal must make accessible to the public any rules of practice and procedure made under this section.

Option 1: General power to make orders

2(1) In order to facilitate the just and timely resolution of [the application/appeal/ complaint] a tribunal may, on application by a party [or an intervener] or on their own initiative, make any order for which a rule has been made by the tribunal[8] under section ___ or prescribed under section ___.

(2) Where an [applicant/appellant/complainant] withdraws an [application/appeal/complaint], the tribunal must order that it is discontinued.

(3) Where the parties advise the tribunal that they have reached a settlement in respect of the subject matter of the proceeding, the tribunal must order that the proceeding is discontinued.

Option 2: Power to make orders (where extensive rule-making powers enumerated)

3(1) In order to facilitate the just and timely resolution of [the application/appeal/complaint] a tribunal may, on application by a party [or an intervener] or on their own initiative, make any order for which a rule has been made under section(s) ___ or has been prescribed under section ___ .

[8] This is suggested in order to encourage tribunals to make rules of practice and procedure and to prevent a tribunal from making orders in respect of those matters that may be the subject of tribunal rules but where no rules are in place.

(2) Without limiting subsection (1), the tribunal may make orders:

(a) requiring the parties to the [application/appeal/complaint] to file written submissions with the tribunal in respect of all or any part of the proceeding;

(b) respecting the filing of admissions by the parties;

(c) respecting disclosure, including without limitation, pre-hearing examination of a party on oath or solemn affirmation or by affidavit;

(d) respecting exchange of records by parties;

(e) directing the joining of [applications/appeals/complaints], issues or parties; and

(f) requiring the parties to attend a confidential, without prejudice, pre-hearing conference in order to discuss issues in the [application/appeal/complaint] and the possibility of simplifying or disposing of any such issues and for this purpose, the board may order that the conference not be open to the public.

(3) Where an [applicant/appellant/complainant] withdraws an [application/appeal/complaint], the tribunal must order that it is discontinued.

(4) Where the parties advise the tribunal that they have reached a settlement in respect of the subject matter of the proceeding, the tribunal must order that the proceeding is discontinued.

Tailoring rule-making powers to tribunals

The first step in tailoring rule-making powers is to examine a tribunal's constituent legislation.

The starting point for this analysis is the recognition that all tribunals, regardless of their statutory mandate, require some powers to make rules governing practice and procedure. The extent of those powers will depend on the complexity of the issues before them and the type of process contemplated by their constituent legislation.

Tribunals which are required to function more akin to courts because of the complexity of the issues that come before them will require the full panoply of procedural powers outlined in the model rule-making powers. This is particularly the case for administrative tribunals which perform a *de novo* function and for those which perform an appellate function but have a broad discretion to receive new evidence. Such tribunals are often required to make determinations on complex questions of law and fact which involve a significant public law dimension (such as human rights, environmental and constitutional issues). Tribunals of this nature often conduct oral hearings with extensive *viva voce* and documentary evidence and multiple parties and interveners. Tribunals which conduct complex hearings require extensive rule-making powers in relation to pre-hearing conferences, disclosure of evidence, addition of parties and interveners, amendment of pleadings, preliminary applications, and mediation or other dispute resolution mechanisms. In short, these tribunals need rules to ensure timely pre-hearing disclosure and resolution of preliminary issues to prevent unnecessary delays and to streamline the hearing process and would

therefore likely require most, if not all, of the rule-making powers contemplated in the model listed above. The following tribunals would fall into this category:

- Environmental Appeal Board
- Expropriation Compensation Board
- Forest Appeals Commission
- Human Rights Tribunal
- Labour Relations Board
- Securities Commission

Some tribunals, such as the Coroners Service, perform an inquiry function. Other tribunals conduct both individual hearings and hearings of a more public nature in relation to issues which have a significant public aspect. Some of these bodies, such as the Motor Carrier Commission and Utilities Commission, have the authority to initiate proceedings on their own motion. Such tribunals require a broad range of powers tailored to the different functions which they perform. They generally require most of the powers outlined in the model rule-making powers for individual hearings. In addition, they require powers to make rules in relation to their unique responsibilities for conducting public hearings. The following tribunals fall into this category:

- Agricultural Land Commission
- British Columbia Marketing Board and Farm Practices Board
- Coroners Service
- Mediation and Arbitration Board
- Motor Carrier Commission
- Property Assessment Appeal Board
- Utilities Commission

Other tribunals function in a less formal or public setting with much more focus on a narrow range of issues which are primarily factual in nature. These tribunals are not expected to follow the same process as courts because they are typically required to process a high volume of cases within short statutorily prescribed time frames. The emphasis is on a fair but efficient and expeditious hearing process. These tribunals typically conduct appeals on the record although some may have discretion to admit new evidence on appeal. Hearings may be conducted in person, in writing, by videoconference or teleconference depending on the nature of the issue and the availability of resources. These tribunals do not conduct public inquiries or hearings because the subject matter before them is confined to individual interests. Most of these tribunals do not require rules for pre-hearing conferences, addition of parties or interveners, preliminary motions, mediation or other dispute resolution processes. However, such tribunals do require, at minimum, rules governing adjournments, disclosure of evidence, service, procedures for withdrawal or abandonment of appeals/applications/complaints, extension or abridgement

of time limits and a general power to make any rules which are unique to their hearing process. The following tribunals would fall into this category:

- Commercial Appeals Commission
- Community Care Facility Appeal Board
- Electrical Safety Appeal Board
- Elevating Devices Appeal Board
- Employment and Assistance Appeal Tribunal
- Employment Standards Tribunal
- Fire Commissioner
- Gas Safety Appeal Board
- Health Care and Care Facility Review Board
- Health Care Practitioners Special Committee for Audit
- Hospital Appeal Board
- Medical and Health Care Services Appeal Board
- Medical Services Commission
- Mental Health Review Panels
- Parole Board
- Power Engineers, Boiler and Pressure Vessel Safety Appeal Board
- Property Assessment Review Panels
- Public Service Appeal Board
- Residential Tenancy Arbitrators
- Workers' Compensation Appeal Tribunal

Practice directives

In addition to express powers respecting practice and procedure, it is recommended that many tribunals be given the power to issue practice directives (or policies) and be required to issue practice directives governing timelines for decision-making.[9] Practice directives constitute non-binding policy statements from the tribunal regarding aspects of its procedures.

[9] Tribunals have the ability to issue such directives even in the absence of an express power to do so. See, for example, *Ainsley Financial Corporation v. Ontario Securities Commission* (1994), 21 O.R. (3d) 104 (C.A.) where the Ontario Court of Appeal held, at p. 108: "The authority of a regulator, like the Commission, to issue non-binding statements or guidelines intended to inform and guide those subject to regulation is well established in Canada. The jurisprudence clearly recognizes that regulators may, as a matter of sound administrative practice, and without any specific statutory authority for doing so, issue guidelines and other non-binding instruments … Non-statutory instruments, like guidelines, are not necessarily issued pursuant to any statutory power to issue such instruments. Rather, they are an administrative tool available to the regulator so that it can exercise its statutory authority and fulfill its regulatory mandate in a fairer, more open, and more efficient manner. While there may be considerable merit in providing for resort to non-statutory instruments in the regulator's enabling statute, such a provision is not a prerequisite for the use of those instruments by the regulator." However, the power proposed requires the tribunal to issue practice directives in respect of decision timelines.

While a practice directive respecting decision-making timelines does not create a binding time limit, as a practical matter it places pressure on the tribunal to comply with it and creates greater certainty for the parties as to what to expect. [10]

Many administrative tribunals are not constrained by specific timelines for decision-making. Other tribunals are constrained by specific timelines for holding a hearing, but not for making a decision.

The Ontario *Statutory Powers Procedure Act* contains a provision requiring tribunals to establish guidelines setting out the usual time frame for completing proceedings, including completing the procedural steps within those proceedings.

To encourage timely completion of proceedings and expeditious decision-making, it is proposed that the following provision apply to those administrative tribunals listed below it:

> ***Option 1: Practice directives (time frames specified in directives)***
>
> 4(1) The tribunal may issue practice directives and must issue practice directives respecting:
>
> (a) the usual time frame for completing proceedings that come before the tribunal and for completing the procedural steps within those proceedings; and
>
> (b) the time period within which a tribunal's final decision and reasons will be released once the proceedings are completed.
>
> (2) Practice directives issued under subsection (1) must be consistent with this Act and with the tribunal's enabling Act or Acts, the regulations made under those Acts and any rules of practice and procedure made by the tribunal.
>
> (3) The tribunal must make any practice directives made under this section accessible to the public.

It is proposed that this provision would apply to the following administrative tribunals:

- British Columbia Marketing Board
- Commercial Appeals Commission
- Community Care Facility Appeal Board
- Electrical Safety Appeal Board
- Elevating Devices Appeal Board
- Employment Standards Tribunal
- Environmental Appeal Board
- Expropriation Compensation Board
- Forest Appeals Commission

[10] Section 49 of the *Human Rights Code* gives the Lieutenant Governor in Council the power to make regulations prescribing (among other things) the period within which hearings must begin and decisions and reasons must be provided. The practice directive provision could be expanded to include a requirement to make practice directives respecting the period within which a hearing must begin, as well as the period within which its decision and reasons will be released.

- Gas Safety Appeal Board
- Health Care and Care Facility Review Board
- Human Rights Tribunal
- Medical Services Commission
- Medical and Health Care Services Appeal Board

Other administrative tribunals are required by their enabling legislation to make decisions within tight or specified timelines. Some of the tribunals that fall into this category are:

- Employment and Assistance Appeal Tribunal
- Labour Relations Board
- Mental Health Review Panels
- Public Service Appeal Board
- Workers' Compensation Appeal Tribunal[11]

For these tribunals, the following provision is proposed:

> ***Option 2: Practice directives (time frames not specified in directives)***
>
> 5(1) The tribunal may issue practice directives consistent with this Act and with the tribunal's enabling Act or Acts, the regulations made under those Acts and any rules of practice and procedure made by the tribunal.
>
> (2) The tribunal must make any practice directives made under subsection (1) accessible to the public.

The ministerial approval requirement

As noted, the White Paper recommends that the rule-making powers of administrative tribunals be subject to an external approval or review process, such as ministerial approval. At present, for those administrative tribunals with express rule-making powers, some have complete rule-making autonomy while others are required to obtain ministerial or Cabinet approval. Of the tribunals falling into the latter category, some express satisfaction with the process currently in place, while others view the external approval process as an erosion of their independence and impartiality. These concerns were raised by administrative tribunals in response to the White Paper. Others expressed concerns regarding the consequences of the approval process. Specifically, it is felt that this type of approval process may add inflexibility or delay (or both) in respect of practice issues.

The concern that ministerial or Cabinet approval undermines the independence and impartiality of the tribunal is grounded largely in perceptions of partiality. Particularly for those administrative tribunals that adjudicate disputes involving the tribunal's host ministry, the concern is that, regardless of whether ministerial approval is legally permissible, there are compelling policy reasons why the tribunal's host

[11] See section 253(4) and (5) of the *Workers Compensation Act*.

minister should not have approval authority. Public confidence in the administrative justice system is eroded where, externally, it appears that the tribunal's rules are dictated by one of the parties appearing before it.

There are, however, practical reasons for requiring a mechanism for reviewing tribunals' rules of practice and procedure. Those practical reasons relate primarily to ensuring that a tribunal's rules are consistent with its enabling legislation and regulations and consistent in expression, to the greatest extent possible, with the rules of other like tribunals. Also, concerns have been expressed that many tribunals make rules sparingly. A ministerial approval requirement might encourage tribunals to engage in rule-making and would ensure that tribunal rules do not defeat or modify a tribunal's purpose.

As an alternative to requiring ministerial approval, a commitment to consultation could be built in to the Memorandum of Understanding entered into between the tribunal chair and the tribunal's host ministry. This commitment would require the tribunal to consult informally with the Administrative Justice Office with respect to certain types of rules (those that are established as being most significant). As time and resources permit, a standing committee comprised of the tribunal chair, representatives of the Administrative Justice Office, legislative counsel and the Legal Services Branch could be established. This joint committee would consider new or amended rules of practice and procedure. The commitment to consultation would strike a compromise between the need to ensure consistency and legality with the desire of tribunals to foster (a greater appearance of) autonomy and independence.

To address concerns that a tribunal (or tribunals) might establish rules that are not consistent with those of other tribunals or not establish rules at all, a general regulation-making power could be established. This power would provide the Lieutenant Governor in Council with the ability to prescribe rules of practice and procedure for particular tribunals. In these circumstances, tribunal rules (if any) would be inoperative to extent that they conflict or are inconsistent with the prescribed rules. It is anticipated that this power would be exercised only in extraordinary circumstances where either the tribunal has exercised its rule-making authority in a manner that is inconsistent with the general policies outlined in this document or the tribunal has declined, despite a power to do so, to establish any rules of practice and procedure.

The following regulation-making power is proposed:

> ***Regulations***
>
> 6(1) The Lieutenant Governor in Council may make regulations as follows:
>
> (a) prescribing rules of practice and procedure for a tribunal.
>
> (2) Where the Lieutenant Governor in Council prescribes rules of practice and procedure for a tribunal under subsection (1), any rules made by that tribunal under

section ___ of this Act are inapplicable to the extent they are inconsistent with the prescribed rules.

Rules of practice and procedure

Each administrative tribunal will develop rules of practice and procedure that are most suitable to its mandate and proceedings. There are many sources available to assist a tribunal crafting its own rules. The Society of Ontario Adjudicators and Regulators (SOAR) has developed detailed model rules of practice and procedure. These rules are accessible on the SOAR website (www.SOAR.on.ca). A joint committee comprised of agency representatives and government developed a *Compendium of Model Rules of Practice and Procedure for Ontario Regulatory and Adjudicatory Agencies*. This document "represents a collection of alternative procedural provisions" and it has been reproduced in Macaulay and Sprague, *Practice and Procedure before Administrative Tribunals*, Appendix 9.1.

It is recommended that development of model rules of practice and procedure be encouraged: first, by informal review through the Administrative Justice Office; and second, as time and resources permit, through a joint tribunal/government committee.

3 DISPUTE RESOLUTION PROCESSES

This Chapter examines the need for enabling legislation to engage in dispute resolution processes and provides some sample enabling provisions. It identifies a number of issues which can be dealt with through tribunal rules, and provides some sample rules. It focuses primarily on mediation as a dispute resolution process, but many of the issues identified also apply to other dispute resolution processes. It also identifies a number of issues which should be considered when designing dispute resolution processes. Finally, this Chapter identifies additional resources and provides links to many of them.

Timely and effective alternatives to the courts

One of the primary mandates of the administrative justice system is to provide an alternative to the court system that is less formal, less complex and less costly. It is in the public interest that the administrative justice system offer parties a range of timely and effective dispute resolution processes. Ironically, over the years administrative tribunals have come to experience problems that parallel those in the court system where costs, delays and procedural complexities too often impede public access. In the court system these problems have been the subject of extensive study and comment – pointing to the need for a much greater emphasis on early, consensual dispute resolution processes. There is an almost universal conclusion that this is the best way to enhance public access to justice.12 Similarly, these processes have much to offer the administrative justice system.

Alternative dispute resolution (ADR) processes, or simply dispute resolution processes, are part of a continuum of processes for resolving disputes ranging from low cost, straight forward processes such as negotiation to high cost, complex processes such as adjudication. In this Chapter "dispute resolution processes" refer to the full range of processes on the continuum from which tribunals can choose the most appropriate process, or processes, for resolving the disputes that come before them. The term "consensual" is used to describe dispute resolution processes where parties to a dispute consent to the outcome.

[12] The main reports are: *Access to Justice: The Report of the Justice Reform Committee*, B.C. (1988); *Civil Justice Review*, Ontario (1996); *Systems of Civil Justice Task Force Report*, Canadian Bar Association (1996); Lord Wolff's *Report on Access to Justice*, England (1996) (http://www.lcd.gov.uk/index.htm); *Managing Justice: A Review of the Federal Civil Justice System*, Australian Law Reform Commission (1999) (http:www.austlii.edu.au/other/alrc/publications/reports/89/index.html)

Tribunals considering alternatives to traditional adjudication need to do more than add a mediation (or other process) box to their procedural flowchart. As one commentator has stated:

> *Bringing ADR into administrative law involves more than just simply engrafting upon the mandate of an agency additional statutory powers authorizing mediation and arbitration. It requires thinking deeply about regulation, government, law and public administration.*[13]

Tribunals should consider policies that support settlement at every stage of the case. This means supporting dispute resolution – not only as a final objective, but at every level and stage in the process – in a consensual fashion. This may mean, for example, training regulatory staff to use a collaborative approach to solving problems in their day-to-day work environment; training all tribunal staff who interact with parties to work in a collaborative fashion; or using case management tools to identify, early in the process, cases appropriate for non-adjudicative resolution.

Tribunals that hear appeals from statutory decision-makers should give careful consideration to whether, or when, a consensual process such as mediation is appropriate for them. In some cases, problems may arise when statutory decision-makers participate in mediation on appeals of their own decisions. For example, such participation can undermine the authority of a regulatory scheme, cause undue delay or create uncertainty as to the finality of the first-level decision. Notwithstanding this caution, the question for tribunals is whether or not they can negotiate outcomes. If they can, they can use mediation.

Case management and dispute resolution

The power to engage in consensual dispute resolution processes is often absent from legislation governing tribunals. Legislating such powers would provide tribunals with the certainty they need to engage in designing such processes with confidence and creativity. Tribunals should be able to consider the full range of dispute resolution processes and to select those that are most likely to improve the quality and efficiency of their work. To support this it is essential that tribunals' enabling legislation include powers in two areas: the general power to engage in dispute resolution processes and confidentiality and compellability. In addition, tribunal powers in two other areas are recommended: selecting a neutral and enforcement.

The power to engage in dispute resolution processes may be in the form of a general power or it may enable only particular processes. A general power to engage in dispute resolution processes is

[13] Reid, Alan, "Seeing Regulation Differently: An ADR Model of Policy Formulation, Implementation and Enforcement" (1995), p.1.

recommended as it enables tribunals to choose from a range of processes to meet their particular needs. Possible dispute resolution processes include:

- *Arbitration* – A process in which disputes are submitted to a neutral adjudicator through presentation of evidence and arguments. The arbitrator is empowered to render a binding decision. This process most resembles the court process.

- *Mediation* – A non-binding process in which a neutral, impartial third party with no decision-making authority attempts to facilitate a settlement between the parties.

- *Mediation-arbitration* – (or med-arb) A process which starts as a traditional mediation by a neutral third party. If the mediation does not result in a resolution, the third party becomes an arbitrator and makes a binding decision.

- *Neutral evaluation* – A non-binding process in which parties obtain a reasoned evaluation of their case on its merits from an experienced, and possibly expert, neutral third party.

- *Pre-hearing conference* – The term "pre-hearing conference" encompasses a range of processes, including case management conferences, settlement conferences and pre-hearing conferences. These involve informal dialogue between a tribunal member or members and legal counsel and/or the parties leading up to a hearing. Objectives can include settling the dispute, expediting the disposition of the matter, discouraging wasteful pre-hearing activities and improving the hearing's efficiency through more thorough preparation.

While case management is not usually considered a dispute resolution process, it is closely linked to the use of dispute resolution processes. For the reasons that follow, the governing legislation of all tribunals should enable case management systems to be introduced, and all tribunals should be encouraged to introduce case management. Case management systems promote early and less costly dispute resolution. They often incorporate, early in the process, a method to assess the potential for, and make referrals to, non-binding dispute resolution processes. Moreover, case management is a very effective tool for keeping cases on track and managing them toward resolution. In case management, timetables can be set for completion of various stages of a case; orders can be made, including orders for disclosure and requiring parties to prepare statements of issues, evidence and legal principles; and settlement conference and hearing dates can be scheduled.

In the preparation of legislation to enable mediation and other dispute resolution processes, and case management, the issue of voluntary versus mandatory participation in these processes needs to be considered. The term "mandatory mediation" is used to describe a diverse range of programs and processes. They all, however, have the following in common:

- Exposure to the process, not settlement, is mandated;
- Only one meeting is mandatory; and
- Certain cases are exempted from even the most stringent obligation to mediate.

Mandatory mediation models exist on a continuum from the highest to the lowest level of compulsion.

- *Mandatory mediation with opt out provisions* – In models with the highest level of compulsion, parties may opt out only with leave of the tribunal. Grounds for exemption can be specifically enumerated, or it can be left for the parties to satisfy a tribunal member or staff of "compelling reasons" or "good cause" for exemption. The main advantage of this model is that it results in the highest up-take rate and, therefore, it has the greatest impact.

- *Presumptively mandatory mediation* – At the next level of compulsion, parties are obliged to mediate, but liberal opting out provisions apply. For example, parties may opt out by joint agreement. This model attempts to reverse the traditional approach where cases are managed as if they will proceed to a hearing. Instead, the starting point is an attempt to resolve the matter collaboratively, with a hearing being the last resort. This model does not attract as many cases to mediation because it is relatively easy for parties to avoid mediation.

- *Mandatory by order of the tribunal* – In this model mediation is mandatory when ordered by a member or staff. A weakness of this model is said to be its lack of predictability and consistency.

- *Notice to Mediate* – This is a "party-driven" quasi-mandatory model in which any party to the proceeding can compel the other parties to attend a mediation session. The Notice to Mediate process is unique to BC and was implemented as part of a more gradual, less dramatic approach to mandatory mediation.

Enabling legislation should be broad enough to give tribunals flexibility. By expressly providing that tribunals may make rules requiring parties' participation in these processes, the major policy decisions around this issue may be made during initial dispute resolution system design or in the future, after tribunals have had experience with voluntary participation or one of the mandatory models. When considering mandatory participation in dispute resolution processes, tribunals also need to consider consequences for parties' failure to participate (examples below).

Option 1: General case management and dispute resolution rule-making powers

This option enables rules for board directed attendance at pre-hearing conferences and rules which would permit or require mediation.[14]

> 7(1) Subject to this Act and the tribunal's enabling Act and any regulations made under them, the tribunal may make rules respecting practice and procedure to facilitate the just and timely resolution of the matters before it.
>
> (2) Without limiting subsection (1), the tribunal may make rules as follows:
>
> > (a) respecting the holding of pre-hearing conferences and requiring the parties to attend a pre-hearing conference in order to facilitate a just and timely resolution of any matter to be determined; and

[14] Based on the *Expropriation Act, ss. 27 and 27.1*.

(b) respecting mediation and other dispute resolution processes, including without limitation, rules that would permit or require mediation of any matter to be determined.

(3) The tribunal must make accessible to the public any rules of practice and procedure made under this section.

Option 2: Case management and dispute resolution rule-making powers (inclusive of Notice to Mediate)

This option enables introduction of a Notice to Mediate process. This provision also enables rules to be made providing consequences for failure to participate in mediation, or to otherwise fail to comply with the rules.[15]

8(1) Subject to this Act and the tribunal's enabling Act and any regulations made under them, the tribunal may make rules respecting practice and procedure to facilitate the just and timely resolution of the matters before it.

(2) Without limiting subsection (1), the tribunal may make rules as follows:

(a) providing to parties to a proceeding the ability to require the other parties to the proceeding to engage in mediation and setting out when and how that ability may be exercised;

(b) setting out the rights and duties that accrue to the parties to a proceeding, the tribunal and the mediator if mediation is required in relation to that proceeding; and

(c) respecting

(i) the forms and procedures that must or may be used or followed before, during and after the mediation process,

(ii) requiring and maintaining confidentiality of information disclosed for the purposes of mediation,

(iii) the circumstances, if any, and manner in which a party to a proceeding may opt out of or be exempted from mediation,

(iv) the costs and other sanctions that may be imposed in relation to mediation, including without limitation, in relation to any failure to participate in mediation when and as required or otherwise to comply with the rules, and

(v) the qualifications required for, and the selection and identification of, individuals who may act as mediators in the mediation process contemplated by the rules.

(3) The tribunal must make accessible to the public any rules of practice and procedure made under this section.

[15] Based on the *Law and Equity Act*, s. 68(1).

Option 3: Dispute resolution rule-making powers (inclusive of directed mediation)

This option enables rules for tribunal directed mediation. It also enables introduction of a Notice to Mediate process, and is simpler than Option 2.[16]

> 9(1) Subject to this Act and the tribunal's enabling Act and any regulations made under them, the tribunal may make rules respecting practice and procedure to facilitate the just and timely resolution of the matters before it.
>
> (2) Without limiting subsection (1), the tribunal may prescribe rules as follows:
>
> (a) to permit or require, or provide to the tribunal or to the parties to a proceeding the ability to permit or require, mediation to be included as part of a proceeding, whether or nor the mediation is provided by the tribunal; and
>
> (b) to govern the conduct of, and all procedures relating to, the mediation.
>
> (3) The tribunal must make accessible to the public any rules of practice and procedure made under this section.

Confidentiality and compellability

Confidentiality is the cornerstone of consensual dispute resolution processes such as mediation. Parties are more likely to engage in frank discussions of their interests – and be open to considering a range of solutions – if they have assurance that the information and documents shared will not become evidence in any subsequent proceeding.

Tribunals' enabling legislation should address the key issues of non-disclosure and compellability. Confidentiality provisions should prevent the disclosure – in any other proceedings – of information and documents acquired in anticipation of, during or in connection with a consensual dispute resolution process. They should also provide that neither the parties nor the neutral can be compelled to give evidence in any subsequent proceeding. They should be sufficiently widely worded that the neutral's notes cannot be entered into evidence.

Confidentiality provisions should also address the circumstances in which the right to confidentiality may be waived by the parties. Typically, the right to confidentiality may be waived for party disclosures only if all parties agree in writing. Similarly, the mediator may be permitted to disclose information only with the consent of the parties.

There are many possible exceptions to confidentiality provisions:

- *Agreements reached in mediation* – Usually agreements made in mediation are exempted from confidentiality because parties may need to disclose settlement agreements in order to enforce them.

[16] Based on the *Court Rules Act*, subsection 1(8).

- *Crime* – Under the constitutional division of powers, provinces cannot enact legislation which would exclude evidence from a criminal trial. Accordingly, the parties and the mediator are compellable to disclose information from the mediation in a criminal trial.

- *Mediator misconduct* – A party claiming mediator misconduct could be empowered to compel the mediator's testimony. Without an exception, a party would be unable to do so without the agreement of the other parties.

- *Fraud, duress and unconscionability* – While it is relatively rare, an exception to the confidentiality rule could allow evidence from the mediator to be admitted in cases of alleged fraud, duress and unconscionability.

- *Pre-existing information* – Information which is otherwise producible or compellable is usually not protected by confidentiality provisions on the basis that a consensual dispute resolution process must not be used to shield information from disclosure in subsequent proceedings if that information would have been subject to disclosure in the absence of the consensual process.

For tribunals that are subject to the *Freedom of Information and Protection of Privacy Act* and have the authority to require that parties attend mediation, it may be appropriate to consider legislation expressly providing that the *Freedom of Information and Protection of Privacy Act* does not apply to any information received by a person who attempts to assist the parties to reach a settlement. Section 40 of the *Human Rights Code* is an example of a provision that has been enacted for this purpose. Further consultation is required before decisions can be made about the scope and application of such legislation to the administrative tribunals that are the subject of this policy document.

A related issue is the confidentiality of outcomes of tribunal proceedings. In most cases the outcome of tribunal proceedings should be available to the public upon request. However, where the work of a tribunal involves matters relating to public security, personal privacy or commercially sensitive business information, it may be necessary to provide in the tribunal's governing legislation that only non-identifying outcomes will be available to the public. This issue is dealt with in Chapter 4.

Option 1: Mediation information confidential (Notice to Mediate model)

This option provides for exceptions, including an exception for information that is otherwise producible or compellable.[17]

> 10(1) Subject to subsections (2) and (3), a person must not disclose, or be compelled to disclose, in any civil, administrative or regulatory action or proceeding:
>
> (a) any oral or written information acquired in anticipation of, during or in connection with a mediation session;

[17] Based on the Notice to Mediate (General) Regulation, ss. 36 and 37.

(b) any opinion disclosed in anticipation of, during or in connection with a mediation session; or

(c) any document, offer or admission made in anticipation of, during or in connection with a mediation session.

(2) Subsection (1) does not apply:

(a) in respect of any information, opinion, document, offer or admission that all of the participants agree in writing may be disclosed;

(b) to any fee declaration, agreement to mediate or settlement document made in anticipation of, during or in connection with a mediation session; or

(c) to any information that does not identify the participants or the proceeding and that is disclosed for research or statistical purposes only.

(3) Nothing in subsection (1) precludes a party from introducing into evidence in any civil, administrative or regulatory action or proceeding any information or records produced in the course of the mediation that are otherwise producible or compellable in those proceedings.

Option 2: Mediation information confidential (from Small Claims Rules)

This option also provides for exceptions, including an exception for information that is otherwise producible or compellable. However, it is somewhat simpler than Option 1.[18]

11(1) Subject to subsection (2) and (3), a person must not disclose, or be compelled to disclose, in any proceeding oral or written information acquired in or in connection with a mediation session.

(2) Subsection (1) does not apply:

(a) in respect of any information, opinion, document, offer or admission that all of the parties agree in writing may be disclosed;

(b) to any mediation agreement made during or in connection with a mediation session;

(c) to any threats of bodily harm made in or in connection with a mediation session; or

(d) to any information that does not identify the parties and that is disclosed for research or statistical purposes only.

(3) Nothing in this section precludes a party from introducing into evidence in any proceeding any information or records produced in the course of mediation that are otherwise producible or compellable in those proceedings.

Option 3: Compulsion protections for neutrals

This option provides that a neutral who attempts to facilitate settlement in a pre-hearing dispute resolution process cannot be required to give evidence or produce documents in a hearing before the tribunal or in a

[18] Based on the Small Claims Rules, subrules 7.2(35)-(37).

civil proceeding. Also the neutral's notes or records are not admissible in a civil proceeding.[19]

> 12(1) No person employed as a mediator, conciliator or negotiator or otherwise appointed to facilitate the resolution of a matter before a tribunal by means of an alternative dispute resolution mechanism shall be compelled to give testimony or produce documents in a proceeding before the tribunal or in a civil proceeding with respect to matters that come to his or her knowledge in the course of exercising his or her duties under this or any other Act.
>
> (2) No notes or records kept by a mediator, conciliator or negotiator or by any other person appointed to facilitate the resolution of a matter before a tribunal by means of an alternative dispute resolution mechanism under this or any other Act are admissible in a proceeding before the tribunal or in a civil proceeding.

Option 4: Exemption from Freedom of Information and Protection of Privacy Act

This option includes an express provision that the *Freedom of Information and Protection of Privacy Act* does not apply to information received by any person who attempts to assist the parties reach a settlement. This may be an appropriate provision where the Act applies to the tribunal and the tribunal is enabled to require the parties to attend mediation presided over by a member, staff or contract mediator.[20]

> 13(1) Any information received by any person in the course of attempting to reach a settlement of an [application/appeal/complaint] is confidential and may not be disclosed or admitted in evidence except with the consent of the person who gave the information.
>
> (2) The *Freedom of information and Protection of Privacy Act*, other than section 44(2) and (3), does not apply to information referred to in subsection (1).
>
> (3) Subsection (2) does not apply to personal information, as defined in the *Freedom of Information and Protection of Privacy Act*, that has been in existence for 100 or more years or to other information that has been in existence for 50 years or more.

Selecting a Neutral

Tribunals' governing legislation should enable tribunals to appoint, or the parties to select, a neutral third party to attempt to facilitate a settlement. There are at least four sources of neutrals for tribunals using consensual dispute resolution processes: tribunal members, tribunal staff, contractors or neutrals whose services are shared with other tribunals. Independent, private-sector neutrals may also be used. From whatever source neutrals are drawn, it is important that they be properly trained and that the parties understand the difference between the consensual dispute resolution process and the adjudicative work of the tribunal.

[19] Based on Ontario *Statutory Powers Procedure Act*, subsections 4.9(1) and (2).

[20] Based on the *Human Rights Code*, s. 40.

Tribunal members may have subject-matter expertise and be especially aware of the tribunal's statutory objectives. However, acting as a dispute resolution neutral requires equally specialized skills and training which many tribunal members may not have. If mediating is an important part of a tribunal's process, policy should require that a certain number of tribunal members be trained mediators.

Even if they are not directly involved in mediation, all tribunal members should have some conflict resolution training. Generally, tribunal members who act as neutrals should be barred from sitting as adjudicators if the matter does not settle.[21] Exceptions may apply in processes such as med-arb, where the neutral is intended to later become an arbitrator, or in cases where the parties consent.

