ADMINISTRATIVE JUSTICE PROJECT

WORKSHOP – VANCOUVER, BC - 28 SEPTEMBER 2001

CHAIR: Bernd Walter

Partial Transcript (Unedited)

THE CHAIR: Good morning, I am the chair of the B.C. Review today. Thank you for coming and responding to invitations in some cases perhaps a bit late and having to clear your busy decks to be here. I don't want to belabor the agenda with a lot of remarks because we have a very busy and ambitious day ahead of us, but since I was invited to participate here today, I have been going back and poring over this series of terms and reference and guidelines and work plan documents that have been coming out of the project and the various projects already. And I thought that both for my need for context as well as perhaps to share my thinking with you, I would go through some of my assumptions underlying the sub project and what we're going to do today. And again I think some of that echoes what Gill has said already and some of my observations and then I'll talk a little bit about the anticipated process for today. My assumption and what I find very encouraging about the project and our participation is that I have had it said several times and I think the terms of reference reflect that rather than focusing on the operations of any individual tribunal the admin justice project and certainly this sub project that we're meeting about today, the admin justice review, is intended to be a comprehensive systemic review of our collective tribunals as a system from the perspective of the relevance of that system, the effectiveness of that system, how its services are delivered and in particular the focuses of today the legal procedural and appropriate policy framework for that system.

I also find it encouraging that the terms of reference for the AJP appear to recognize that or assume that a process or a system of decision-making which is independent of line ministries and government is relevant and necessary. And, indeed, I was quite heartened to read that at one point, as reflected in the terms of reference, it's acknowledged that in some cases the relationship between tribunals and governments may in fact proximate that with the courts. I'm also assuming that the focus of the administrative justice review and I call it a sub project of the larger AJP and today's discussion as has been said is -- the focus is the legal and the procedural context of our tribunals, their authorities and their powers, and it's my assumption that those people who are here today, those who have been invited to attend and participate today, are assumed to be intimately involved with that system and that they have something relevant and useful to say about these issues and to add to the debate.

I also have a hopeful submission or assumption, and again, I think Gillian has led the way, and that is that similar opportunity for discussion and input will be available again on the other sub project components and again of course as the terms of reference reflect, when the white paper is published in February and hopefully also in the subsequent phase is the accountability piece that Gillian mentioned. So I consider this day a key opportunity for tribunals, practitioners and in some cases looking around at the ministry people, possibly consumers to offer their early advice about what is needed to deliver or perhaps to improve an already sound system so that we are delivering a uniform quality administrative justice. I think it's also a key opportunity to perhaps interact and meet some of our stakeholders in a context that's outside of the hearing room.

And I have to tell you, I left the practice of law and got into policy work because I really enjoy this kind of work, I think it's worthwhile; I love the policy debate process. And thinking back ever since the genesis of B.C. CAT and the Circle of Chairs, it's my sense that this sector, if I can call it that, has felt somewhat at least benignly neglected or perhaps even misunderstood and we now have before us the possibility of bringing about an enhanced system of administrative justice. And I was particularly encouraged the other day when I joined the Circle of Chairs meeting by telephone to here Wendi say that this engendered a great deal of optimism in me, that the area that we work in and strive in every day is described just not as an interest but indeed a passion of the Attorney General. So to me that augers well for some positive progress here. And I'm really glad you are here to participate. It's also my sense that despite some initial apprehension on the part of tribunal members and no doubt, ministry people, about the number of high level reviews that are going on throughout government right now, and despite what might be some lingering doubts or questions at least about agendas or about sincerity of the consultation efforts, there is now a real and honest desire to participate and to be heard. I would also suggest to those of us who have worried about the degree or the extent of our participation that at lease the procedural and legal issues that are under discussion today are the very -- the ones that are the most least likely to raise concerns about compromising independence or to give rise to any perceptions of by as, simply by virtue of our participation.

So having said that, I want to talk about a couple of process issues, if I may. Obviously the topics under discussion are succinctly identified in the agendas that have been provided to you and in the work plan for the sub project. Given the number of people here I think we will need a little bit of structure. The key members of the project team are here as is Wendi. I propose that as we introduce a topic I will call on the lead team member, researcher, Frank or Bruce, to briefly describe the agenda topic and perhaps his sense of why this is an issue of priority or consequence. And then I would open the discussion to the participants who will be invited to hear or reflect their … concerns on the listed issues as well as, of course, others. And I think as that point as you can see we are transcribing the proceedings it becomes important for the benefit of the transcript and for the record to ensure that only one person is speaking at a time, so I'll ask to you kind of make your desire known and I will try to ensure that you are given an opportunity to be heard. And as Wendi has already said the transcript will be made available in a non-identifying way and will also I understand be published on the project's web site. I think have been canvassed initially on a particular topic the issues we'll then move into suggestions and your recommendations and your perspectives with respect to possible solution or remedies for those issues. I'll participate to the extent of maintaining some degree of order and adherence to the schedule. It's critically important for me that people feel at the end of the day that they have been given the opportunity to be heard, so I'll try and see to that.

I would also invite you, because we've got the expert resources here, to consider the members of the project teams as full participants, as resources, both in terms of asking them to perhaps elaborate their thinking behind the issues and also probing them to your ideas in the interest of generating a very clear and informed discussion. It may be that at the end of the day not everyone is going to feel completely heard, but I understand that notwithstanding that the participants are also encouraged to render written comments on the issues and submitting them to the project and it's my understanding that the commit submissions will also be acknowledged and appended to the options paper or to the research reports that are going to be turned in. And then at the end of the day I will try to close with perhaps some summary comments both from the participants and anything that I've observed as a result of the day.

Let's turn then to issue number one on our agenda and that's the issue of procedural authority as I called it. And I guess the question before us is do the constitutive statutes provide adequate tools for us to do the job that we are given or should those be somehow centrally codified? My example is in the tribunal in which I work the underlying statute is the criminal code and while provides certainly evidentiary or procedural authorities or discretion it doesn't really speak to some very basic matters, things like adjournments, interim rulings, the effect of missing a particular time limit within which something has to happen. I've discussed with some individuals in this room over the years their views on the merits of a statutory powers procedures act, or to borrow the Ontario name, but I actually have never, it occurred to me when I was thinking about this, been in the room to hear both sides of the debate on that issue. So I would ask you to turn to page of the work plans to look at the issues that are under discussion today, those include of course non-adjudicative role of the chair as well, issues of consent, dispositions or orders, power to compel, expert reports, interim interlocutory matters, the power to vary orders outside of a hearing, sanctions and compliance issues. And I'm going to at this point put up an overhead and ask Frank who is the lead researcher on that topic to speak more to it to perhaps reserve or elaborate on some of his thinking in the area and then open it up to discussion.

MR. FALZON: Thank you, Bernd. Because this is a day for brain-storming and the rolling up of sleeves I have rolled up my sleeves and will commence with a few opening comments that will set the groundwork hopefully for what will be initially at least a free-wheeling discussion, and I'll say a few things towards the end of my comments as to why the hope is for this will be a bit more of a brain-storming session at least initially than would be the case, say, if we had a white paper with specific recommendations that were already out there. And I would like to begin if I may by just reading you a quotation that was written by a fellow named Sir Oliver Franks in 1957 and ask you to think as I'm reading it of how applicable this may or may not be to the situation in British Columbia today. Perhaps the most striking feature of tribunals is their variety, not only the functions but also constitutions. It's no doubt right that the body established to adjudicate on a particular case should be specially designed to fulfill the particular function should therefore vary widely in character, but the wide variation which now exists are much more the result of ad hoc decisions, political circumstances and historical accident than of the general application of consistent principles. We think that there should be a standing body, the advice of which should be sought whenever proposed to establish a new type of tribunal and which would also keep under review the consultation and procedure of existing tribunals. And then later a statement is made that there ought to be some form to ensure consistency to the extent possible while still retaining the necessary diversity that exists between tribunals so that we can accommodate the very different functions that the different tribunals perform, indeed that the same tribunal perform, depending on what it's doing.

Now, to the extent that the program described by Franks resonates with those of us sitting here 44 years later and half a world away, it's clearly a proper subject for review under form to ensure that the administrative law community can achieve as best it can the fundamental and widely shared values of effective and credible public service. We are going to be having some discussion today some of which may be fairly esoteric, but we ought not to lose sight of the fact that really what we are talking about is the tool kit, if I can put it that way, the tribunals need to be able to exercise their public service function, because there's nothing more frustrating that having some preliminary jurisdictional issue on a matter that you shouldn't be fighting about with some other tribunal has got resolve and no obvious reason why it isn't addressed to our satisfaction. So while in some respects the discussions may seem particular and not sort of earth shattering, the cost and efficiency implications of

these small things not being addressed in the statute can be quite significant. And so if there are simple fixes to problems and a core set of issues that apply to everyone around the table, most people around the table that we can address, Bruce and I would like to be able to identify those in our option paper. That's why we're doing this process at this stage, because we want your feedback even in the development of options even before they are out there for comment. Now, to effectively and credibly serve the publication -- sorry, I should add by way of parenthesis that I was reading an article recently by Robert Reid entitled "judicial review a poor way to run a railroad," and he said: I've ruefully developed Reid's rule for administrative law. Trying to make things better only makes them worse. If I believed that was the case I probably wouldn't be doing this task but it's a useful reminder to keep in mind that there ought to be a sort of Hippocratic aspect to what we're doing, which is not to make things worse than they are right now. And there's no underlying assumption that things are fundamentally bad right now but that's not to say that isn't room for improvement.

That's another reason why it is very important to get some intelligent and informed comments rather than some abstract notion of what might work that's not grounded in the actual experience of our tribunals. So to effectively and credibly serve the public tribunals have got to be able to resolve disputes between parties or between the citizen and the states by means that are accessible, fair, impartial, lawful and efficient. Those are the mantra words that are uttered whenever these discussions take place, and of course the difficulty is in the actual implementation and reconciliation of those sometimes competing values. Achieving all of these goals is as you will all know no small feat given a number of factors including the court-like rights that parties will often assert before you. The limited resources that are available to you, the uneasy status of the administrative tribunal situated in the netherworld between the executive and the courts, and the very difficult subject matter with which you regularly deal.

As a prominent American author has observed, the problem of procedures is often made more difficult because of the matter of substance. The job of the tribunal is properly understood from a close reading of the enabling statute is, here is the problem, you deal with it. Whatever the problem an administrative tribunal ought to be able to deal with it without assuming all the trappings of the court, particularly where as is most often the case the very purpose of the tribunal as to create a system as an alternative to a court. Indeed the very useful discussion about alternative dispute resolution that has happened in recent years, people sometimes lose site of the fact that the administrative tribunal itself is probably the greatest alternate dispute resolution idea ever invented. Whenever a tribunal encounters procedural and remedial impediments to achieving fair, flexible and efficient resolution of disputes its public services objectives are impaired.

Sometimes these impediments arise from the drafting of a statute, sometimes from what's in it; sometimes they arise from what's not in it. In either case, as I've indicated earlier, even the smallest procedural or remedial issue which for a tribunal that's bound by the rule of law becomes a potentially big legal and jurisdictional headache will create cost and complication and divert you from your ability to get to the heart of the problems that you have to address and to decide them. As Bismarck so ably put it, neither sausage making or legislation making are processes for the faint of heart. And as the Franks' committee pointed out diversity is essential but the degree of diversity that exists doesn't appear to reflect at present as least as I see it any systematic attempt to cross the tribunal committee to rationalize administrative powers and procedures. One board and the Inquiry Act powers, another board that seems to be similar things doesn't. Some have statutory protection in

good faith for their decisions, another one might not or it might be framed in a different way from the other tribunal. Some have the ability to grant a stay pending the hearing, others don't. In some cases the government decision-maker has the ability to grant a stay in its own decision as opposed to the tribunal hearing it. In very few cases is the problem with tribunal members just finishing off their work after the appointment expired addressed, but it can be a big problem in terms of resources time and frustration if the statute doesn't address it. And the fact that these matters haven't been addressed seems to me to reflect the fact that the process of legislation making, despite all of our best efforts, sometimes after the result of the drafting custom within a particular ministry or indeed, just the hurly burly of what all well intentioned people do in a pressure cooker process.

So what Attorney General Plant has done here is to sponsor a project that's probably the first ever opportunity to examine the whole system, and with respect to procedures come up with what I really strongly believe ought to be a made-in-B.C. solution to B.C. problems, as they exist, to properly balance uniformity and diversity. And while some of our discussion will obviously be informed by solutions that have been proposed elsewhere it was felt very important to have this early brain-storming session with all of you to hear first-hand what sort of procedural and remedial difficulties you've encountered so far. And I would really invite you to offer them up and I'm sure many of you have some in mind already. As you'll see, the notion of statutory powers procedure legislation has been identified as an option for consideration in the background paper.

As Bernd pointed out STPAs or the other labels that they have been given has been the source of some controversy and as you're aware there are different models ranging from the very comprehensive statute that deals with everything from service of documents to distribution of reasons that superimposed on all tribunals that fall within a particular category, to a very different model that was proposed in Alberta recently, where you draft the model statute and tribunals opt in to the provisions that they think work for them and for those that don't opt in they have an obligation to draft rules and work for them. So everybody has kind of got some things to think about that works for their tribunal. And as you'll see from the work plan, all of it's open for discussion, the fix is not in any on issue that's discussed in the work plan, but to the extent that all these things need to be discussed openly and put on the table, that's why they are in the work plan and that's why the work plan is so lengthy, because we want to be as transparent as possible in allowing the discussion to happen. I should say as well that I'm well aware that these are big questions and that you would all, as I would, would like to have more time to prepare for them for today's session, but I also know from dealing with chairs that each of you is bursting with ideas that if we just sit you down for five minutes you are not shy in offering your experiences and the issues that have troubled you.

And that's really what we want to hear today. I'm not particularly interested in systematic organized, classroom like discussion, what I'm really interested in that would assist me greatly and I know will assist Bruce in his sessions will be just your actual experience and what your problems are and issues that may have gone to court that have been unresolved issues that may be repetitive. If some of you think, for example, Bernd, maybe you could flick on the overhead for a second --

THE CHAIR: This was our not high tech, but I didn't realize I was going to have the pleasure of sitting right beside the reporter and I think the noise is going to intervene.

MR. FALZON: You will see the final bullet is very decisive. One of things that seem to be a source of frustration is having to decide the same issue over and over and over

again and having different panels come to different conclusions and the chair has to decide, well, do I appoint the same people over and over again? Maybe the time has come to have a provision in the statute that says that the tribunal can in certain cases make a decision and that decision is binding on the tribunal and other tribunal panels in the same way. Maybe it's not a good idea. But these are the kinds of issues that we would like some feedback on. So having said all of that, with some apologies for the length of time perhaps I took by way of preface, Bernd, I would simply hope we could open it up to participants at least for the first part of the morning, subject to any structure that might be worth suggesting later, we just open it up for relatively free-form discussion.

THE CHAIR: Right. I hope, I had opened that these overheads would be a little aid memoires or provoke discussion but like, Frank, I don't think we actually need them so I think we'll just do without them. The floor is open. Who would like to begin?

SPEAKER: I just wanted to follow up by Frank's comments. One of the boards I'm involved with has a difference of opinion on whether there is jurisdiction to hear cases over do-not-resuscitate orders, which are very stressful for families and health professionals. I think that might be a good example of following up on his idea if where the board in a majority determines it's got jurisdiction and the some division of the chair can determine jurisdiction. It would certainly remove uncertainty so you don't have one family getting access to a tribunal and another one not getting it on the same set of facts, and something in the legislation that spells out very clearly what the jurisdiction is would probably be very helpful.

SPEAKER: My comment was more to the graduation sort of effect of a new tribunal where they don't have a certain power, but after proving their function then can obtain that power. Am I clear?

MR. FALZON: Yes. So your point is that --

SPEAKER: The board may make recommendations versus an order, and then having established it's necessary that they be given the power to make orders and obtain that later.

MR. FALZON: Well, it's a good point, because one of the quite unique suggestions that the Alberta Law Institute made in 1999 was that if you had this model statute of various procedures, the way you would opt in would be through ministerial orders so you would actually identify what procedures you need, why you need them, it would go to, I think the Minister of Justice made a suggestion and I guess at that point a policy decision would be made, particularly with respect to coercive powers or powers that may potentially judicialize a tribunal more than any original idea, that government would then be the one that would make the final decision about which powers were allocated and one ones were not. But one could also see the -- in the other model that's been suggested by the Uniform Law Conference is having to opt in by the tribunals themselves. So the issue of kind of government oversight as it relates to power of exercising is certainly a live one in the literature I've ride.

THE CHAIR: But Frank, wouldn't you say that the issue of whether a tribunal has advisory versus compelling or coercive powers is a matter that ought to be settled at the policy table before the tribunal is established? It's a matter to me that goes beyond procedure, it's a matter of substance. I can't think of a more substantive matter than that.

SPEAKER: I'm the chair of an interesting tribunal because it's a mandatory mediation project, what it does is allows people who are residents of manufactured home parks to appeal their rents and it's set up under the Residential Tendency Act. Now, the interesting part about that or the reason I bring it up is because one jurisdictional issue we have is aboriginal lands. Often times manufactured home parks are set up on aboriginal lands and there are questions as to what our jurisdiction is when you have people that are tenants but the landlord either will be often times they are locatees (sic) or people who rent the lands from the aboriginal bands but it's aboriginal land and we have some particular issues about that. So I don't know if that's an issue that's common to anyone else. It's more or less a constitutional, of course, problem, and that's something that we have encountered at various time. What we tend to do is I tend to take jurisdiction insofar as it's a residential tenancy issue but as soon as it become an interest in land issue or trying to remove people from the land issue then of course I don't have jurisdiction. The problem is if you try and assert your jurisdiction too much and the band takes issue with you doing that, then they can kick the person off and then the person is sort of thrown to the wolves and you don't have jurisdiction. And you may have, as the Hippocratic thing, you may have done more damage than you did good, by trying to mediate the problem. So that's one issue that we encounter from time to time and we have to tread very carefully on.

MR. FALZON: Just going to back to the level of generality to just the whole idea of mandatory mediation, it's one that I understand is fairly controversial in some of the literature that I've read and I just would be curious to know whether dragging parties kind of kicking and screaming to the mediation process when they want to have their rights vindicated is something that actually turns out to work really well and how you manage it in cases where they don't want to engage in mediation.

SPEAKER: I've been in the chair for about three and a half years and what we try and do is educate parties to say, look, this is mediation, it's not a rights adjudication process, so you will still have rights adjudication if you wish because you can use the arbitration process through the Residential Tenancy Act.

MR. FALZON: They have to come to you first?

SPEAKER: If we are mediating something other than a rent review, it's not mandatory but all rent reviews are mandatory, and to the extent that's most of our jurisdiction because that's typically what brings people to us is to have their rent reviews, the increase in rent reviewed. So it's largely mandatory in that sense. Now, as far as the success goes I'd say it's been of mixed success. I think it's a very, very good project and I think it has a lot of potential to it. It had some management problems in the early going, which tended to put some of the parties off. Some of the park owners, typically it's people who own the parks or companies own the parks and then it's individuals who of course rent the pads that comprise the people who typically are the applicants. But the park owners kind of got off on the wrong foot with our group and tended not to like the process. Now, through attending their meetings and working with them I believe that we've gotten to a situation where the park owners respect it a bit more and certainly the applicants will continue to come, so I think it's a very, very good project and I think mandatory mediation so long as it's accompanied with enough education so the people understand that it will be mediation once they get there, can work. And I think it's a project that bears a lot of scrutiny and application in other places.

MR. FALZON: Do they come without counsel typically?

SPEAKER: They started to try and get counsel, we more or less talked them out it through education, again, and now they come without counsel.

MR. FALZON: Does it work better without counsel?

SPEAKER: Oh, yes absolutely. Because as you know mediation is a process whereby you try and get the parties to see the other side's position and to put them as much as you can in the other parties place, as opposed to putting out positions or saying this is my position. It's more are less -- not negotiation, it's really trying to understand the other parties' point of view and saying, well, you know, I can sort of see where the other party is coming from, and then the parties crafting their own resolution to that. So trying to get them out of the rights of adjudication model as much as possible through education, I think, is necessary to make this model work.