Tribunals with a sufficient number of cases referred to consensual dispute resolution processes could consider hiring specialized staff to act as neutrals. They would develop subject-matter expertise over time, while developing their skills as neutrals. Whether staff are exclusively dedicated to serving as neutrals (and they need not be), tribunals must take careful steps to separate their adjudicative and non-adjudicative functions. Particular care is needed to protect information gathered through consensual dispute resolution processes from spilling over into the adjudicative side of the tribunal without the proper consent of the parties.

For tribunals with only occasional need for neutrals, contracting is a viable option. It may be more difficult to find contracted neutrals with subject-matter expertise and knowledge of the tribunal's statutory objectives, but these areas of expertise can be developed by using the same individuals on a regular basis. Contractors can be more expensive but, if they are not required frequently, the cost may not be prohibitive. Tribunals can also rely on established rosters of neutrals, where appropriate, or develop their own rosters.

Another possibility is for groups of tribunals to employ or retain neutrals such as mediators and share their services. This can work particularly well for tribunals that work in similar sectors or with similar subject matters.

Option 1: Appointment of tribunal member as mediator

This option may be used where tribunal members and staff are available to act as mediators.[22]

> 14(1) The chair or vice chair may appoint a member or staff of the tribunal to conduct a mediation.

[21] This is the approach taken in Ontario's *Statutory Powers Procedure Act* (s. 4.8(5).

[22] Based on a provision contained in Ontario's *Compendium of Model Rules of Practice*.

(2) Where a member of the tribunal is appointed to conduct a mediation, that member must not subsequently hear the matter if it comes before the tribunal unless all parties consent.

Option 2: Appointment of mediator by tribunal

This option may be used where the tribunal has an approved list of contract mediators, or where the tribunal has its own roster of mediators or uses a roster of mediators established by another organization.[23]

15. The chair or vice chair may appoint a mediator from a list of mediators approved by the tribunal where:

(a) the mediator is acceptable to all parties; and

(b) the parties agree to share the cost of the mediation equally.

Option 3: Appointment of mediator by parties

This option is similar to Option 2, except that it provides for party choice in the selection of the mediator.

16. The parties may appoint a mediator from a list of mediators approved by the tribunal where

(a) the mediator is acceptable to all parties, and

(b) the parties agree to share the cost of the mediation equally.

Settlement, dispositions and enforcement

Consensual dispute resolution processes are non-binding in the sense that a resolution will not be imposed on the parties. However, parties engaged in such processes often come to agreement about how to resolve their dispute, and such agreements then become binding on the parties. There are a number of ways in which these agreements can be monitored or enforced:

- *Parties may withdraw the case* – If a tribunal does not have a legislated mandate to oversee or record settlements, parties who have reached agreement can simply withdraw their case from the tribunal's process. The disadvantage is that they have no recourse to the tribunal's enforcement powers (if any) if the agreement is breached, and must rely instead upon one another's good faith and the fact that they have an enforceable contract.

- *Parties may file terms of settlement with the tribunal* – Filing provides the tribunal with information on the settlement that may be needed for reporting purposes, and which allows the tribunal to close the case. Filing may also allow the parties to take advantage of the tribunal's enforcement powers.

- *Tribunals may issue an order* – Settlement terms reflected in a tribunal order are subject to any enforcement mechanisms available under the governing legislation.

[23] Based on a provision contained in Ontario's *Compendium of Model Rules of Practice*.

- *Tribunal approval* – If a tribunal has a public interest mandate or if the settlement must conform to statutory objectives, legislation can require that the tribunal approve all settlements before they are final. Approval can be issued directly or after a brief hearing. The Utilities Commission, for example, will reject any settlement that does not reflect the public interest.

Option 1: Settlement (party consent required)

This option allows parties who have reached agreement prior to the hearing to simply withdraw their case from the tribunal's process. Its use would not be appropriate where the tribunal has a mandate to oversee or record settlements, or where the tribunal has a public interest mandate or if the settlement must conform to statutory objectives.[24]

> 17. Where the parties reach a settlement prior to the hearing, the application may be withdrawn if all parties consent.

Option 2: Settlement (tribunal must dispose of matter)

In this option the "general order" of the board would simply confirm that the parties reached a settlement and that the matter was disposed of without a hearing. It would enable the tribunal to record settlements. However, as it would not enable the tribunal to oversee the terms of settlement, its use would not be appropriate where the tribunal has a public interest mandate or if the settlement must conform to statutory objectives.[25]

> 18. Where the parties reach a settlement prior to the hearing, the tribunal must dispose of the matter by a general order, without including the terms of settlement.

Option 3: Settlement (order inclusive of terms)

This option enables recording of settlements and use of the tribunal's enforcement powers, but confidentiality of settlement terms is lost as the terms of settlement would be incorporated in the tribunal's order. As it would not enable the tribunal to oversee the terms of settlement, its use would not be appropriate where the tribunal has a public interest mandate or if the settlement must conform to statutory objectives.[26]

> 19. Where the parties reach settlement prior to the hearing, the tribunal must dispose of the matter by an order that includes the terms of settlement.

[24] Based on a provision contained in *Ontario's Compendium of Model Rules of Practice.*
[25] Based on a provision contained in Ontario's *Compendium of Model Rules of Practice*.
[26] Based on a provision contained in Ontario's *Compendium of Model Rules of Practice*.

Option 4: Settlement (tribunal approval and incorporation of terms)

This option provides oversight of the terms of settlement. This is important where the tribunal has a public interest mandate or if the settlement must conform to statutory objectives.[27]

> 20(1) Where the parties reach settlement prior to the hearing, the terms of settlement must be approved by the tribunal.
>
> (2) The tribunal may hold a hearing to determine whether the terms of settlement [are in the public interest or conform to the objectives of the Act].
>
> (3) If the tribunal determines that the terms of settlement [are in the public interest or conform to the objectives of the Act], the tribunal must dispose of the matter by an order that includes the terms of settlement.

Enforcement of settlement terms

This provision enables terms of settlement to be enforced by the Supreme Court to the extent that they could have been ordered by the tribunal.[28]

> 21(1) If there has been a breach of the terms of a settlement agreement, a party to the settlement agreement may apply to the Supreme Court to enforce the settlement agreement to the extent that the terms of the settlement agreement could have been ordered by the tribunal.
>
> (2) The right to enforce a settlement agreement under subsection (1) cannot be waived.
>
> (3) A provision of a settlement agreement that purports to waive the right to enforce the agreement under subsection (1) is void.

Tribunal rules

Once appropriate enabling legislation is in place, tribunals can prescribe rules to facilitate use of dispute resolution processes. A discussion of a number of issues, and sample rules, follows.

Voluntary vs. mandatory participation

If the enabling provision empowers both voluntary and mandatory participation in dispute resolution processes, at the rule-making stage tribunals need to consider whether parties' participation in these processes should be mandatory. By making participation mandatory, or mandatory at the direction of the tribunal or a member, tribunals can maximize the impact of these processes in helping them manage their cases toward resolution.

As mentioned above, voluntary programs almost always fail to result in high rates of participation in the mediation process. This is the case notwithstanding the fact that many studies report high settlement and

[27] Based on a provision contained in Ontario's *Compendium of Model Rules of Practice*.

[28] Based on the *Human Rights Code*, s. 30.

party satisfaction rates with mediation. There are many reasons cited for this, including users' unfamiliarity with the process and lawyers' reluctance to refer clients to untraditional processes. A rule providing that the tribunal, or a member, may direct that the parties attend a mediation session would enable the tribunal to make an assessment that mediation is appropriate in a particular case and then to require that the parties participate in a mediation session. Such a rule would enable the tribunal to manage its cases and make the most effective use of resources. This is an example of how case management can be used effectively in conjunction with mediation or other dispute resolution processes.

Sample Rule

> (1) At the request of a party, or on its own initiative, the tribunal or a member may direct that the parties attend a mediation session [settlement conference].
>
> (2) A direction under subsection (1) may be made during a case management conference, or at any other stage of the proceeding.

Exemption from mandatory participation

If participation in a dispute resolution process such as mediation is to be mandatory in all cases (as opposed to being mandatory at the direction of the tribunal), tribunals will need to provide for exemptions in certain circumstances. For example, where all parties to a particular case have already participated in a mediation session in relation to the matter in issue, it may be unreasonable to require that they participate in another mediation session. There may be other circumstances in which requiring parties in all cases to participate in a particular step in the tribunal process would be unreasonable.

Sample Rules

Option 1

This option provides an exemption where all parties have already participated in a mediation session.[29]

> Parties to a proceeding need not attend a mediation session if all of the parties to the proceeding have already been involved in a mediation session in relation to the matters in issue in that proceeding.

Option 2

This option provides that the tribunal may, on an application, grant an exemption.[30]

> On an application, the tribunal may direct that the parties need not attend a mediation session if in the tribunal's opinion it is materially impractical or unfair to require the parties to attend.

[29] Based on the Notice to Mediate (General) Regulation, s. 21.

[30] Based on the Notice to Mediate (General) Regulation, s. 23.

Pre-hearing conferences

Tribunals should consider prescribing rules making pre-hearing conferences a routine part of their processes. Case management conferences, settlement conferences and conferences held shortly prior to scheduled hearing dates in order to confirm that parties are prepared to proceed can all be effective case management tools. Rules may provide that pre-hearing conferences will be conducted at the request of a party, by agreement of all parties, at the recommendation or direction of the tribunal or a member, or they may be required at set stages of the tribunal's processes.

As already discussed, tribunals may use case management conferences as occasions to assess the potential of, and make referrals to, non-binding dispute resolution processes. In addition, timetables can be set for completion of stages of the case, orders can be made, and settlement conferences and hearing dates may be scheduled.

There should also be flexibility within a case management conference to move into settlement discussions if it appears that the case, or some of the matters at issue, may be resolved shortly. However, where this occurs and the case does not settle the member should not preside at the hearing unless all parties consent. Where this occurs and tribunal staff presided at the case management conference, care must be taken that information acquired in settlement discussions does not spill over into the adjudicative side of the tribunal.

Sample Rules

Option 1

In this option the holding of pre-hearing conferences is at the request of a party, or all parties. If "the tribunal *may*" is used, the tribunal will retain discretion to hold pre-hearing conferences. If "the tribunal *must*" is used the tribunal will not have that discretion, and its process may be subject to abuse by a party who wishes to delay the hearing or increase other parties' costs by requiring additional steps. This option also enables a settlement conference to be held once the hearing has commenced if it appears that there is an opportunity for settlement.[31]

> Upon the request of a party [all parties], the tribunal may [must] direct the parties to attend one or more pre-hearing conferences prior to or during the hearing.

Option 2

In this option the tribunal retains discretion to direct that the parties attend pre-hearing conferences. By holding a case management conference early in its process the tribunal is able to manage cases toward resolution and assess potential for settlement. This option, a variation of Option 1, also enables a

[31] Based on a provision contained in Ontario's *Compendium of Model Rules of Practice*.

settlement conference to be held once the hearing has commenced if it appears that there is an opportunity for settlement.

> At the request of a party or, on its own initiative, the tribunal may direct that the parties attend one or more pre-hearing conferences prior to or during the hearing.

Option 3

This option may be used along with Options 1 or 2 to facilitate the convenient holding of case management conferences and to set out the powers of presiding members or staff.[32]

> (1) The tribunal may direct that a case management conference be held in person, by telephone conference or by some other method and be conducted by a member or the registrar.
>
> (2)The member or registrar presiding over a case management conference may make any order considered appropriate for the efficient conduct of the proceeding and, without limitation, may:
>
> (a) canvass the issues and any steps taken to reach agreement on the issues;
>
> (b) assist the parties to clarify the issues;
>
> (c) consolidate all or part of the proceeding with another proceeding;
>
> (d) require a party to produce to the tribunal or another party, or allow the tribunal or another party access to, any documents or other information which may be material to an issue in the proceeding;
>
> (e) require a party to provide to the tribunal and the other parties, or allow the tribunal or another party access to, any documentary evidence that will be submitted as evidence at a hearing;
>
> (f) require a party to provide to the tribunal and the other parties a list of witnesses and a written summary of witnesses' evidence;
>
> (g) require a party to provide to the tribunal and the other parties notice of an expert witness and a written summary of the evidence to be given by an expert witness;
>
> (h) require the experts who have been retained by the parties to confer, on a without prejudice basis, to determine issues, facts and opinions on which they agree and do not agree;
>
> (i) before the commencement of a hearing, require a party to answer under oath or affirmation by way of oral evidence or affidavit, questions of another party;
>
> (j) require the parties to prepare an agreed statement of facts;
>
> (k) require the parties to provide written submissions;
>
> (l) require the parties to complete statements of issues, evidence and legal principles;
>
> (m) impose time limitations and terms and conditions on the production of documents, expert reports, agreed statements of facts, written submissions or

[32] Based on the *Rules of Practice and Procedure before the BC Assessment Appeal Board*, s. 14.

any other process necessary for the fair and efficient management of the proceeding;

(n) schedule or reschedule dates for a settlement conference;

(o) schedule or reschedule dates for a hearing;

(p) record the results of the case management conference, including a summary of the issues and any orders, directions or rulings made.

Option 4

This option may be used along with Options 1 or 2 to facilitate the convenient holding of settlement conferences and to set out the powers of presiding members.[33]

(1) The tribunal may direct that a settlement conference by held in person, by telephone conference or by some other method. The member presiding over a settlement conference will not participate in the hearing unless all parties agree.

(2) The member presiding has discretion in the manner in which the settlement conference is conducted and, without limitation, may

(a) facilitate discussion among the parties toward a settlement of the issues in dispute;

(b) meet with the parties individually;

(c) provide non-binding opinions on any issue in dispute;

(d) provide an evaluation of the likelihood of success on any issue in the proceeding;

(e) make any order that may be made at a case management conference;

(f) adjourn and reschedule the settlement conference; and

(g) record the results of the settlement conference, including any settlement reached and any orders made.

Issues for consideration when designing dispute resolution processes

When designing mediation and other dispute resolution processes a number of issues should be considered. Some of those issues are identified and discussed briefly below. For a fuller discussion of these and other issues related to the design of dispute resolution systems, see "Reaching Resolution: A Guide to Designing Public Sector Dispute Resolution Systems" published by the Justice Services Branch, Ministry of Attorney General, Province of British Columbia, available at:

http://www.ag.gov.bc.ca/dro/publications/guides/design.pdf

[33] Based on the *Rules of Practice and Procedure before the BC Assessment Appeal Board*, s. 15.

Exchange of information and documents

- As the full exchange of information, including documents, will facilitate settlement, the tribunal's process should require the early exchange of information and documents.

- This is an area for which a timetable can be set in a case management conference, which itself should be scheduled early in the tribunal's process.

Timing of mediation

- A mediation session may be scheduled at any time during the tribunal's process.

- That said, early scheduling of mediation will maximize the potential for resource savings for the tribunal and time and cost savings for the parties.

Role of the mediator

- Where the mediator adopts an "interest-based" approach to mediation, he or she encourages the parties to identify their needs, desires and concerns, and to craft an outcome which addresses as many of their underlying needs and interests as possible. Parties are more likely to be satisfied with settlements based on their interests. The mediator oversees the process and is not responsible for the outcome.

- Where the mediator adopts a "rights-based" or evaluative approach to mediation, he or she assumes that the parties want and need direction on the appropriate grounds for settlement, and takes a more active role in determining the outcome. The mediator frames matters in terms of opposing rights and obligations, and considers the likely position of the parties if the matter proceeds to hearing as the benchmark for settlement. This approach is more appropriate where the settlement must conform to statutory objectives.

Who may attend a mediation?

- A mediation should be attended by all parties to the proceeding. While it is possible for a party to attend by representative, this should be avoided whenever possible. Where a party must attend by representative, it is essential that the representative have authority to settle the matter, or access by telephone during the mediation to the party represented or some other person with authority to settle.

- Where a party is represented by a lawyer or agent, they may attend.

- Where expert opinion is involved in the proceeding, the experts may attend. The experts' role in the mediation should be agreed upon in advance of, or at the beginning of, the mediation.

Cost of mediation

- Where mediation services are provided by the tribunal, cost savings can be achieved by using specialized tribunal staff as mediators, rather than tribunal members.

- Where mediators are appointed from, or the parties can choose from, a list of private mediators approved by the tribunal, the mediators' hourly rates will vary (unless a set rate was negotiated in preparation of the list). Typically mediators' hourly rates will range from $150 to $250. This is a factor for parties to consider in selecting a mediator.

Consequences for failure to attend mandatory mediation or other tribunal directed dispute resolution processes

- Where attendance at mediation or other tribunal directed dispute resolution processes is mandatory, there should be clear consequences for parties' failure to attend as required.
- A common sanction is an award of costs against the party who failed to attend. This assumes that the tribunal's governing legislation enables costs awards.
- In addition, hearing dates may be set and procedural orders may be made without hearing from the party who failed to attend.

Additional resources

In designing dispute resolution systems the following resources may be helpful:

Reaching Resolution: A Guide to Designing Public Sector Dispute Resolution Systems, Justice Services Branch, Ministry of Attorney General, Province of British Columbia, available at http://www.ag.gov.bc.ca/dro/publications/guides/design.pdf

The Compendium of Model Rules of Practice for Ontario Regulatory and Adjudicative Agencies, Society of Ontario Adjudicators and Regulators, January 1999, available at http://www.soar.on.ca/soar-compendium.htm

Agency Dispute Resolution Practices, A Compendium and Guide for Regulatory & Adjudicative Agencies, Province of Ontario, February 2001

Statutory Powers Procedure Act, R.S.O. 1990, Chapter S.22, available at www.e-laws.gov.on.ca/DBLaws/Statutes/English/90s22_e.htm

Powers and Procedures for Administrative Tribunals in Alberta, Alberta Law Reform Institute, Final Report No. 79, December 1999

Dispute Resolution Series, a four volume series intended to support dispute resolution education and training in the fields of law and public policy. The volumes were developed by the Dispute Resolution Office, Ministry of Attorney General, in partnership with the Continuing Legal Education Society of B.C.

Volume 1 – "Reaching Agreement: Negotiating in the Public Interest"

Volume 2 – "Turning Conflict into Consensus: Mediation Theory, Process and Skills"

Volume 3 – "Working Together: Designing Shared Decision-Making Processes"

Volume 4 – "Thinking Strategically: Developing Systems to Resolve Conflict"

More information about the Dispute Resolution Series is available at http://www.ag.gov.bc.ca/dro/policy-design/series.htm

4 PROCEDURAL POWERS

Many administrative tribunal powers of a procedural nature would benefit from either codification or expansion in legislation.[34] This Chapter explores these types of powers and proposes statutory provisions in respect of them.

Notice and service provisions

Administrative tribunals are required by natural justice considerations to provide parties to a proceeding with adequate notice of the proceeding and to provide parties with other documentation, including any interim or final decisions or orders. For some tribunals, it may be impractical to provide notice individually to parties in all proceedings, in which case it is desirable to provide tribunals with some flexibility in deciding how to effect notice. The means by which such notice can be served on the parties should be legislated in order to avoid disputes about whether the method chosen is adequate.

Questions can arise as to whether an administrative tribunal has actually "served" a party to a proceeding with notice or other documentation. This issue arises most often where it is most efficient and practical for the tribunal to serve parties by using the ordinary mail. To eliminate room for doubt as to what constitutes appropriate service of notice or other documents, it is proposed that legislation provide for the means by which service of documents can be effected. There are a variety of methods for serving parties to a proceeding. The federal *Proposal for an Administrative Hearings Powers and Procedures Act* has listed the following possible methods:

- By any method agreed to by the person;
- By giving the notice or a copy of it to the person;
- By giving the notice to any counsel or agent acting for the person in the matter before the agency and who has been recognized as such on the record of the agency;

[34] Administrative tribunals are creatures of statute and thus their powers must be either express or implied in their enabling legislation. Courts have held that many types of procedural powers are implied. However, it is not always clear whether, in the absence of any express power, a particular power will be said to be implied in respect of a particular tribunal. This point was made by Macaulay and Sprague in their text, *Practice and Procedure before Administrative Tribunals*, (Carswell) at 35-4: "An agency has only the powers which are expressed or implied by statute. A court will imply a power if it can be shown to be necessary to carry out a function that is expressly given to an agency. When an agency is holding hearings in order to make a determination of some issue properly before it, there must be implied some power to control its own proceedings. The fine question will be whether the agency has the power, express or implied, to proceed as it has". To eliminate any room for doubt, it is proposed that a number of these different types of powers be legislated.

- In the case of a corporation, by giving the notice or a copy of it to:
    - The president, manager, or other head officer, the treasurer, the secretary, the assistance treasurer, the assistance secretary, any vice-president, any person designated by the corporation to receive service, or any person employed by the corporation to receive service, or any person employed by the corporation in a legal capacity,
    - The person apparently in charge, at the time of the service, of the head office or of the branch or agency in Canada where the service is effected,
    - Any person discharging duties for a particular corporation comparable to those of an officer as described above, or
    - By serving it by such other method as may be provided by the statute under which the matter arises or as is provided for service of a document on a corporation for the purposes of a superior court in the province where the service is being effected;
- Where the person is a non-incorporated association of persons, by giving the notice or a copy of it to any person which the association has designated to the agency as its representative for the purposes of the matter;
- By leaving the notice or a copy of it in the mail box where mail is ordinarily delivered to the person;
- Where there is no mail box, by leaving the notice or a copy of it with an adult person at the place where mail is ordinarily delivered to the person;
- By sending the notice or a copy of it by ordinary mail to the address where the person resides or carries on business;
- By sending the notice or a copy of it by ordinary mail to the last address for service for that person which the person has given the agency;
- By sending a copy of the notice by telephone facsimile to any place where the agency could serve the document by ordinary mail;
- Where the intended recipient consents, by sending the notice by electronic means, computer disk, or other similar medium, to the place agreed to by the recipient.

Service provisions should provide administrative tribunals with flexibility to effect service of notice and other documentation on the parties by methods that are most suited to their needs. It seems most practical to enable tribunals to effect service through ordinary mail or by electronic means, with an ability to establish other methods of service in the tribunal's rules. Additionally, legislation should specify both when service is deemed to have occurred and when the failure to serve a party will not invalidate the

tribunal's proceeding. The following provisions are proposed:

> ***Service of documents***
>
> 22(1) Where the tribunal is required to provide notice or any document to a party or other person in a proceeding, it may do so by sending a copy of it to the party, other person, or their agent or representative:
>
> (a) by ordinary mail;[35]
>
> (b) by electronic transmission, including telephone transmission of a facsimile;
>
> (c) by some other method [that allows proof of receipt] if the tribunal's rules deal with the matter.[36]
>
> (2) If the copy is sent by ordinary mail, it shall be sent to the most recent address known to the tribunal and shall be deemed to be received on the fifth day after the day it is mailed, unless that day is a Saturday or a holiday, in which case the copy shall be deemed to be received on the next day that is not a holiday.
>
> (3) If the copy is sent by electronic transmission it shall be deemed to be received on the day after it was sent, unless that day is a Saturday or a holiday, in which case the copy shall be deemed to be received on the next day that is not a holiday.
>
> (4) If the copy is sent by a method referred to in subsection (1)(c), the tribunal's rules will govern its deemed day of receipt.
>
> (5) If a party that acts in good faith does not, through absence, accident, illness or other cause beyond the party's control, receive the copy until a later date than the deemed day of receipt, subsection (2), (3) or (4), as the case may be, does not apply.
>
> ***When failure to serve does not invalidate proceedings***
>
> 23. Where a notice or document is not served in accordance with section ___ of this Act, the proceedings will not be invalidated if:
>
> (a) the contents of the notice or document were actually known by the person to be served within the time required for such service;
>
> (b) the person to be served consents; or
>
> (c) the failure to serve does not result in prejudice to the person or any such prejudice can be satisfactorily addressed by an adjournment or some other means.

It is proposed that these service provisions apply to all administrative tribunals except:

- Building Code Appeal Board
- Parole Board

[35] Bill 57 (*Environmental Management Act*) proposes that notice be by registered mail sent to the last known address of the person. Notice sent by registered mail is deemed to be served on the person on the 14th day after deposit with Canada Post.

[36] For example, the rules could specify that service can be carried out by leaving a copy of the document at the person's residence with an adult person who apparently resides with the person to be served; by leaving a copy of the document in the mailbox or mail slot at the address provided by the person for service, etc. The rules would specify the deemed day of receipt in such circumstances.

Some administrative tribunals require additional flexibility for the provision of notice of a hearing due to the number of parties involved. It is proposed that these tribunals be given the discretion to provide notice by means of publication.

> ***Notice of hearing by publication***
>
> 24. Where a tribunal is of the opinion that because the parties to any proceeding before it are so numerous or for any other reason, it is impracticable to give notice of the hearing to all or any of the parties individually, the tribunal may, instead of doing so, cause reasonable notice of the hearing or of its decision to be given to such parties by public advertisement or otherwise as the tribunal may direct.[37]

This additional flexibility should be afforded to the following administrative tribunals:

- Environmental Appeal Board
- Motor Carrier Commission
- Utilities Commission

Notice of appeal provisions

The persons who may commence an appeal should be identified clearly in the tribunal's enabling statute.[38] The following notice provisions are proposed as model provisions for appeal tribunals:

> ***Option 1: Notice of appeal (inclusive of prescribed fee)***
>
> 25(1) A decision or order may be appealed by filing a notice of appeal with the tribunal.
>
> (2) A notice of appeal must:
>
> (a) be made in writing or in another form acceptable to the appeal tribunal;
>
> (b) identify the decision or order that is being appealed;
>
> (c) state why the decision or order is incorrect or why it should be changed;
>
> (d) state the outcome requested;
>
> (e) contain the name, address and telephone number of the appellant, and if the appellant has an agent to act on the appellant's behalf in respect of the appeal, include the full name of the agent and a telephone number at which the agent may be contacted during regular business hours; and
>
> (f) include an address for delivery of any notices in respect of the appeal.
>
> (3) The notice of appeal must be accompanied by payment of the prescribed fee or it will not be accepted by the tribunal unless the tribunal considers that the appellant cannot reasonably afford to pay the fee.

[37] The Expropriation Compensation Board may publish notice to a party where the last known address of the party is unknown: see section 49 of the *Expropriation Compensation Act*.

[38] A good example is found in section 241 of the *Workers Compensation Act*. It specifies what is meant by persons "directly affected by a decision of the review officer". Another example are appeals to the Employment and Assistance Appeal Tribunal which must be made within 7 days of the decision as it is important that such appeals be processed very quickly.

(4) Notwithstanding subsection (3), if a notice of appeal is deficient or if the prescribed fee is outstanding, the tribunal may in its discretion allow a reasonable period of time within which the notice may be perfected or the fee is to be paid.[39]

Option 1 would apply to the following appeal tribunals:

- Agricultural Land Commission (section 55 appeals)
- British Columbia Marketing Board
- Building Code Appeal Board
- Commercial Appeals Commission
- Community Care Facility Appeal Board
- Electrical Safety Appeal Board
- Elevating Devices Appeal Board
- Employment Standards Tribunal
- Environmental Appeal Board
- Forest Appeals Commission
- Fire Commissioner
- Gas Safety Appeal Board
- Labour Relations Board (section 99 applications)
- Power Engineers and Boiler and Pressure Vessel Safety Appeal Board
- Property Assessment Appeal Board

Option 2: Notice of Appeal (exclusive of prescribed fee)

26(1) A decision or order may be appealed by filing a notice of appeal with the tribunal.

(2) A notice of appeal must:

(a) be made in writing or in another form acceptable to the appeal tribunal;

(b) identify the decision or order that is being appealed;

(c) state why the decision or order is incorrect or why it should be changed;

(d) state the outcome requested;

(e) contain the name, address and telephone number of the appellant, and if the appellant has an agent to act on the appellant's behalf in respect of the appeal, include the full name of the agent and a telephone number at which the agent may be contacted during regular business hours;

(f) include an address for delivery of any notices in respect of the appeal; and

(g) be signed by the appellant or the appellant's agent.

(3) If a notice of appeal is deficient the tribunal may in its discretion allow a reasonable period of time within which the notice may be perfected or the fee is to be paid.[40]

[39] This provision is based on section 50(3) of the *Assessment Act*, except under that section only the tribunal chair has this discretion.

Option 2 would apply to the following appeal tribunals:

- Employment and Assistance Appeal Tribunal
- Health Care and Care Facility Review Board
- Hospital Appeal Board
- Human Rights Tribunal
- Medical and Health Care Services Appeal Board
- Mental Health Review Panels
- Public Service Appeal Board
- Workers' Compensation Appeal Tribunal

Fee Regulations

The fees payable on filing a complaint, application, review or appeal should be prescribed by regulation. Accordingly, the following provision is proposed:

> ***Regulations***
>
> 27. The Lieutenant Governor in Council may make regulations as follows:
>
> (a) for purposes of section __ of the Act [*fees*] prescribing tariffs of fees to be paid with respect to the filing of different types of complaints, applications, reviews and appeals.

Time limits for appeals

As a general rule, the time limit for filing an appeal will be 30 days from the date of the decision or order being appealed from. Exceptions to this general rule will be expressly provided for in the tribunal's enabling statute.[41] The following time limit provision is proposed:

> ***Time limit for appeal***
>
> 28(1) A notice of appeal respecting a decision or order must be filed within 30 days of the decision or order being appealed.
>
> (2) A tribunal may extend the time to file a notice of appeal even if the time to file has expired where satisfied that:
>
> (a) special circumstances existed which precluded the filing of a notice of appeal within the time period required in subsection (1); and
>
> (b) an injustice would otherwise result.[42]

The proposed notice and time limit provisions would apply to the following appeal tribunals:

- Agricultural Land Commission (section 55 appeals)

[40] This provision is based on section 50(3) of the *Assessment Act*, except under that section only the tribunal chair has this discretion.

[41] An example is found in section 243(2) of the *Workers Compensation Act* where a 90 day time limit applies in respect of certain decisions.

[42] This subsection is based on section 243(3) of the *Workers Compensation Act*.

- British Columbia Marketing Board
- Commercial Appeals Commission
- Community Care Facility Appeal Board
- Electrical Safety Appeal Board
- Elevating Devices Appeal Board
- Environmental Appeal Board
- Forest Appeals Commission
- Gas Safety Appeal Board
- Labour Relations Board (section 99 applications)
- Medical and Health Care Services Appeal Board
- Power Engineers and Boiler and Pressure Vessel Safety Appeal Board
- Workers' Compensation Appeal Tribunal

The proposed time limit provision would not apply to the following appeal tribunals:

- Employment and Assistance Appeal Tribunal
- Health Care and Care Facility Review Board[43]
- Hospital Appeal Board
- Property Assessment Appeal Board
- Property Assessment Review Panels
- Public Service Appeal Board[44]

Type of hearing

Administrative tribunals should have the flexibility to conduct oral (in person), written (paper) or electronic (telephone conference or video conference) hearings, or to conduct hearings utilizing a combination of these techniques. Such flexibility allows the tribunal to take advantage of existing technology and handle increasing caseloads more effectively and efficiently. The discretion to choose which type (or combination) of hearing is appropriate in a given proceeding should be a matter for the administrative tribunal to determine, subject to statutory guidance respecting the factors to be taken into account in exercising tribunal discretion.

The ability to combine different types of hearings within one proceeding is essential to facilitating efficiency. For example, a tribunal may decide that an oral hearing should be afforded the parties to a proceeding because of the nature of the proceeding, the complexity of the issues at stake and/or other reasons (e.g. there are issues of credibility). However, it may be most efficient to enable one or more witnesses in a proceeding to participate in that proceeding by way of telephone conference. In the same

[43] Decisions are to be appealed to this board within 72 hours.

[44] Under the *Public Service Act* regulations, an unsuccessful applicant on a competition has 14 days to file an appeal with the board.

hearing, it might be most efficient to dispense with preliminary legal issues through an exchange of written submissions only.

While there should be no impediment to party agreement to conduct a hearing in writing or electronically, the administrative tribunal should have the discretion to require written or electronic hearings (instead of an oral hearing) regardless of whether the parties consent to such hearing processes.

In her article *Amendments to the Statutory Powers Procedure Act (Ontario): Analysis and Comments* (published in Anisman Reid, *Administrative Law Issues and Practice* (Carswell, 1995)), author Margot Priest noted:

> *Written hearings have their own requirements; the collection of evidence, the taking of affidavits, and the writing of arguments, etc., can be both time-consuming and require expertise and skill. Written hearings are not necessarily faster, cheaper or simpler. Not all parties are equally able to participate in a written hearing any more than all parties are equally skilled or advantaged in participating in oral hearings. Written hearings are particularly well-suited to cases with a large policy component and extensive background documentation. They are also suited to less complex cases in which the primary evidence is straightforward and can be easily presented in affidavits or other documents. In deciding to hold a written hearing, the tribunal should consider these factors and the convenience of the parties as well as its own. Having taken all that into account, however, and considering such factors as prejudice to the parties (e.g., written hearings are particularly difficult for the illiterate and may be more difficult for those speaking languages other than French or English), the tribunal should have the final say on the matter.*

To ensure that hearing selection powers are exercised fairly, having regard to relevant factors, the statutory discretion should require the administrative tribunal to consider and balance:

- The convenience of the parties and the tribunal;
- The prejudice to one or more party (e.g. literacy or language issues); and
- The nature of the issues (e.g. primarily law rather than fact, procedural rather than substantive, requiring resolution of credibility issues).

Additionally, provisions should be made to deal with situations where a party fails to attend or otherwise participate in an oral, written or electronic hearing.

Form of hearing power

The proposed form of hearing power is as follows:[45]

> ***Form of hearing***
>
> 29(1) A tribunal may, in a proceeding, hold any combination of written, electronic and oral hearings.
>
> (2) Where notice of a hearing has been given to a party to the proceeding in accordance with the tribunal's rules and the party does not participate in the hearing in accordance with such notice, the tribunal may proceed in the absence of the party and the party is not entitled to any further notice in the proceeding.

This power would not apply to the Forest Practices Board or the Building Code Appeal Board.[46] It would apply to all other administrative tribunals except that only subsection (1) applies to:

- Coroners Service
- Fire Commissioner
- Parole Board

Rights of parties to tribunal proceedings

Any party appearing before an administrative tribunal should be permitted to be represented by counsel or an agent and to make submissions as to facts, law and jurisdiction.

The following provision is proposed and would apply to all administrative tribunals:

> ***Representation of parties to a proceeding***
>
> 30. A party to a proceeding may be represented by counsel or an agent and make submissions as to facts, law and jurisdiction.[47]

[45] The Society of Ontario Adjudicators and Regulators (SOAR) also proposed inclusion of the following provisions in the Ontario *Statutory Powers Procedure Act*: "9(2) Despite subsection (1), proceedings, in whole or in part, may be held in writing or by telephone or by means of any other audio or visual or other technology. 9(3) Despite subsection (2), where the tribunal determines that there will be significant prejudice if the proceeding or part of the proceeding is held without personal attendance, the tribunal shall hold the hearing by personal attendance." Macaulay and Sprague (*Practice and Procedure before Administrative Tribunals*) recommend a specific provision to deal with pre-hearing conferences, mediations, etc. Their recommendation is: "(1) Where an agency conducts a hearing, evidence, submissions, and arguments may be given in either oral or written form, or in mixed oral and written form. (2) Where an agency conducts a pre-hearing conference, a mediation and conciliation or settlement conference, evidence submissions, and arguments may be given in either oral or written form or in mixed oral and written form."

[46] The Building Code Appeal Board's enabling Act and regulations contemplates written hearings only.

[47] Sometimes these rights are consolidated with the right to present evidence and, in respect of oral hearings, ask questions. See, for example, section 58 of the *Safety Standards Act*, S.B.C. 2003, c. 39 (not in force) which provides: "In an appeal, a party may (a) present evidence, (b) if there is an oral hearing, ask questions, (c) make submissions as to facts, law and jurisdiction, and (d) be represented by counsel". See also Bill 57 – 2003 (*Environmental Management Act*), s. 94.

In some administrative tribunal proceedings, the parties would have the natural justice right to examine and cross-examine witnesses.[48] For these tribunals, common law rights should be legislated in recognition of their importance. The following provision is proposed:

> ***Examination of witnesses***[49]
>
> 31(1) Subject to subsection (2), a party to a proceeding may, at an oral or electronic hearing:
>
> (a) call and examine witnesses and present evidence and submissions; and
>
> (b) conduct cross-examination of witnesses at the hearing
>
> as reasonably required for a full and fair disclosure of all matters relevant to the issues in the proceeding.
>
> (2) The tribunal may reasonably limit further examination or cross-examination of a witness where it is satisfied that the examination or cross-examination has been sufficient to disclose fully and fairly all matters relevant to the issues in the proceeding.[50]
>
> (3) The tribunal may question any witness who gives oral evidence in an oral or electronic proceeding.

It is proposed that the following administrative tribunals be provided with the proposed examination of witness powers are:

- Commercial Appeals Commission
- Coroners Service
- Electrical Safety Appeal Board
- Elevating Devices Appeal Board
- Employment and Assistance Appeal Tribunal
- Environmental Appeal Board
- Expropriation Compensation Board
- Farm Practices Board
- Financial Institutions Commission
- Fire Commissioner
- Forest Appeals Commission
- Gas Safety Appeal Board
- Health Care and Care Facility Review Board
- Hospital Appeal Board

[48] Such a right is found in section 132 of the Quebec *Act Respecting Administrative Justice*. It provides that "[a]ny party may examine and cross-examine witnesses to the extent necessary to ensure fair proceedings".

[49] The proposed provision is based on provisions presently found in the *Human Rights Code* and the *Environment Management Act* and section 10.1 of the Ontario *Statutory Powers Procedure Act.* It has been suggested that express provision be made to preclude the examination of lower level decision-makers. Also, concern has been expressed about allowing witnesses to be called at an electronic hearing. Particularly where there are issues of credibility, examination and cross-examination should be by oral hearing only. This is a matter that could be dealt with in a tribunal's rules of practice and procedure.

[50] This provision is based on section 23(2) of the Ontario *Statutory Powers Procedure Act*.

- Human Rights Tribunal
- Labour Relations Board
- Mediation and Arbitration Board
- Mental Health Review Panels
- Motor Carrier Commission
- Power Engineers and Boiler and Pressure Vessel Safety Appeal Board
- Property Assessment Review Panels
- Public Service Appeal Board
- Residential Tenancy Arbitrators
- Securities Commission
- Utilities Commission
- Workers' Compensation Appeal Tribunal

Adjournments

At common law, administrative tribunals have discretion to adjourn their proceedings from time to time as long as their discretion is exercised in accordance with natural justice principles.[51] The power to adjourn a hearing is implicit in the power to hold a hearing. It is proposed that the power to adjourn and the criteria to be taken into account by an administrative tribunal when deciding whether to adjourn a matter, either on its own motion or on application by a party, be legislated. The criteria to be applied will reflect natural justice principles. Those principles require that discretion to grant an adjournment be exercised on the basis of relevant considerations and having regard to the balance of convenience between the parties. The law is clear that an adjournment must be granted where it is necessary to avoid unfairness or a miscarriage of justice. Where appropriate, an express limitation on the length of an adjournment may be justified.[52] An example would be in relation to Health Care and Care Facility Review Board proceedings.

Section 21.1 of the Ontario *Statutory Powers Procedure Act* provides:

> 21.1 A hearing may be adjourned from time to time by a tribunal of its own motion or where it is shown to the satisfaction of the tribunal that the adjournment is required to permit an adequate hearing to be held.

Similarly, section 134 of the Quebec *Act Respecting Administrative Justice* provides:

> 134. The Tribunal may adjourn the hearing, on the conditions it determines, if it is of the opinion that the adjournment will not cause unreasonable delay in the proceeding or a denial of natural justice, in particular, for the purpose of fostering an amicable settlement.

[51] *Prassad v. Canada (Minister of Employment & Immigration)* (1989), 57 D.L.R. (4th) 663 (S.C.C.).
[52] See, for example, section 14 of the *Fire Services Act*.

The following proposed adjournment power is based on these provisions:

> ***Adjournments***
>
> 32(1) A proceeding may be adjourned from time to time by a tribunal on its own motion or where it is shown to the satisfaction of the tribunal that the adjournment is required to permit an adequate hearing to be held.
>
> (2) In considering whether a proceeding should be adjourned, the tribunal shall have regard to the following factors:
>
> (a) the reason for the adjournment;
>
> (b) whether an adjournment would cause unreasonable delay in the proceedings;
>
> (c) the impact of refusing the adjournment on an applicant;
>
> (d) the impact of granting an adjournment on the other parties; and
>
> (e) the impact of the adjournment on the public interest.

Administrative tribunals requiring adjournment power

All tribunals required to conduct proceedings require the power to grant an adjournment to ensure procedural fairness. Some tribunals, such as the Employment and Assistance Appeal Tribunal and Mental Health Review Panels, are required to hold hearings within a prescribed time. While such tribunals should have less flexibility in relation to the length of an adjournment, they must still have the power to grant adjournments to comport with the rules of procedural fairness.

The Forest Practices Board does not require this power as it does not conduct proceedings, but rather acts as a watchdog agency. It has broad powers to investigate complaints about forest practices, oversee the forest practices audit process and report to the public on the administration of the *Forest Practices Code*. It can also request a review of certain determinations made under the Code.

Combining tribunal proceedings

The Ontario *Statutory Powers Procedure Act* contains a provision enabling tribunals to combine proceedings in certain limited circumstances. The federal *Proposal for an Administrative Hearings Powers and Procedures Act* also recommended that tribunals be given the ability to hear different matters within one proceeding. Macaulay and Sprague (in *Practice and Procedure before Administrative Tribunals*) expressed the view that:

> *Agencies need greater flexibility to hear and resolve a wide range of disputes and issues. Given the nature of many agency proceedings, many parties can raise substantially the same issues. Agencies should have the power to join several matters in one hearing to ensure that duplication be avoided. …*

The federal proposal included the ability to: consolidate proceedings or require proceedings to be heard at the same time or one immediately after the other; stay proceedings until the determination of another proceeding; and apply an order or decision in respect of one proceeding with respect to the other proceeding. These powers could be exercised in circumstances where two or more proceedings have an issue or question of law, fact or policy in common or where joinder is in the interest of a just and expeditious resolution of the proceedings.

The following provision is based on the federal proposal and section 9.1 of the Ontario *Statutory Powers Procedure Act*:

> ***Proceedings involving similar questions***
>
> 33(1) If two or more proceedings before a tribunal involve the same or similar questions of fact, law or policy, the tribunal may:
>
> (a) combine the proceedings or any part of them, with the consent of the parties;
>
> (b) hear the proceedings at the same time, with the consent of the parties;
>
> (c) hear the proceedings one immediately after the other; or
>
> (d) stay one or more of the proceedings until after the determination of another one of them.
>
> (2) A tribunal may make additional orders respecting the procedure to be followed with respect to proceedings under this section.

Many administrative tribunals should have the power to combine proceedings raising the same or similar issues. However, the nature of other tribunal proceedings is such that this power would be either inappropriate or impractical. These types of proceedings would include:

- Proceedings involving sensitive personal information (e.g. medical information or income assistance information);
- Proceedings that are intended to be heard within tight time frames;
- Proceedings that are fact-intensive or inquisitorial.

The following tribunals would fall into this category and thus should not be provided with the power to combine proceedings:

- Building Code Appeal Board
- Community Care Facility Appeal Board
- Coroners Service
- Electrical Safety Appeal Board
- Elevating Devices Appeal Board
- Employment and Assistance Appeal Tribunal
- Fire Commissioner
- Forest Practices Board
- Gas Safety Appeal Board

- Health Care and Care Facility Review Board
- Health Care Practitioners Special Committee for Audit
- Hospital Appeal Board
- Mediation and Arbitration Board
- Medical and Health Care Services Appeal Board
- Medical Services Commission
- Mental Health Review Panels
- Parole Board
- Power Engineers and Boiler and Pressure Vessel Safety Appeal Board
- Private Post Secondary Education Commission
- Public Service Appeal Board

The power to combine proceedings would be provided to the following administrative tribunals:

- Commercial Appeals Commission
- Employment Standards Tribunal
- Environmental Appeal Board
- Expropriation Compensation Board
- Forest Appeals Commission
- Human Rights Tribunal
- Labour Relations Board
- Motor Carrier Commission
- Property Assessment Appeal Board
- Public Service Appeal Board
- Securities Commission
- Utilities Commission
- Workers' Compensation Appeal Tribunal

Interim orders

Many administrative tribunals would benefit from an express power to make interim orders. The following power is proposed:

> ***Interim orders***
>
> 34. The tribunal may make an interim order in a proceeding.

This power would be provided to the following administrative tribunals:

- Commercial Appeals Commission
- Environmental Appeal Board
- Forest Appeals Commission
- Human Rights Tribunal
- Labour Relations Board
- Residential Tenancy Arbitrators

- Securities Commission
- Utilities Commission
- Workers' Compensation Appeal Tribunal

Consent orders

Most administrative tribunals that adjudicate disputes should be permitted to make consent orders as long as the terms of such orders are reasonable and do not conflict with the tribunal's enabling statute. Tribunals should be required to provide reasons for refusing to make a consent order where the parties to a proceeding have agreed in writing to dispose of a matter by consent.

The federal *Proposal for an Administrative Hearings Powers and Procedures Act* set out the circumstances that tribunals would be required to take into account in deciding whether or not to dispose of a matter by consent order. Those considerations (in addition to reasonableness and consistency with enabling legislation) are:

- The value of the parties resolving their dispute through consensual dispute resolution in light of the agency's mandate;
- Whether a full inquiry by the agency into the matter is required to adequately fulfill the purposes of the statute under which the matter arises;
- The benefits likely to arise in determining the matter through a full inquiry into the matter;
- The impact of holding a full inquiry (rather than proceeding on the basis of the consent order) on the ability of the agency to hold inquiries in other matters.

While these considerations may be taken into account by a tribunal in deciding whether or not to dispose of a matter by consent, it is not recommended that these latter considerations be legislated.

The following provision is proposed:

> ***Consent Orders***
>
> 35(1) On application by the parties to a proceeding, the tribunal may make a consent order if it is satisfied that the order is reasonable and consistent with its enabling legislation.
>
> (2) Where a tribunal declines to make a consent order under subsection (1), it must provide reasons for doing so to the parties.

It is proposed that this power be provided to the following administrative tribunals:

- Commercial Appeals Commission
- Community Care Facility Appeal Board
- Electrical Safety Appeal Board
- Elevating Devices Appeal Board
- Employment Standards Tribunal
- Environmental Appeal Board

- Forest Appeals Commission
- Gas Safety Appeal Board
- Human Rights Tribunal
- Labour Relations Board
- Power Engineers and Boiler and Pressure Vessel Safety Appeal Board
- Securities Commission
- Utilities Commission
- Workers' Compensation Appeal Tribunal

Recording the proceedings

At common law, there is no requirement that a tribunal transcribe its proceedings, although courts have occasionally held that the failure to produce a transcription can constitute a violation of the rules of natural justice. For various reasons (among them costs), few administrative tribunals have instituted the practice of transcribing hearing proceedings. Particularly in respect of proceedings that are factually complex and where credibility issues arise, the lack of a transcription can result in practical difficulties (and inefficiencies) if those proceedings are subsequently the subject of a judicial review application (e.g. the parties try to recreate the evidence given through affidavit evidence).

It is proposed that some administrative tribunals be expressly given the power to record their proceedings and that such power clearly deem a tribunal's recording to constitute part of the record and be deemed to be correct. If, by reason of a mechanical or like failure or other accident, the recording is destroyed, interrupted or incomplete, the validity of the proceedings will not be affected.

It is also proposed that these tribunals make available, on request, a copy of any recording of a proceeding to a party to that proceeding for a reasonable reproduction fee (including the preparation expense or materials or the cost charged to have it commercially reproduced).

The following provision is proposed:

> ***Recording tribunal proceedings***
>
> 36(1) The tribunal may, in its discretion, transcribe or record its proceedings.
>
> (2) Where the tribunal transcribes or records a proceeding, the transcription or recording is deemed to be correct and constitute part of the record of the proceeding.
>
> (3) If, by reason of a mechanical or human failure or other accident, the transcription or recording is destroyed, interrupted or incomplete, the validity of the proceedings will not be affected.
>
> (4) On request by a party to a proceeding and on payment of a reasonable reproduction fee as determined by the tribunal, the tribunal will provide the party with a copy of the recording of the proceeding.

> (5) For the purposes of this section and section 37, recording includes any video, audio or digital recording of oral evidence given at a hearing.

The provision would apply to all administrative tribunals except:

- Building Code Appeal Board (written hearings only)
- Coroners Service (transcripts required)
- Forest Practices Board (board does not conduct hearings)

Record of proceedings

The Ontario *Statutory Powers Procedure Act* requires administrative tribunals to compile a record of proceeding for each hearing that it holds and specifies what that record should consist of.[53] Such a provision eliminates any room for doubt about what constitutes the record for purposes of any judicial review or appeal proceedings. In Ontario, the matters to be included in the record are:

- An application, complaint, reference or other document, if any, by which the proceeding was commenced;
- The notice of any hearing;
- Any interlocutory orders made by the tribunal;
- All documentary evidence filed with the tribunal, subject to any limitation expressly imposed by any other Act on the extent to or the purposes for which any such documents may be used in evidence in any proceeding;
- The transcript, if any, of the oral evidence given at the hearing;
- The decision and reasons of the tribunal.

These matters are very similar to the matters included in the definition of "record of the proceeding" in section 1 of the *Judicial Review Procedure Act,* R.S.B.C. 1996, c. 241. Section 1 defines "record of the proceeding" to include:

> (a) a document by which the proceeding is commenced;
>
> (b) a notice of a hearing in the proceeding;
>
> (c) an intermediate order made by the tribunal;
>
> (d) a document produced in evidence at a hearing before the tribunal, subject to any limitation expressly imposed by any other enactment on the extent to which or the purpose for which a document may be used in evidence in a proceeding;
>
> (e) a transcript, if any, of the oral evidence given at a hearing;
>
> (f) the decision of the tribunal and any reasons given at a hearing.

It is proposed that all administrative tribunals be required by statute to prepare a record for each of their proceedings and that the matters to be included in the record mirror those listed in the definition of "record

[53] The federal *Proposal for an Administrative Hearings Powers and Procedures Act* also recommended inclusion of such a provision.

of the proceeding" in the *Judicial Review Procedure Act*.[54] It is also proposed that, in addition to transcriptions, if any, the record expressly include a copy of any recording of the proceedings made by the administrative tribunal. This would require paragraph (e) of the definition of "record of the proceeding" in the *Judicial Review Procedure Act* to be amended as follows:

> ***"record of the proceeding"***
>
> …
>
> (e) any video, audio or digital recording, or other form of transcript made of the oral evidence given at a hearing;
>
> …

Additionally, with certain restrictions (to protect personal privacy or confidential and sensitive business information) the administrative tribunal will be required to make a copy of the record of a proceeding available to a person on payment of a fee. The fee would be prescribed by regulation made by the Lieutenant Governor in Council. The proposed provision is as follows:

> ***Tribunal to compile record***
>
> 37(1) The tribunal must prepare a record of every proceeding before it.
>
> (2) For purposes of subsection (1), the record includes:
>
> (a) a document by which the proceeding is commenced;
>
> (b) a notice of a hearing in the proceeding;
>
> (c) an intermediate order made by the tribunal;
>
> (d) a document produced in evidence at a hearing before the tribunal, subject to any limitation expressly imposed by any other enactment on the extent to which or the purpose for which a document may be used in evidence in a proceeding;
>
> (e) a transcript or recording, if any, of the oral evidence given at a hearing;
>
> (f) the decision of the tribunal and any reasons given at a hearing.
>
> (3) Subject to subsection (4), on application during normal business hours and on payment of the prescribed fee, the tribunal must provide any person with a copy of a record.
>
> (4) Where the person applying to the tribunal for a copy of a record of proceeding under subsection (3) is not a party to that proceeding, the tribunal shall first sever from the record any information that was received by it on an *in camera* or confidential basis under section ___ of this Act.

[54] Some administrative tribunals are already required to prepare a record of every proceeding before it. An example is the Mediation and Arbitration Board established under the *Petroleum and Natural Gas Act*. Section 15(2) of the Act provides that the board must "(a) prepare a record of every proceeding before it, and (b) provide any person, on application during normal business hours and payment of the fee, with copies of a record in the custody of the board". It also provides that the board "has custody of its records and of documents filed with the board in the board's proceedings" and that it "is responsible for drawing orders and rulings of the board, and for filing those orders and rulings with their appropriate records".

Written decisions and provision of reasons

As a general rule, administrative tribunals should be required to provide the parties to a proceeding with copies of any final decision or order, including reasons for that decision. Additionally, subject to the types of concerns addressed in the proposed *in camera* provisions (i.e. concerns respecting disclosure of sensitive personal, commercial or security information), tribunal decisions should be available to the public. Tribunals should be encouraged to write decisions that concern sensitive personal, commercial or security information in a way that protects these interests in order to best balance the values of openness against privacy and other public interest goals.

The following provision (which is based on sections 17 and 18 of the Ontario *Statutory Powers Procedure Act*) is proposed and would apply to all tribunals except the Coroners Service, the Fire Commissioner and the Forest Practices Board:

> ***Decision***
>
> 38(1) The tribunal shall make its final decision, with reasons, and any final order in writing.
>
> (2) A tribunal that makes an order for the payment of money shall set out in the order the principal sum, and if interest is payable, the rate of interest and the date from which it is to be calculated.
>
> (3) The tribunal's decision is effective the date it is issued by the tribunal, unless otherwise specified by the tribunal.
>
> (4) The tribunal must provide for public assess to its decisions and orders in a manner that protects the privacy of the parties to the proceeding and any sensitive confidential business or security information.[55]
>
> ***Notice of Decision***
>
> 39(1) Subject to subsection (2), the tribunal shall send each party who participated in the proceeding, or the party's counsel or agent, a copy of its final decision or order, including the reasons.
>
> (2) Where a tribunal is of the opinion that because the parties to any proceeding before it are so numerous or for any other reason, it is impracticable to send its final decision or order to all or any of the parties individually, the tribunal may, instead of doing so, cause reasonable notice of its decision to be given to such parties by public advertisement or otherwise as the tribunal may direct.
>
> (3) A notice of final decision or order given by a tribunal under subsection (2) shall inform the parties of the place where copies of it may be obtained.

[55] The Ontario statute provides that "Tribunal decisions and orders must be available for public inspection during regular business hours at the office of the tribunal". Section 234(2) of *the Workers Compensation Act* requires the chair of the Workers' Compensation Appeal Tribunal to provide for "public access to decisions of the appeal tribunal in a manner that protects the privacy of the parties to the proceedings".

Amendments to a tribunal decision

Section 21.1 of the Ontario *Statutory Powers Procedure Act* gives a tribunal the discretion to correct at any time a typographical error, error of calculation or similar error made in its decision or order. This type of provision essentially codifies those circumstances (accidental slips, omissions or errors of a clerical nature) that are recognized as an exception to the *functus officio* doctrine. Other circumstances that have been recognized by the courts as allowing an administrative tribunal to reopen one of its final decisions are where decisions are ambiguous or do not reflect the intent of the decision-maker.

The general rule expressed in the doctrine of *functus officio* is that a court may not reopen a final decision. The Supreme Court of Canada has held (in *Chandler v. Alta. Assoc. of Architects*, [1989] 2 S.C.R. 848) that this doctrine applies more flexibly to administrative tribunals such that there is often some debate about whether a tribunal is able to reopen a decision for jurisdictional or other reasons. In *Chandler* the Court determined that a tribunal could reopen its proceedings in circumstances where it failed to dispose of an issue that was fairly raised in those proceedings.

In the interests of establishing that a tribunal's decision, once issued, is final and may only be reopened in express and limited circumstances, a provision similar to that presently found in section 57.1 of the *Residential Tenancy Act* and section 27 of the *Commercial Arbitration Act*[56] is proposed:

> ***Amendments to decision or order***
>
> 40(1) On application of a party or on the tribunal's own initiative, the tribunal may amend a final decision or order to correct:
>
> (a) a clerical or typographical error;
>
> (b) an accidental or inadvertent error, omission or other similar mistake; or
>
> (c) an arithmetical error made in a computation.
>
> (2) An amendment under subsection (1) must not, without the consent of all parties, be made more than 15 days after all parties have been served with the decision.
>
> (3) Within 15 days after being served with the decision, a party may apply to the tribunal for clarification of the decision and the tribunal may amend the decision only if it considers the amendment will clarify it.
>
> (4) Within 15 days after being served with the decision, a party may apply to the tribunal to make an additional decision with respect to an issue presented in the proceeding but unintentionally omitted from the decision and the tribunal may make such additional decision with respect to that issue.
>
> (5) The tribunal may not amend a final decision other than in those circumstances described in subsections (1) to (4).[57]

[56] Section 27 of the *Commercial Arbitration Act* enables an arbitrator appointed under that Act to make amendments to an arbitration award to correct accidental slips, errors or omissions or make an additional award with respect to claims presented in the proceedings but omitted from the award.

(6) Nothing in this section should be construed as limiting a tribunal's ability to reopen a proceeding in order to cure a natural justice defect.

This provision would apply to all administrative tribunals except:

- Coroners Service
- Fire Commissioner
- Forest Practices Board

General procedural fairness requirements

It is proposed that the following provision apply to all administrative tribunals.

Tribunal duties

41. A tribunal member must faithfully, honestly and impartially perform his or her duties and must not, except in the proper performance of those duties, disclose to any person any information obtained as a member.[58]

[57] Section 57.1 of the *Residential Tenancy Act* provides that amending powers may only be exercised where an arbitrator "considers it just and reasonable to do so".

[58] Based on section 31 of the *Assessment Act.*

5 STANDING TO PARTICIPATE IN ADMINISTRATIVE TRIBUNAL PROCEEDINGS

The law of *locus standi* or standing is concerned with the important threshold question of who is entitled to participate in or have access to an administrative tribunal's proceedings. Standing principles focus on the interests of those who wish to participate in the subject matter of particular proceedings; they seek to distinguish between those who have "standing" to participate either as "parties" or "interveners" from those who are "mere busybodies" who should not be entitled to participate. The law of standing thus performs an important gate-keeping function.

While common law rules have been developed to set appropriate limits on participation in the judicial process, the determination of who has standing before a statutory decision-maker is a highly contextual exercise governed by the language of the tribunal's constituent legislation. In both the administrative and judicial context, the rules governing standing attempt to strike a balance between two competing goals. One is to ensure that the decision-maker is fully informed by hearing from representatives of interests that may not coincide with those of the parties. The other is to prevent litigation from being protracted and complicated by individuals whose interests are not directly affected.

The White Paper Report, *Standing to Appear before Administrative Tribunals,* proposes that legislated standing rules be guided by the following principles:

- Standing provisions should ensure fairness and openness in administrative proceedings, without undermining statutory objectives;
- Standing provisions should promote the efficient and timely resolution of disputes within statutory boundaries;
- Standing rules should be open and transparent so that parties affected by an administrative process understand the basis on which they are entitled to participate;
- There should be consistency between tribunals in formulating standing rules, unless there is a rational basis for inconsistency.

Legislated standing rules which are unclear cause uncertainty which often leads to unnecessary delay and expense for the parties and those seeking to participate; hence, the need for clear provisions outlining who can participate in proceedings and the scope of their participation. To that end, the White Paper recommends that government:

25. Provide, as far as possible, in the context of tribunals engaged in party/party dispute resolution, unambiguous statutory provisions setting out who is entitled to appeal, to file a complaint or to otherwise invoke the process of the tribunal.
26. Provide, where open-ended standing provisions are necessary because the tribunal decisions will affect a broad constituency:

- consistency in the language of such open-ended standing provisions;
- legislative guidance as to the types of interests that are intended to be captured by the standing provision.

27. Enact legislation, where appropriate, authorizing tribunals to add parties or interveners to an ongoing proceeding and setting out the criteria on which such intervention would be permitted.

The White Paper therefore distinguishes between three types of proceedings: (a) "party/party" proceedings; (b) proceedings that determine issues affecting a broad constituency; and (c) proceedings that perform an inquiry function. The point must be made, however, that there is often considerable overlap between these various types of proceedings. A tribunal may conduct party/party proceedings which raise issues that affect a broader constituency. As well, a tribunal may be required to conduct party/party proceedings in relation to certain issues and perform an inquiry function in relation to other issues under its constituent legislation.

The White Paper also distinguishes between the status to automatically participate as a "party" to a tribunal proceeding and the status to participate on a more limited basis as an intervener at the discretion of the administrative tribunal. Accordingly, the White Paper contemplates two types of participants: (1) "parties" who have an automatic right to participate because the decision at issue has a direct impact on them; and (2) "interveners" who can demonstrate that they have both an interest in the proceeding and an ability to meaningfully contribute to consideration of the issues in a way that the parties do not or cannot reasonably be expected to.

Party/party proceedings

The phrase "party/party proceedings" is used to describe proceedings that involve a *lis inter partes.* Examples of administrative tribunals that adjudicate disputes in party/party proceedings are:

- Employment and Assistance Appeal Tribunal
- Employment Standards Tribunal
- Expropriation Compensation Board
- Health Care and Care Facility Review Board
- Health Care Practitioners Special Committee for Audit
- Hospital Appeal Board
- Human Rights Tribunal
- Medical and Health Care Services Appeal Board
- Mental Health Review Panels
- Property Assessment Appeal Board
- Property Assessment Review Panels
- Public Service Appeal Board

- Residential Tenancy Arbitrators
- Workers' Compensation Appeal Tribunal

The enabling statutes for tribunals which are party-driven should identify the issues which may be brought before a tribunal for resolution and who may bring such issues. The question of standing in party/party proceedings is one of statutory interpretation. The provisions should clearly identify the persons who can participate in the proceedings. Generally, the persons who are entitled to participate are those who will be directly affected by the tribunal decision.

Proceedings that affect a broad constituency

Some administrative tribunals are required to resolve issues of general public importance that either directly affect, or have the potential to directly affect, a broad constituency of interests. Many of these tribunals are party-driven but the issues before them raise implications beyond the immediate parties. The following administrative tribunals fall into this category:

- British Columbia Marketing Board
- Commercial Appeals Commission
- Community Care Facility Appeal Board
- Electrical Safety Appeal Board
- Elevating Devices Appeal Board
- Environmental Appeal Board
- Forest Appeals Commission
- Gas Safety Appeal Board
- Human Rights Tribunal
- Labour Relations Board
- Power Engineers and Boiler and Pressure Vessel Safety Appeal Board
- Securities Commission
- Utilities Commission

For these administrative tribunals, the question of standing is also one of statutory interpretation. The governing legislation should clearly identify those who should be permitted to participate as parties. The question of who may participate as an intervener should also be within the tribunal's discretion. This can be a complex question depending on the nature of the issues raised in the proceeding.

Proceedings that perform an inquiry function

Some administrative tribunals are mandated to carry out a public inquiry function to deal with issues which transcend the interests of any one person or group of persons. The following tribunals are required to conduct public inquiries in relation to certain issues:

- Agricultural Land Commission

- Coroners Service
- Expropriation Compensation Board
- Utilities Commission

It is generally not necessary in this context to set out legislative criteria for party (or intervener) status as the public inquiry process contemplates broad public participation. An exception relates to proceedings under the *Coroners Act*.

The general policy

The statutory rules governing standing before administrative tribunals should be clear and, to the extent possible, consistent. Statutory provisions governing standing in proceedings that are party-driven should be designed to allow participation by those persons who are directly affected by the administrative tribunal's decision. The rules of procedural fairness require that the right to participate in the proceedings should be an automatic one.

Administrative tribunals that make decisions which affect, or potentially affect, a broad constituency or diverse interests, require greater flexibility and discretion to determine who is (or may be) sufficiently affected or aggrieved by the subject matter of the tribunal proceedings as to warrant the right of participation. For these tribunals, the general statutory discretion should be expressed in uniform language and to the extent possible, additional tribunal-specific legislative guidance should be provided in the form of criteria to be considered by the administrative tribunal in determining who should be able to participate as a party in that tribunal's proceedings.

Proposed legislative provisions

It is not feasible to develop model statutory rules for determining who can participate as a party in party/party proceedings because of the sheer range and diversity of issues that are adjudicated by administrative tribunals. As noted, the enabling legislation of administrative tribunals that adjudicate more "private" disputes tend to be more clear and thus issues about whether a person is or is not a party generally do not arise.[59]

Those administrative tribunals that make decisions potentially affecting diverse interests and a broad constituency should be afforded discretion to determine whether the person seeking to participate in the proceedings has a sufficiently direct interest in the subject matter of the proceedings to warrant participation. Where it is possible to clearly identify the categories of persons that would have party

[59] Section 241 of the *Workers Compensation Act* is a good example of a clear and comprehensive provision identifying who can bring an appeal before the Workers' Compensation Appeal Tribunal.

status in the tribunal's proceedings in the enabling legislation, this should be done. Where it is not possible, the administrative tribunal should be given a discretion to determine whether a person is a "person directly affected" and thus able to participate as a party.