SPEAKER: I just wanted to say at the outset that I've taken advantage of today's opportunity to bring along a copy of our government statute and perhaps by working together we can get it appropriately revised in the course of the day. But participants were encouraged to comment on the difficulties they have exercised in their statutory mandate, and I would say over the years of my experience with our board that a great deal of the board's time had been spent in trying to define the scope of our authority to adopt procedures which we feel may fit the particular case. The board has its own practice and procedure regulations which the Court of Appeal on one occasion describe I thought somewhat disparagingly as a mini set of rules. But one of the regulations specifically incorporates the Supreme Court rule on discovery. However, we've often been faced with questions as to whether we could have reference to other Supreme Court Rules that are not specifically incorporated in our regulation and we severe issues and hear one ahead of the other and we strike pleadings and we state a case and can we conduct a proceeding much like a Rule 18A application, a summary disposition of the matter. These matters have all come before us and many others. And to my way of thinking the absence of that kind of certainty with respect to our proceed usual authority certainly raises to my mind the intriguing question of whether it would be useful to have a statutory power and procedures act or something of that order.

MR. FALZON: If I may ask, how are these -- I mean, the expropriation compensation context in terms of the range of administrative tribunals would probably be on the more labeling it quasi-judicial and of the tribunal structure, so are your hearings -- somebody walks into one of your hearings, are they essentially kind of a civil trial type proceeding in the way this they run and --

SPEAKER: Very much so, in terms of we hear sworn evidence, the parties are almost invariably represented by counsel. We do have adherence to the rules of evidence and the Evidence Act. I think it's probably one of the more formalized procedures outside the courts that applies to administrative tribunals. Now, whether that's a good thing or a bad thing is open to a question but it's viewed as a pretty formal process.

MR. FALZON: Are most of your rules, I take it there are some procedural safeguards that are set out in the act itself and procedural powers in the enabling statute and some you've issued yourselves?

SPEAKER: Yes, exactly, on an ad hoc basis. We have taken a pretty expansive view of our role.

MR. FALZON: So once of the things that you've done in terms of your rules that you've issue, they're sort of non-binding, you have incorporated the Supreme Court discovery rules in your own procedural roles?

SPEAKER: Well, in the regulation, practice and procedure regulation. Not a separate rule. We do have practice directive because those govern fairly minor matters.

SPEAKER: I find the idea of some generalized practice and procedures rules attractive from a number of points of view. In our statute I as chief appeal commissioner have the authority and the responsibility to determine our practices and procedures and so -- and I've just taken our organization through a consolidation of ten years of different practices and procedures and that took an enormous amount of time and so that's one of the reasons the generalized approach is attractive to me. But I thought I would just explain some of the things that arose and resulted from that process and just to sort of countervail to the idea of a generalized approach. As I say, it took an enormous amount of time, ten years' history in which we were consolidating, we were asking question internally about why we did some things the way we did it and could it be done differently and things like that. So that was a good process, the organization was different at the end of it, it was in some significant ways more sophisticated from the practice and procedures point of view. The other side of it was the community that we deal with it. And we had I think, a serious consultation with the community, we had over 30 written responses to what we were doing, some medium to heavy controversy on some issues and some of those issues I had to make some decisions on and we made the decision. One example I was very pleased, gratified to see that my decision on that was responded to, it was a sort of a process within our practice and procedures, it was -- -- and the very application was controversial in the consultation, but at the end of the day I made the decision that there would be an application this particular participation, and we have had very good response from that. And so I suggest that the fact that a tribunal has responsibility for its own practices and procedures and I think the Alberta model is interesting because you can take pieces out of it. But my experience is, difficult as it, time consuming as it is, resource heavy as it is, the organization has in this particular example more credibility and frankly more accountability in the community it serves.

MR. McKINNON: Some of you may have heard of the Leggett report I think it was in March of this year it was a major review of the administrative justice system in England. And one of the underlying values or goals there that they were striving for and to try as far as possible to set up a system that did not encourage participation of lawyers representing people appearing before them. Now, they recognize in some cases lawyers were necessary. Nonetheless that was sort of one of the goals they were trying to work towards, and it struck me that the extent that we think that that's a good goal, that may have an impact on what sorts of rules and procedures we want to put into place and perhaps whether we want them all codified so that lay people have a one-stop place to go to find out. I just wanted to throw that out for comment and discussion.

SPEAKER: With respect to the Securities Commission, we have given this a bit of thought and I suppose first of all I should say that we are quite, our mandate requires us to make a variety of decisions, some of which fall on the scale which are quite quasi-judicial, we have a hearing process for that, and there is other decisions that in terms of regulating the markets that are very administrative and very regulatory in nature, so we have that broad spectrum of decision-making. We have also in our enabling legislation very specific authority for quasi-judicial process, we have a lot of tools that the legislation has given to us to have a very flexible process, including we have rule making power with respect to making rules for our hearings, we have local policy with respect to our hearings which we have

already drafted and it's out there. We would be concerned, I think, first of all there is a lot of jurisprudence with respect to securities law already that's established. How the courts view us with respect to prosecutorial deference and specialized expertise, I guess we wouldn't want to lose that in the process of -- in this process. We would like to maintain what already has been established. Our process works actually quite well. What we would be concerned about is having general statutory powers and procedures imposed on all tribunals. I certainly would have more preference if there was going to be an option, having a statutory powers and procedures as in Alberta so if you needed certain powers you could opt into them or not. My preference would be for us to have control over that process because we need to be flexible in discharging our mandate and it would be better if we could incorporate any powers that we need into our legislation. At the moment our hearing process contemplates that number one, we can do hearings as originating in the jurisdiction our staff hearings, enforcement hearings. We also act as the tribunal for decision of our organizations such as the exchange or the Investment Dealers Association. So we can act in different kinds of capacities. From our decisions they go directly to the Court of Appeal but with leave, so -- and for us that is a recognition as well by the legislature of that expertise, and only certain kinds of cases go to the Court of Appeal. And we wouldn't want that to change. What we would perhaps like to see is perhaps more definitive screening there that would get rid of sort of interlocutory appeals. There is some sort of jurisprudence around that now. But with respect to the extra tools that we would like to see if any that we need, we would like to see that incorporated in our enabling legislation as opposed to statutory powers and procedure act. We pretty much have all of the tools and we've developed a relatively sophisticated process, we have a corporate governance process, with respect to the tribunal things are quite defined, there is a performance review process in place. We have disclosure rules for our hearings and so --

MR. FALZON: My sense is that you are in the category, that because of your profile have developed a pretty sophisticated regime through the school of hard knocks theory, through the --

SPEAKER: That's right, and we don't want to lose the prizes that we've won along the road. So I would be concerned. And I think after the model I was looking statutory powers and procedures act in Ontario when they refer to a decision, it covers a lot of what we do. Some of which is at the very end of the scale where we need really need the flexibility and it wouldn't fall within the quasi-judicial regime and that would be of concern to us. Right now we have rules in place that are fairly definitive and allow us to maintain the flexibility. It works quite well.

MR. FALZON: Even at the Securities Commission you get issues around, I don't know, can you accept consent orders or quorum issues or even sort of small niggly jurisdictional issues that still come up or are you able to get to the heart of the matter pretty effectively?

SPEAKER: Pretty much. There is a few that go to -- it's interesting, no matter -- let me put it this way, our experience tells us that no matter how definitive the rules are if there's enough money and getting close to the bone they're going to go to court. And we have those kinds of cases. So you can have very definitive rules and quite frankly in some cases it simply doesn't matter, they are going to court if there's enough money and if it's a big enough issue. So what my concern would be would be to have such definitive rules that they sort of impeded the flexibility when we need it. I think we have -- there is enough oversight over us to keep watch. The courts are never ousted when it comes it issues of natural justice of course, but when it comes to the area of our expertise there is that

recognition that this is to our business and that recognition is not just with respect to the jurisdiction, it's pretty much established across the country, so we don't want to -- we are trying to harmonize legislation across the country with respect to securities legislation and that would include a loss of the enforcement disciplinary side. So we could be concerned if we did, you know, if somehow that there was something imposed upon us that would interfere with our flexibility. So the option that you mentioned of something that elects sort of a model standard, because we are there already we would like to continue to do our business. But if there is a model standard out there that tribunals could opt into, that would be great and we could share the benefit of our experience. We have produced, I have some copies here this morning, we have produced a plain language brochure for people to participate in our hearing in addition to the local policy that sets outs the rules, so that if parties come to our proceedings and they don't have counsel they know how to conduct themselves.

MR. FALZON: Following on Bruce's point, if I may linger with your board for a minute, how many of your hearings just ballpark percentage-wise do parties appear without counsel? Is it the minority or are there a good number?

SPEAKER: I suppose it's a minority now.

MR. FALZON: Does it make a difference?

SPEAKER: It does. Sitting as a chair, I'll tell you I prefer to have counsel, because otherwise it's I mean the proceedings become extended they are less focused and quite frankly, you know, they just they become involved in collateral issues people focused on particular things that are really not relevant to the allegations in the notice of hearing but of are extreme moment to them, you know, they become personalized and the intervention of lawyers sometimes can put up that barrier. Although we have had lots of long hearings where there has not been counsel and the panel tries to accommodate that kind of thing and so, you know, we try to do that. We have a flexibility with respect to trying to make that as inexpensive as process for them as possible.

MR. FALZON: So the point you would make is there is a difference between being accessible to people who can attend without counsel, but not necessarily discouraging counsel, because they may in fact be part of the solution in the majority of cases where they appear?

SPEAKER: We don't take a position one way or the other. On complicated cases where we see that it would be an advantage for the party to have counsel, in their best interest we try to, you know, suggest that there may be a need for counsel to get them preliminary advice if they are in there alone because clearly they are in above over their head, they don't recognize the significance of the conditions or understand them, so they are not in a very good position to advance their own case. So sometimes we will try to encourage them to do that. But if they can then of course the panel helps them through the process.