Legislative guidance should be provided as to what types of persons would be persons "directly affected" by the subject matter of the proceeding. This requires an examination of the nature of the interest affected and an assessment of the remoteness of that interest to the proceeding. There must be some causal connection between the interest which is directly affected and the tribunal decision.

The proposed model standing provisions for these tribunals would provide:

> ***Who may bring an appeal***
>
> 42(1) An [application/appeal] may be brought by a person directly affected by the decision of _____.
>
> (2) For the purpose of subsection (1), a "person directly affected" means:
>
> (a) a person who has sustained an injury to an interest that the statutory provision is designed to protect; and
>
> (b) a person who has sustained an injury to an interest that is distinguishable from that sustained by other members of the public
>
> and includes the following persons:
>
> (c) [enumerate]
>
> but excludes the following persons:
>
> (d) [enumerate].

The enabling legislation of each of the administrative tribunals identified would have to be amended to incorporate this provision.

Access by interveners

Common law principles of standing give superior courts the discretion to permit "strangers" to a judicial proceeding to participate as interveners. As a general rule, intervener status is most likely to be granted in cases raising issues of public importance that are expected to have an impact beyond the immediate and direct interests of the parties.

In determining whether or not to grant intervener status in court proceedings, the courts have regard to three general factors:[60]

- The nature of the group seeking intervener status;
- The directness of the groups' interest in the matter;
- The suitability of the issue raised in the proceedings (e.g. is it an issue of public importance).

Although a group seeking intervener status need not have any special corporate form or structure, it should be able to demonstrate that it has a broad representative base and that it has an ability to advance a perspective that differs from the parties (or other interveners) that would be of assistance to the court.[61]

Private or public interest groups that may not have a direct interest in a proceeding but nevertheless have an interest in "public law" issues raised in the proceeding may be granted intervener status if they can demonstrate that they might bring a different, unique, or helpful perspective to bear on the consideration of such issues. However, not every application by a private or public interest group that can bring a different perspective to an issue should be allowed. In each case, it is necessary to consider the nature of the issue and the degree of likelihood that an intervener will be able to make a useful contribution to the resolution of the issue, without causing undue delay to the proceedings and prejudice to the parties.[62]

It is well established that interveners should not be permitted to take the litigation away from those directly affected by it (*Can. (A.G.) v. Aluminum Co. of Can*. (1987), 10 B.C.L.R. (2d) 371 (C.A.)). Accordingly, an intervener cannot expand or complicate the proceedings by raising new issues, but rather must confine its role to advancing arguments in relation to the questions raised by the parties themselves. Additionally, where a group is granted intervener status, the court will often limit the scope of the intervener's participation through various means such as confining the intervener to certain issues, directing the intervener to make written rather than oral submissions, limiting the ability of the intervener to cross-examine or to lead evidence or imposing time limits for oral submissions.

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[60] *Guadagni v. Workers Compensation Board of B.C*. (1988), 30 B.C.L.R. (2d) 259 (C.A.); *Canada (Attorney General) v. Aluminium Co. of Canada Ltd*. (1987), 10 B.C.L.R. (2d) 371 (C.A.); *MacMillan Bloedel Ltd. v. Mullin* (1985), 66 B.C.L.R. 207 (C.A.), *Bosa Development Corp. v. British Columbia (Assessor of Area 12 – Coquitlam)* (1996), 82 B.C.A.C. 260*; Western Industrial Clay Products Ltd. v. Keeping* (1997), 86 B.C.A.C. 50 (C.A.); *Hobbs v. Robertson*, [2002] B.C.J. No. 454, 2002 BCCA 168; *Ward v. Clark*, [2001] B.C.J. No. 901, 2001 BCCA 264; *Vancouver (City) Police Department v. British Columbia (Police Complaint Commissioner)*, [2001] B.C.J. No. 1193 (C.A.).

[61] In *Oak Bay Marina Ltd. (c.o.b. Painter's Lodge) v. British Columbia (Human Rights Commission),* [2001] B.C.J. No. 1136 (C.A.), Madam Justice Newbury declined to grant intervener status to the Human Rights Commission. Her Ladyship accepted that one of the parties "should not have to face the arguments of two counsel on the same issues where the arguments do not differ in substance". Its contribution to consideration of the issues was outweighed by the prejudice to that party and "to the efficient resolution of the appeal generally".

[62] *MacMillan Bloedel Limited v. Mullin et al*, [1985] 3 W.W.R. 380 (B.C.C.A.).

There are sound policy reasons for giving some administrative tribunals the power to grant a person or group intervener status in their proceedings. Enabling participation of interveners in administrative tribunal proceedings can assist the tribunal by providing a unique perspective and expertise in relation to issues of general importance. On the other hand, such participation has the potential to lead to more complex or protracted proceedings, with attendant additional costs.

The work of some tribunals is focused primarily, if not exclusively, on fact-finding and adjudication. Some of these tribunals operate in a context where the volume of cases is high and decisions must be issued quickly. It is unlikely that these types of tribunals would have occasion to engage in consideration of questions of law with a significant public law dimension. Examples of the kinds of tribunals that should not be given the discretion to add interveners to a proceeding include: Employment and Assistance Appeal Tribunal, Mental Health Review Panels, Parole Board, Public Service Appeal Board and Residential Tenancy Arbitrators.

Other administrative tribunals carry out adjudicative functions in a context that is very similar to the courts. These tribunals routinely make determinations on questions of law that will necessarily impact other parties coming before them in future proceedings.[63] In reaching their decisions, many of these tribunals are required to balance a variety of competing interests. It is proposed that, as a general rule, these types of tribunals be given discretion to permit participation by interveners in their proceedings. The statutory power for granting intervener status should reflect the principles developed in the context of judicial proceedings.

Power to add interveners

The following power to add interveners is proposed:

> ***Interveners***
>
> 43(1) A tribunal may allow a person or group of persons to intervene in a proceeding that has been commenced by a party on such terms as it sees fit provided that:
>
> (a) the person or group of persons demonstrates it can make a valuable contribution or bring a different perspective to consideration of the issues raised in the proceedings that differs from those of the parties; and
>
> (b) the benefits of such participation outweigh any prejudice to the parties caused by such participation.
>
> (2) Without limiting the generality of subsection (1), a tribunal may limit the participation of an intervener:
>
> (a) in relation to cross-examination of witnesses;

[63] Although the principle of *stare decisis* has no application to administrative tribunals, virtually all develop a body of jurisprudence that adopts and builds upon other tribunal decisions.

(b) in relation to the right to lead evidence;

(c) to one or more issues raised in the proceedings;

(d) to written submissions;

(e) to time-limited oral submissions.

(3) Where two or more applicants for intervener status have the same or substantially similar views or expertise, a tribunal may require them to file joint submissions.

It is proposed that the following administrative tribunals be given the power to add interveners:

- Agricultural Land Commission
- Electrical Safety Appeal Board
- Elevating Devices Appeal Board
- Environmental Appeal Board
- Forest Appeals Commission
- Gas Safety Appeal Board
- Human Rights Tribunal
- Labour Relations Board
- Motor Carrier Commission
- Power Engineers and Boiler and Pressure Vessel Safety Appeal Board
- Property Assessment Appeal Board
- Securities Commission
- Utilities Commission
- Workers' Compensation Appeal Tribunal

6 SUBSTANTIVE (NON-PROCEDURAL) POWERS

There are many different types of substantive or non-procedural powers that may, depending on the nature of the tribunal, be necessary to protect the tribunal and enable it to carry out its statutory mandate, fairly, efficiently and effectively. These powers include powers to compel production of evidence, summarily dismiss applications, enforce orders and award costs. These types of substantive powers and proposed statutory provisions relating to them are discussed in this Chapter.

Dismissal powers

Most administrative tribunals should have discretion to summarily dismiss matters before them without a hearing in appropriate circumstances (such as to prevent an abuse of process). Such discretion should be exercisable either on the tribunal's own initiative or on application of a party.

The circumstances in which a tribunal may dismiss an application or appeal should be clearly spelled out in legislation. There are a variety of circumstances where summary dismissal or dismissal of an application or appeal would be justified.[64] Those circumstances include ones where the matter is outside the tribunal's jurisdiction, the subject application or appeal was not filed within a statutory time limit, the matter has been brought for an improper purpose or in bad faith,[65] the matter is one that the tribunal considers to be frivolous or vexatious or the substance of the matter has been dealt with in another tribunal proceeding.[66]

[64] The Society of Ontario Adjudicators and Regulators (SOAR), in its *Proposal to Amend Statutory Powers Procedure Act* (December 1993), recommended that tribunals be given summary dismissal powers. SOAR suggested that: "a tribunal may, where it is of the opinion that an application, request, appeal or other proceeding is an abuse of process or does not significantly affect a party or the public interest, or that the reasons in support of an application, request, appeal or other proceeding are frivolous or vexatious [or do not show any apparent grounds that would allow the requested remedy to be granted], dismiss the matter, but before doing so, shall notify the person bringing the proceedings and afford him or her the opportunity to make representations as to why the matter should not be dismissed".

[65] The federal *Proposal for an Administrative Hearings Powers and Procedures Act* recommended that tribunals have the authority to refuse to accept or continue or to dismiss any matter where, in the opinion of the tribunal, the matter: (1) was initiated or continued primarily with the intent to cause harm to others rather than to pursue any right, privilege, responsibility or other purpose of the statute under which the matter arises; (2) is an attempt to litigate an earlier application without legislative authority; or (3) was brought for a purpose other than one in accordance with the spirit and intent of the statute under which it arises.

[66] The English Council on Tribunals' *Model Rules of Procedure for Tribunals* includes provision for dismissal where a party fails to comply with certain directions. Those rules provide: "If any directions given to a party under this Part of these Rules are not complied with by such a party, the Tribunal may, before or at the hearing, dismiss the whole or part of the appeal, or as the case may be, strike out the whole or part of a respondent's reply and, where appropriate, direct that a respondent shall be debarred from contesting the appeal altogether. Provided that a Tribunal shall not so dismiss or strike out or give such a direction unless it has sent notice to the party who has not complied with the direction giving him an opportunity to show cause why it should not do so."

In addition to these types of circumstances, the federal *Proposal for an Administrative Hearings Powers and Procedures Act* recommended that tribunals have the ability, on request by a party or on its own motion, to dismiss an application on grounds of lack of evidence. Such dismissal discretion could be exercised "without having heard from all of the participants" where:

- The agency has before it all of the evidence which the applicant wishes the agency to consider; and
- That evidence, if it was taken as true by the agency and given the most favorable meaning which can reasonably be attributed to it, including every legitimate and reasonable inference which may be drawn from it, cannot support the thing sought on the application.

The federal Proposal goes on to say that, in deciding whether to dismiss an application early for lack of evidence, the tribunal should be directed to consider:

- Whether, in the event that the claims made by the applicant were true, there is an element of public interest which would be served should the application be granted;
- The likelihood of there being other evidence capable of supporting the application which the agency would reasonably expect to be presented with, or which the agency would be willing to compel production of, should the matter proceed; and
- The wishes of the other parties in the matter.

A similar type of power is found in the *Human Rights Code*, although it constitutes a broader discretion than that contemplated in the federal Proposal. Section 27(1)(c) allows the Human Rights Tribunal to dismiss a complaint if it determines that "(c) there is no reasonable prospect that the complaint will succeed". This power enables the Tribunal to summarily dismiss a complaint without a hearing where the complainant does not provide information that would reasonably support a *prima facie* complaint under the Code or where, having regard to the information provided by both parties, there is no reasonable prospect that the complaint will succeed at a hearing.

Summary dismissal powers

Summary dismissal powers should provide the tribunal with discretion to summarily dismiss an application on the tribunal's own initiative or on application by a party to the proceeding before it. It should be clear that the power can be exercised either with or without a hearing. The grounds on which such a power is to be exercised should be enumerated. Proposed summary dismissal powers follow.

> ***Summary dismissal***
>
> 44(1) At any time after an [application/appeal/complaint] is filed, the tribunal may dismiss all or part of it if the tribunal determines that:
>
> (a) the [application/appeal/complaint] is not within the jurisdiction of the tribunal;
>
> (b) the [application/appeal/complaint] was not filed within the statutory time limit;

(c) the [application/appeal/complaint] is frivolous, vexatious or trivial or gives rise to an abuse of process;[67]

(d) the [application/appeal/complaint] was made in bad faith or filed for an improper purpose or motive;

(e) the [applicant/appellant/complainant] failed to diligently pursue the [application/appeal/complaint/complaint] or failed to comply with an order of the tribunal;

(f) there is no reasonable prospect the [application/appeal/complaint] will succeed;[68] or

(g) the substance of the [application/appeal/complaint] has been appropriately dealt with in another proceeding.

(2) Before dismissing an [application/appeal/complaint], the tribunal must give the [applicant/appellant/complainant] an opportunity to be heard.

(3) If the tribunal dismisses all or part of an [application/appeal/complaint] under subsection (1), the tribunal must inform the parties [and any interveners] of its decision in writing and give reasons for its decision.

The following administrative tribunals should be provided with the following summary dismissal powers:

- Agricultural Land Commission ((1)(a) to (e))
- British Columbia Marketing Board ((1)(a) to (e))
- Building Code Appeal Board ((1)(a) to (e))
- Commercial Appeals Commission ((1)(a) to (e))
- Community Care Facility Appeal Board ((1)(a) to (g))
- Electrical Safety Appeal Board ((1)(a) to (e))
- Elevating Devices Appeal Board ((1)(a) to (e))
- Employment Standards Tribunal ((1)(a) to (g)
- Environmental Appeal Board ((1)(a) to (f))
- Expropriation Compensation Board (re section 11 inquiries only) ((1)(c) to (e))
- Farm Practices Board ((1)(a) to (e))[69]
- Fire Commissioner ((1)(b), (e))
- Forest Appeals Commission ((1)(a), (c) to (d), (g))
- Forest Practices Board (section 177 complaints) ((1)(a) to (e), (g))
- Gas Safety Appeal Board ((1)(a) to (e))

[67] The phrase “frivolous, vexatious or trivial”, like the phrase “bad faith”, has unfortunate connotations and can be difficult to apply. Examples of where a court has struck an action or pleadings on the basis they are “scandalous, frivolous or vexatious” include ones where the claim or pleadings were “frivolous” in the sense of being unnecessary, premature, moot, not calculated to lead to any practical result (e.g. intended only to embarrass the other party) or unsustainable by reason of the doctrine of issue estoppel or cause of action estoppel.

[68] Residential tenancy arbitrators have a similar power where, in review proceedings, they can dismiss a review application if it discloses no basis on which, even if submissions in the application were accepted, the decision or order would be set aside”.

[69] This board requires an additional dismissal power equivalent to that presently provided for in section 6(2)(c) of the *Farm Practices Protection (Right to Farm) Act;* i.e. the board may dismiss if “the complainant does not have a sufficient personal interest in the subject matter of the application”.

- Hospital Appeal Board ((1)(a) to (e))
- Human Rights Tribunal ((1)(a) to (g))
- Medical and Health Care Services Appeal Board ((1)(a), (c) to (d))
- Motor Carrier Commission ((1)(c) to (d))
- Power Engineers and Boiler and Pressure Vessel Safety Appeal Board ((1)(a) to (e))
- Property Assessment Review Panels ((1)(a) to (e))
- Property Assessment Appeal Board ((1)(a) to (e))
- Public Service Appeal Board ((1)(a) to (d))
- Residential Tenancy Arbitrators ((1)(a) to (g))
- Workers' Compensation Appeal Tribunal ((1)(a) to (g))

Evidentiary powers

All tribunals, except those appeal tribunals that are restricted to conducting appeals strictly on the record, require the power to receive and accept evidence.

The common law duty of procedural fairness entitles parties to adjudicative tribunal proceedings to be permitted to present relevant evidence. This duty has never required a tribunal to exclude evidence solely on the basis that it would be inadmissible in a court of law, although there may be circumstances where the admission of such evidence would amount to a denial of natural justice. The question is whether the evidence at issue is relevant and necessary and has cogency in law.

The rationale behind a tribunal's discretionary power to consider evidence that would not be admissible in a court was described in the Manual of Practice for the Ontario *Statutory Powers Procedure Act* (respecting section 15 of that Act):[70]

> *A tribunal has power to accept evidence inadmissible in court and evidence not proven by sworn testimony or to insist upon proof of any fact in accordance with the strict rules of evidence or by sworn testimony. The obvious purpose of the statute in conferring this power on the tribunal is to permit it to proceed informally, in so far as such informality is consistent with a just hearing to all parties, to save parties and other persons affected, such as witnesses, time and unnecessary expense and inconvenience. The power should be exercised by the tribunal in each case to achieve this purpose. The tribunal should therefore not issue an ironclad blanket ruling that will apply in all proceedings before it. It may develop a practice or indicate a general course that it will follow but it should be prepared to apply its mind to the procedure to be followed in the circumstances of each particular case and having regard to the nature of the case.*

The federal *Proposal for an Administrative Hearings Powers and Procedures Act* suggested that tribunals be required to take the following considerations into account when determining whether to admit evidence

[70] Robert W. Macaulay, Q.C., and James L.H. Sprague, *Hearings before Administrative Tribunals*, (2nd ed.) (Carswell)., pp. 17-11, 17-12.

that would not be admissible in a court:

- Whether the evidence tendered was capable, if believed, of creating a sufficient basis for the decision in question and the degree to which it is capable of so doing;
- Whether the admission of the evidence tendered would lead to greater social harm than the good likely to be achieved by its admission;
- Whether there is anything about the way the evidence came to the agency which threatens the fairness or the smooth operation of the hearing which is of sufficient importance, in light of the agency's mandate, to warrant its exclusion.

The federal Proposal also suggests that legislation expressly provide that, where such evidence (i.e. evidence not admissible in court) is admitted by a tribunal, it only be given the weight which is warranted by its reliability, and that where the evidence is insufficient (either considered alone or in connection with other evidence) to establish a fact according to an appropriate standard of proof, the tribunal be prohibited from using that evidence to establish that fact simply because there is no other evidence to the contrary.

As a general rule, administrative tribunals are not required to only accept evidence on oath or affirmation although, as a matter of practice, many do.[71] The following provision dealing with the extent of an administrative tribunal's discretion to accept evidence in its proceedings is proposed. This provision is flexible enough to enable the tribunal to exclude evidence that it considers unduly repetitious or evidence that is so unduly prejudicial to a party that its relevance is overshadowed by its prejudicial effect.

[71] Authors Macaulay and Sprague (*Practice and Procedure before Administrative Tribunals*, (Carswell) at pp. 35-23, 35-24) are of the view that all evidence put before a tribunal should be under oath. They write: "Some agencies have the power to swear or affirm witnesses while some do not. Even those that have the power to do so, do not always use it. Some agencies believe that swearing or affirming testimony makes no difference; others believe that swearing or affirming destroys the informality of the hearing. I believe that all agencies should be empowered to swear or affirm witnesses and that all agencies which receive evidence in a hearing, even a paper hearing, should receive it under oath. Materials filed in a paper hearing should be accompanied by an appropriate affidavit and evidence should only be taken after an oath has been administered. In that regard, there should be conformity of procedure before agencies. It is apparent that every hearing receives evidence, oral or written. It is well know that when a witness gives evidence under oath or by affirmation, there is a much stronger onus to respect the truth. I believe it is better if all agencies are required to impose an oath or affirmation except in unusual circumstances for which I would propose that a discretion be permitted. This is all the more desirable if we are to have a common basic hearing procedure across all hearing agencies, allowing for necessary differences." The authors recommended the following provision: "(1) A member of a tribunal has power to administer oaths and affirmations for the purposes of its proceedings and the tribunal shall require evidence before it to be given under oath or affirmation."

> ***Evidence admissible in tribunal proceedings***
>
> 45(1) The tribunal may receive and accept on oath or affirmation, by affidavit or otherwise, evidence and information that it considers relevant, necessary and appropriate, whether or not the evidence or information would be admissible in a court of law, but the tribunal may exclude anything unduly repetitious or evidence of such a nature that it is not likely to further the interests of justice.[72]
>
> (2) Nothing is admissible before the tribunal that is inadmissible in a court because of a privilege under the law of evidence.
>
> (3) No notes or records kept by a mediator or any other person appointed by the tribunal to facilitate the resolution of a matter by means of dispute resolution mechanisms are admissible in tribunal proceedings.[73]
>
> (4) Nothing in subsection (1) overrides the provisions of any Act expressly limiting the extent to or purposes for which any oral testimony, documents or things may be admitted or used in evidence.

Section 4 of the *Human Rights Code* provides that, in the event of a conflict between the Code and any other enactment, the Code prevails. It is therefore proposed that section 4 of the Code be amended to add the following subsection:

> (2) Subsection (1) does not override an Act expressly limiting the extent to which or purposes for which evidence may be admitted or used in any proceeding.

Compelling production of evidence and requiring testimony

Administrative tribunals would benefit from flexible document production and summons powers. Many administrative tribunals have been given the power to issue a summons through the application of sections 15 and 16 of the *Inquiry Act*.[74] A summons that is issued under that Act requires witnesses to attend before the tribunal and bring identified documents with them. Such a mechanism for purposes of

[72] The Quebec *Act Respecting Administrative Justice* provides that the "Tribunal may refuse to admit any evidence that is not relevant or that is not of a nature likely to further the interests of justice".

[73] Under section 4.9(2) of the Ontario *Statutory Powers Procedure Act*, such notes and records are also inadmissible in any civil proceedings.

[74] Section 15 provides: "(1) The commissioners acting under a commission issued under this Part, by summons, may require a person (a) to attend as a witness, at a place and time mentioned in the summons, which time must be a reasonable time from the date of the summons, and (b) to bring and produce before them all documents, writings, books, deeds and papers in the person's possession, custody or power touching or in any way relating to or concerning the subject matter of the inquiry. (2) A person named in and served with a summons must attend before the commissioners and answer on oath, unless the commissioners direct otherwise, all questions touching the subject matter of the inquiry, and produce all documents, writings, books, deeds and papers in accordance with the summons." Section 16 provides: "(1) The commissioners have the same powers, to be exercised in the same way, as judges of the Supreme Court, if (a) any person on whom a summons has been served by the delivery of it to the person, or by leaving it at the person's usual residence, (i) fails to appear before the commissioners at the time and place specified in the summons, or (ii) having appeared before the commissioners, refuses to be sworn, to answer questions put to the person by the commissioners, or to produce and show to the commissioners any documents, writings, books, deeds and papers in the person's possession, custody or power touching or in any way relating to the subject matter of the inquiry, or (b) a person is guilty of contempt of the commissioners or their office. (2) All jailers, sheriffs, constables, bailiffs and all other police officers must assist the commissioners in the execution of their office."

pre-hearing production of evidence is inefficient and burdensome. An express power to order the pre-hearing production of documents or pre-hearing examination of witnesses (as well as production and attendance during the hearing) is a much more effective and expeditious means for requiring parties to exchange documentation prior to the commencement of a hearing.

Administrative tribunals and parties should have a mechanism for enforcing tribunal orders that require persons to produce documents or other things or attend a hearing and answer questions.[75] It is therefore proposed that the following provisions apply to all administrative tribunals,[76] except those tribunals that conduct appeals strictly on the record:

> ***Option 1: Power to compel witnesses and order disclosure***[77]
>
> 46(1) The tribunal may, at any time before or during a hearing but prior to its decision, make an order requiring a person:
>
> (a) to attend an oral or electronic hearing to give evidence on oath or solemn affirmation or in any other manner; or
>
> (b) to produce for the tribunal or another party a document or other thing in the person's possession or control as specified by the tribunal
>
> that is admissible and relevant to an issue in the proceeding.[78]
>
> (2) The tribunal or a party to the proceeding may apply to the Supreme Court for an order:
>
> (a) directing a person; or
>
> (b) directing any directors and officers of a person to cause the person
>
> to comply with an order the tribunal made under subsection (1).[79]
>
> ***Option 2: Power to compel witnesses and order disclosure (court rules apply)***
>
> 47(1) The rules of court relating to:
>
> (a) discovery and inspection of documents;
>
> (b) examination for discovery;

[75] It was suggested that it might also be desirable to enable parties to prepare and serve subpoenas on witnesses as is permitted under section 40(35) of the Rules of Court.

[76] This power may, however, be limited in respect of a particular tribunal. See, for example, section 180 of the *Forest Practices Code* which limits the type of information that can be subject to a production order by the Forest Practices Board.

[77] This provision is based on section 53 of the *Assessment* Act. Similar powers are found in the proposed draft *Securities Act and Rules* (sections 2B3, 12C3, 13A2), which can be found on the Securities Commission website: www.bcsc.bc.ca in the Commission documents database. These provisions reference the power as being "the same as the Supreme Court in a trial of a civil action" in respect of its ability to summon and enforce the attendance of witnesses and compel evidence on oath or document production.

[78] SOAR suggested the inclusion of the phrase "where such evidence is necessary to the determination of the proceedings". The justification for doing so was that "There should be some requirement upon the party seeking a summons to indicate both relevance and necessity before a tribunal compels a person to appear before it. This would curtail existing abuses."

[79] This subsection is based on section 59 of the *Assessment Act.*

(c) pre-trial examination of witnesses;

(d) discovery by interrogatories

apply to pre-hearing proceedings before the tribunal.

(2) The tribunal may, at any time during a hearing but prior to its decision, make an order requiring a person:

(a) to attend an oral or electronic hearing to give evidence on oath or solemn affirmation or in any other manner; or

(b) to produce for the tribunal or another party a document or other thing in the person's possession or control as specified by the tribunal

that is admissible and relevant to an issue in the proceeding.[80]

(3) The tribunal or a party to the proceeding may apply to the Supreme Court for an order:

(a) directing a person; or

(b) directing any directors and officers of a person to cause the person

to comply with an order the tribunal made under subsection (2).

The proposed subsection (1) of Option 2 is modeled on section 12 of the *Expropriation Compensation Board Practice and Procedure Regulation,* B.C. Reg. 452/87. This power has proven effective for the Expropriation Compensation Board. The advantage to such a power is that the obligations to disclose documents under the rules of court are well explored in the case law. It may be more appropriate to give this power to those tribunals, like the Expropriation Compensation Board, that operate at the judicial end of the tribunal spectrum.

Tribunal enforcement powers

It is imperative that an administrative tribunal be given the tools it needs to ensure that the parties in tribunal proceedings comply with its rules and orders. The consequences of party non-compliance should be clearly spelled out in legislation.

[80] SOAR suggested the inclusion of the phrase "where such evidence is necessary to the determination of the proceedings". The justification for doing so was that "There should be some requirement upon the party seeking a summons to indicate both relevance and necessity before a tribunal compels a person to appear before it. This would curtail existing abuses."

Power to act where party non-compliance with tribunal order or rules of practice and procedure[81]

It is proposed that administrative tribunals be given the power to dismiss an application, appeal or complaint (as the case may be) where the applicant, appellant or complainant fails or refuses to comply with an order of the tribunal or the tribunal's rules of practice and procedure.[82] Similarly, there should be consequences where, for example, a party declines or refuses to participate in a hearing (such as those proposed in the form of hearing provisions).[83]

The following provision (which is modeled on section 246(5) of the *Workers Compensation Act*) is proposed:

> ***Failure of party to comply with tribunal orders and rules***
>
> 48. If a party fails to comply with an order of the tribunal or with the rules of practice and procedure of the tribunal, including any time limits specified for taking any actions, the tribunal may, after giving notice to that party:
>
> (a) continue with the proceedings and make a decision based upon the evidence before it; or
>
> (b) determine that the [application/appeal/complaint] has been abandoned and make an order accordingly.[84]

[81] The federal *Proposal for an Administrative Hearings Powers and Procedures Act* recommended that an administrative tribunal be authorized: (1) prior to the making of a final decision in a matter, to stay or dismiss a matter where the person bringing the matter to the agency fails to comply with a decision respecting that matter; (2) to prohibit, in whole or in part, the participation in a matter of a participant who fails to comply with any decision rendered by the agency in any matter until such time as the participant complies with the decision; (3) to refuse to accept any matter brought by a person as long as that person fails to comply with a decision of the agency in any matter; provided the person has (1) been earlier advised against the actions or failure to act complained of by the agency and of the enforcement action which the agency may, or proposes to, take, and (2) the person is given an opportunity to make representations with respect to the enforcement action proposed to be taken by the agency before the agency takes such action.

[82] Such a power has been included in the proposed summary dismissal powers.

[83] See the proposed section 29(2) which provides: "Where notice of a hearing has been given to a party to the proceeding in accordance with the tribunal's rules and the party does not participate in the hearing in accordance with such notice, the tribunal may proceed in the absence of the party and the party is not entitled to any further notice in the proceeding". A similar provision is found in section 55(4) of the *Safety Standards Act*, S.B.C. 2003, c. 39 (not in force): "The appeal board may hear, consider or determine an appeal, or conduct any proceeding in an appeal, even though a party to an appeal under this Part fails to attend the proceeding, file or make submissions, make disclosure or exchange records, in accordance with an order of the board".

[84] Similar powers are provided for in section 54(4) and (5) of the *Assessment Act*. It gives the Property Assessment Appeal Board the power to "hear, consider or determine an appeal, or conduct any proceeding in an appeal, even though a party to an appeal under this Part fails to attend the proceeding, file or make submissions, make disclosure or exchange records, in accordance with an order of the board". For purposes of this power, the board "may make any order the board considers appropriate in relation to the party referred to in that subsection, including, without limitation, restricting the party's continued participation in the appeal and the party's ability to submit evidence or make submissions".

It is proposed that the following administrative tribunals be provided with this power:

- British Columbia Marketing Board
- Commercial Appeals Commission
- Community Care Facility Appeal Board[85]
- Electrical Safety Appeal Board
- Elevating Devices Appeal Board
- Employment Standards Tribunal
- Environmental Appeal Board
- Expropriation Compensation Board
- Farm Practices Board
- Forest Appeals Commission
- Forest Practices Board (section 177 complaints)
- Gas Safety Appeal Board
- Hospital Appeal Board
- Human Rights Tribunal
- Labour Relations Board
- Medical and Health Care Services Appeal Board
- Medical Services Commission
- Motor Carrier Commission
- Power Engineers and Boiler and Pressure Vessel Safety Appeal Board
- Property Assessment Appeal Board
- Residential Tenancy Arbitrators
- Utilities Commission
- Workers' Compensation Appeal Board

Costs

Another way in which a tribunal can deal with non-compliance by a party is through the imposition of costs, including interim costs, against the non-complying party and in favour of the other party or parties.

Generally speaking, in the context of judicial proceedings, party/party costs are intended to reimburse successful parties for the expenses of litigation. In *Roberts v. College of Dental Surgeons*,[86] [1999] B.C.J.

[85] The *Community Care and Assisted Living Act*, S.B.C. 2002, c. 75 (not in force) will give this board the power to dismiss an appeal on the motion of a party or on its own initiative if it "gives a party written notice requiring the party to diligently pursue their appeal and the party fails to act on the notice within the time specified in the notice".

[86] At issue in that case was the question of what "costs" meant for purposes of section 26(1.1)(g) of the *Dentists Act* which empowered the Council of the College of Dental Surgeons to make rules respecting "(g) costs of investigations and hearings concerning a current or former registrant … including the assessment of some or all of the costs against some or all of the parties to the hearing and collection of costs".