MR. FALZON: If I may prevail upon you for one more question because I think this will help stimulate the discussion more generally, and that is with respect to time of completion of work product and whether --

SPEAKER: I'm sorry?

MR. FALZON: One of my preliminary thoughts is that it may be an illusion to suggest that the procedural reform can always make a hearing shorter when the hearing itself has kind of a life of its own and you need to kind of be responsive to that hearing, so to impose a certain time limit upon decision-makers that's artificial may not respond to the realities of decision-making. That said, are there in some cases having greater procedural flexibility to allow decision makers to get it finished, get it over with, get some finality, have you experienced significant delays in decision-making or statutory burdens given procedures that you have to follow that made it more difficulty to get the hearing finished and resulted in delays in your --

SPEAKER: No, we have now in our policy we have some guidelines with respect to getting decisions out on time. They are still -- we have 30-day period for certain decisions.

MR. FALZON: In your own policy?

SPEAKER: Having said that there is some recognition that companies are not going to be able to meet with because of the complexity of some of the cases that we do. And so but I think that becomes more of a question of time management on individual panels as opposed to the lack or having the benefit of certain kind of procedural tools to help them through that, make the process go faster or slower. That was generally not the issue with respect to moving the process along.

MR. FALZON: And whose responsibility is it in your tribunal to kind of give people the nudge to do that, is it the panel chair or is the chair of board that keeps track of kind of due dates and that kind of thing, you haven't heard from the panel 45 days after the hearing is completed?

SPEAKER: We have sort of a system in place where we have reminders, we have time limits now to issue decisions in a timely way. Sometimes it's a question of resources but we have a reminder system and it's clearly up to the chair of the commission, but also the chair of the panel. We have you know, sort of an internal system in place to keep that on track. And it's also tied in specifically to our performance of individual commissioners and pay, we are a self-funding organization, and those commitments to fulfill your job as it were, are directly tied to how you're paid. Personal objectives. So we have a system in place that if you don't meet those personal objectives there's a direct impact. We have that flexibility because of the financial structure that we have.

SPEAKER: Well, I would sort of echo the comments about having -- I think of it as a template of statutory powers and procedures that each different tribunal might draw on, and I see that advisable because of the differences in the boards that I chair. And their functions are so different and the nature of the appeals are so different that that make sense to me, to take sort of an individual approach but to have an array or menu, I think, of statutory powers that you can draw from. One of the most interesting ones, I would echo Bob's comments about sort of assuming powers that I may not have and we do exercise powers sometimes that we wonder about, joining parties, adding parties, naming parts, for example --

SPEAKER: Can you speak a little louder?

SPEAKER: Oh, I'm sorry. We do it under the -- sort of talking to these people, maybe I'll talk to you. My first comment was having a menu of statutory powers that each tribunal might draw on. My second point was concerning not having the powers that we actually exercise and I think it would be a good idea to have articulation of those powers.

One of the biggest areas is disclosure, pre-hearing disclosure, I think, and here we run into some interesting problems, I think, sometimes that people who come before our boards are more likely to get good disclosure using Freedom of Information Act than we can provide. We do, one of the things that our tribunals do is professional misconduct kind of hearings and the disclosure requirements there are very strong and the courts are very clear that this should occur, but we really don't have the power to order disclosure in a timely way. We have the power to compel witnesses, but what does that mean three months before the hearing? So disclosure and the combination with the FOI Act is really of interest to me. Another thing that's of interest is disclosure during a hearing or during the hearing process of our own records to members of the public. To what extent are these available to the public while we are in the process before the decision is reached? We've sort of taken the view that it's not open to the public until the decision is final.

MR. FALZON: How does that arise?

SPEAKER: Well, if we have an appeal that's of interest to the public, the public can come but they may also want to have access to the documents that are filed and query whether we should release them. We really -- I don't think we have any clear direction in our legislation with respect to that. And then just the last thing I would mention, and I'm not sure if it really belongs in the procedures part, but it's of interest to me and it concerns the burden of proof in any appeal. And again because our -- the nature of our appeals are very different. Sometimes we are sort of substitutional decision makers. But we've always taken the view that nevertheless it's the appellant who has the burden of proof and yet if it's substitutional it really shouldn't be that way. And so that's something that I think that ought to be included, at least some reference to that in this template or menu.

MR. FALZON: Well, if I may, that very subject will be the -- in this afternoon session. Because one of the things we identified very early on is if you are an appeal board you kind of got to know what the nature of appeal is and it's bizarre there is still litigation about what the nature of appeal is and also bizarre that there's only two competing models out there, one being the pure appeal model, or the hearing de novo where the original decision is ignored in all respects. And there's got to be some sort of middle ground where the decision maker makes some acknowledgment to the fact that somebody heard this and has done something, but can exercise vigorous appellate role hearing new evidence and sort of not turning it into a Court of Appeal, which is really not why they were created. So it's a very important question.

SPEAKER: I, along with several others, represent the mass volume administrative law. At one level there are 180,000 cases brought forward for adjudication and that could result in one decision, no, it didn't happen at work so you don't have a claim, or it could result in a dozen decisions. This is your level of wage, this is your -- it happened at work, yes, here is your medical treatment, here is your rehabilitation, et cetera, et cetera, et cetera. If we weren't given the ability to have our own procedural -- to set our own procedure, I'm not too sure we could handle the volumes that we have to handle, because we may be have to cut corners. You're not identifying who's saying these words, are you? We may have to do things in a -- and although sometimes you don't like it as the top administrator it's necessary, you just have to do it because of the sheer volume that's coming at you. We have a -- in my part of the system we are designed probably to handle 6,000 cases a year and this year we're going to have 16,000, and you just say, do I let the inventory of undecided cases grow to it's over 20,000 right now, or do I try to figure out some way to get a decision out which has a basic fairness to it? But which has -- quickness is maybe as important or more important than fairness. So we, I believe, have to have our own procedural making ability.

The other comment I will make is that 20 years ago in this system, which was originally designed as an inquiry model, in other words, all of the questions that are put forward, the administrative body is to answer them or to make the exploration or the investigation sufficient that it can render the decision. For reasons which we needn't go into today, the model is turning more and more adversarial. And I'm not too sure it can literally survive more adversarial -- originally if there was an adversarial relationship it was between a worker who had a claim and an administrative body who were making a decision. Now it's turning into an adversarial model between the employer who is the insurer and the worker who is the claimant, such that demands are being put upon the appellate bodies to have trials. Literally -- and administrative justice like Workers Compensation was never intended to go through all of that. You can't do it when you've got 180,000 cases before you. So we need the ability to set our own procedure or it will founder, the system will founder.

MR. FALZON: May I ask a couple of questions flowing from that, one is a very practical question around where your procedural authority derives from, is it in the statute or is it sort of an informal development of rules that the review board has developed over time?

SPEAKER: It's both. The statute allows for us to set our own procedures. We have a book which I think we are supposed to reduce by one-third from another exercise that we are engaged in. I told our people to count the musts and shalls and rip every third page out of the procedures manual. There has been some intervention by the courts, but not all that much.

MR. FALZON: I had another question that maybe relates more to kind of a philosophical inquiry and maybe even in the cultural shift that has happened in Canada in the last 20 years or so, which is, it's my perception with the advent of the charter people are much more concerned now about their rights and so people are coming into administrative tribunals perceiving that these are forums not for the alternative disposition of disputes, you know, like sort of the Harry Arthur's model of these shouldn't be courts, because people expect them to deliver court-like justice and so they are coming in asserting more and more court-like rights which turns the process more adversarial. Have you observed that? Is that part of what might be at work at the --

SPEAKER: Yes, but it actually began to happen before the charter came in. And partly it was because of the nature of the administrative bodies. They were very closed and secretive and when the doors were finally thrown up I think people were horrified by some of the things they saw. Ontario is the best example where the system was using denigrating names to certain ethnic groups and it was just sort of an unacceptable type of situation. That led to a lot of crusaders getting into the system to try to overcome this closed door and began long before the charter actually. I think you can back into probably the '70s was when things started to get quite hot.

SPEAKER: We are a statutory tribunal that has rule making powers in our statute and we have adopted rules and currently in the process of revising some of them. But one of most difficult things that we have to deal with as members is dealing with parties or participants who don't comply with the rules and what our powers are in that regard. We don't believe that we are a tribunal that has contempt power for example or if lawyers don't do it we are not of the view that we should be running off and reporting them to the Law Society despite the professional obligations that they owe under that. And refusing to admit documents and allowing experts to testify may very well result in judicial review on natural justice, so it would be nice to have some clarification and some kind of statutory powers to

be granted about the implications of failure of parties to comply with the rules that are in place.

THE CHAIR: Just in aid of provoking the discussion, a couple of points came up in the break including a question about Brian's comments about why do we think or what our people's perceptions about why administrative tribunal proceedings may be or are becoming more adversarial and more court-like in their approaches and someone else remarked about getting to specifics about if we were going to codify rules, what specific types of powers do we think we lack or put another way, perhaps what specific types of powers should tribunals not have or should a statute be silent in that respect.

SPEAKER: Yes, I think there are a couple of things that I think myself and I think other members of the advisory committee would very much like your advice on. And it really goes to what's the scope of the discussion we ought to be engaging in? One aspect of this is whether we should be focusing on powers of case management or whether we should also include powers of internal management of the organization, the powers of the chair, if there is a chair, vis-a-vis the members, in terms of ensuring productivity and things of that nature. Is that something that's it's worth talking about at all or is something that should be off the table, and there are different models out there, some administrative justice statutes you know, have very elaborate provisions dealings dealing with internal management type issues some of them don't say anything and approach it on a case management. The other type of thing is whether we should be focusing just on case management powers or whether we should also think a bit about procedural obligations, do we just leave procedural obligations to the common law rules of natural justice or whatever, and we think just about powers, or do we see some relationship between the two? And there are a couple of ways of thinking about that. One is to say that you can be powers but you have to tell people how you're going to exercise them in advance in some way, so you have powers in you make rules that will give people a sense of how those rules are going to be administered, or you can simply say you have powers and you figure it out as you can along on a case-by-case basis. And then another thinking that we can think about is to even go so far as to say there may be some obligations that you should be relieved from, that a court may read in certain kinds of obligations and you maybe should have the power to interrule, so well, no, for the reasons that Brian was putting forward, we can't have that kind of obligation, we have to be able to do things in a different way. Do we want to empower tribunals to be able to make those determinations or again, do we just want to leave that blank. So it's really a question of how big a discussion we ought to have and there are, as Frank said earlier, there is a lot of different models out there and some of them encompass some of these things and some of them don't. And we really need your advice from a practical standpoint as to how big the discussion ought to be.

MR. FALZON: Thank you very much for that, because that may be without limiting anything anybody else wants to say, a good way to structure the last part of the morning and on the issue of the internal powers of the chair, for example, which makes a big difference to how all the values that we've talked about can be achieved. Without disclosing any solicitor-client privilege I can say that I once had a chair ask me whether the chair had the authority to make a decision about litigation strategy or whether it was for the board as a whole to make that decision. The chair thought that one thing and the majority of the board members at the board meeting thought something different, and the issue was whose view prevails. Usually it's just the force of the chair's personality as to strategic thinking that those sort of things don't get to the full board people, but it does arise from time to time. And certainly there are some boards for whom the -- you know, the chair is the chief executive officer of

the board and responsible for supervising staff and making resource decisions and that addresses it. But -- and there are other obviously manifestations of that kind of management issue, but that might well be worth a brief canvass.

THE CHAIR: Can we hear from the group? Yes.

SPEAKER: I guess a couple of points have been raised here this morning that sort of touch on concerns that I have about there being change. The first is that it would be really nice to have something on the table we are discussing sort of rather than some potential act that would change the rules, because I think we are all seized of the idea that things work okay where we are. It's hard to envision a new reality of new way of doing things, so if I have something in front of me it might be a little bit easier. I think that in terms of the efficiency issues that are involved in the board that I sit on they are met pretty darn well by the existing regime, that efficiency as measured by how quick decisions get out, how expensive it is in terms of getting a decision taken, in terms of the balance between whether or not you are dealing with an overly adversarial process as opposed to one where you get quick justice and inexpensive justice. I think those issues are dealt with pretty darn well. In terms of the access to justice issue in terms of efficiency, we have a two-tiered structure, there is a tribunal process on the ground and in that process rarely are lawyers involved. I believe it's probably one of the cheapest processes that there can be. And the level that I sit on the appeal board is generally in fact statutorily we are confined to questions of law, so it's not a trial de novo kind of situation. And in that case the guarding against the overgenerous tribunal comes and sits at the door of the tribunal, the worry about there be non-legal decisions being made at the lower level is supposedly stopped when the get to the appeal board. In terms of the kind of problems that the board sees in terms of efficiency there was one overriding issue that was? My view and I think is shared by most board members that interfered with efficiency and that was not lack of deference to our decisions but in fact lack of deference by the government itself in terms of basically recognizing that the appeal board was making the same decision over and over again, and yet the ministry kept on appealing over and over again the very same issue. And in that regard, I mean, perhaps this is something that is worth some discussion, not that the question of precedent value of administrative boards that I'm not sure I advocate changing it but I think it's worth some discussion in terms of the issues that sort of surround the effectiveness of administrative boards, especially when they are affecting a ministry or an organization that may or may not actually implement the decisions. And in the case of the board that I sit on, the failure of the ministry to implement a decision or to apply the decision in other similar fact patterns had the effect and has had the effect, I think, of interfering with the system. And the people who lose in those circumstances generally are the persons who are the recipient of benefits because they are not generally in a position to go back and appeal again. And the major issue upon which this was exercised had to do with AIDS patients and we were roundly criticized for the -- I don't know how many, but a significant number of persons actually died during the process of going through the appeal process the first time round, let alone have to go to be and re-appeal if for example the ministry chose not to apply the decision at the date that the law normally would have implied that it be in place. So these are in my view the kind of issues that I would like to see addressed in any kind of core review. And I guess the other thing is I would really like to see a draft and have an opportunity to be able to look at it point by point, because I know that we all hate change, me too, but that I would like to see whether or not we could improve those efficiency indicators as well, for both the government and for the participants at the lower level.

THE CHAIR: If I may ask you to elaborate a little bit, are you talking about in terms of your decisions being followed by the effected ministry something in the nature of a binding precedent or are you talking about are you getting close in your discussion to something amounting to an enforcement power in your tribunal?

SPEAKER: I think both should be discussed. Like I said, I think I would have some trouble personally advocating a binding precedent because I know how tribunals are conducted and I know that any problem with a tribunal decision if it became or sorry an appeal board decision, if it became a precedent would increase the likelihood of judicial review, because now we're talking about something that has legal weight therefore it's not the cost benefit of whether we appeal this on the basis of this particular issue, but its precedent value. And I think the reality is that the board that I sit on has had very little judicial review and that's probably one of the reasons, is that there isn't a president value on in the decision. On the other hand the enforcement power, I haven't even given it any thought. It might be something that could be looked at.

THE CHAIR: If I could respond, it might be stepping out of my role a little bit in terms of a consultation draft or something on the table, I suspect that while that maybe a good idea and there are certainly people involved with the project who would speak to it here, but I suspect that this group is happy that we are not at that stage yet, in the hope that our consultation would inform such a document once it's developed.

SPEAKER: I wanted to pick up the theme of those tribunals that are in a position of hearing appeals of their host ministry decisions, because I do think that those situations are somewhat unique and certainly would have special kind of benefits from a generic legislation or tool kit because often times of course our host ministries are the least likely to give us the time on the legislative agenda or whatever it is to meet the needs and concerns that we will bring forward and being an effective appeal body of their decisions. Certainly the notion of enforcement powers is a critical one for us. As well I would add some capacity toward costs as something that I would like to see addressed perhaps in a generic act. But I do think in general that the notion of some specific ways to address tribunals that appeal their host ministry decisions is important around security of tenure of appointment. You know, sometimes I think I would have a nicer chair if I approved or if we confirmed more of the ministry's decisions. So there are numerous issues around the institutional independence that I think perhaps could be addressed on a government-wide basis. I think they are unlikely to be addressed on an individual ministry basis because of those kinds of sensitivities. Even when it comes to the issue of strict compliance, we will find it's not surprising when the party that does not comply with our rules is often the ministry, not either of the other parties. So for those of us who are in those quite awkward positions of constantly biting the hand that feeds you, some government-wide or system-wide protection would be most efficient, I think, in terms of our stakeholder groups in the public.

SPEAKER: If I could just add one little point to that, that is one of the things that has often crossed the lips of board members it would really be nice if the government looked at the decisions with respect to problem areas, because it could be an early warning system to address perhaps interpretive difficulties with particular pieces of legislation or with particular areas in the legislation. I can think of a couple of issues that are recurring over and over again on my desk coming from the board, where, make up your mind, you know, go to the legislative table, change it. The ministry is the one that is for the most part feeling these things, so go fix it. If you don't want to do it don't just keep appealing the same case over and over again, use the decisions in the way of reviewing your own work in the legislative mandate.

THE CHAIR: The notions that the decision of the tribunal or indeed the court can surface policy issues that need to be addressed.

SPEAKER: Absolutely.

THE CHAIR: We certainly used to that in Ontario in the '70s always reviewing in the policy branch court decisions about the interpretation of the legislation.

SPEAKER: Yes. This is just going back to the other issue that you raised, Frank, on the role of the chair of an organization. Again I guess we would be concerned if there were specific rules or us as an organization that would interfere with our flexibility. As it stands at the moment we are a fairly large organization and the chair of the commission we have found usually doesn't sit on very many hearings because just of the quantity of other work that he has to do. But also the way that we are organized as a commission we have -- the legislature has authorized us effectively to be the investigator or prosecutor or the adjudicator, and the Supreme Court of Canada has confirmed that while that would normally invite institutional bias that has been accepted in the field of the securities regulation if there are built in safeguards, so in our legislation we have certain provisions that address those safeguards so that if a panel is hearing a matter those panel members are precluded or panel members are precluded from sitting on a hearing if they have at all been involved in the investigatory process by signing orders or in any -- or some other provisions issuing freeze orders, so there is procedural safeguards so that in essence what happens is the panel members on a hearing will come in completely fresh like a court, they knowing nothing about the proceeding. So there are safeguards that are built into our legislation. At the same time there is a recognition by the legislature that part of our mandate is in the legislation is the commission's ability to determine policy. Our quasi-judicial hearing even though they deal quite often with parties' rights or they affect parties personally it's not like a list between parties. Often our policy is reflected in our quasi-judicial process in our hearings, so if there is a -- and quite often most of our big cases we have -- we've got so much work we only take the big cases to the hearings. They generally involve some policy issue, whether it's enforcement policy or some other regulatory policy. And occasionally the chair of the commission may sit on those where there is a big policy issue, but again those same rules those protective natural justice rules would apply to him so that if a commissioner has signed an investigation or that commissioner could not sit on the hearing process. So what we would not like to see are some rules put in place that would affect the chair let's say of the organization or the tribunal to fulfill his role as sort of the chief CEO and -- of the organization to fulfill our public interest regulatory and interfere with the administrative quasi-judicial function to allow us to have that flexibility. As long as we have built-in protections to address those issues I don't think we would want any more. We also have a very definitive governance policy which I've given you a copy of that set out what the rules are with respect to the commission and the chair and the expectations for that.

THE CHAIR: But in terms of Philip's first comment, I often wonder what my authorities are as a tribunal chair in terms of marshalling panels and do I have to keep an eye on equity issues, meaning equality of working type, am I able to impose a rule that I have done, that I want reasons on the table and in hand within 45 days of the hearing or it will affect the scheduling issues and sitting time. Am I overstepping my authorities there in making, for example, decisions about I think there is a conflict here, you should not sit on this panel. Those sorts of things that come up day-to-day in a management sense, but the legislation is absolutely silent about them. Am I at risk in making those kinds of determinations?