No. 357, 1999 BCCA 103, Mr. Justice Goldie observed:

> *Generally, "costs", when used in the province in the context of legal proceedings, comprehends two classifications: one, a lawyers' recovery of his or her account from the client and the other, the recovery of fees and expenses as between the parties to the proceedings. In the second edition of Jowett's Dictionary of English Law (London, 1977) the first paragraph of a lengthy entry under the word "Costs" reads as follows:*
>
> > *… The term "costs" also denotes the expenses which a person is entitled to recover from the other side by reason of his being a party to legal proceedings. They include court fees, stamps, etc., and also, where the party is represented by a solicitor, the reasonable and proper charges and fees of the solicitor and counsel. The amount of these costs is ascertained by the process of taxation, which is regulated by certain principles of general application.*
>
> *It is evident that when a party is paid costs under the second classification the amount so paid will operate as an indemnity in respect of the recipient's own costs. Only in exceptional circumstances will this amount to a full indemnity.*

In an administrative tribunal context, costs are sometimes provided for on a similar basis. However, some statutes permit a costs award (in limited circumstances) to reimburse the administrative tribunal for its own expenses in respect of a proceeding. The *Environment Management Act* provides one such example.[87]

There are important access to justice issues associated with empowering tribunals to make cost recovery orders (beyond party/party costs). Such powers should be reserved for exceptional circumstances,

[87] In their text, *Practice and Procedure before Administrative Tribunals* (at pp. 35-32 to 35-35), Macaulay and Sprague explore the need for consistency and clarity in costs provisions. In their view, "costs" should be broadly defined to include "legal fees, expert fees, witness fees, fees for the preparation of evidence, travel and accommodation costs, and other expenses incurred by a party directly related to the proceedings". Tribunals should be given the power to determine the amount of costs "of any proceeding" and "order by whom and to whom costs are to be paid". They further recommend that a general costs provision include the following powers: … "(3) In making an order under subsection (2) the agency shall consider, (a) whether the party has or represents a sufficient interest in the outcome of the proceedings, as determined by the agency; (b) the conduct of the party in the course of the proceedings; (c) the contribution of the party to the better understanding of the issues by the agency; (d) whether a party has received a benefit as a result of the proceedings. (4) An agency may establish a scale under which costs shall be assessed." They also propose the following provision respecting hearing expenses: "(1) The expenses of an agency incurred in determining any matter may be recovered from any or all of the parties by an expense recovery order made by the agency. (2) In making an order under subsection (1), an agency shall consider: (a) whether a party has or represents a substantial interest in the outcome of the proceedings, as determined by the agency; (b) the conduct of the party in the course of the proceeding; (c) the contribution of the party to the better understanding of the issues by the agency; (d) whether a party has received a benefit as a result of the proceedings. (3) An order under subsection (2) may include directions respecting the disposition of money deposited under subsection (1). (4) In addition to any expenses to be recovered under subsection (1), an agency may make an order respecting the recovery of costs and hearing expenses from a party, or his or her counsel or agent, where the agency determines that the costs and hearing expenses have been needlessly increased due to the conduct of the party, counsel or agent. (5) The costs payable by the government under an order under subsection (4)(b) must be paid out of the consolidated revenue fund.

although public policy may justify a broader application in respect of a small number of regulatory tribunals (e.g. the Securities Commission and the Utilities Commission).

For some tribunals, the nature of their proceedings is such that a costs power would be quite inappropriate. Tribunals that adjudicate claims or issues involving liberty interests or entitlement to medical or disability assistance should not have such a power. The following administrative tribunals would fall into that category:

- Employment and Assistance Appeal Tribunal
- Health Care and Care Facility Review Board
- Medical and Health Care Services Appeal Board
- Medical Services Commission
- Mental Health Review Panels
- Parole Board
- Workers' Compensation Appeal Tribunal

As a general rule, administrative tribunals that conduct inquiries and make reports and/or recommendations should not have the power to make a costs order. Tribunals falling into this category are:

- Coroners Service
- Fire Commissioner
- Forest Practices Board

It is proposed that many administrative tribunals that adjudicate party/party disputes should have the authority to require a party to pay all or part of the costs (including interim costs) against another party in connection with a proceeding.[88] In order to discourage wholly unreasonable, frivolous, vexatious or abusive conduct (e.g. an appeal is being pursued for an improper reason or a party's actions in pursuing or resisting an application or appeal is wholly unreasonable), these administrative tribunals should also be

[88] Section 17.1 of the Ontario *Statutory Powers Procedure Act* provides: "17.1(1) subject to subsection (2), a tribunal may, in the circumstances set out in a rule made under section 25.1, order a party to pay all or part of another party's costs in a proceeding. (2) A tribunal shall not make an order to pay costs under this section unless, (a) the conduct or course of conduct of a party has been unreasonable, frivolous or vexatious or a party has acted in bad faith; and (b) the tribunal has made rules under section 25.1 with respect to the ordering of costs which include the circumstances in which the amount of the costs is to be determined. (3) The amount of the costs ordered under this section shall be determined in accordance with the rules made under section 25.1. (4) Despite section 32 [which is a conflict provision], nothing in this section shall prevent a tribunal from ordering a party to pay all or part of another party's costs in a proceeding in circumstances other than those set out in, and without complying with, subsections (1) to (3) if the tribunal makes the order in accordance with the provisions of an Act that are in force on the day this section comes into force".

given the power to require a party to pay all or part of the expenses of the tribunal in connection with a proceeding. For these tribunals, the following costs provisions are proposed:

> ***Costs***
>
> 49(1) Subject to the regulations, the tribunal may make orders for payment as follows:
>
> (a) requiring a party [or an intervener] to pay all or part of the costs of another party [or intervener] in connection with the [application/appeal/complaint]; and
>
> (b) if the tribunal considers the conduct of a party has been improper, vexatious, frivolous, or abusive, requiring the party to pay to the Minister of Finance and Corporate Relations all or part of the actual costs and expenses of the tribunal in connection with the [application/appeal/complaint].
>
> (2) An order under subsection (1) may include directions respecting the disposition of money deposited under subsection (1).
>
> (3) If a party is an agent or representative of the government, an order under subsection (2)(a) may be made for or against the government, not for or against the agent or representative.[89]
>
> (4) An order under subsection (1) has, after filing in the court registry, the same effect as an order of the Supreme Court for the recovery of a debt in the amount stated in the order against the person named in it, and all proceedings may be taken as if it were an order of the court.

These provisions would apply to the following tribunals:

- British Columbia Marketing Board
- Employment Standards Tribunal
- Environmental Appeal Board[90]
- Farm Practices Board
- Forest Appeals Commission
- Human Rights Tribunal
- Labour Relations Board
- Mediation and Arbitration Board
- Property Assessment Appeal Board

As a general rule, appeal proceedings respecting regulatory or licensing decisions should not give rise to cost orders under the proposed subsection (1)(a). In such cases, absent exceptional circumstances, it is

[89] This provision is based on section 95 of Bill 57 (*Environmental Management Act*, 2003) and section 60 of the *Assessment Act*.

[90] Bill 57 (*Environmental Management Act*, 2003) also contains the following subsection: "(1) The tribunal may require the [applicant/appellant] to deposit with it an amount of money it considers sufficient to cover all or part of the anticipated costs of the responding party and the anticipated expenses of the appeal board in connection with the appeal".

not appropriate to make the lower tribunal the subject of a costs award. Accordingly, it is proposed that the following tribunals be given the power to award costs under (1)(b) only:

- Agricultural Land Commission (section 55 appeals)
- Commercial Appeals Commission
- Community Care Facility Appeal Board
- Electrical Safety Appeal Board
- Elevating Devices Appeal Board
- Gas Safety Appeal Board
- Hospital Appeal Board
- Power Engineers and Boiler and Pressure Vessel Safety Appeal Board

The Utilities Commission has unique costs provisions. Section 117 gives the Commission the power to "order that the costs of the commission incidental to a proceeding before it are to be paid by one or more participants in the proceeding in such amounts and proportions as the commission may determine". Section 118 enables the commission to order that a participant pay all or part of the costs of another participant and, if it considers it to be in the public interest, the commission may pay all or part of the costs of a participant. Similarly, the Expropriation Compensation Board and the Securities Commission also have unique costs powers. No changes to these powers or to the powers of the Utilities Commission are proposed.

It is also proposed that the Lieutenant Governor in Council be given the power to make regulations that would prescribe a tariff of fees and rates relating to costs awards under this section. The regulation-making power proposed is this:

> ***Regulations***
>
> 50. The Lieutenant Governor in Council may make regulations as follows:
>
> (a) prescribing the circumstances in which an award of costs may be made by a tribunal;[91]
>
> (b) prescribing a tariff of costs payable under a tribunal order to pay all or part of the costs of a party or intervener;
>
> (c) prescribing what are to be considered costs to the government where a tribunal order requires the government to pay all or part of the costs of a party or intervener;
>
> (d) prescribing limits and rates relating to a tribunal order to pay the actual costs and expenses of the tribunal.

[91] Some tribunals that have costs powers do not, in practice, award costs other than in exceptional circumstances. This regulation-making power would enable the government to ensure that its legislative intent with respect to costs provisions is carried out by a tribunal or tribunals.

Maintenance of order and contempt powers

It is important that, where oral hearings are conducted, administrative tribunals be able to maintain order in their proceedings. A provision respecting the maintenance of such order during oral hearings is therefore proposed.[92]

Some administrative tribunals have the power to find a person guilty of contempt and punish that person for contempt of their proceedings. It is proposed that, instead of providing tribunals with contempt powers, provisions be made for application to a superior court either by the tribunal or by a party for a finding of and punishment for contempt by any person in a tribunal proceeding.[93]

The following provisions are proposed:

> ***Maintenance of order at hearings***[94]
>
> 51(1) The tribunal may make such orders or give such directions at an oral hearing as it considers necessary for the maintenance of order at the hearing, and, if any person disobeys or fails to comply with any such order or direction, the tribunal may call for the assistance of any peace officer to enforce the order or direction, and every peace officer so called upon shall take such action as is necessary to enforce the order or direction and may use such force as is reasonably required for that purpose.
>
> (2) Without restricting the generality of subsection (1), the tribunal may, by order, impose restrictions on the continued participation or attendance of a person in proceedings, and may exclude a person from further participation or attendance in proceedings until the tribunal orders otherwise.
>
> ***Contempt for uncooperative witness***
>
> 52(1) The failure or refusal of a person summoned as a witness to:
>
> (a) attend a hearing;
>
> (b) take an oath or solemn affirmation;
>
> (c) answer questions;
>
> (d) produce the records or things in his custody or possession; or
>
> (e) comply with an order made by the tribunal under section 51
>
> makes the person, on application to the Supreme Court by the tribunal, liable to be committed for contempt as if in breach of an order or judgment of the Supreme Court.

[92] It has also been suggested that a provision be enacted making it an offence for a witness to provide false or misleading information (testimony or documentation) to a tribunal. No specific recommendation on this issue has been made in this policy document.

[93] Macaulay and Sprague believe that agencies should have the power to find contempt and punish for it (i.e. the power to punish for *in facie* as opposed to *ex facie* contempt). They propose that agencies be given the power to impose a fine of not more than $1,000.00 for a first offence and not more than $10,000.00 for a second offence for contempt "in the face of the agency".

[94] This provision is based on sections 9(2) and 13 of the Ontario *Statutory Powers Procedure Act*.

> (2) The failure or refusal of any other person to comply with an order or direction made by the tribunal under section 51 makes the person, on application to the Supreme Court by the tribunal, liable to be committed for contempt as if in breach of an order or judgment of the Supreme Court.[95]

Power to suspend or stay an administrative decision or order

Absent statutory authority, administrative tribunals have no power to suspend an administrative decision or order against which an appeal is made pending disposition of that appeal. For some tribunals, having the discretion to order a stay (or interim stay) is necessary. The usual test for granting a stay of proceeding is that set out by the Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada (Attorney General),* [1994] 1 S.C.R. 311. The test requires an applicant for a stay of proceedings to demonstrate: (1) there is a serious issue to be tried; (2) irreparable harm will result if the stay is not granted; and (3) the balance of convenience favours granting the stay.

The following provision for granting a stay of proceedings is proposed:

> ***Appeal does not operate as a stay[96]***
>
> 53. The commencement of an appeal does not operate as a stay or suspend the operation of the decision being appealed unless the tribunal orders otherwise.

The types of considerations that would indicate that a tribunal would benefit from having the power to stay or suspend the operation of a decision include these:

- The tribunal hears appeals from or reviews of decisions of other statutory decision-makers;
- The subject matter of the appeal proceeding is such that immediate application of the decision being appealed from could lead to irreparable harm (e.g. loss of a business or money) to the appellant;
- Implementation of the decision being appealed from would render the appeal academic and thus deprive the appellant of the benefit of a successful appeal.

Applying these types of considerations, the following administrative tribunals should have the power to order that the decision being appealed is stayed or suspended pending disposition of the appeal:

- Agricultural Land Commission (section 55 appeals)
- Commercial Appeals Commission
- Community Care Facility Appeal Board[97]

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[95] This subsection is based on section 39 of the *Assessment Act*. Such a provision eliminates the need to give tribunals *in facie* contempt powers. A similar power is found in the proposed draft *Securities Act and Rules* (section 2B4), which can be found on the Securities Commission website: www.bcsc.bc.ca in the Commission documents database.

[96] This provision is based on section 104 of Bill 57 (*Environmental Management Act*). The Workers' Compensation Appeal Tribunal has a similar power (section 244) which provides: "Unless the chair directs otherwise, the filing of a notice of appeal under section 242 does not operate as a stay or affect the operation of the decision or order under appeal".

- Electrical Safety Appeal Board
- Elevating Devices Appeal Board
- Employment Standards Tribunal[98]
- Environmental Appeal Board
- Forest Appeals Commission
- Gas Safety Appeal Board
- Labour Relations Board (section 99 applications)
- Medical and Health Care Services Appeal Board[99]
- Power Engineers and Boiler and Pressure Vessel Safety Appeal Board
- Private Post-Secondary Education Commission
- Workers' Compensation Appeal Tribunal

Open or in camera hearings

The White Paper Report and Recommendations on *Providing Administrative Tribunals with Essential Powers and Procedures* identifies as a policy issue the question of whether some tribunals should be permitted to accept evidence or otherwise conduct themselves on an *in camera* (private) basis. The Report notes that, at the present time, many enabling statutes are silent as to whether the administrative tribunal has the power to accept and consider evidence on an *in camera* basis. Others expressly require tribunal proceedings to be open to the public. Some enabling statutes give tribunals discretion to exclude the public for all or part of a hearing if proceeding in public would be unduly prejudicial to a party or witness or contrary to the public interest. The question posed by the Report is this:

> *Should administrative tribunals have statutory discretion to determine whether to conduct proceedings, in whole or in part, in camera? If so, the government needs to determine whether such discretion should be broadly stated (so the tribunal has the flexibility to set its own criteria for exercising its discretion in its rules of practice and procedure) or statutorily constrained by reference to limited or specific circumstances.*

A tangential issue is whether an administrative tribunal should be empowered to prohibit or restrict the publication of evidence filed with the tribunal or presented during its proceedings. This issue has been considered in the above discussion on document production and compulsion of witnesses.

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[97] The *Community Care Facility Act* (section 15(5)) presently gives the person that made the decision or order under appeal the discretion to stay his/her decision or order until the outcome of the appeal if the stay does not entail risk to the health or safety of clients in a facility.

[98] The Employment Standards Tribunal has power to suspend the effect of a determination made under the *Employment Standards Act* "for the period and subject to the conditions it thinks appropriate, but only if the person who requests the suspension deposits with the director (a) the total amount, if any, required to be paid under the determination, or (b) a smaller amount that the tribunal considers adequate in the circumstances of the appeal".

[99] Under section 42(3) of the *Medicare Protection Act*, appeals automatically operate as a stay unless the board orders otherwise.

The general policy is that administrative justice proceedings should, with some exceptions, be open to the public and that most administrative tribunals should have discretion to accept evidence *in camera* in appropriate circumstances. There are sound public policy reasons for providing public access to administrative tribunal proceedings to the greatest extent possible. Those reasons mirror the underlying rationale for open court processes. As Mr. Justice Dickson (as he then was) explained in *Attorney-General of Nova Scotia v. MacIntyre* (1982), 132 D.L.R. (3d) 385 (S.C.C.) at pp. 401, 405:[100]

> *Many times it has been urged that the "privacy" of litigants requires that the public be excluded from Court proceedings. It is now well established, however, that covertness is the exception and openness the rule. Public confidence in the integrity of the Court system and understanding of the administration of justice are thereby fostered. As a general rule the sensibilities of the individuals involved are no basis for the exclusion of the public from judicial proceedings.*
>
> *…*
>
> *Undoubtedly every Court has a supervisory and protecting power over its own records. Access can be denied when the ends of justice would be subverted by disclosure or the judicial documents might be used for an improper purpose. The presumption, however, is in favour of public access and the burden of contrary proof lies upon the person who would deny the exercise of the right.*

The federal Department of Justice, in its *Proposal for Administrative Hearings Powers and Procedures Act,*[101] identified the following four public interest reasons for providing public access:

- To maintain an effective evidentiary process;
- To ensure an administration behaves fairly and that is sensitive to the values espoused by society;
- To promote a shared sense that the agency operates with integrity and dispenses justice;
- To provide an ongoing opportunity for the community to learn.

Like Ontario and Quebec, the federal report reflects a general policy that oral, written and (if practicable) electronic hearings be open to the public. However, administrative tribunals should have a residual discretion to exclude the public for all or part of a hearing for valid public interest reasons.

Just as there are sound public policy reasons for establishing a general rule in favour of public access, there are compelling reasons to recognize public interest exceptions to the general rule. The most obvious exceptions would relate to matters of public security, personal privacy or commercially sensitive information. These types of exceptions are recognized in the Ontario *Statutory Powers Procedure Act*

[100] See also, *Edmonton Journal v. Attorney General for Alberta*, [1990] 1 W.W.R. 577 (S.C.C.) at p. 613, where, in the context of a discussion on the Charter right of free expression, Mr. Justice Cory said that: "It is also essential to a democracy and crucial to the rule of law that the courts are seen to function openly. The press must be free to comment upon court proceedings to ensure that the courts are, in fact, seen by all to operate in the penetrating light of public scrutiny".

[101] Available at http://canada.justice.gc.ca/en/cons/fahp/.

and the Quebec *Act Respecting Administrative Justice*.[102] While not exhaustive, the federal report suggests that the following considerations are relevant to determining whether or not evidence should be accepted *in camera* or its publication otherwise restricted:

- The degree to which the amount of disclosure or non-disclosure sought is compatible with the mandate of the agency;
- The nature and importance of the interest sought to be defended by the party seeking the non-disclosure;
- The extent to which the non-disclosure sought is necessary to protect that interest;
- The nature and importance of the interest of the person resisting non-disclosure;
- The degree to which the information for which non-disclosure is sought is necessary to defend that interest;
- The extent to which the information available to the person resisting non-disclosure will allow the party to adequately defend that interest.

In appropriate circumstances, administrative tribunals should also be given the power to accept oral testimony or documentary evidence to the exclusion of other parties (as well as to the exclusion of the public). Such a power would enable the tribunal to consider relevant, but confidential information, the disclosure of which to the other party could cause commercial harm (e.g. reveal trade secrets where the other party is a competitor) or harm to security interests. As Margot Priest observed (*Amendments to the Statutory Powers Procedure Act*):

> *... In certain types of proceedings, some of the evidence may be confidential. This means that not only should that evidence be kept confidential from the general public, but also that there may be limits on what the parties themselves should see or hear ... Where there are parties opposed in interest, the most common type of information that should be kept confidential is commercially sensitive information or trade secrets where disclosure could cause substantial competitive harm. The usual way to deal with this is through summaries, severances, and undertakings from legal counsel to keep the information confidential, including from their clients.*

Administrative tribunals that are called upon to consider confidential commercially sensitive information of this nature should have discretion to consider it confidentially or to accept such documentation in its proceedings in an appropriately severed form.[103]

[102] The Quebec statute provides: "131. The Tribunal may, of its own initiative or on an application by a party, ban or restrict the disclosure, publication or dissemination of any information or documents it indicates, where necessary to maintain public order or where the confidential nature of the information or documents requires the prohibition or restriction to ensure the proper administration of justice."

[103] Section 131(1) of Bill 57 (*Environmental Management Act*) deals with the confidential nature of this type of information. It provides: "(1) If, under this Act, information relating to any trade secret or any proprietary right in a process or technique that the user keeps confidential is disclosed to or obtained by any person engaged in the administration of this Act, a person who has access to the information so disclosed or obtained must not communicate it to any other person except (a) as may be required in connection with the administration of this Act or the regulations or any proceeding under this Act or the regulations, (b) to his or her counsel, or (c) with the consent of the person rightfully possessing or using the trade secrets, process or technique to which the information relates".

Similarly, administrative tribunals that receive relevant but highly personal (including medical) information about a party should be able to withhold it in exceptional circumstances where its disclosure could result in serious harm to a party (e.g. harm to the party's mental health). An example of such a power is found in section 6(18) of the *Mental Health Regulation*, B.C. Reg. 233/99. It provides:

> (18) The chair may
>
> (a) exclude the patient from attendance at the hearing or any part of it, but only if satisfied that the exclusion is in the best interests of the patient, or
>
> (b) make orders respecting the taking, hearing or reproduction of evidence as he or she considers necessary to protect the interests of the patient or any witness.

The following *in camera* provision is proposed:

> ***Hearings open to the public***
>
> 54(1) An oral or electronic hearing shall be open to the public[104] except where the tribunal is of the opinion that:
>
> (a) an individual's personal information or a person's confidential commercially sensitive information may be disclosed that is of such a nature that the desirability of avoiding disclosure in the interests of any person or party affected or in the public interest outweighs the desirability of adhering to the principle that hearings be open to the public;
>
> (b) public security may be endangered;[105] or
>
> (c) it is not practical to hold the hearing in a manner that is open to the public
>
> in which case the tribunal may direct that all or part of the evidence be received to the exclusion of the public.
>
> (2) Members of the public are entitled to reasonable access to documents submitted in a written hearing unless the tribunal is of the opinion that subsection (1)(a) or (b) applies to those documents.
>
> ***Discretion to receive evidence in confidence***
>
> 55(1) The tribunal may direct that all or part of the evidence of a witness or documentary evidence be received by it in confidence to the exclusion of a party or parties, on such terms as the tribunal sees fit, where that evidence consists of:
>
> (a) commercially sensitive information or trade secrets and its disclosure could cause substantial competitive harm;
>
> (b) personal information the disclosure of which could reasonably be expected to result in immediate and grave harm to a person's safety or mental or physical health; or
>
> (c) information the disclosure of which could compromise public security.

[104] It has been suggested that this requirement not apply to hearings in respect of preliminary matters before a tribunal.

[105] Section 28 of the *Coroners Act* enables a coroner to conduct a proceeding *in camera* on national security grounds or where the witness has been charged with an indictable offence.

It is proposed that the following administrative tribunals have the power to conduct an *in camera* oral or electronic hearing:

- British Columbia Marketing Board[106]
- Commercial Appeals Commission
- Community Care Facility Appeal Board
- Coroners Service ((1)(a) and (b))
- Environmental Appeal Board
- Expropriation Compensation Board
- Farm Practices Board
- Financial Institutions Commission
- Fire Commissioner (section 14 inquiries)
- Forest Appeals Commission
- Human Rights Tribunal ((1)(a), (2))
- Labour Relations Board
- Mediation and Arbitration Board
- Medical and Health Care Services Appeal Board
- Medical Services Commission
- Mental Health Review Panels[107]
- Public Service Appeal Board[108]
- Securities Commission
- Utilities Commission
- Workers' Compensation Appeal Tribunal ((1)(a), (c), (2))

Liability and compulsion protections

The White Paper Report and Recommendations on *Providing Administrative Tribunals with Essential Powers and Procedures* notes that, through the mechanism of incorporation by reference to the *Inquiry Act*, some administrative tribunals are granted "the same protection and privileges, in the case of an action brought for an act done or omitted to be done in the execution of the [tribunal's] duties, as are by law given to the judges of the Supreme Court".

[106] Section 8(8.1) of the *Natural Products Marketing (B.C.) Act* allows the board to conduct "all or part of a hearing in private to the extent it considers it necessary to one or both of the following: (a) to protect the confidential business records or confidential business information respecting a party or witness from disclosure to competitors; (b) to protect personal or medical information about a party or witness from public disclosure". See also, *Commercial Appeals Commission Act*, section 14; *Farm Practices Protection (Right to Farm) Act*, section 7(5); *Financial Institutions Act*, section 239; *Fire Services Act*, section 16(2)(b).

[107] At present, hearings are presumptively private unless the tribunal decides otherwise: section 6(16) of the Mental Health Regulation, B.C. Reg. 233/99.

[108] Section 9 of *the Public Service Act* regulations provides "[e]very party to the appeal must keep in confidence all information about any applicant or competition that he or she obtains during an appeal".

In other cases, the tribunal's enabling Act contains an express provision respecting immunity from suit, but these types of provisions vary from tribunal to tribunal. In still other cases, the administrative tribunal's enabling statute is silent on the point. Thus the immunity provisions have historically been included on an ad hoc basis; any stated policy rationale for determining whether it is appropriate or necessary to include such provisions (and to whom they should be extended) is unclear.

The Report concludes that:

> *The problems caused by the ad hoc inclusion and statutory wording of immunity provisions logically compel a conclusion that either this type of provision be uniformly included (for example, through statutory powers legislation) or uniformly excluded (through statutory repeal).*

The common law provides immunity in negligence for the good faith exercise of quasi-judicial powers. Arguably, the common law has been codified by section 3(2) of the *Crown Proceeding Act* which provides immunity for actions of a "judicial nature". Additionally, through the Ministry of Finance's Risk Management Branch, the government provides for indemnification to persons appointed to government agencies, boards and commissions as long as the appointees were acting in good faith in the discharge of their statutory duties. Thus many would say that statutory immunity clauses are not necessary or useful and further, that they are not necessarily effective as courts tend to construe these types of liability exceptions very narrowly. Finally, the statutory interpretation questions raised by the inclusion of these types of provisions have led to some unanticipated developments in the law.

The federal *Proposal for an Administrative Hearings Powers and Procedures Act* recommended that legislation provide specific statutory protection from civil or criminal liability in appropriate circumstances:

> ***Liability of agency or member of agency***
>
> *In addition to any protection afforded by statute, the Act would protect an agency or any member of an agency from any criminal or civil liability for anything done, reported or said in the course of the performance or intended performance of their responsibilities, or believed responsibilities under any legislation to which the Act applies unless it shown that the agency or member of the agency acted primarily for a purpose other than to carry out what the person believed to be the responsibilities of the agency.*

The present policy of the provincial Ministry of Attorney General is that immunity provisions be uniformly excluded from statute (no express provision). Indemnity protections are afforded tribunals by Treasury Board Directive. Consistent with this policy, no express immunity provision is proposed. However, the

following provision protecting all administrative tribunals against compulsion to testify about their proceedings is proposed:[109]

> ***Compulsion protection***
>
> 56(1) A tribunal member or person acting on behalf of or under the direction of a tribunal member is not, in a civil proceeding to which the member is not a party, required to testify or produce evidence about records or information obtained in the discharge of duties under this Act.
>
> (2) Notwithstanding subsection (1), a tribunal may be required by the court to produce a record of a proceeding that is the subject of an application for judicial review.

Court enforcement powers

Many tribunals make orders requiring the payment of money or orders directing, limiting or prohibiting a party from doing something. Just as an administrative tribunal needs to be able to enforce orders made by it during the course of proceedings, the tribunal itself, as well as the parties appearing before the tribunal, needs to be provided with a clear mechanism for enforcing these types of orders should the need to do so arise. The simplest mechanism is to treat a tribunal's order as an order of the court and thus enforceable as such.

The following provision is proposed for administrative tribunals that have power to make final orders directing the payment of money or directing, restraining or prohibiting conduct:

> ***Enforcement of tribunal orders***
>
> 57(1) The tribunal, the party in whose favour a tribunal order is made, or a person designated in the order, may file a certified copy of the order with the Supreme Court.
>
> (2) An order filed under subsection (1) has the same force and effect, and all proceedings may be taken on it, as if it were a judgment of the Supreme Court.
>
> (3) A party filing an order under subsection (1) shall give notice of the filing to the tribunal within 10 days of filing.

This provision would apply to the following administrative tribunals:

- Agricultural Land Commission (section 55 appeals)
- British Columbia Marketing Board
- Commercial Appeals Commission
- Community Care Facility Appeal Board
- Electrical Safety Appeal Board
- Elevating Devices Appeal Board
- Employment and Assistance Appeal Tribunal

[109] The federal *Proposal for an Administrative Hearings Powers and Procedures Act* suggested the following provision: "No member or staff of an agency would be either competent or compellable to testify in any proceeding in order to explain what was considered by an agency in reaching a decision or why a particular decision was reached".

- Employment Standards Tribunal
- Environmental Appeal Board
- Expropriation Compensation Board
- Farm Practices Board
- Financial Institutions Commission
- Forest Appeals Commission
- Gas Safety Appeal Board
- Health Care and Care Facility Review Board
- Human Rights Tribunal
- Labour Relations Board
- Medical Services Commission (re section 39 orders)
- Power Engineers and Boiler and Pressure Vessel Safety Appeal Board
- Property Assessment Appeal Board
- Residential Tenancy Arbitrators
- Securities Commission
- Utilities Commission
- Workers' Compensation Appeal Tribunal

7 JUDICIAL REVIEW OF TRIBUNAL DECISIONS – STANDARDS OF REVIEW AND RELATED ISSUES

On the question of judicial review, the fundamental concern identified in the White Paper is that the standard of review jurisprudence is too complex and unpredictable, owing in large part to a lack of clarity in the enabling legislation of administrative tribunals. That jurisprudence has become even more complex with the introduction of a middle standard of review (reasonableness *simpliciter)*, the application of standard of review principles to discretionary decisions and, more recently, the idea embraced by the British Columbia Court of Appeal[110] that some deference might be appropriate even within the correctness standard. Additionally, for those questions which are found to be within the jurisdiction of a tribunal, standard of review principles require that each question be individually scrutinized to determine the standard applicable to that question. Accordingly, the degree of deference to be extended to a tribunal can vary depending on which intra-jurisdictional question is before it.

The White Paper recommends that:

35. The mechanism of statutory appeal be used where the tribunal's decisions on intra-jurisdictional questions are to be reviewed on a correctness standard. This should be reflected clearly in legislation.
36. Clear and consistent privative clauses be used where the tribunal's decisions on intra-jurisdictional questions are to be reviewed only for jurisdictional error. This should also be made clear in legislation.
37. Government develop policy guidelines governing the criteria for determining (1) when a tribunal's decision should be subject to statutory appeal provisions rather than subject to judicial review only and (2) when a tribunal's decision should be insulated from review for other than jurisdictional error.
38. Government conduct a tribunal-by-tribunal review to address the question of whether an administrative tribunal statute should include a statutory appeal provision or a privative clause and consider appropriate legislative amendments.
39. Government develop a *Statutory Appeals Procedure Act*, providing a uniform procedure for statutory appeals to the court.
40. The *Judicial Review Procedure Act* be amended to include a limitation period of not more than 6 months, subject to a discretion in the court to relieve against it.

The White Paper therefore contemplates a number of statutory reform initiatives aimed at clarifying which tribunals should be given some latitude to interpret their enabling statutes in a way that makes sense given the overall statutory framework. These initiatives are also aimed at simplifying standard of review

[110] See *Northwood Inc. v. Forest Practices Board*, 2001 BCCA 141, leave to appeal denied, [2001] S.C.C.A. No. 207 and *Van Unen v. British Columbia (Workers Compensation Board*), [2001] B.C.J. No. 672.

issues and providing a uniform process for statutory appeals where that mechanism is selected as appropriate for tribunals.

The legal debate

The courts have been consistent in emphasizing that the fundamental question in any standard of review analysis involves ascertaining the legislature's intent. Did the legislature intend the tribunal's decisions to be insulated from judicial interference for all but jurisdictional errors?

It used to be that, for those tribunals whose decisions were subject to statutory privative clauses, the existence of that clause effectively constituted a complete answer to the question of legislative intent.[111] In such cases, the standard of review was that of patent unreasonableness; a standard that reflected the fact that to be reviewable, the tribunal decision had to be so egregious as to constitute jurisdictional error. More recently, however, the Supreme Court of Canada has emphasized that in ascertaining whether or not to apply the policy of judicial deference to a tribunal, a privative clause is only one of four factors to be taken into account in a functional and pragmatic analysis. Perhaps not surprisingly, this has resulted in arguments that, notwithstanding the existence of a privative clause, the appropriate standard of review is correctness because (for example), the nature of the question – statutory interpretation – is of a type that the courts are at least as well-equipped to answer as the tribunal.