SPEAKER: Again, in terms of I think this is really a function of the nature of the tribunal. Again I think it would be best, I think it would be very useful to have those kinds of tools in a cafeteria style statutory procedures act so if you needed them we can do and say that we want to incorporate that are there so that some guidance is there for tribunals that need to reference that authority. Where it works, where it functions without them or they've already built in procedural safeguards to allow you to accommodate those kinds of issues. What we wouldn't want to see is an original scheme imposed on tribunals but I agree it probably would be helpful to a lot of tribunals to put it into the model legislation so that they can say, yeah, we need that kind of guidance and that's really useful for us.

MR. FALZON: One of the things that Bruce had raised earlier is that we haven't heard from some of the tribunals that sit on the part-time basis and it would be useful to know what kind of key issues there are that arise in tribunals who are exercising their mandate sort of on a more as-needed basis than perhaps those that are staffed with significant resources and continuous work load.

THE CHAIR: I'm also noticing we haven't heard much from professional regulatory tribunals and wonder if they encounter these sorts of issues.

SPEAKER: Just one small points on organizational powers and the case management powers, it seems to me that you shouldn't be able to pick and chose which organizational powers, that that should be in your enabling statute saying that you do as the chair you have certain powers, there is a conflict code if you have to adopt and all sorts of things, but when it comes to the case management I think there is a good argument to make that you can pick and chose from statutory powers procedures, because no one knows until you start sitting what sort of problems may come up in your cases, but I think the government of the day has to decide what sort of power you have in the first place.

SPEAKER: Well, Frank, you were asking about part-time members, I'm not quite sure what you want to hear about it.

MR. FALZON: Oh, I'm just more curious about tribunals, I see some around the table and ask what are the sorts of legal or procedural or remedial questions that might be applicable to those of you who are not full-time chairs but rather chairs of tribunals that have part-time members.

MR. McKINNON: And there are some tribunals in the province I don't know that -- there may be some representative here, your cases on a very ad hoc basis maybe four or five times a year, but they may be significant cases, they don't have any resources to generate their own rules so there may be different concerns there as opposed to the tribunals that have full-time staff.

THE CHAIR: I think your tribunal has something I think even in a different ilk than part-time, client appointed.

SPEAKER: Yes. We have actually got the arbitration model with appointed members on each panel and then a chair appointed by the ministry. I find it -- I'm the only full-time person and I find the big issue is usually consistency, making sure that you keep everybody informed. The only times you can meet is on Saturdays. Phil's opening point, I wonder -- and Frank's opening point too, I wondered if there isn't some kind of a need for the chair to be able to invoke adjudication mechanisms for being consistent. If, for instance, you've got a tribunal where you are hearing appeal after appeal after appeal on the same

exact question where you have got sort of arbitration style panels and there's very little likelihood of judicial review or the court rectifying it because the parties don't have the money to take it there, surely there must be some way to say this is our policy or summarily dismiss these things when they come up. You know, if you're getting the same question over and over again. How to offer some kind of consistency to it by the board considering it as a whole by resolution. I'm not sure, that may fetter individual decision-makers, I don't know what the limits would be on that, but it does seem like a deficiency in the system if you are not using the courts.

SPEAKER: I would just like to address the review of the legislation, I know some of the smaller boards when the legislation obviously doesn't seem to work for the particular class that you are dealing with I would like to see some kind of mechanism in place where that can be addressed in an efficient speedy way. Particularly with our board, we are dealing with very unsophisticated mostly unrepresented appellants and one of the legislative provisions is for a 30-day filing time and I think that's caused quite some difficulty for some of the appellants because of their unsophistication. I think it would be good to change that from the board's perspective but there is no mechanism or doesn't appear to be, to really address these in a speedy efficient way. So it's been in place for some time, it's obviously difficult for some appellants and it just seems to me for unsophisticated appellants that go two days over the 30-day time limit it just seems an unfairness or at least it should be up for discussion or at least a mechanism where those kinds of things can be discussed. So I would like to see some kind of mechanism between the boards for discussion on specifically legislative items.

SPEAKER: I just wanted to harken back to Allen's point about consistently in an arbitral kind of setting. There is no better model, I don't think, than the Tenancy Act arbitrators. Because significant work, and I'm sure Gillian knows about that, has been done over the past few years in working toward consistency without trenching on their independence and fettering their discretion. Because we have and still continuing to -- going over in my area, manufactured home parks, we have people who howl is probably the best word, stakeholders who are really concerned about some of the arbitrators. And they say, so and so arbitrator is always against us and always deciding against the park owners and on and on it goes, and of course we can't, you know, call them to heel and tell them what to do, so the way that it's been worked is they have their own counsel and their own group of arbitrators and they work and work through issues, work through problems work through -- and it's taken a lot of work but I think it's a very good model of how they've managed to get arbitrators to think on a consistent basis, to think on a systemic policy basis where it can be done and to apply those policies to the facts as they come up. And I think a lot of good work has been done there so that's probably a good model to look at. And then if you got a few that really don't seem to be cutting the mustard then you have to either not assign cases or find another way to disappoint them. Sometimes you do have to fish or cut bait.

MR. FALZON: Well, it's very interesting to listening to people's comments on the whole issue of whether some ability to invoke a form of stare decisis at the tribunal level, I think some people are concerned about it because if you pick the wrong case to be the binding precedent you're stuck with it. And I think many people too are, as Judith pointed out, there is a concern that if you do pick that case as your binding decision then it might be more likely to be judicially reviewed. The way that some reform proposals have structured it is to simply identify cases if they are going to go to court let's be the ones ourselves to pose the questions and actually have the power to state the case to the court on a question of law

or jurisdiction that's troubling the tribunal. Some tribunals will look at that and say, well, we want to be the ones to make the decision and then if it goes to court we want material deference on the issue. On the other hand, if you want to bite the bullet and make the decision that it not be binding there is sort of a bipolar aspect to the discussion. So this whole issue of being able to -- for the chair or somebody to be able to pick a case that's right for this being it, you know, finality, fish or cut bait, whether to go to court but we're not going to deal with it another times, whether that's something that has -- or what people's thoughts are on that, perhaps if we could talk about that a little more.

THE CHAIR: Frank, I'm assuming your reference to bipolar was not a clinical one?

SPEAKER: It seems to me there was kind of two aspects, the stare decisis, one was where the people who were getting the decisions didn't like the decisions and kept coming back, and then the other one was the consistency problem that you have with your own board and trying to control it. And I guess I just wanted to comment I think the rules and the tool box and everything is really good, I'm not sure it's going to solve all the problems, because some of the things like consistency within the panel is to make sure you provide adequate training to your board members so that the board members understand the need for consistency, why consistency is important, the things they should be aware of, that they are aware of the board's decisions themselves. So I think it's really important that part of the process we all keep in mind adequate resources, so having all the tools in the box isn't going to do it if you don't have the resources to learn how to use the tools. So I know it's probably outside the scope of your paper but I think that's part of it all and I think that's part of the sometimes the consistency problems with inboards is just making sure that you have opportunity to meet as required so that your board members are educated and trained.

MR. FALZON: Frankly it also links directly in with appointments issue too because you can have the best tools in the world but having good people to apply good rules is sure a lot better than the opposite.

SPEAKER: And on that issue of part-time members as well, on the consistency issues, I don't have the time to read the decisions of the other members. In fact I don't get paid for it either. It is a bit of a problem in terms of, you know, just barrel ahead and do the work that's on your plate, it's already a volunteer position based on what they pay us. And on that point as well there are other smaller issues in terms of just how the administration of it all works. We do most of our work on your own computers which nobody compensates us for, we print out on your own paper which nobody compensates us for. They do pay postage and that's great. But you know there's things about how you operate that makes it a pretty volunteer operation in many respects. And I'm not sure that resources are going to increase, everything we hear says otherwise, so as much as the issues you are raising are important, I don't know how much they would actually get on the table.

SPEAKER: I just wanted say as well that while it's very attractive to -- at employment standards we have a system of having a leading decision and so on a major topic we'll -- one of our decisions will be designated as the leading decision and all adjudicators are then expected to have a good read of that, and to be pretty well researched and clear if they intend to go down a different path. And I think that works well. I would be a bit reluctant to see anything stronger than that, because I think it is important for any board from time to time to take a look at its policy and decisions and to decide whether or not the time is still that that's decision is still the best decision based on the best time and thinking that's available. So I guess I'm a bit suspicious about too much consistency. I'm not sure it's best for our business.

SPEAKER: I think Phil's challenge to think of it in terms of rules and procedures is a useful one and I'm just sort of thinking that through myself. And I'm struggling with whether in substance there is a lot of difference from an administrative justice point of view. We live and die by our procedures in a judicial review sense, the natural justice, administrative fairness of the rules, and that's one of the key differences between us and the courts. A superior court judge's decision could be set aside because of an error giving instructions to a jury, but mostly procedural issues are not reviewed, unlike ours. And it also occurs to me that if you looking at powers and assigning powers to statute or some other government instrument to tribunals, there are some risks from -- perhaps a risk perhaps they are benefits from the government's point of view, and I have in mind the Montreal bar decision of the Quebec Court of Appeal, and in Quebec most tribunals come under something called TAK, under the Attorney General or whatever it is.

THE CHAIR: The mega tribunal.

SPEAKER: Mega tribunal. There are a few exceptions to it but virtually all the tribunals in the province. And it's difficult getting through the French in the appeal decision, but it seems that one of the themes there is that the more tribunals become not part of government but more they become attached to government, the closer they become to government, the more the courts see them as closer to being courts, and the more they are looking to give tribunals independence equivalent to the courts. So if we are talking about creating giving tribunals powers through a statute or some other instrument powers such as stare decisis for example, I think again it's -- there is a lot of things to look at, but I think that that moves tribunals closer to the courts. Whether that's a good thing or not is a debate, but I think we should be aware at least of the question. And two other aspects to it and it may be a big earlier for a segue into the afternoon but Frank and I were talking about during the break that from the point of view the judicial review, if there is a statutory instrument and practice and procedures or powers and we make an error interpreting that, is that subject to correctness standard or error of law going to jurisdictional standards? And I gather from Frank that the cases are mixed. Speaking from my tribunal I don't have that problem now. And a final point again perhaps relating to the afternoon is the application of the charter. And I don't know, I just simply don't know whether there are any tribunals that are not part of the government of the province for the purposes of application of charter, but if there are and then the statute comes along, that's one of the indices that the courts would look at or anybody would look at to see whether the charter applies to that tribunal.

MR. FALZON: That's a slightly different question that tribunal is going to apply the charter.

SPEAKER: Yes, yes.

THE CHAIR: Just to round out John's comment that the Court of Appeal Barrow de Montreal decision, I don't know if anybody's made their way through the untranslated decision, but that's quite a controversial decision of the Court of Appeal in Quebec and I think it's fairly recent. And not to get into issues of appointment and accountability, but it was raised as a role of the chair. Apparently the case dealt with the court not allowing or upholding not allowing the chair of the mega tribunal in Quebec to undertake the performance evaluation, reappointment and remuneration of the various tribunal Christ, and saying that that was some form of conflict and those kinds of issues needed to be dealt with in a separate forum. That's my understanding of that case. I don't know if anybody else has had a chance to analyze it. But it's getting a lot of interest in Quebec. I guess nobody has.

SPEAKER: I was wondering, the federal government floated a draft statutory powers and procedures act four or five years ago and it just disappeared, and I was wondering whether it was flawed in concept or what the reason was for its disappearance. Apparently it doesn't seem to be is there and discussed.

MR. FALZON: I've read some things about it but I don't know whether Phil or Sandra might have any greater information than I would. My understanding was that there was money for the project and then there wasn't money for the project. And -- but the Alberta Lawyer Forum Institute picked up a lot of the substance of it, but what they didn't like about it was the sort of uniformity so that was appropriate to Joyce's comments, said we'll take all this good stuff, but we'll let people opt into it as they like, subject to an Alberta administerial approval idea.

SPEAKER: I remember looking at the federal piece of legislation, it was a very detailed statutory act. And I was concerned if -- we would be concerned because it was so detailed, obviously you would lose your flexibility.

MR. FALZON: And that relates to the point that John made too, if you make a mistake in applying the statutory procedure act that's going to be an error of law that disturbs the decision, the real test ought to be whether the decision was fundamentally unfair. I mean, that's something we could address in the drafting, but it's completely valid as an issue that one ought to be concerned about in these sorts of exercises.

SPEAKER: Well, you could address it in the drafting assuming that you know about it, it assumes that you know that you made an error.

MR. FALZON: You could say the test on judicial review would be whether or not there's been fundamental unfairness on the hearings, so that a technical breach of one of the provisions didn't give rise to an error.

SPEAKER: Well, yeah, that helps solve the problem, but it doesn't solve it entirely.

MR. FALZON: No.

SPEAKER: For many months some of us were fixated on the Ocean Port Hotel Court of Appeal and the overturning of that by the Supreme Court of Canada and we now have the reasons, with respect to the matters of institutional independence. And the characterization of administrative tribunals in that decision as I read it, raises a question in my mind as to what extent we have to factor the highest court's view of how administrative tribunals, what their nature and function is in this whole review process.

MR. FALZON: This is almost a throw-away line where they said, oh, well, they're just instruments of government policy anyway. And it was a very interesting comment from a couple of perspectives, one is that if you compare that comment to I think Madam -- Chief Justice McLaughlin gave a speech to B.C. CAD around the rule of law and the role of adjudicative agencies and enforcing the rule of law and how -- the partnership with the court system. It was a very differ flavor to that ex cathedra statement than other line in Ocean Port. But more significantly still perhaps, when you read the Leggett report, they proceed on the fundamental premise that it almost isn't even worth discussion for them, that, look, tribunals are rights determining agencies, we should just treat them that way and not ring our hands around this whole executive relationship. And the way that I'm understanding Ocean Port or at least choosing to understanding the notion in Ocean Port is the notion of parliamentary supremacy is the operative principle for tribunals that don't adjudicate

constitutional rights, and so to the extent that tribunals are subject to the legislative wish that it be less independent than the courts, the legislature can do that. So to that extent perhaps the statement makes sense. But I agree with you, Bob, that the fundamental question of any government has to ask when it creates any tribunal is what is this thing? What is it for? Is it truly an extension of government policy or is it meant to adjudicate rights? And the truth probably is that more tribunals comply more to one model than they do to the other, and that's why it makes sense in having these kinds of discussions to avoid the sort of uniform conception of tribunals that doesn't take account those differences. But there are some boards which deal with individual liberty, which you probably wouldn't say that the decision to put somebody in a psych ward against their will is an extension of government policy. It's a pretty classic adjudicative function that deals with people's individual liberty. On the other hand there are policy boards probably some of which -- on the policy side which has a fairly close connection with government policy, I would think. Maybe you would say that, well, that's Securities Commission policy, but it's more akin to the kinds of function --

SPEAKER: Yes, definitely policy, there is some parts of what we do that are definitely policy h driven in the classic sense of government policy.

MR. FALZON: But I mean just speaking for myself, I don't view that statement as particularly helpful in explaining all of what we have to do.

THE CHAIR: It does seem to leave the door open to looking at the nature of tribunal's function. And I think, just editorially, the folks around the outside of the room, I don't think the debate is so intense that you can't also wade in from time to time if you feel like it. Don't feel excluded.

SPEAKER: Well, I can say a little bit about the challenges that have happened to part-time tribunal and members and having extremely variable volumes and cases. We have about 15 part-timers and either it seems we have eight cases going at once or we have no cases going for a period of four months. So we can't solve our problems around improving the knowledge base of the tribunal members by having a smaller numbers because sometimes 15 isn't sufficient to keep all the cases populated. And at other times we have people who are going for eight or 12 months without being on a case at all. We put a lot of effort and energy into keeping people educated and supported and so on and so forth, but I've come to the conclusion that for a tribunal of that nature the more that can be spelled out in terms of policy and particularly procedural stuff, the better off you are. Our statute leaves the design of a process of a particular case to the particular panel. And what that means is that a lot of time gets wasted dealing with admission to the process questions that really could be better spent spending more time looking at the substance of the issues. So I'm a believer that particularly for a tribunal of that nature it's important to spell out as much as possible. I'm not sure, though, whether that should be in a special statute or whether that should be a characteristic of the statute that enables the particular tribunal. And my final comment would be that I think there are some things that must be common across all tribunals that have to do with confusing independence of adjudication with independence of behavior. And some of the behavioral issues could surely be dealt with in some overriding statute.

THE CHAIR: Behavior at the hearing?

SPEAKER: Well, behavior of adjudicators in terms of timeliness, delivery of decisions and those kinds of things, which are often -- and please understand I'm not commenting negatively on my tribunal members particularly, but I see a lot of confusion

about people standing behind independence as an explanation for behaviors that have nothing to do with adjudicative independence.

THE CHAIR: Good point.

SPEAKER: I just wanted to add that part of what we look at in terms of looking at the judicial -- Bernd raised about the role of the chair and do you have the authority to decide who's going to sit on what panel and to make some of those other decisions. What we have been lacking is clear direction to people who are appointed to boards, what their role is. And I think that's really true with the part-time board members and I think that's part of what John is referring to as some of the confusion that arises. I would like to see it made very clear what the authority of the chair of the board is. And I think that it would be a great service to board members to have their expectations spelled out for them so that they know when they get to the boards. I know when the board members came on they assumed they were a board of directors as well as the board of adjudicators. And I tried not to disabuse them of that in too heartily a way, but at the same time it was very clear that they didn't have the decision-making ability that I did. So I think that that needs to be clarified. There has been an example, a model of having the duties of the chair split with an executive director.

THE CHAIR: Duty of the chair, what?

SPEAKER: Split, yes, with an executive director. And that might be a model that could be examined to help relieve some of the tension that falls to the chair who's dealing with the board members on the adjudication side as well as on the administration side.

MR. FALZON: On this model would the chair also be subject to the executive directors' judgment on matters of administration?

SPEAKER: No. I believe that the executive director would be reporting to the chair. Now, I'm not that familiar with the model, obviously Allen would be familiar with the model that was used and it is used in their board. And I'm not saying it would have to be, you know, used in every instance, but if there are problems about the legality or the propriety of the chair being involved in that kind of role with the board members, that would resolve it. Some of the issues that have been raised I think get resolved also by performance of --

THE CHAIR: Are you talking about the executive director carrying out a delegated role by the chair or actually split by way of the statute?

SPEAKER: I don't have the answer to that, Bernd. I don't know which way it would work. I think that it is an interesting model to pursue and I haven't talked to Allen about how well it works. It looks as though Allen may be able to --

SPEAKER: This is with the Environmental Appeal Board and the Board of Appeals Commission, they have a joint chair, they have a joint executive director, they have a joint supportive staff of seven or eight people. The chair has all of the adjudicative responsibilities and all of the statutory responsibilities that one finds in the various legislation that give -- are given to it by both tribunals. The executive director carries out, without any statutory authority, all of the management functions of the tribunals and supervises the staff, ensures that there is training of all the board members, reviews decisions for purposes of policy only. In terms of a management tools it allows the chair to focus more on the adjudicative end of things and allows for a professional management model to be introduced into a tribunal such that when there are matters that are being dealt with the ministries or with other agencies that person is there to deal with it. And you avoid putting your chair in

any kind of conflict situation because the executive director can deal with those things and making actual decisions. I think it's worked very well and it is a model this can be considered.

THE CHAIR: Is it kind of a standing arrangement that the executive director reports to and gets instructions from the chair on key issues that happen to arise within the context of their own --

SPEAKER: I think they give direction to the chair --

THE CHAIR: I think we are at our lunch break. If this afternoon's sessions don't generate the kind of debate that will fill the allotted time, we can come back to this topic which the subject of some interest.

SPEAKER: I just wanted to say we are an example of a regulatory tribunal with part-time commissioners, part-time chair and the separate chief executive officer. They were one and the same until a particular political issue came to the fore a few years ago and then they were separated. Over the history we have had both models. So it does seem to work fairly well. We do have governance policy which sets out the role of commissioners, chair, chief executive officers. The chief executive officer like the other example is in charge of staff, all the management aspects and the budget and delivering on the budget. And the example about the litigation actually just came up last week in our office because a particular panel wants to litigate and because the chief executive officer wants to-- not litigate but at least start an enforcement action which may lead to litigation, and the chief executive officer because he manages the budget is -- generally would want to pick and choose what might lead to litigation because we have very limited resources on that. So there is a tension there. The chair was trying to figure out what to do and I'm not sure how it's been resolved, but I would think that the chief executive officer would have that influence because of basically the budget bottom line.