The jurisprudence also extends the policy of curial deference to decisions of tribunals that are subject to statutory appeals, primarily for reasons of expertise. Of this development, Mr. Justice Robertson of the New Brunswick Court of Appeal observed:[112]

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[111] This point was made by Mr. Justice Gonthier in *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission),* [1989] 1 S.C.R. 1722 at paragraph 30: "... Where the legislator has clearly stated that the decision of an administrative tribunal is final and binding, courts of original jurisdiction cannot interfere with such decisions unless the tribunal has committed an error which goes to its jurisdiction. Thus, this Court has decided in the CUPE case that judicial review cannot be completely excluded by statute and that courts of original jurisdiction can always quash a decision if it is 'so patently unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the court upon review' (p. 237). Decisions which are so protected are, in that sense, entitled to a non-discretionary form of deference because the legislator intended them to be final and conclusive and, in turn, this intention arises out of the desire to leave the resolution of some issues in the hands of a specialized tribunal. In the CUPE case, Dickson J., as he then was, described the legislator's intention as follows, at pp. 235-36: 'Section 101 constitutes a clear statutory direction on the part of the Legislature that public sector labour matters must be promptly and finally decided by the board. Privative clauses of this type are typically found in labour relations legislation. The rationale for protection of a labour board's decisions within jurisdiction is straightforward and compelling. The labour board is a specialized tribunal which administers a comprehensive statute regulating labour relations. In the administration of that regime, a board is called upon not only to find facts and decide questions of law, but also to exercise its understanding of the body of jurisprudence that has developed around the collective bargaining system, as understood in Canada, and its labour relations sense acquired from accumulated experience in the area'."

[112] *Keddy v. New Brunswick (Workplace Health, Safety and Compensation Commission),* [2002] N.B.J. No. 91, 2002 NBCA 24.

> *¶27 … [i]t is easy to forget that the legislative decision to subject tribunal decisions to a right of appeal may stem from political considerations that transcend the principles of relative expertise and specialization of duties. Even if the tribunal is regarded as an expert tribunal, the decision to grant a qualified right of appeal, e.g. on a question of law, may reflect a compromise reached by competing interest groups who regularly appear before the tribunal and who lobbied the government to legislate accordingly. It may also signify that the bulk of the tribunal's work is concerned more with the application of the law than it is with its interpretation and the promotion of policy objectives at odds with common law concepts. Finally, the right of appeal may signify the legislature's understanding that historically, the appointment of tribunal members has been influenced by factors not tied to legislative objectives. Each of these considerations is implicitly addressed once the legislature authorizes appellate review on stated grounds.*
>
> *¶28 It is worth reemphasizing that the Supreme Court has repeatedly held that whether a tribunal decision is owed deference is a question directed at isolating legislative intent …*
>
> *¶29 It is equally important to remember that it is not the mandate of reviewing courts to determine the proper standard of review by reference to the four factors that comprise the pragmatic and functional approach. Those factors are used to address the issue of legislative intent. Otherwise, it is all too easy to place overriding weight on the principles of relative expertise and specialization of duties at the expense of a clearly worded statutory provision that negates the duty of reviewing courts to exercise deference. The search for legislative intent begins with the trite understanding that legislative draftspersons appreciate the legal distinction between a full privative clause and a right of appeal on stated grounds. The fact that a tribunal possesses a relative expertise is not a sufficient basis for insisting that deference be granted to a tribunal's decision. Otherwise, the fundamental distinction between judicial and appellate review is obscured, if not lost. Above all, the principles of relative expertise and specialization of duties cannot displace a statute's unambiguous wording.*

In the case of statutory appeals, the courts generally will choose between the standards of correctness or reasonableness *simpliciter*. This reasonableness *simpliciter* standard, while differentiated from the more "strict" patently unreasonable standard in cases like *Southam*, is for all practical purposes in its application virtually indistinguishable from it. The idea that a fourth standard may exist was only recently discounted by the Court in *Law Society of New Brunswick v. Ryan*, 2003 SCC 20.[113]

Superimposed on the present uncertainties presented by the standard of review debate is a lack of consistency in both privative clauses and appeal mechanisms contained in administrative tribunal statutes.

[113]Although Mr. Justice Iacobucci had not long ago hinted that such a standard might well be recognized in future in his article, *Articulating a Rational Standard of Review Doctrine: A Tribute to John Willis*, (2002) Queen's L.J. 809 at para. 31.

Issue: Judicial review for unreasonableness or appeal to ensure correctness?

The White Paper reflects a general policy that:

> (1) Intra-jurisdictional statutory interpretation decisions[114] of administrative tribunals that are subject to a statutory right of appeal will be reviewed on a correctness standard; and,
>
> (2) Intra-jurisdictional statutory interpretation decisions of administrative tribunals protected by a privative clause can be reviewed only for jurisdictional error and thus will be subject to a patently unreasonable standard.

The general goal of these reform initiatives is to try to overcome the *Pushpanathan*-type analysis where the courts are directed to treat privative clauses (or broad appeal provisions, as the case may be) as just one factor to be taken into account in deciding whether the tribunal's decision should be extended deference. If the test truly is one of legislative intent – and the courts are emphatic that this is so – then a clear pronouncement of legislative intent should be conclusive.[115]

The proposed reform initiatives seek to achieve consistency and clarity in statutory language and legislative intent for those tribunals whose decisions should, for sound policy reasons, be subjected to a patent unreasonableness standard. At the present time, there are varying types of privative clauses in tribunal statutes and there are some statutes that are silent as to the standard of review for questions of law. Ascertaining the legislature's intent under the present standard of review analysis becomes less straightforward as one moves along the spectrum from consideration of those statutes that have very powerful privative clauses, to statutes that contain quasi-privative or finality clauses, to statutes that are silent on the question. Strengthening and harmonizing privative clauses will more clearly communicate the legislature's intentions (e.g. decisions on questions of law or statutory interpretation made within the tribunal's jurisdiction can only be reviewed on a patent unreasonableness standard).

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[114] That is, tribunal decisions respecting the interpretation of a provision in the tribunal's enabling statute where the interpretive question is not jurisdictional in nature. These types of interpretation questions are within the jurisdiction of the tribunal and so, to the extent that the policy of curial deference applies, it would apply to these types of questions.

[115] The Supreme Court of Canada recently emphasized that the question is fundamentally one of statutory interpretation in *R. v. Owen*, [2003] S.C.J. No. 31, 2003 SCC 33. At issue there was the appropriate standard of review to be applied to decisions of *Criminal Code* review boards. Speaking for the Court, Mr. Justice Binnie first observed that the appellant had submitted an extensive analysis of the Court's administrative law jurisprudence applying the "functional and pragmatic test" to establish the appropriate standard or review. He went on to say this: "However, in the case of these review boards, Parliament has spelled out in the *Criminal Code* the precise standard of review, namely that the court may set aside an order of the review board only where it is of the opinion that: (a) the decision is unreasonable or cannot be supported by the evidence; or, (b) the decision is based on a wrong decision on a question of law (unless no substantial wrong or miscarriage of justice has occurred); or, (c) there was a miscarriage of justice. It must be kept in mind that "[t]o a large extent judicial review of administrative action is a specialized branch of statutory interpretation"…Where Parliament has shown its intent in the sort of express language found in s. 672.78 of the Code then, absent any constitutional challenge, that is the standard of review that is to be applied".

Similarly, many administrative tribunal decisions are subject to statutory appeal provisions, some to the Supreme Court, some to the Court of Appeal, and still others require leave to appeal to the Supreme Court or the Court of Appeal. Sometimes the grounds for appeal are expressly stated and sometimes they are not. Harmonizing these types of appeal provisions and identifying the desired standard of review with more clarity should result in the development of more consistent appeal processes.

The point has been made that, regardless of what statutory language has been chosen, interpretation of it will always be open to some debate. Undoubtedly novel types of legal arguments will continue to be advanced. However, such legislative clarity on the appropriate standard of review of a tribunal's decision on statutory interpretation questions should at least focus the debate more narrowly on what is or is not a jurisdictional question (as distinct from the two step process of determining first, whether the question is jurisdictional or intra-jurisdictional and second, if within jurisdiction, what standard of review should be applied).

Standard of review for questions of jurisdiction

The jurisprudence is clear that the policy of judicial deference has no application to errors of jurisdiction and that the standard of review for such questions will, for constitutional reasons, always be that of correctness. For such questions, a simple error will result in a loss of jurisdiction. In this context, a jurisdictional error is understood to mean an error which relates generally to a provision in a tribunal's enabling statute that confers jurisdiction (e.g. one that relates to a provision that describes, lists or limits the powers of an administrative tribunal, or is intended to circumscribe the authority of that tribunal).[116] As this principle is well-understood and has a constitutional foundation, any legislated standard of review rules must be consistent with it.

Standard of review for questions of law other than statutory interpretation questions concerning the enabling statute of an administrative tribunal

It is generally understood that questions concerning common law principles or questions of statutory interpretation of statutes other than the tribunal's enabling statute ("external statutes") do not attract the

[116] *Crevier v. Quebec (Attorney General),* [1981] 2 S.C.R. 220 at 234-235; *Syndicat national des employés de service, Local 298 (sub nom U.E.S., Local 298 v. Bibeault),* [1988] 2 S.C.R. 1048 at p. 1087; *Syndicat des employés de production du Québec & l'Acadie v. Canada (Labour Relations Board),* [1984] 2 S.C.R. 412 at pp. 412-442 ("Once a question is classified as one of jurisdiction, and has been the subject of a decision by an administrative tribunal, the superior court exercising the superintending and reform power over that tribunal cannot, without itself refusing to exercise its own jurisdiction, refrain from ruling on the correctness of that decision, or rule on it by means of an approximate criterion. This is why the superior courts which exercise the power of judicial review do not and may not use the rule of the patently unreasonable error once they have classified an error as jurisdictional".)

policy of deference as these questions do not engage the expertise of a tribunal.[117] Accordingly, these types of questions call for review on a correctness standard. Charter questions would fall into this category. Any legislated standard of review rules should reflect the general principle.

Standard of review for questions of fact

Applying standard of review jurisprudence, a finding of fact is unreasonable and constitutes jurisdictional error if either there is no evidence before the tribunal to justify its finding, or, in light of that evidence it appears to be wholly unreasonable. In such a case, the error of fact has been described as an error of law which deprives the tribunal of jurisdiction. Regardless of whether an administrative tribunal is insulated by a privative clause, a reviewing court is generally extremely deferential to tribunal fact-finding.

The standard of review for findings of fact is sometimes described as a patent unreasonableness standard. Sometimes the test is expressed as requiring demonstration of palpable and overriding error. The palpable and overriding error test is often, but not always, equated with the review standard of patent unreasonableness. For example, in *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, Mr. Justice Iacobucci equated the palpable and overriding error test with the standard of reasonableness *simpliciter*:

> *¶ 59 The standard of reasonableness simpliciter is also closely akin to the standard that this Court has said should be applied in reviewing findings of fact by trial judges. In Stein v. "Kathy K" (The Ship), [1976] 2 S.C.R. 802, at p. 806, Ritchie J. described the standard in the following terms:*
>
> > *. . . the accepted approach of a court of appeal is to test the findings [of fact] made at trial on the basis of whether or not they were clearly wrong rather than whether they accorded with that court's view of the balance of probability. [Emphasis added.]*
>
> *¶ 60 Even as a matter of semantics, the closeness of the "clearly wrong" test to the standard of reasonableness simpliciter is obvious. It is true that many things are wrong that are not unreasonable; but when "clearly" is added to "wrong", the meaning is brought much nearer to that of "unreasonable". Consequently, the clearly wrong test represents a striking out from the correctness test in the direction of deference. But the clearly wrong test does not go so far as the standard of patent unreasonableness. For if many things are wrong that are not unreasonable, then many things are clearly wrong that are not patently unreasonable (on the assumption that "clearly" and "patently" are close synonyms). It follows, then, that the clearly wrong test, like the standard of reasonableness simpliciter, falls on the continuum between correctness and the standard of patent unreasonableness. Because the clearly wrong test is familiar to Canadian*

[117] See, for example*, Bell Canada (Deputy Minister of National Revenue) v. Mattel Canada Inc.* (2001), 199 D.L.R. (4th) 598 (S.C.C.). However, at least one exception to this general rule has been recognized; some deference has been said to be justified where it can be said that the external statute is linked to the tribunal's mandate and frequently encountered by it. See, for example, *A.C.T.R.A. v. Canadian Broadcasting Corp.*, [1995] 1 S.C.R. 157 (per Iacobucci J.)

> *judges, it may serve as a guide to them in applying the standard of reasonableness simpliciter.*

There are sound policy reasons why, as a general rule, the decision of an administrative tribunal on questions of fact should be accorded a high level of deference. To discourage debate about whether the reviewing standard should be patent unreasonableness or reasonableness *simpliciter*, the appropriate test should be legislated.

Standard of review for questions of mixed fact and law

The Supreme Court of Canada (in *College of Physicians and Surgeons of British Columbia v. Dr. Q*, 2003 SCC 19) has held that that standard of review for questions of mixed fact and law of a particular tribunal will range from correctness to patent unreasonableness, depending on the application of the *Pushpanathan* factors. That Court has also said that "with respect to questions of mixed fact and law, this factor will call for more deference if the question is fact-intensive and less deference if it is law-intensive".[118] To discourage debate about whether the reviewing standard is correctness, reasonableness *simpliciter* or patent unreasonableness (and whether the particular question of mixed fact and law is "fact intensive" or "law-intensive") the appropriate test should be legislated. The patently unreasonable standard should apply to questions of mixed fact and law by administrative tribunals whose decisions are subject to a privative clause. The correctness standard should apply to questions of mixed fact and law by administrative tribunals whose decisions are not protected by a privative clause.

Standard of review for discretionary decision-making

The concept of administrative discretion has been described as referring to "decisions where the law does not dictate a specific outcome or where the decision-maker is given a choice of options within a statutorily imposed set of boundaries".[119] The functional and pragmatic approach to ascertaining the standard of review now applies to discretionary decision-making. This means that even discretionary decision-making, which traditionally has been tested against different criteria,[120] may be subject to more or less

[118] *College, supra*, at para. 34.

[119] *Baker v. Canada (Minister of Citizenship and Immigration),* [1999] 2 S.C.R. 817, [1999] S.C.J. No. 39 at ¶52.

[120] The traditional approach is referred to in *Baker, supra*, at ¶53: "Administrative law has traditionally approached the review of decisions classified as discretionary separately from those seen as involving the interpretation of rules of law. The rule has been that decisions classified as discretionary may only be reviewed on limited grounds such as the bad faith of decision-makers, the exercise of discretion for an improper purpose, and the use of irrelevant considerations: see, for example, *Maple Lodge Farms Ltd. v. Government of Canada, [1982] 2 S.C.R. 2, at pp. 7-8; Shell Canada Products Ltd. v. Vancouver (City),* [1994] 1 S.C.R. 231. A general doctrine of unreasonableness has also sometimes been applied to discretionary decisions: *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation*, [1948] 1 K.B. 223 (C.A.) … these doctrines incorporate two central ideas – that discretionary decisions, like all other administrative decisions, must be made within the bounds of the jurisdiction conferred by the statute, but that considerable deference will be given to decision-makers by courts in reviewing the exercise of that discretion and determining the scope of the decision-maker's jurisdiction. These doctrines recognize that it is the intention of the

scrutiny depending on whether a reviewing court determines the appropriate standard to be that of correctness, unreasonableness or patent unreasonableness.[121]

To simplify the analysis, the legislated standard for discretionary decision-making should be that set out in *Maple Lodge Farms Ltd. v. Government of Canada*, [1982] 2 S.C.R. 2. Accordingly, such decisions should only be set aside on the limited grounds of bad faith, use for an improper purpose or use of irrelevant considerations.

Standard of review for natural justice issues

There is presently consensus that questions concerning a tribunal's compliance with the rules of natural justice are legal issues for which principles of deference have no application. While the test for review is sometimes referred to as the standard of correctness, the point has been made that the notion of correctness is misplaced and the real question is whether the procedure was fair or not.[122] In any event, there are sound policy reasons for the general principle. Any legislated standard of review rules should reflect the general principle. The same standard should apply to all administrative tribunals.

Tribunals with privative clauses

There are fundamentally two reasons why, as a matter of policy, the decisions of a tribunal on intra-jurisdictional statutory interpretation questions concerning its enabling statute should be protected by a privative clause. Those reasons relate to: (1) the need for specialized expertise and understanding of the activities regulated by the statute; and, (2) the need to ensure expediency and finality in tribunal decision-making.

Deference for reasons of relative expertise

First, the subject matter and framework of some statutes is such that administrative tribunal members must have some specific non-legal expertise in order for those statutes to operate effectively and in the way intended by the legislature. That expertise gives them a specialized understanding of the very activities they supervise. For these tribunals, the legislature should protect their decisions from judicial

legislature, when using statutory language that confers broad choices on administrative agencies, that courts should not lightly interfere with such decisions, and should give considerable respect to decision-makers when reviewing the manner in which discretion was exercised".

[121] *Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services),* [2001] 2 S.C.R. 281, 2001 SCC 41 at para. 54, where the Court recognized that even "the review for abuse of discretion may in principle range from correctness through unreasonableness to patent unreasonableness". See also, Baker*, supra; Suresh v. Canada (Minister of Citizenship and Immigration*, [2002] 1 S.C.R. 3, 2002 SCC 1; *Chieu v. Canada (Minister of Citizenship and Immigration*, [2002] S.C.J. No. 1, 2002 SCC 3.

[122] See, for example, David Phillip Jones, QC., *Recent Developments in Administrative Law*, Canadian Bar Association, National Administrative/Labour & Employment Law Section/CLEC, Ottawa, 22 November 2002.

interference for other than jurisdictional error because the courts do not have the same necessary expertise to interpret their enabling statutes in an informed way (i.e. a way that most appropriately reflects the broad policy context in which these tribunals operate as well as the realities of the particular industry that is regulated).

Courts recognize that some statutory provisions do not yield a single, uniquely correct interpretation, but are rather ambiguous or silent on a particular question, or couched in language that invites the exercise of discretion. As Madam Justice Wilson observed in *National Corn Growers Ass. v. Canada (Canadian Import Tribunal),* [1990] 2 S.C.R. 1324, there are situations where it is less appropriate to speak of correct answers, and more appropriate to speak in terms of a range of acceptable answers. In that case, Madam Justice Wilson, quoted J.M. Evans in his text, *Administrative Law*, 3d ed. (Toronto: Edmond Montgomery, 1989) at p. 414 who described the idea this way:

> *[J]udges have … been increasingly willing to concede that the specialist tribunal to which the legislature entrusted primary responsibility for the administration of a particular programme is often better equipped than a reviewing court to resolve the ambiguities and fill the voids in the statutory language. Interpreting a statute in a way that promotes effective public policy and administration may depend more upon the understanding and insight of the frontline agency than the limited knowledge, detachment, and modes of reasoning typically associated with courts of law. Administration and interpretation go hand in glove.*

Accordingly, the courts themselves have recognized that certain types of tribunals are better equipped to interpret their enabling statutes than the courts. The policy focus for determining those tribunals falling into this general category is on the question of relative expertise. The specific policy question of ascertaining whether a specific tribunal should be protected by a privative clause for reasons of relative expertise involves consideration of a number of factors. The following factors point to such expertise:

- The tribunal is responsible for the regulation of a specific industrial or technical sphere (e.g. labour relations, telecommunications, financial markets, international economic relations, energy);
- The tribunal has oversight functions in respect of the ongoing interpretation of its enabling statute and the development of policy and precedent in respect of such interpretation;
- Statutory interpretation questions are best answered in a context-specific setting;
- In the discharge of its regulatory function, the tribunal is required to interpret its legislation taking into account and balancing a number of different and competing interests;
- The tribunal has broad, discretionary “public interest” powers;
- The tribunal is permanent (as opposed to ad hoc).

Applying these policy considerations, decisions on intra-jurisdictional statutory interpretation questions by the following administrative tribunals should be protected by a privative clause:

- Agricultural Land Commission
- British Columbia Marketing Board
- Environmental Appeal Board
- Forest Appeals Commission
- Labour Relations Board
- Motor Carrier Commission
- Securities Commission
- Utilities Commission
- Workers' Compensation Appeal Tribunal

Deference for reasons of expediency and finality

The work of some administrative tribunals is focused primarily, if not exclusively, on fact-finding and adjudication often (but not always) in a context where the volume of cases is high. For these tribunals, the goal is to enable the tribunal to generate its decisions quickly and to ensure that, to the extent possible, these decisions are final. Where such a tribunal is rarely if ever involved in non-jurisdictional statutory interpretation or consideration of questions of law, deference is warranted so that the statutory scheme can be administered in the way that the legislature intended. An exception to this is where the decisions of an administrative tribunal affect the liberty or security of the persons regulated by the tribunal's statute (e.g. decisions affecting a person's medical treatment).

Applying these policy considerations, decisions of the following administrative tribunals should be protected by a privative clause:

- Agricultural Land Commission
- Community Care Facility Appeal Board
- Employment and Assistance Appeal Tribunal
- Employment Standards Tribunal
- Health Care Practitioners Special Committee for Audit
- Hospital Appeal Board
- Parole Board
- Public Service Appeal Board
- Residential Tenancy Arbitrators

Deference for reasons of special expertise

Some tribunals are comprised of subject matter experts whose decisions primarily involve the application of their technical or professional expertise to facts. These tribunals rarely engage in statutory

interpretation or decide questions of law. These tribunals should be protected by a privative clause for reasons of relative expertise (i.e. they have greater subject matter expertise than the courts).

Tribunals that fall into this category are:

- Building Code Appeal Board
- Electrical Safety Appeal Board
- Elevating Devices Appeal Board
- Farm Practices Board
- Fire Commissioner
- Gas Safety Appeal Board
- Hospital Appeal Board
- Mediation and Arbitration Board
- Power Engineers and Boiler and Pressure Vessel Safety Appeal Board
- Private Post-Secondary Education Commission

Proposed legislation – model privative clause

Some privative clauses have proven to be more effective than others in ensuring that the legislative objective of judicial non-interference for other than jurisdictional error is met. Examples are privative clauses in the *Labour Relations Code* and the *Workers Compensation Act* (See Schedule A at the end of this Chapter). Because these clauses have proven to be effective they should remain intact. Model statutory privative clauses for the administrative tribunals listed above should be based on these privative clauses. Common features of them are:

- A provision respecting finality; and
- A provision respecting exclusivity of tribunal jurisdiction.

It is proposed that the enabling statutes of the above tribunals be amended to include the following form of privative clause:

> ***Privative Clause***
>
> 58(1) The [named tribunal] has exclusive jurisdiction to inquire into, hear and determine all those matters and questions of fact and law arising or required to be determined under [this Part or this Act] and to make any order permitted to be made.
>
> (2) Without limiting the generality of subsection (1), the [named tribunal] has exclusive jurisdiction to hear and determine any question as to whether:
>
> [list subject areas of exclusive jurisdiction].
>
> (3) A decision [or order and/or action] of the [named tribunal] under [this Part or this Act and regulations] on a matter in respect of which the [named tribunal] has exclusive jurisdiction is final and conclusive and is not open to question or review in any court.

Tribunals without privative clauses

The policy considerations that militate in favour of requiring judicial deference through the mechanism of a privative clause are set out above. Those factors relate to relative expertise, expediency and finality. Factors which would indicate a greater degree of judicial scrutiny and militate against judicial deference include these:

- Legal expertise is an important, if not necessary, qualification for most or all tribunal appointees;
- A large proportion of the tribunal's work involves the interpretation of its enabling legislation or other legal principles (rather than, for example, the exercise of discretion);
- The tribunal is routinely called upon to decide questions that have a quasi-constitutional dimension;
- The tribunal primarily adjudicates disputes between two parties;
- The tribunal's proceedings are similar to those of court proceedings and the tribunal exercises a quasi-judicial function;
- The tribunal's decisions affect a person's liberty, security or property rights;
- The tribunal does not have a policy-making function;
- The tribunal is not responsible for the regulation of financial, energy, labour relations or like markets;
- The tribunal does not have broad "discretionary public interest" powers (e.g. power to make orders "in the public interest").

Taking all of these considerations are taken into account, decisions of the following administrative tribunals should not be subject to a privative clause:

- Commercial Appeals Commission
- Expropriation Compensation Board
- Health Care and Care Facility Review Board
- Human Rights Tribunal
- Medical and Health Care Services Appeal Board
- Medical Services Commission
- Mental Health Review Panels
- Property Assessment Appeal Board

The standard of review for the decisions of these tribunals on questions of statutory interpretation made within their jurisdiction will be that of correctness.

Legislating the standard of review for administrative tribunals

The White Paper recommends that tribunal decisions that are not protected by privative clauses be subject to statutory appeals. The legislated standard of review for these decisions is correctness. The

White Paper also recommends that statutory appeals procedure legislation be enacted to establish consistent procedures for these types of appeals.

It is proposed, however, that all tribunal decisions be subject to judicial review only (no statutory appeals). The standards of review for the two types of tribunals would be legislated.

Discussion

Historically, courts have often made distinctions between a statutory appeal and the judicial review of a tribunal's decision-making. For example, it is sometimes emphasized that "judicial review is not an appeal" to signify that judicial review has generally been understood to be the mechanism for ensuring that tribunals act reasonably (not correctly) and within their jurisdiction. Recently (in *College of Physicians and Surgeons of British Columbia*), the Supreme Court of Canada held that:

> *The term 'judicial review' embraces review of administrative decisions by way of both applications for judicial review and statutory rights of appeal. In every case where a statute delegates power to an administrative decision-maker, the reviewing judge must begin by determining the standard of review on a pragmatic and functional approach.*[123]

Thus the traditional reason for creating a statutory right of appeal has been significantly eroded by the evolving standard of review jurisprudence.

Subjecting all tribunal decisions to judicial review proceedings would not only dispense with the need to enact a *Statutory Appeals Procedure Act* to govern the procedures for statutory appeals but also dispense with the need to differentiate between the types of appeal provisions (if any) that would be appropriate for individual tribunals.[124] It would also overcome the fact that tribunals whose decisions are subject to statutory appeals may still be the subject of judicial review proceedings.

The simplicity of the proposed process is preferred over that initially proposed by the White Paper.

Proposed standard of review provisions

The applicable standard of review to be applied to the judicial review of specific tribunals should be expressly legislated. In this way, the application (or non-application, as the case may be) of the proposed new section 3(2) of the *Judicial Review Procedure Act* (discussed below) in a given case would be reinforced by express standard or review provisions.

[123] See *Dr. Q. v. College of Physicians and Surgeons*, 2003 SCC 19.

[124] For example, whether the appeal should be to the Supreme Court, the Court of Appeal or either court, with leave.

Standard of review where tribunal decisions protected by privative clause

The standard of review provisions in relation to tribunal decisions that are subject to a privative clause should provide as follows:

> ***Option 1: Standard of review on judicial review (with privative clause)***
>
> 59(1) In judicial review proceedings, the standard of review to be applied by the court to a decision of the tribunal is as follows:
>
> (a) for intra-jurisdictional statutory interpretation questions, the standard of review is patent unreasonableness;
>
> (b) for questions of law, other than those described in paragraph (a), and questions of jurisdiction the standard of review is correctness;
>
> (c) for questions of fact and questions of mixed fact and law, the standard of review is patent unreasonableness;
>
> (d) for questions involving the exercise of the tribunal's discretion, the tribunal's decision can only be set aside if it is unreasonable.
>
> (2) For purposes of subsection (1)(a), a decision is patently unreasonable if it is clearly irrational.
>
> (3) For purposes of subsection (1)(b), questions of jurisdiction include natural justice questions.
>
> (4) For purposes of subsection (1)(c), a finding of fact is patently unreasonable if there is no evidence to support it or if, in light of the whole of the evidence, the finding is clearly irrational.
>
> (5) For purposes of subsection (1)(d), a discretionary decision is unreasonable if it is made arbitrarily or in bad faith, if the discretion is exercised for an improper purpose, if the tribunal relied on irrelevant considerations or if the tribunal failed to take into account relevant considerations.

Standard of review for tribunals with no privative clause

For those tribunal decisions that are not protected by a privative clause, the following model standard of review provision would apply:

> ***Option 2: Standard of review on judicial review (with no privative clause)***
>
> 60(1) In judicial review proceedings, the standard of review to be applied to a decision of the tribunal is correctness for all questions except those respecting findings of fact.
>
> (2) A finding of fact by the tribunal should only be set aside if there is no evidence to support it or if, in light of the whole of the evidence, the finding is clearly irrational.

Proposed consequential amendments to the Judicial Review Procedure Act

Section 3 of the *Judicial Review Procedure Act* presently provides:

> ***Error of law***
>
> 3. The court's power to set aside a decision because of error of law on the face of the record on an application for relief in the nature of *certiorari* is extended so that it applies to an application for judicial review in relation to a decision made in the exercise of a statutory power of decision to the extent it is not limited or precluded by the enactment conferring the power of decision.

To reinforce the patently unreasonable standard of review for intra-jurisdictional decisions protected by privative clauses, it is proposed that section 3 of the *Judicial Review Procedure Act* be amended by adding a new subsection (2):

> (2) For purposes of subsection (1), those provisions in the enactments that are listed in Schedule 1 to this Act limit the court's powers to set aside a statutory interpretation decision made by a tribunal under and in relation to those enactments unless the interpretation error is patently unreasonable.

Consequential amendments to the *Judicial Review Procedure Act* would be required to give the Cabinet or the Minister (e.g. Attorney General) the power to add tribunals to the Schedule to the Act.

Time limits for judicial review applications

Section 11 of the *Judicial Review Procedure Act* provides as follows:

> ***No time limit for applications***
>
> 11. An application for judicial review is not barred by passage of time unless
>
> (a) an enactment otherwise provides, and
>
> (b) the court considers that substantial prejudice or hardship will result to any other person affected by reason of delay.

It is proposed that the *Judicial Review Procedure Act* contain a limitation period requiring judicial review applications relating to tribunal decisions to be filed within 30 days.[125] For constitutional reasons, the proposed 30 day limitation period is subject to the court's discretion to relieve against it in appropriate

[125] The White Paper Report recommends a limitation period of not more than 6 months for judicial review applications. A 30 day period with discretion in the court to relieve against the time limit is proposed. Some administrative tribunals (like the Public Service Appeal Board) need to make decisions quickly, and uncertainty and delay in challenging these tribunal decisions can undermine the purposes of the speedy appeal process. It is noted that section 18.1(2) of the *Federal Court Act* requires judicial review applications to be brought "within thirty days after the time the decision or order was first communicated by the federal board, commission or other tribunal to the office of the Deputy Attorney General of Canada or to the party directly affected thereby, or within such further time as a judge of the Trial Division may, either before or after the expiration of those thirty days, fix or allow.

circumstances. It is therefore proposed that the *Judicial Review Procedure Act* be amended to include the following provision:

> ***Time limit for certain applications***
>
> 11.1(1) Unless an enactment otherwise provides, an application for judicial review of the exercise of a statutory power of decision must be commenced within 30 days of the date of the decision.
>
> (2) Despite subsection (1), the court may extend the time for making the application, either before or after expiration of the time so limited, on such terms as it considers proper, where it is satisfied that there are apparent grounds for relief and that no substantial prejudice or hardship will result to any person affected by reason of the delay.[126]

Appeals to the Court of Appeal with leave only

At present, all judicial review decisions of the Supreme Court are subject to an automatic right of appeal to the Court of Appeal. To reduce the number of appeals from such decisions, it is proposed that the *Judicial Review Procedure Act* be amended to provide that an appeal to the Court of Appeal lies only with leave of that court. Accordingly, it is proposed that the *Judicial Review Procedure Act* be amended to include the following provision:

> ***Appeals***
>
> An appeal lies to the Court of Appeal, with leave of the Court of Appeal, from a final order of the British Columbia Supreme Court disposing of an application for judicial review under the *Judicial Review Procedure Act*.

Schedule A: Selected Privative Clauses

The *Labour Relations Code* privative provisions relating to decisions of the Labour Relations Board[127] provide, in part, as follows:

> ***Jurisdiction of board***
>
> 136(1) Except as provided in this Code, the board has and must exercise exclusive jurisdiction to hear and determine an application or complaint under this Code and to make an order permitted to be made.
>
> ***Jurisdiction of court***
>
> 137(1) Except as provided in this section, a court does not have and must not exercise any jurisdiction in respect of a matter that is, or may be, the subject of a complaint under section 133 or a matter referred to in section 136, and, without

[126] This provision is based on section 5 of the Ontario *Judicial Review Procedure Act*.

[127] The *Labour Relations Code* also contains provisions respecting limited appeal rights to the board and to the Court of Appeal from decisions of an arbitration board constituted under Part 8 of the Code. Decisions of arbitrators are also subject to a privative clause. The focus of this policy document does not extend beyond administrative tribunals as defined by the Administrative Justice Project and so does not extend to the decisions of arbitration boards under the *Labour Relations Code*.

limitation, a court must not make an order enjoining or prohibiting an act or thing in respect of them.

Finality of decisions and orders

138. A decision or order of the board under this Code, a collective agreement or the regulations on a matter in respect of which the board has jurisdiction is final and conclusive and is not open to question or review in a court on any grounds.

Jurisdiction of board to decide certain questions

139. The board has exclusive jurisdiction to decide a question arising under this Code and on application by any person or on its own motion may decide for all purposes of this Code any question, including, without limitation, any question as to whether

(a) a person is an employer or employee

…

(w) an activity constitutes a strike, lockout or picketing.

The *Workers Compensation Amendment Act (No. 2),* S.B.C. 2002, c. 66, amends the privative clause in the *Workers Compensation Act* and substitutes the following provisions:

Exclusive jurisdiction

254. The appeal tribunal has exclusive jurisdiction to inquire into, hear and determine all those matters and questions of fact and law arising or required to be determined under this Part, including the following:

(a) all appeals from review officers' decisions as permitted under section 239;

(b) all appeals from Board decisions or orders as permitted under section 240;

(c) all matters that the appeal tribunal is requested to determine under section 257;

(d) all other matters for which the Lieutenant Governor in Council by regulation permits an appeal to the appeal tribunal under this Part.

Appeal tribunal decision or action final

255(1) Any decision or action of the chair or the appeal tribunal under this Part is final and conclusive and is not open to question or review in any court.

(2) Proceedings by or before the chair or appeal tribunal under this Part must not

(a) be restrained by injunction, prohibition or other process or proceeding in any court, or

(b) be removed by certiorari or otherwise into any court.

(3) The Board must comply with a final decision of the appeal tribunal made in an appeal under this Part.

8 POWER TO HEAR AND DECIDE CHARTER ISSUES

The White Paper Report on *Charter Jurisdiction* identifies two main concerns relating to a tribunal's ability to determine questions respecting the constitutional validity of its own enabling legislation. First, given the state of the jurisprudence, it is often difficult to accurately predict whether a court would find a given administrative tribunal has the jurisdiction to consider and decide Charter questions. Second, many tribunals do not have the institutional capacity and resources to deal with complex constitutional law issues.

The White Paper recommends that:

30. Government clarify in legislation which administrative tribunals have jurisdiction to decide that a provision in the tribunal's enabling statute is inconsistent with the *Charter of Rights and Freedoms*. This legislative clarification could be achieved by adding a provision to the *Constitutional Question Act*.
31. No administrative tribunals have jurisdiction to determine that provisions in their enabling statutes are contrary to the Charter unless this jurisdiction is expressly enumerated.
32. The list of enumerated tribunals with this type of Charter jurisdiction be strictly limited.
33. A tribunal with jurisdiction to decide this type of Charter issue have a discretionary power to refer the Charter question to the British Columbia Supreme Court.
34. The *Constitutional Question Act* be amended to remove any possible doubt that it applies to tribunal hearings in which a constitutional question is raised.

Thus the White Paper recommendations call in part for legislative amendments to the *Constitutional Question Act* to identify those tribunals that have power to hear and decide Charter questions and to clarify that the *Constitutional Question Act* applies to those tribunals. It is therefore necessary to identify the policy considerations to be taken into account when deciding whether a particular tribunal should have Charter jurisdiction.

The legal tests for Charter jurisdiction

The Supreme Court of Canada has held that there is no constitutional impediment to conferring powers on an administrative tribunal to consider questions of law, including the Charter. While section 52 of the *Constitution Act, 1982* does not provide a tribunal with an independent source of jurisdiction for considering Charter questions, if the tribunal has been granted the power to consider questions of law then the tribunal has a concomitant power to determine whether that law is constitutionally valid. Accordingly, if the tribunal has such a power and also has jurisdiction over the parties, the subject matter at issue and the remedy that is sought, it can decide questions involving the constitutional validity of provisions in its enabling statute. The exception is that it cannot consider the validity of a limiting provision in its statute.

The judicial analysis thus calls for a determination of whether, as a matter of statutory interpretation, the legislature has either expressly or impliedly granted the tribunal the power to determine questions of law. Where there is no express power, the statutory interpretation exercise can take into account practical matters, such as the tribunal's expertise, its composition and its structure.

Accordingly, just as there is no constitutional impediment to conferring Charter jurisdiction on an administrative tribunal, there is no such impediment in legislatively pronouncing the tribunal does not have such a jurisdiction.

Issue: Should administrative tribunals have Charter jurisdiction?

The White Paper reflects a general policy that tribunal Charter jurisdiction should be the exception and not the norm. There are many reasons for the general policy that the list of tribunals with Charter jurisdiction be strictly limited. The factors that militate in favour of limited Charter jurisdiction include:

- Charter questions are questions of law to which a reviewing court will extend no deference. In terms of relative expertise, the courts have superior expertise.
- Charter questions are most frequently complex and require the introduction of appropriate section 1 evidence. Adjudication of Charter questions thus results in more protracted and complex tribunal proceedings.
- Parties to administrative tribunal proceedings need not be represented by counsel. Lay litigants are ill-equipped to respond to complex constitutional arguments and this will work to the disadvantage of both the lay litigant and the tribunal.
- If a tribunal determines that a provision in its enabling statute is unconstitutional, it can only grant a remedy that it already has jurisdiction to grant in that statute. It cannot grant declaratory relief (such relief can only be granted by a superior section 96 court) and so it can only decline to apply the unconstitutional provision in the proceedings before it.
- The decisions of administrative tribunals are not binding; they are not tantamount to a declaration of invalidity. As a practical matter, the tribunal must therefore consider the constitutional question afresh in each proceeding in which it is raised. Such duplication is not an efficient use of the tribunal's resources.[128]
- Section 8 of the *Constitutional Question Act* requires that notice be given to the Attorneys General of Canada and British Columbia where the constitutional validity of a law is challenged in any proceeding. Such notice must be served at least 14 days before the date the question is to be argued (unless a shorter notice period is authorized or consented to). A tribunal hearing can therefore be delayed to accommodate the mandatory requirements of the *Constitutional Question Act*. Where the Attorney General decides to participate, another party is added to the tribunal proceeding. Also, the Legal Services Branch, Ministry of Attorney General,

[128] For example, the constitutional validity of section 7 of the *Human Rights Code* was considered and decided by the Human Rights Tribunal in *Canadian Jewish Congress v. Collins*. The hearing of the constitutional issue consumed over one month of the Tribunal's time. The same constitutional issue was advanced subsequently in different proceedings. In those proceedings, the Tribunal ruled that it would not rely on the evidentiary record established in respect of the constitutional issue in the earlier proceedings but proceeded to hear and decide the issue afresh.

does not have the resources to participate in all tribunal proceedings where Charter issues are raised. Scarce resources are instead directed to those court proceedings where Charter challenges to a tribunal's enabling statute are brought. Thus, in many cases, the tribunal is deprived of the informed expertise of the Attorney General where constitutional issues are raised.

- Depending on the outcome of a tribunal hearing on its merits, the constitutional question may well become academic to the party raising it. It is a well-established principle that Charter questions should not be considered unnecessarily.
- Where serious constitutional issues are advanced, those issues will rarely end with the tribunal's decision but will be the subject of judicial review or appeal proceedings in the courts.
- Some question the appropriateness of providing a tribunal with the ability to determine the constitutional validity of the very statute that created it.

The idea that a tribunal created by the legislature for the purpose of giving effect to its enabling statute should be empowered to consider the constitutional validity of a provision in that statute was discussed at length by Chief Justice Lamer in his dissenting reasons in *Bell v. Canada (Canadian Human Rights Commission); Cooper v. Canada (Canadian Human Rights Commission)*, [1996] 3 S.C.R. 854. His Lordship there concluded that, for reasons relating to fundamental constitutional principles of Parliamentary democracy and the separation of powers, the operation of section 52 of the Charter should be limited to the judiciary and he encouraged the Court to revisit its jurisprudence in this area. While his invitation has not been acted upon by the Court and the principles established in such cases as *Cuddy Chicks* remain intact, the question remains as to whether as a matter of policy, tribunals should be afforded this power given the purposes for which they have been created. As noted in *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch),* 2001 SCC 52 (at paragraph24), administrative tribunals are "created precisely for the purpose of implementing government policy", policy that manifests itself in their enabling legislation. In light of this fundamental purpose it seems incongruous to afford a tribunal the ability, on Charter grounds, to decline to give effect to a provision in the very statute that created it.

These considerations collectively illustrate that there are sound policy reasons for only conferring Charter jurisdiction on tribunals in exceptional cases. Perhaps most significantly, such jurisdiction can undermine the administrative justice goals of accessibility and efficiency.

Determining whether a tribunal should have Charter jurisdiction

Ascertaining whether a specific tribunal should have Charter jurisdiction involves consideration of a number of factors. A major consideration relates to the question of whether the tribunal is well-equipped institutionally to deal with Charter questions. Such institutional capacity would require, at minimum, the following features:

- The tribunal has relevant legal expertise;
- The tribunal exercises an adjudicative function;
- The tribunal has the resources and procedural machinery to deal with complex constitutional questions;
- The tribunal is not required to hear and decide a high volume of cases quickly;
- The tribunal is not required to take into account evidence that would be inadmissible in judicial proceedings;
- The tribunal is not engaged primarily in fact-finding (as distinct from determining questions of law).

In addition to consideration of the tribunal's institutional capacity to hear and decide Charter questions, the following factors should also be considered but are not determinative:

- Does the tribunal exercise a broad policy-making function that informs its interpretation of provisions in its enabling statute?
- Does the subject matter before the tribunal require it to engage in consideration of polycentric issues and balancing of competing social, economic and/or public interest questions?
- Is the tribunal's decision-making protected by a privative clause?

These latter types of factors look to the question of the tribunal's relative expertise as compared to the courts in relation to the subject matter at issue. Where the tribunal's expertise and experience is intended by the Legislature to inform the administration of the tribunal's statute, and where the types of issues coming before the tribunal involve competing social, economic or other interests, it may be desirable to have the tribunal hear and decide Charter questions in the first instance. In such circumstances, the tribunal's understanding of these tensions may assist in the section 1 analysis.

Tribunals with Charter jurisdiction

Applying the factors discussed above, there is justification for providing the Labour Relations Board with Charter jurisdiction. Accordingly, the *Labour Relations Code*, should be amended to include the following provision:

> ***Jurisdiction of the board over Charter questions***
>
> (1) The board has jurisdiction to consider and decide whether its enabling legislation is constitutionally valid.
>
> (2) Section 8 of the *Constitutional Question Act* applies to proceedings before the board involving the constitutional validity of this Act.

Tribunals without Charter jurisdiction

Administrative tribunals, other than the Labour Relations Board, should not have Charter jurisdiction. The limit on their jurisdiction should be clearly spelled out in their enabling legislation. Accordingly, the

enabling statutes of all tribunals other than the Labour Relations Board would include the following provision:

> ***Limits on tribunal jurisdiction***
>
> Nothing in this Act is to be construed as giving the [named tribunal] jurisdiction to consider and decide whether its enabling legislation is constitutionally valid.

Amendments to the Constitutional Question Act

Amendments to the *Constitutional Question Act* are also required. The White Paper Report recommends two amendments to the *Constitutional Question Act*. The first amendment is to make it clear that administrative tribunals with Charter jurisdiction are subject to the requirements of that Act. The second amendment is to reflect the general policy that, as a general rule, administrative tribunals do not have Charter jurisdiction.

Section 8 of the *Constitutional Question Act* presently provides:

> ***Notice of questions of validity or applicability***
>
> **8**(1) In this section:
>
> **"constitutional remedy"** means a remedy under section 24 (1) of the *Canadian Charter of Rights and Freedoms* other than a remedy consisting of the exclusion of evidence or consequential on such exclusion;
>
> **"law"** includes an enactment and an enactment within the meaning of the *Interpretation Act* (Canada).
>
> (2) If in a cause, matter or other proceeding
>
> (a) the constitutional validity or constitutional applicability of any law is challenged, or
>
> (b) an application is made for a constitutional remedy,
>
> the law must not be held to be invalid or inapplicable and the remedy must not be granted until after notice of the challenge or application has been served on the Attorney General of Canada and the Attorney General of British Columbia in accordance with this section.
>
> (3) If in a cause, matter or other proceeding the validity or applicability of a regulation is challenged on grounds other than the grounds referred to in subsection (2) (a), the regulation must not be held to be invalid or inapplicable until after notice of the challenge has been served on the Attorney General of British Columbia in accordance with this section.
>
> (4) The notice must
>
> (a) be headed in the cause, matter or other proceeding,
>
> (b) state
>
> (i) the law in question, or
>
> (ii) the right or freedom alleged to be infringed or denied,

(c) state the day on which the challenge or application under subsection (2) or (3) is to be argued, and

(d) give particulars necessary to show the point to be argued.

(5) The notice must be served at least 14 days before the day of argument unless the court authorizes a shorter notice.

(6) If in a cause, matter or other proceeding to which this section applies the Attorney General of British Columbia appears, the Attorney General is a party and, for the purpose of an appeal from an adjudication respecting the validity or applicability of a law, or respecting entitlement to a constitutional remedy, has the same rights as any other party.

(7) If in a cause, matter or other proceeding to which this section applies the Attorney General of Canada appears, the Attorney General of Canada is a party and, for the purpose of an appeal from an adjudication respecting the validity or applicability of a law, or respecting entitlement to a constitutional remedy, has the same rights as any other party.

Section 8(1) of the *Constitutional Question Act* should be amended to add the following definition:

"cause, matter or other proceeding" does not include a cause, matter or other proceeding before an administrative tribunal unless that tribunal has express jurisdiction to consider and decide whether its enabling legislation is constitutionally valid.

APPENDIX 1 – PROPOSED STATUTORY POWERS LEGISLATION

Tribunal Powers to Make Rules Governing Practice and Procedure (Chapter 2)

Rules

General power to make rules respecting practice and procedure

1(1) Subject to this Act and the tribunal's enabling Act and any regulations made under them, the tribunal may make rules respecting practice and procedure to facilitate the just and timely resolution of the matters before it.

(2) Without limiting subsection (1), the tribunal may make rules as follows:

(a) requiring the parties to attend a confidential, without prejudice, pre-hearing case management conference in order to consider the simplification of the issues, facts or evidence that may be agreed upon, and any other matter that may assist in the just and most expeditious disposition of the proceeding, and for this purpose, the tribunal may order that the conference not be open to the public;

(b) respecting disclosure of evidence, including but not limited to pre-hearing disclosure and pre-hearing examination of a party on oath or solemn affirmation or by affidavit;

(c) respecting mediation and other dispute resolution processes, including, without limitation, rules that would permit or require mediation of any matter to be determined, whether the mediation is provided by a tribunal member or by a person appointed, engaged or retained by the tribunal;

(d) respecting exchange of records by parties;

(e) respecting the filing of written submissions by parties;

(f) respecting the filing of admissions by parties;

(g) specifying the form of notice to be given to a party by another party or by the tribunal requiring a party to diligently pursue an [application/appeal/complaint] and specifying the time within which and the manner in which the party must respond to the notice;

(h) respecting service of notices and orders, including substituted service;

(i) requiring a party or an intervener to provide an address for service or delivery of notices and orders;

(i) providing that a party's or an intervener's address of record is to be treated as an address for service;

(k) respecting procedures for preliminary or interim applications;

(l) respecting procedures for formal settlement offers;

(m) respecting procedures for the withdrawal or settlement of an [application/appeal/complaint];

(n) respecting amendments to an[application/appeal/complaint] or responses to it;

(o) respecting the addition of parties to the [application/appeal/ complaint];

(p) respecting adjournments;

(q) respecting the extension or abridgement of time limits provided for in the rules;

(r) respecting the transcribing or recording of its proceedings;

(s) establishing the forms it considers advisable;

(t) respecting the joining of [applications/appeals/complaints]; and

(u) respecting exclusion of witnesses from proceedings.

(3) The tribunal must make accessible to the public any rules of practice and procedure made under this section.

Orders

Option 1: General power to make orders

2(1) In order to facilitate the just and timely resolution of [the application/appeal/complaint] a tribunal may, on application by a party [or an intervener] or on their own initiative, make any order for which a rule has been made by the tribunal under section ___ or prescribed under section ___.

(2) Where an [applicant/appellant/complainant] withdraws an [application/appeal/complaint], the tribunal must order that it is discontinued.

(3) Where the parties advise the tribunal that they have reached a settlement in respect of the subject matter of the proceeding, the tribunal must order that the proceeding is discontinued.

Option 2: Power to make orders (where extensive rule-making powers enumerated)

3(1) In order to facilitate the just and timely resolution of [the application/appeal/complaint] a tribunal may, on application by a party [or an intervener] or on their own initiative, make any order for which a rule has been made under section(s) ___ or has been prescribed under section ___ .

(2) Without limiting subsection (1), the tribunal may make orders

(a) requiring the parties to the [application/appeal/complaint] to file written submissions with the tribunal in respect of all or any part of the proceeding,

(b) respecting the filing of admissions by the parties,

(c) respecting disclosure, including without limitation, pre-hearing examination of a party on oath or solemn affirmation or by affidavit,

(d) respecting exchange of records by parties,

(e) directing the joining of [applications/appeals/complaints], issues or parties, and

(f) requiring the parties to attend a confidential, without prejudice, pre-hearing conference in order to discuss issues in the [application/appeal/complaint] and the possibility of simplifying or disposing of any such issues and for this purpose, the board may order that the conference not be open to the public.

(3) Where an [applicant/appellant/complainant] withdraws an [application/appeal/complaint], the tribunal must order that it is discontinued.

(4) Where the parties advise the tribunal that they have reached a settlement in respect of the subject matter of the proceeding, the tribunal must order that the proceeding is discontinued.

Practice Directives

Option 1: Practice directives (time frames specified in directives)

4(1) The tribunal may issue practice directives and must issue practice directives respecting:

(a) the usual time frame for completing proceedings that come before the tribunal and for completing the procedural steps within those proceedings, and,

(b) the time period within which a tribunal's final decision and reasons will be released once the proceedings are completed.

(2) Practice directives issued under subsection (1) must be consistent with this Act and with the tribunal's enabling Act or Acts, the regulations made under those Acts and any rules of practice and procedure made by the tribunal.

(3) The tribunal must make any practice directives made under this section accessible to the public.

Option 2: Practice directives (time frames not specified in directives)

5(1) The tribunal may issue practice directives consistent with this Act and with the tribunal's enabling Act or Acts, the regulations made under those Acts and any rules of practice and procedure made by the tribunal.

(2) The tribunal must make any practice directives made under subsection (1) accessible to the public.

Regulations

Regulations

6(1) The Lieutenant Governor in Council may make regulations as follows:

(a) prescribing rules of practice and procedure for a tribunal.

(2) Where the Lieutenant Governor in Council prescribes rules of practice and procedure for a tribunal under subsection (1), any rules made by that tribunal under section ___ of this Act are inapplicable to the extent they are inconsistent with the prescribed rules.

Dispute Resolution Processes (Chapter 3)

Dispute Resolution Rule-Making

Option 1: General case management and dispute resolution rule-making powers

7(1) Subject to this Act and the tribunal's enabling Act and any regulations made under them, the tribunal may make rules respecting practice and procedure to facilitate the just and timely resolution of the matters before it.

(2) Without limiting subsection (1), the tribunal may make rules as follows:

(a) respecting the holding of pre-hearing conferences and requiring the parties to attend a pre-hearing conference in order to facilitate a just and timely resolution of any matter to be determined, and

(b) respecting mediation and other dispute resolution processes, including without limitation, rules that would permit or require mediation of any matter to be determined.

(3) The tribunal must make accessible to the public any rules of practice and procedure made under this section.

Option 2: Case management and dispute resolution rule-making powers (inclusive of Notice to Mediate)

8(1) Subject to this Act and the tribunal's enabling Act and any regulations made under them, the tribunal may make rules respecting practice and procedure to facilitate the just and timely resolution of the matters before it.

(2) Without limiting subsection (1), the tribunal may make rules as follows:

(a) providing to parties to a proceeding the ability to require the other parties to the proceeding to engage in mediation and setting out when and how that ability may be exercised;

(b) setting out the rights and duties that accrue to the parties to a proceeding, the tribunal and the mediator if mediation is required in relation to that proceeding; and

(c) respecting:

(i) the forms and procedures that must or may be used or followed before, during and after the mediation process,

(ii) requiring and maintaining confidentiality of information disclosed for the purposes of mediation,

(iii) the circumstances, if any, and manner in which a party to a proceeding may opt out of or be exempted from mediation,

(iv) the costs and other sanctions that may be imposed in relation to mediation, including without limitation, in relation to any failure to participate in mediation when and as required or otherwise to comply with the rules, and

(v) the qualifications required for, and the selection and identification of, individuals who may act as mediators in the mediation process contemplated by the rules.

(3) The tribunal must make accessible to the public any rules of practice and procedure made under this section.

Option 3: Dispute resolution rule-making powers (inclusive of directed mediation)

9(1) Subject to this Act and the tribunal's enabling Act and any regulations made under them, the tribunal may make rules respecting practice and procedure to facilitate the just and timely resolution of the matters before it.

(2) Without limiting subsection (1), the tribunal may make rules as follows:

(a) to permit or require, or provide to the tribunal or to the parties to a proceeding the ability to permit or require, mediation to be included as part of a proceeding, whether or nor the mediation is provided by the tribunal; and

(b) to govern the conduct of, and all procedures relating to, the mediation.

(3) The tribunal must make accessible to the public any rules of practice and procedure made under this section.

Confidentiality of dispute resolution process

Option 1: Mediation information confidential (Notice to Mediate model)

10(1) Subject to subsections (2) and (3), a person must not disclose, or be compelled to disclose, in any civil, administrative or regulatory action or proceeding:

(a) any oral or written information acquired in anticipation of, during or in connection with a mediation session;

(b) any opinion disclosed in anticipation of, during or in connection with a mediation session; or

(c) any document, offer or admission made in anticipation of, during or in connection with a mediation session.

(2) Subsection (1) does not apply:

(a) in respect of any information, opinion, document, offer or admission that all of the participants agree in writing may be disclosed;

(b) to any fee declaration, agreement to mediate or settlement document made in anticipation of, during or in connection with a mediation session; or

(c) to any information that does not identify the participants or the proceeding and that is disclosed for research or statistical purposes only.

(3) Nothing in subsection (1) precludes a party from introducing into evidence in any civil, administrative or regulatory action or proceeding any information or records produced in the course of the mediation that are otherwise producible or compellable in those proceedings.

Option 2: Mediation information confidential (from Small Claims Rules)

11(1) Subject to subsections (2) and (3), a person must not disclose, or be compelled to disclose, in any proceeding oral or written information acquired in or in connection with a mediation session.

(2) Subsection (2) does not apply:

(a) in respect of any information, opinion, document, offer or admission that all of the parties agree in writing may be disclosed,

(b) to any mediation agreement made during or in connection with a mediation session,

(c) to any threats of bodily harm made in or in connection with a mediation session, or

(d) to any information that does not identify the parties and that is disclosed for research or statistical purposes only.

(3) Nothing in this section precludes a party from introducing into evidence in any proceeding any information or records produced in the course of mediation that are otherwise producible or compellable in those proceedings.

Option 3: Compulsion protections for neutrals

12(1) No person employed as a mediator, conciliator or negotiator or otherwise appointed to facilitate the resolution of a matter before a tribunal by means of an alternate dispute resolution mechanism shall be compelled to give testimony or produce documents in a proceeding before the tribunal or in a civil proceeding with respect to matters that come to his or her knowledge in the course of exercising his or her duties under this or any other Act.

(2) No notes or records kept by a mediator, conciliator or negotiator or by any other person appointed to facilitate the resolution of a matter before a tribunal by means of an alternative dispute resolution mechanism under this or any other Act are admissible in a proceeding before the tribunal or in a civil proceeding.

Option 4: Exemption from Freedom of Information and Protection of Privacy Act

13(1) Any information received by any person in the course of attempting to reach a settlement of an [application/appeal/complaint] is confidential and may not be disclosed or admitted in evidence except with the consent of the person who gave the information.

(2) The *Freedom of information and Protection of Privacy Act*, other than section 44(2) and (3), does not apply to information referred to in subsection (1).

(3) Subsection (2) does not apply to personal information, as defined in the *Freedom of Information and Protection of Privacy Act*, that has been in existence for 100 or more years or to other information that has been in existence for 50 years or more.

Appointment of neutrals (see also proposed section 1(2)(c))

Option 1: Appointment of tribunal member as mediator

14(1) The chair or vice chair may appoint a tribunal member to conduct a mediation.

(2) Where a tribunal member is appointed to conduct a mediation, that member must not subsequently hear the matter if it comes before the tribunal unless all parties consent in writing.

Option 2: Appointment of mediator by tribunal

15(1) The chair or vice chair may appoint a mediator from a list of mediators approved by the tribunal where:

(a) the mediator is acceptable to all parties; and

(b) the parties agree to share the cost of the mediation equally.

Option 3: Appointment of mediator by parties

16(1) The parties may appoint a mediator from a list of mediators approved by the tribunal where:

(a) the mediator is acceptable to all parties; and

(b) the parties agree to share the cost of the mediation equally.

Settlements (in substitution for proposed section 2(3))

Option 1: Settlement (party consent required)

17. Where the parties reach a settlement prior to the hearing, the application may be withdrawn if all parties consent.

Option 2: Settlement (tribunal must dispose of matter)

18. Where the parties reach a settlement prior to the hearing, the tribunal must dispose of the matter by a general order, without including the terms of settlement.

Option 3: Settlement (order inclusive of terms)

19. Where the parties reach settlement prior to the hearing, the tribunal must dispose of the matter by an order that includes the terms of settlement.

Option 4: Settlement (tribunal approval and incorporation of terms)

20(1) Where the parties reach settlement prior to the hearing, the terms of settlement must be approved by the tribunal.

(2) The tribunal may hold a hearing to determine whether the terms of the settlement [are in the public interest or conform to the objectives of the Act.]

(3) If the tribunal is satisfied that the terms of the settlement [are in the public interest or conform to the objectives of the Act], the tribunal must dispose of the matter by an order that includes the terms of settlement.

Enforcement

Enforcement of settlement terms

21(1) If there has been a breach of the terms of a settlement agreement, a party to the settlement agreement may apply to the Supreme Court to enforce the settlement agreement to the extent that the terms of the settlement agreement could have been ordered by the tribunal.

(2) The right to enforce a settlement agreement under subsection (1) cannot be waived.

(3) A provision of a settlement agreement that purports to waive the right to enforce the agreement under subsection (1) is void.

Procedural Powers (Chapter 4)

Notice and service powers

Service of documents

22(1) Where the tribunal is required to provide notice or any document to a party or other person in a proceeding, it may do so by sending a copy of it to the party, other person, or their agent or representative:

(a) by ordinary mail;

(b) by electronic transmission, including telephone transmission of a facsimile;

(c) by some other method [that allows proof of receipt] if the tribunal's rules deal with the matter.

(2) If the copy is sent by ordinary mail, it shall be sent to the most recent address known to the tribunal and shall be deemed to be received on the fifth day after the day it is mailed, unless that day is a Saturday or a holiday, in which case the copy shall be deemed to be received on the next day that is not a holiday.

(3) If the copy is sent by electronic transmission it shall be deemed to be received on the day after it was sent, unless that day is a Saturday or a holiday, in which case the copy shall be deemed to be received on the next day that is not a holiday.

(4) If the copy is sent by a method referred to in subsection (1)(c), the tribunal's rules will govern its deemed day of receipt.

(5) If a party that acts in good faith does not, through absence, accident, illness or other cause beyond the party's control, receive the copy until a later date than the deemed day of receipt, subsection (2), (3) or (4), as the case may be, does not apply.

When failure to serve does not invalidate proceedings

23. Where a notice or document is not served in accordance with section ___ of this Act, the proceedings will not be invalidated if:

(a) the contents of the notice or document were actually known by the person to be served within the time required for such service;

(b) the person to be served consents; or

(c) the failure to serve does not result in prejudice to the person or any such prejudice can be satisfactorily addressed by an adjournment or some other means.

Notice of hearing by publication

24. Where a tribunal is of the opinion that because the parties to any proceeding before it are so numerous or for any other reason, it is impracticable to give notice of the hearing to all or any of the parties individually, the tribunal may, instead of doing so, cause reasonable notice of the hearing or of its decision to be given to such parties by public advertisement or otherwise as the tribunal may direct.

Notice of appeal provisions

Option 1: Notice of appeal (inclusive of prescribed fee)

25(1) A decision or order may be appealed by filing a notice of appeal with the tribunal.

(2) A notice of appeal must:

(a) be made in writing or in another form acceptable to the appeal tribunal;

(b) identify the decision or order that is being appealed;

(c) state why the decision or order is incorrect or why it should be changed;

(d) state the outcome requested;

(e) contain the name, address and telephone number of the appellant, and if the appellant has an agent to act on the appellant's behalf in respect of the appeal, include the full name of the agent and a telephone number at which the agent may be contacted during regular business hours;

(f) include an address for delivery of any notices in respect of the appeal; and

(g) be signed by the appellant or the appellant's agent.

(3) The notice of appeal must be accompanied by payment of the prescribed fee or it will not be accepted by the tribunal unless the tribunal considers that the appellant cannot reasonably afford to pay the fee.

(4) Notwithstanding subsection (3), if a notice of appeal is deficient or if the prescribed fee is outstanding, the tribunal may in its discretion allow a reasonable period of time within which the notice may be perfected or the fee is to be paid.

Option 2: Notice of appeal (exclusive of prescribed fee)

26(1) A decision or order may be appealed by filing a notice of appeal with the tribunal.

(2) A notice of appeal must:

(a) be made in writing or in another form acceptable to the appeal tribunal;

(b) identify the decision or order that is being appealed;

(c) state why the decision or order is incorrect or why it should be changed;

(d) state the outcome requested;

(e) if the appellant has an agent to act on the appellant's behalf in respect of the appeal, include the full name of the agent and a telephone number at which the agent may be contacted during regular business hours;

(f) include an address for delivery of any notices in respect of the appeal; and

(g) be signed by the appellant or the appellant's agent.

(3) If a notice of appeal is deficient the tribunal may in its discretion allow a reasonable period of time within which the notice may be perfected or the fee is to be paid.

Fee Regulations

Regulations

27. The Lieutenant Governor in Council may make regulations as follows:

(a) for purposes of section __ of the Act [fees] prescribing tariffs of fees to be paid with respect to the filing of different types of complaints, applications, reviews and appeals.

Time limits for appeals

Time limit for appeal

28(1) A notice of appeal respecting a decision or order must be filed within 30 days of the decision or order being appealed.

(2) A tribunal may extend the time to file a notice of appeal even if the time to file has expired where satisfied that:

(a) special circumstances existed which precluded the filing of a notice of appeal within the time period required in subsection (1), and

(b) an injustice would otherwise result.

Form of hearing

Form of hearing

29(1) A tribunal may, in a proceeding, hold any combination of written, electronic and oral hearings.

(2) Where notice of a hearing has been given to a party to the proceeding in accordance with the tribunal's rules and the party does not participate in the hearing in accordance with such notice, the tribunal may proceed in the absence of the party and the party is not entitled to any further notice in the proceeding.

Rights of parties in a proceeding

Representation of parties to a proceeding

30. A party to a proceeding may be represented by counsel or an agent and make submissions as to facts, law and jurisdiction.

Examination of witnesses

31(1) Subject to subsection (2), a party to a proceeding may, at an oral or electronic hearing:

(a) call and examine witnesses and present evidence and submissions; and

(b) conduct cross-examination of witnesses at the hearing

as reasonably required for a full and fair disclosure of all matters relevant to the issues in the proceeding.

(2) The tribunal may reasonably limit further examination or cross-examination of a witness where it is satisfied that the examination or cross-examination has been sufficient to disclose fully and fairly all matters relevant to the issues in the proceeding.

(3) The tribunal may question any witness who gives oral evidence in an oral or electronic proceeding.

Adjournments

Adjournments

32(1) A proceeding may be adjourned from time to time by a tribunal on its own motion or where it is shown to the satisfaction of the tribunal that the adjournment is required to permit an adequate hearing to be held.

(2) In considering whether a proceeding should be adjourned, the tribunal shall have regard to the following factors:

(a) the reason for the adjournment;

(b) whether an adjournment would cause unreasonable delay in the proceedings;

(c) the impact of refusing the adjournment on an applicant;

(d) the impact of granting an adjournment on the other parties;

(e) the impact of the adjournment on the public interest.

Joining proceedings

Proceedings involving similar questions

33(1) If two or more proceedings before a tribunal involve the same or similar questions of fact, law or policy, the tribunal may:

(a) combine the proceedings or any part of them, with the consent of the parties;

(b) hear the proceedings at the same time, with the consent of the parties;

(c) hear the proceedings one immediately after the other; or

(d) stay one or more of the proceedings until after the determination of another one of them.

(2) A tribunal may make additional orders respecting the procedure to be followed with respect to proceedings under this section.

Interim orders

Interim orders

34. The tribunal may make an interim order in a proceeding.

Consent orders

Consent orders

35(1) On application by the parties to a proceeding, the tribunal may make a consent order if it is satisfied that the order is reasonable and consistent with its enabling legislation.

(2) Where a tribunal declines to make a consent order under subsection (1), it must provide reasons for doing so to the parties.

Recording tribunal proceedings

Recording tribunal proceedings

36(1) The tribunal may, in its discretion, transcribe or record its proceedings.

(2) Where the tribunal transcribes or records a proceeding, the transcription or recording is deemed to be correct and constitute part of the record of the proceeding.

(3) If, by reason of a mechanical or human failure or other accident, the transcription or recording is destroyed, interrupted or incomplete, the validity of the proceedings will not be affected.

(4) On request by a party to a proceeding and on payment of a reasonable reproduction fee as determined by the tribunal, the tribunal will provide the party with a copy of the recording of the proceeding.

(5) For the purposes of this section and section 37, recording includes any video, audio or digital recording of oral evidence given at a hearing.

Compiling the record

Tribunal to compile record

37(1) The tribunal must prepare a record of every proceeding before it.

(2) For purposes of subsection (1), the record includes:

(a) a document by which the proceeding is commenced;

(b) a notice of a hearing in the proceeding;

(c) an intermediate order made by the tribunal;

(d) a document produced in evidence at a hearing before the tribunal, subject to any limitation expressly imposed by any other enactment on the extent to which or the purpose for which a document may be used in evidence in a proceeding;

(e) a transcript or recording, if any, of the oral evidence given at a hearing;

(f) the decision of the tribunal and any reasons given at a hearing.

(3) Subject to subsection (4), on application during normal business hours and on payment of the prescribed fee, the tribunal must provide any person with a copy of a record.

(4) Where the person applying to the tribunal for a copy of a record of proceeding under subsection (3) is not a party to that proceeding, the tribunal shall first sever from the record any information that was received by it on an *in camera* or confidential basis under section ___ of this Act.

Tribunal decisions

Decision

38(1) The tribunal shall make its final decision, with reasons, and any final order in writing.

(2) A tribunal that makes an order for the payment of money shall set out in the order the principal sum, and if interest is payable, the rate of interest and the date from which it is to be calculated.

(3) The tribunal's decision is effective the date it is issued by the tribunal, unless otherwise specified by the tribunal.

(4) The tribunal must provide for public assess to its decisions and orders in a manner that protects the privacy of the parties to the proceeding and any sensitive confidential business or security information.

Notice of decision

39(1) Subject to subsection (2), the tribunal shall send each party who participated in the proceeding, or the party's counsel or agent, a copy of its final decision or order, including the reasons.

(2) Where a tribunal is of the opinion that because the parties to any proceeding before it are so numerous or for any other reason, it is impracticable to send its final decision or order to all or any of the parties individually, the tribunal may, instead of doing so, cause reasonable notice of its decision to be given to such parties by public advertisement or otherwise as the tribunal may direct.

(3) A notice of final decision or order given by a tribunal under subsection (2) shall inform the parties of the place where copies of it may be obtained.

Amendments to decision or order

40(1) On application of a party or on the tribunal's own initiative, the tribunal may amend a final decision or order to correct:

(a) a clerical or typographical error;

(b) an accidental or inadvertent error, omission or other similar mistake; or

(c) an arithmetical error made in a computation.

(2) An amendment under subsection (1) must not, without the consent of all parties, be made more than 15 days after all parties have been served with the decision.

(3) Within 15 days after being served with the decision, a party may apply to the tribunal for clarification of the decision and the tribunal may amend the decision only if it considers the amendment will clarify it.

(4) Within 15 days after being served with the decision, a party may apply to the tribunal to make an additional decision with respect to an issue presented in the proceeding but unintentionally omitted from the decision and the tribunal may make such additional decision with respect to that issue.

(5) The tribunal may not amend a final decision other than in those circumstances described in subsections (1) to (4).

(6) Nothing in this section should be construed as limiting a tribunal's ability to reopen a proceeding in order to cure a natural justice defect.

Tribunal duties

Tribunal duties

41. A tribunal member must faithfully, honestly and impartially perform his or her duties and must not, except in the proper performance of those duties, disclose to any person any information obtained as a member.

Consequential amendment to *Judicial Review Procedure Act*

Definitions

"record of proceeding"

…

(e) any video, audio or digital recording, or other form of transcript made of the oral evidence given at a hearing;

…

Standing to Participate in Administrative Tribunal Proceedings (Chapter 5)

Who may bring an appeal

42(1) An [application/appeal] may be brought by a person directly affected by the decision of _____.

(2) For the purpose of subsection (1), a "person directly affected" means:

(a) a person who has sustained an injury to an interest that the statutory provision is designed to protect; and

(b) a person who has sustained an injury to an interest that is distinguishable from that sustained by other members of the public

and includes the following persons:

(c) [enumerate]

but excludes the following persons:

(d) [enumerate].

Interveners

43(1) A tribunal may allow a person or group of persons to intervene in a proceeding that has been commenced by a party on such terms as it sees fit provided that:

(a) the person or group of persons demonstrates it can make a valuable contribution or bring a different perspective to consideration of the issues raised in the proceedings that differs from those of the parties, and,

(b) the benefits of such participation outweigh any prejudice to the parties caused by such participation.

(2) Without limiting the generality of subsection (1), a tribunal may limit the participation of an intervener:

(a) in relation to cross-examination of witnesses;

(b) in relation to the right to lead evidence;

(c) to one or more issues raised in the proceedings;

(d) to written submissions;

(e) to time-limited oral submissions.

(3) Where two or more applicants for intervener status have the same or substantially similar views or expertise, a tribunal may require them to file joint submissions.

Substantive (Non-Procedural) Powers (Chapter 6)

Summary dismissal

44(1) At any time after an [application/appeal/complaint] is filed, the tribunal may dismiss all or part of it if the tribunal determines that:

(a) the [application/appeal/complaint] is not within the jurisdiction of the tribunal;

(b) the [application/appeal/complaint] was not filed within the statutory time limit;

(c) the [application/appeal/complaint] is frivolous, vexatious or trivial or gives rise to an abuse of process;

(d) the [application/appeal/complaint] was made in bad faith or filed for an improper purpose or motive;

(e) the [applicant/appellant/complainant] failed to diligently pursue the [application/appeal/complaint/complaint] or failed to comply with an order of the tribunal;

(f) there is no reasonable prospect the [application/appeal/complaint] will succeed; or

(g) the substance of the [application/appeal/complaint] has been appropriately dealt with in another proceeding.

(2) Before dismissing an [application/appeal/complaint], the tribunal must give the [applicant/appellant/complainant] an opportunity to be heard.

(3) If the tribunal dismisses all or part of an [application/appeal/complaint] under subsection (1), the tribunal must inform the parties [and any interveners] of its decision in writing and give reasons for its decision.

Evidence admissible in tribunal proceedings

45(1) The tribunal may receive and accept on oath, by affidavit or otherwise, evidence and information that it considers relevant, necessary and appropriate, whether or not the evidence or information would be admissible in a court of law, but the tribunal may exclude anything unduly repetitious or evidence of such a nature that it is not likely to further the interests of justice.

(2) Nothing is admissible before the tribunal that is inadmissible in a court because of a privilege under the law of evidence.

(3) No notes or records kept by a mediator or any other person appointed by the tribunal to facilitate the resolution of a matter by means of dispute resolution mechanisms are admissible in tribunal proceedings.

(4) Nothing in subsection (1) overrides the provisions of any Act expressly limiting the extent to or purposes for which any oral testimony, documents or things may be admitted or used in evidence.

Consequential amendment to Section 4 of the *Human Rights Code*

4(2) Subsection (1) does not override an Act expressly limiting the extent to which or purposes for which evidence may be admitted or used in any proceeding.

Witness compulsion and disclosure powers

Option 1: Power to compel witnesses and order disclosure

46(1) The tribunal may, at any time before or during a hearing but prior to its decision, make an order requiring a person:

(a) to attend an oral or electronic hearing to give evidence on oath or solemn affirmation or in any other manner; or

(b) to produce for the tribunal or another party a document or other thing in the person's possession or control as specified by the tribunal

that is admissible and relevant to an issue in the proceeding.

(2) The tribunal or a party to the proceeding may apply to the Supreme Court for an order:

(a) directing a person; or

(b) directing any directors and officers of a person to cause the person

to comply with an order the tribunal made under subsection (1).

Option 2: Power to compel witnesses and other disclosure

47(1) The rules of court relating to:

(a) discovery and inspection of documents;

(b) examination for discovery;

(c) pre-trial examination of witnesses;

(d) discovery by interrogatories

apply to pre-hearing proceedings before the tribunal.

(2) The tribunal may, at any time during a hearing but prior to its decision, make an order requiring a person:

(a) to attend an oral or electronic hearing to give evidence on oath or solemn affirmation or in any other manner; or

(b) to produce for the tribunal or another party a document or other thing in the person's possession or control as specified by the tribunal

that is admissible and relevant to an issue in the proceeding.

(3) The tribunal or a party to the proceeding may apply to the Supreme Court for an order:

(a) directing a person; or

(b) directing any directors and officers of a person to cause the person

to comply with an order the tribunal made under subsection (2).

Non-compliance powers

Failure of party to comply with tribunal orders and rules

48. If a party fails to comply with an order of the tribunal or with the rules of practice and procedure of the tribunal, including any time limits specified for taking any actions, the tribunal may, after giving notice to that party:

(a) continue with the proceedings and make a decision based upon the evidence before it; or

(b) determine that the [applicant/appellant/complainant] has been abandoned and make an order accordingly.

Power to award costs

Costs

49(1) Subject to the regulations, the tribunal may make orders for payment as follows:

(a) requiring a party [or an intervener] to pay all or part of the costs of another party [or intervener] in connection with the [application/appeal/complaint]; and

(b) if the tribunal considers the conduct of a party has been improper vexatious, frivolous or abusive, requiring the party to pay all or part of the actual costs and expenses of the tribunal in connection with the [application/appeal/complaint].

(2) An order under subsection (1) may include directions respecting the disposition of money deposited under subsection (1).

(3) If a party is an agent or representative of the government, an order under subsection (2)(a) may be made for or against the government, not for or against the agent or representative.

(4) An order under subsection (1) has, after filing in the court registry, the same effect as an order of the Supreme Court for the recovery of a debt in the amount stated in the order against the person named in it, and all proceedings may be taken as if it were an order of the court.

Regulations

50. The Lieutenant Governor in Council may make regulations as follows:

(a) prescribing the circumstances in which an award of costs may be made by a tribunal;

(b) prescribing a tariff of costs payable under a tribunal order to pay all or part of the costs of a party or intervener;

(c) prescribing what are to be considered costs to the government where a tribunal order requires the government to pay all or part of the costs of a party or intervener;

(d) prescribing limits and rates relating to a tribunal order to pay the actual expenses of the tribunal.

Maintaining order and witness contempt

Maintenance of order at hearings

51(1) The tribunal may make such orders or give such directions at an oral hearing as it considers necessary for the maintenance of order at the hearing, and, if any person disobeys or fails to comply with any such order or direction, the tribunal may call for the assistance of any peace officer to enforce the order or direction, and every peace officer so called upon shall take such action as is necessary to enforce the order or direction and may use such force as is reasonably required for that purpose.

(2) Without restricting the generality of subsection (1), the tribunal may, by order, impose restrictions on the continued participation or attendance of a person in proceedings, and may exclude a person from further participation or attendance in proceedings until the tribunal orders otherwise.

Contempt for uncooperative witness

52(1) The failure or refusal of a person summoned as a witness to:

(a) attend a hearing;

(b) take an oath or solemn affirmation;

(c) answer questions;

(d) produce the records or things in his custody or possession; or

(e) comply with an order made by the tribunal under section 51

makes the person, on application to the Supreme Court by the tribunal, liable to be committed for contempt as if in breach of an order or judgment of the Supreme Court.

(2) The failure or refusal of any other person to comply with an order or direction made by the tribunal under section 51 makes the person, on application to the Supreme Court by the tribunal, liable to be committed for contempt as if in breach of an order or judgment of the Supreme Court.

Power to grant stay of proceedings discretionary

Appeal does not operate as a stay

53. The commencement of an appeal does not operate as a stay or suspend the operation of the decision being appealed unless the tribunal orders otherwise.

Discretion to hear evidence in private

Hearings open to the public

54(1) An oral or electronic hearing shall be open to the public except where the tribunal is of the opinion that:

(a) an individual's personal information or a person's confidential commercially sensitive information may be disclosed that is of such a nature that the desirability of avoiding disclosure in the interests of any person or party affected or in the public interest outweighs the desirability of adhering to the principle that hearings be open to the public;

(b) public security may be endangered; or

(c) it is not practical to hold the hearing in a manner that is open to the public

in which case the tribunal may direct that all or part of the evidence be received to the exclusion of the public.

(2) Members of the public are entitled to reasonable access to documents submitted in a written hearing unless the tribunal is of the opinion that subsection (1)(a) or (b) applies to those documents.

Discretion to receive evidence in confidence

55(1) The tribunal may direct that all or part of the evidence of a witness or documentary evidence be received by it in confidence to the exclusion of a party or parties, on such terms as the tribunal sees fit, where that evidence consists of:

(a) commercially sensitive information or trade secrets and its disclosure could cause substantial competitive harm;

(b) personal information the disclosure of which could reasonably be expected to result in immediate and grave harm to a person's safety or mental or physical health; or

(c) information the disclosure of which could compromise public security.

Tribunal protections

Compulsion protection

56(1) A tribunal member or person acting on behalf of or under the direction of a tribunal member is not, in a civil proceeding to which the member is not a party, required to testify or produce evidence about records or information obtained in the discharge of duties under this Act.

(2) Notwithstanding subsection (1), a tribunal may be required by the court to produce a record of a proceeding that is the subject of an application for judicial review.

Enforcing tribunal orders

Enforcement of tribunal orders

57(1) The tribunal, the party in whose favour a tribunal order is made, or a person designated in the order, may file a certified copy of the order with the Supreme Court.

(2) An order filed under subsection (1) has the same force and effect, and all proceedings may be taken on it, as if it were a judgment of the Supreme Court.

(3) A party filing an order under subsection (1) shall give notice of the filing to the tribunal within 10 days of filing.

Judicial Review of Tribunal Decisions - Standards of Review and Related Issues (Chapter 7)

Privative Clause

58(1) The [named tribunal] has exclusive jurisdiction to inquire into, hear and determine all those matters and questions of fact and law arising or required to be determined under [this Part or this Act] and to make any order permitted to be made.

(2) Without limiting the generality of subsection (1), the [named tribunal] has exclusive jurisdiction to hear and determine any question as to whether:

[list subject areas of exclusive jurisdiction].

(3) A decision [or order and/or action] of the [named tribunal] under [this Part or this Act and regulations] on a matter in respect of which the [named tribunal] has exclusive jurisdiction is final and conclusive and is not open to question or review in any court.

Option 1: Standard of review on judicial review (with privative clause)

59(1) In judicial review proceedings, the standard of review to be applied by the court to a decision of the tribunal is as follows:

(a) for intra-jurisdictional statutory interpretation questions, the standard of review is patent unreasonableness;

(b) for questions of law, other than those described in paragraph (a), and questions of jurisdiction the standard of review is correctness;

(c) for questions of fact and questions of mixed fact and law, the standard of review is patent unreasonableness;

(d) for questions involving the exercise of the tribunal's discretion, the tribunal's decision can only be set aside if it is unreasonable.

(2) For purposes of subsection (1)(a), a decision is patently unreasonable if it is clearly irrational.

(3) For purposes of subsection (1)(b), questions of jurisdiction include natural justice questions.

(4) For purposes of subsection (1)(c), a finding of fact is patently unreasonable if there is no evidence to support it or if, in light of the whole of the evidence, the finding is clearly irrational.

(5) For purposes of subsection (1)(d), a discretionary decision is unreasonable if it is made arbitrarily or in bad faith, if the discretion is exercised for an improper purpose, if the tribunal relied on irrelevant considerations or if the tribunal failed to take into account relevant considerations.

Option 2: Standard of review on judicial review (with no privative clause)

60(1) In judicial review proceedings, the standard of review to be applied to a decision of the tribunal is correctness for all questions except those respecting findings of fact.

(2) A finding of fact by the tribunal should only be set aside if there is no evidence to support it or if, in light of the whole of the evidence, the finding is clearly irrational.

Consequential amendments to *Judicial Review Procedure Act*

Error of law

3(2) For purposes of subsection (1), those provisions in the enactments that are listed in Schedule 1 to this Act limit the court's powers to set aside a statutory interpretation decision made by a tribunal under and in relation to those enactments unless the interpretation error is patently unreasonable.

Time limit for certain applications

11.1(1) Unless an enactment otherwise provides, an application for judicial review of the exercise of a statutory power of decision must be commenced within 30 days of the date of the decision.

(2) Despite subsection (1), the court may extend the time for making the application, either before or after expiration of the time so limited, on such terms as it considers proper, where it is satisfied that there are apparent grounds for relief and that no substantial prejudice or hardship will result to any person affected by reason of the delay.

Appeals

An appeal lies to the Court of Appeal, with leave of the Court of Appeal, from a final order of the British Columbia Supreme Court disposing of an application for judicial review under the *Judicial Review Procedure Act*.

Power to Hear and Decide Charter Issues (Chapter 8)

Consequential Amendment to *Constitutional Question Act*

Section 8(1) of the *Constitutional Question Act* is amended by adding the following definition:

Notice of questions of validity of applicability

"cause, matter or other proceeding" does not include a cause, matter or other proceeding before an administrative tribunal unless that tribunal has express jurisdiction to consider and decide whether its enabling legislation is constitutionally valid.

Amendment to Labour Relations Code

Jurisdiction of the board over Charter questions

(1) The board has jurisdiction to consider and decide whether its enabling legislation is constitutionally valid.

(2) Section 8 of the *Constitutional Question Act* applies to proceedings before the board involving the constitutional validity of this Act.

Administrative Tribunals – Enabling Legislation (Other than *Labour Relations Code*)

Limits on tribunal jurisdiction

Nothing in this Act is to be construed as giving the [named tribunal] jurisdiction to consider and decide whether its enabling legislation is constitutionally valid.

APPENDIX 2 – ADMINISTRATIVE TRIBUNALS

Tribunal	Acronym	Enabling Statute
Agricultural Land Commission	ALC	*Agricultural Land Commission Act*, S.B.C. 2002, c. 36
British Columbia Marketing Board	BCMB	*Natural Products Marketing Act*, R.S.B.C. 1996, c. 330
Building Code Appeal Board	BCAB	*Local Government Act*, R.S.B.C. 1996, c. 323
Commercial Appeals Commission	CAC	*Commercial Appeals Commission Act*, R.S.B.C 1996, c. 54[129]
Community Care Facility Appeal Board	CCFAB	*Community Care Facility Act*, R.S.B.C., c. 60[130]
Coroners Service	CS	*Coroners Act*, R.S.B.C. 1996, c. 72
Electrical Safety Appeal Board	ESAB	*Electrical Safety Act*, R.S.B.C. 1996, c. 109[131]
Elevating Devices Appeal Board	EDAB	*Elevating Devices Safety Act*, R.S.B.C. 1996, c. 110[132]
Employment and Assistance Appeal Tribunal	EAAT	*Employment and Assistance Act*, S.B.C. 2002, c. 40; *Employment and Assistance for Persons with Disabilities Act*, S.B.C. 2002, c. 41
Employment Standards Tribunal	EST	*Employment Standards Act*, R.S.B.C. 1996, c. 113
Environmental Appeal Board	EAB	*Environment Management Act*, R.S.B.C. 1996, c. 118[133]
Expropriation Compensation Board	ECB	*Expropriation Act*, R.S.B.C. 1996, c. 125
Farm Practices Board	FarmPB	*Farm Practices Protection (Right to Farm) Act*, R.S.B.C. 1996, c. 131[134]
Financial Institutions Commission	FIC	*Financial Institutions Act*, R.S.B.C. 1996, c. 141[135]
Fire Commissioner	FC	*Fire Services Act*, R.S.B.C. 1996, c. 144
Forest Appeals Commission	FAC	*Forest Practices Code of British Columbia*, R.S.B.C. 1996, c. 159
Forest Practices Board	ForestPB	*Forest Practices Code of British Columbia*, R.S.B.C. 1996, c. 159
Gas Safety Appeal Board	GSAB	*Gas Safety Act*, R.S.B.C., 1996, c. 169[136]

[129] Bill 70 – 2003 (*Commercial Appeals Commission Repeal Act*) proposes repeal of the *Commercial Appeals Commission Act* and the establishment of a Financial Services Tribunal by consequential amendment to the *Financial Institutions Act,* R.S.B.C. 1996, c. 141.

[130] *Community Care and Assisted Living Act*, S.B.C. 2002, c. 75 (not in force) proposes to continue this board as the Community Care and Assisted Living Appeal Board.

[131] *Safety Standards Act*, S.B.C. 2003, c. 39, ss. 43-48 (not in force) proposes the consolidation of the Electrical Safety Appeal Board, Elevating Devices Appeal Board, Gas Safety Appeal Board, and the Power Engineers and Boiler and Pressure Vessel Safety Appeal Board into one Board, the Safety Standards Appeal Board.

[132] See footnote 131.

[133] Bill 57 – 2003 (*Environmental Management Act*) proposes some changes to the board's existing powers.

[134] *Miscellaneous Statutes Amendment Act, 2003*, S.B.C. 2003, c. 7, ss. 19-22 and 45-49 (not in force) proposes a merger of the Farm Practices Board with the British Columbia Marketing Board.

[135] Bill 70 – 2003 (*Commercial Appeals Commission Repeal Act*) proposes an appeal from commission orders to a new Financial Services Tribunal.

[136] See footnote 131.

Tribunal	Acronym	Enabling Statute
Health Care and Care Facility Review Board	HCCFRB	*Health Care (Consent) and Care Facility (Admission) Act*, R.S.B.C. 1996, c. 181
Health Care Practitioners Special Committee for Audit	HCPSCA	*Medicare Protection Act*, R.S.B.C. 1996, c. 286
Hospital Appeal Board	HAB	Hospital Act Regulation, B.C. Reg. 121/97
Human Rights Tribunal	HRT	*Human Rights Code*, R.S.B.C. 1996, c. 210
Labour Relations Board	LRB	*Labour Relations Code*, R.S.B.C. 1996, c. 244
Mediation and Arbitration Board	MAB	*Petroleum and Natural Gas Act*, R.S.B.C. 1996, c. 361
Medical and Health Care Services Appeal Board	MHCSAB	*Medicare Protection Act*, R.S.B.C. 1996, c. 286
Medical Services Commission	MSC	*Medicare Protection Act*, R.S.B.C. 1996, c. 286
Mental Health Review Panels	MHRP	*Mental Health Act*, R.S.B.C. 1996, c. 288
Motor Carrier Commission	MCC	*Motor Carrier Act*, R.S.B.C. 1996, c. 315
Parole Board	PB	*Parole Act*, R.S.B.C. 1996, c. 346
Power Engineers and Boiler and Pressure Vessel Safety Appeal Board	PEBPVSAB	*Power Engineers and Boiler Pressure Vessel Safety Act*, R.S.B.C. 1996, c. 368[137]
Private Post-Secondary Education Commission	PPSEC	*Private Post-Secondary Education Act,* R.S.B.C. 1996, c. 375[138]
Property Assessment Appeal Board	PAAB	*Assessment Act*, R.S.B.C. 1996, c. 20
Property Assessment Review Panels	PARP	*Assessment Act*, R.S.B.C. 1996, c. 20
Public Service Appeal Board	PSAB	*Public Service Act*, R.S.B.C. 1996, c. 385[139]
Residential Tenancy Arbitrators	RTA	*Residential Tenancy Act*, R.S.B.C. 1996, c. 406[140]
Securities Commission	SC	*Securities Act*, R.S.B.C. 1996, c. 418
Utilities Commission	UC	*Utilities Commission Act*, R.S.B.C. 1996, c. 473
Workers' Compensation Appeal Tribunal	WCAT	*Workers Compensation Act*, R.S.B.C. 1996, c. 492

[137] See footnote 131.

[138] Bill 52 – 2003 (*Private Career Training Institution Act)* provides for the replacement of the commission with a new self-regulating, self-funded board.

[139] Bill 71 – 2003 (*Public Service Amendment Act, 2003*) proposes the substitution of an appeal process to the Merit Commissioner in place of an appeal to the Public Service Appeal Board.

[140] *Residential Tenancy Act*, S.B.C. 2002, c. 78 (not in force) will replace the current Act to modernize and streamline administrative and adjudicative processes.

APPENDIX 3 – APPLICATION OF PROPOSED LEGISLATION TO INDIVIDUAL ADMINISTRATIVE TRIBUNALS

Tribunal ---------- Application of Proposed Legislation	ALC	BCMB	BCAB	CAC	CCFAB	CS	ESAB	EDAB	EAAT	EST	EAB	ECB	Farm PB	FIC	FC	FAC	Forest PB	GSAB	HCCFRB	HCPSCA	HAB	HRT	LRB	MAB	MHCSAB	MSC	MHRP	MCC	PB	PPSEC	PEBPVSAB	PAAB	PARP	PSAB	RTA	SC	UC	WCAT
Chapter 2: Rules of Practice and Procedure																																						
Section 1: Power to make rules																																						
Comprehensive	X	X				X					X	X	X			X						X	X	X				X				X				X	X	
Informal				X	X		X	X	X	X					X			X	X	X	X				X	X	X		X		X		X	X	X			X
Section 2: General power to make orders				X	X		X	X	X	X					X			X	X	X	X				X	X	X		X		X		X	X	X			X
Section 3: Power to make orders (extensive rules)	X	X				X					X	X	X			X						X	X	X				X				X				X	X	
Section 4: Time frames specified in directives		X		X	X		X	X		X	X	X				X		X	X			X			X	X												
Section 5: Time frames not specified in directives									X														X				X								X				X
Section 6: Regulations	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X
Chapter 4: Procedural Powers																																						
Section 22: Service of documents	X	X		X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X		X	X	X	X	X	X	X	X		X	X	X	X	X	X	X	X	X

Appendix 3
Application of Proposed Legislation to Individual Administrative Tribunals

Tribunal / Application of Proposed Legislation	ALC	BCMB	BCAB	CAC	CCFAB	CS	ESAB	EDAB	EAAT	EST	EAB	ECB	Farm PB	FIC	FC	FAC	Forest PB	GSAB	HCCFRB	HCPSCA	HAB	HRT	LRB	MAB	MHCSAB	MSC	MHRP	MCC	PB	PPSEC	PEBPVSAB	PAAB	PARP	PSAB	RTA	SC	UC	WCAT
Section 23: Failure to serve does not invalidate proceedings	X	X		X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X		X	X	X	X	X	X	X	X		X	X	X	X	X	X	X	X	X
Section 24: Notice of hearing by publication											X																	X										X	
Section 25: Notice of appeal (inclusive of prescribed fee)	X	X	X	X	X		X	X		X	X				X	X		X					X								X	X						
Section 26: Notice of appeal (exclusive of prescribed fee)									X										X		X	X			X		X							X					X
Section 27: Regulations	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X
Section 28: Time limit for appeal	X	X		X	X		X	X			X					X		X					X		X					X								X
Section 29: Form of hearing (subs. (1) only)						X									X														X									
Section 29: Form of hearing	X	X		X	X		X	X	X	X	X	X	X	X		X		X	X		X	X	X	X	X	X	X	X		X	X	X	X	X	X	X	X	X
Section 30: Representation of parties	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X
Section 31: Examination of witnesses				X		X	X	X	X		X	X	X	X	X	X		X	X		X	X	X	X			X	X			X		X	X	X	X	X	X
Section 32: Adjournments	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X		X	X		X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X

Tribunal ---------- Application of Proposed Legislation	ALC	BCMB	BCAB	CAC	CCFAB	CS	ESAB	EDAB	EAAT	EST	EAB	ECB	Farm PB	FIC	FC	FAC	Forest PB	GSAB	HCCFRB	HCPSCA	HAB	HRT	LRB	MAB	MHCSAB	MSC	MHRP	MCC	PB	PPSEC	PEBPVSAB	PAAB	PARP	PSAB	RTA	SC	UC	WCAT
Section 33: Combined proceedings				X						X	X	X				X						X	X					X				X		X		X	X	X
Section 34: Interim orders				X							X					X						X	X												X	X	X	X
Section 35: Consent orders				X	X		X	X		X	X					X		X				X	X								X					X	X	X
Section 36: Recording tribunal proceedings	X	X		X	X		X	X	X	X	X	X	X	X	X	X		X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X
Section 37: Tribunal to compile record	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X		X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X
Section 38: Decision	X	X	X	X	X		X	X	X	X	X	X	X	X		X		X	X		X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X
Section 39: Notice of decision	X	X	X	X	X		X	X	X	X	X	X	X	X		X		X	X		X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X
Section 40: Amendments to decision or order	X	X	X	X	X		X	X	X	X	X	X	X	X		X		X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X
Section 41: Tribunal duties	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X
Section 42: Who may bring an appeal		X					X	X			X		X																		X							
Section 43: Power to add interveners	X						X	X			X					X		X				X	X					X			X	X				X	X	X
Chapter 6: Substantive Powers																																						
Section 44: Summary dismissal	X	X	X	X	X		X	X		X	X	X	X		X	X	X	X			X	X			X			X			X	X	X	X	X			X

Tribunal / Application of Proposed Legislation	ALC	BCMB	BCAB	CAC	CCFAB	CS	ESAB	EDAB	EAAT	EST	EAB	ECB	Farm PB	FIC	FC	FAC	Forest PB	GSAB	HCCFRB	HCPSCA	HAB	HRT	LRB	MAB	MHCSAB	MSC	MHRP	MCC	PB	PPSEC	PEBPVSAB	PAAB	PARP	PSAB	RTA	SC	UC	WCAT
Section 45: Evidence admissible in proceedings		X		X		X				X	X	X	X		X				X		X	X	X	X		X	X	X				X	X		X	X	X	X
Section 46: Witnesses and disclosure		X		X		X				X	X		X		X				X		X	X	X	X		X	X	X				X	X		X		X	X
Section 47: Witnesses and disclosure (court rules)												X																								X			
Section 48: Failure of party to comply with orders and rules		X		X	X		X	X		X	X	X	X			X	X	X			X	X	X		X	X		X			X	X			X		X	X
Section 49: Costs		X								X	X		X			X						X	X	X							X							
Section 49(1)(b): Costs only if party conduct improper	X			X	X		X	X										X			X										X							
Section 50: Regulations	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X
Section 51: Maintenance of order at hearings	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X
Section 52: Contempt for uncooperative witness	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X
Section 53: Appeal does not operate as a stay	X			X	X		X	X		X	X					X		X					X		X					X	X						X

Appendix 3
Application of Proposed Legislation to Individual Administrative Tribunals

Tribunal ---------- Application of Proposed Legislation	ALC	BCMB	BCAB	CAC	CCFAB	CS	ESAB	EDAB	EAAT	EST	EAB	ECB	Farm PB	FIC	FC	FAC	Forest PB	GSAB	HCCFRB	HCPSCA	HAB	HRT	LRB	MAB	MHCSAB	MSC	MHRP	MCC	PB	PPSEC	PEBPVSAB	PAAB	PARP	PSAB	RTA	SC	UC	WCAT
Section 54: Hearings open to the public		X		X	X	X					X	X	X	X	X	X						X	X	X	X	X	X							X		X	X	X
Section 55: Discretion to receive evidence in confidence		X		X	X	X					X	X	X	X	X	X						X	X	X	X	X	X							X		X	X	X
Section 56: Compulsion protection	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X
Section 57: Enforcement of tribunal orders	X	X		X	X		X	X	X	X	X	X	X	X		X		X	X			X	X			X					X	X			X	X	X	X
Chapter 7: Judicial Review																																						
Section 58: Privative clause	X	X	X		X		X	X	X	X	X		X		X	X		X		X	X		X	X				X	X	X	X			X	X	X	X	X
Section 59: Standard of review (with privative clause)	X	X	X		X		X	X	X	X	X		X		X	X		X		X	X		X	X				X	X	X	X			X	X	X	X	X
Section 60: Standard of review (with no privative clause)				X								X							X			X			X	X	X					X							