MR. FALZON: I would hope that your legal counsel has an easier time finding a clearer answer that I did.

SPEAKER: Very quickly, we are an order-in-council board and we have a performance management process in place and we have productivity measures that we have in place. The fundamental problem is unless the government acts on the recommendations of the chair none of that matters. And unless we have memorandums of understanding or we have some sort of commitment it's a total waste of my time to sit down with members and try to mentor them and to try to get proper performance from them if they are protected -- I don't think I need to explain.

THE CHAIR: I wondered when we were going to get to the point of the performance and management issues butting up against the appointment issue.

SPEAKER: I just was going to say for all of you who are lawyers know of course that's the way the Law Society is run, there is an executive director, which is an employee of the Law Society, so the chief employee of the Law Society obviously and the chair of the adjudicative panel if you want to call it that, the president of the law society. And we, of course, have elected benchers which probably are a different from anyone else, but there's very clear distinction in the roles between the president and the executive director and it works quite well. The benchers discuss what the policy should be, the executive director is in charge of putting the policy into place. And the executive director has a number of

functions under the statute that are assigned to him which he can delegate to staff which are carried out by staff, and many of those decisions can be appealed to the benchers and dealt with in various committees of the benchers. So that's another model. And one of the things that I think works quite well at the Law Society, actually, is that division of power.

(LUNCH BREAK)

THE CHAIR: I just want to kind of use the prerogative that I've been granted, ruminating a little bit, sitting up here I'm constantly thinking in the morning whether and how useful this is and are we getting to the appropriate depth in the issues and is everybody having a chance to be heard? And I think the Attorney said this more eloquently, but the uniqueness of this is that there is not a bunch of options already on the table, that hopefully the kinds of discussions and issues that we surface today will actually be reflected once options for debate are brought forward. So -- and again looking at my background I am a person who actually believes that public participation and debate is good public policy per se in and of itself, so I'm quite happy with the participation here today. I hope others are. If anybody wants to push any issue to a greater level of depth, let's look for opportunities to do so. Having said that, I will now turn to the next issue on the agenda which is entitled, fairness, timeliness and certainty of outcome. I gather the policy -- this topic deals with the policy considerations which underlie issues of levels of review, appeals, multiplicity type of issues, and of course the mechanisms by which things are reviewed and appealed. And I won't say any more than that other than having Bruce, who is the lead researcher on this issue, elaborate on his area of research.

MR. McKINNON: As Bernd mentioned, the issue in this area on appeal is quite nicely summarized on the heading, fairness timeliness and certainty of outcomes, because they are certainly some concerns and issues that need to be addressed in the issue. The question is how to achieve the appropriate mix of structure of appeals used so that we achieve finality in a timely fashion but also get decisions on the merits that are fair on the merits. As the Attorney mentioned during his lunchtime address to us, there's also the issue around having user-friendly access to the appeal system. There are a wide variety of appeals and review mechanisms just as there are a wide variety of decisions in the first instance. I think that's important to bear that in mind, it obviously has some sort of impact on what sort of appeal and review mechanisms we put in place. For example some, as we all know, initial decisions are made literally in minutes, others takes place after lengthy very formal hearings that can go on for weeks, some decisions are part of a high volume operation, others are made by decision-makers who only maybe make a few a year. Some decisions can effect the most profound thing probably for any person, their liberty, other things other decisions are much less significant in terms of the day to day life of an individual. So from my perspective and if anybody disagrees please say so, I think it's quite clear that as in other areas here, one size does not fit all. Having said that, there are I think, a number of systemic issues that are worth addressing and I'm hoping to receive some input on this afternoon.

And I'll just list some of the issues that I think are worth spending some time on. There are a number of other ones and hopefully they will come up in the discussion as well. I guess the first and most obvious one and what initially was driving this area of the project is how many layers of review and appeal are appropriate and perhaps sort of more fundamentally what factors should we take into account in deciding how many layers are appropriate. Another issue is how do we decide whether it makes most sense to take an appeal to a tribunal as opposed to the court. On any appeal there is always this wonderful question of how much new evidence is going to be heard and we mentioned this morning,

the options range from absolutely no new evidence all the way through to entirely new evidence and with things in between. Another obvious issue is grounds of appeal. To what extent should they be restricted to appeal purely on points of law, the other end of the spectrum one could have appeals of course on law and facts. And the final general question that I want to leave out there is, how useful is a power of reconsideration? Certainly some initial decision-makers, some appeal bodies have that power. I'll be interested in hearing your comments from your practical experience on these issues. Many of you sit on appeal boards so I'm anticipating that you've got some thoughts on the questions.

THE CHAIR: All right, Bruce, thank you. Open for comments.

SPEAKER: Just on the power of reconsideration, we have that in our legislation generally to vary or revoke any decision that is made. We also in our appeal provision to the Court of Appeal have a section in there that reads that we can make any other decision despite a decision of the Court of Appeal, if circumstances change the commission can make another decision if it thinks it's appropriate. And that's just to accommodate, I think, the varied circumstances that sometimes can happen in the marketplace, the dynamics of a securities market. So we have two tools in our legislation. The one that's in the provision relating to appeals of our decisions going to the Court of Appeals, we don't use that very often unless there is some really dramatic change, it's generally not necessary to do that. We often use our reconsideration section with respect to a variety of decisions including decisions that result from the hearing process. So the reconsideration provision generally is used often with respect to a variety of administrative decisions that don't involve the hearing process, but occasionally it's used in the hearing process. And it gives us some flexibility to reconsider things, particularly after a period of time. Sometimes let's say we put in a cease-trade order in a particular time but then the circumstances will change, the parties always have the opportunity to us to ask for a reconsideration. And because we have this public interest sort of regulatory focus, it allows us to act even if let's say time periods have expired for sort of normal appeal periods it allows us to address it. It's very useful.

MR. McKINNON: Some of the situations you've described where the circumstances change or there's been a passage of time and I guess again circumstances may change as a result of that, how often do you use it where the only real reason for using it is someone convincing you the first decision was wrong or needs to be rethought? Do you use it much there or --

SPEAKER: I'm trying to think back of examples. I can't think of one we have done that, although we might have. I mean, sometimes during the hearing process parties -- we make parties aware of those provisions and so if something comes up often we'll get applications for variations of our old orders during even the course of proceedings. I mean sometimes we have to make rulings and orders during the course of proceedings and there will be variation applications throughout those proceedings so we often do vary orders. Say listen -- sometimes we don't know the impact, we don't understand because we don't -- all the information is not in front of us, we don't have a complete picture of the impact of our order, but we have to make an order to protect the public interest. So as a result of getting more information from the parties then we are in an ability to reassess the situation and so we use that tool actually quite a bit. But not so much after the formal hearing process because hopefully we have gone through it right the first time.

SPEAKER: We also have the ability to reconsider our decisions. Normally a matter would be considered only once. We consider at the request of any of the parties or on our own motion. The issue for us has been the act doesn't specify a time limit for that power or

request for leave to recover. And we have been faced with a number of situations in which ministry of labor has requested that we reconsider decisions some six, eight, nine, ten months after they've been rendered. And of course this causes considerable concern in the business community because they are not -- they don't like that uncertainty and they don't like the fact that for six, eight months the government has kept their money and not instituted the process. So we've actually requested that the ministry provide a specific time limit. What has happened up until now is that we consider each application and consider whether or not we should grant leave, even though it's very late. Frank's been involved in a number of our cases and this is one area in which we have actually changed a policy direction of the tribunal. Our first half dozen or so of these decisions the leave for reconsideration was denied because of the time. They were six or so months after the decision was rendered and our panel decided, no, they were legally out of time to request leave to reconsider. And what was a real change of direction for us we decided that even though we had a very lengthy and unexplained delay in making the request, we would consider whether or not the issue was serious enough for us to grant leave to recover it. So we've tried -- we've changed direction on that. Of course, still I think our preference would be a specific time limit in the act that would provide a clear signal to parties about, that they couldn't linger, that they had to decide whether or not to request a reconsideration. And I think there's been only once in the last few years where even after a reconsideration decision we revisited the matter and changed the decision because of what we thought was an error in the reconsideration process. So it certainly -- the reconsideration power is very useful, but I think it has to be used with real sensitivity around the certainty of outcome and the timeliness issue. There is a real struggle there between those two issues.

SPEAKER: Yes, Building Code people, certainly the authority to use reconsiderations is essential. It's a part-time board in that we only meet once a month, probably the total number of appeals we hear in a year is about 60 to 70 but some of them are fairly lengthy and they all are very site specific nature and very technical in nature. And while we don't get a lot of requests for reconsideration, certainly as I say, the decisions are based on written submissions and being highly technical, if you don't have all of the information, some information the applicant doesn't feel important at the time and may resubmit later, so there have been occasions where the appeals have been reconsidered and the decisions changed. And I think when we have got technical issues, it's very important to have that.

SPEAKER: One of the things that I think is useful to do is separate out different ways in which reconsideration powers can be used and decide whether an agency needs any or all of them. Sometimes reconsideration is just to deal with things that you would call an acknowledged mistake, I mean, the award says $1,000 in the remedy and everything leads you to believe that it should be $10,000 and somebody made a mistake. That's one kind of reconsideration. Another kind is the changed circumstance reconsideration. A third kind is in effect a substitute for an appeal. And a fourth kind is the way that I consider the reconsideration powers used at the labour board and with leave, and it's the board's way of saying we'll grant leave on the policy issue, we'll set a bigger panel, and it's designed to provide guidance and consistency in a multi-member panel. If it's and you will an alternative to judicial review, so if an important issue goes out to judicial review it's one that the board really has considered rather than one that's a decision of an individual member. And I think sometimes it's hard for people to understand which of those notions of reconsideration is in play at any given time and it's useful to separate them out.

SPEAKER: We have two ways to reconsider our decisions. The statute provides for a reconsideration on the basis of new evidence that's material, substantial and that leads to the due diligence test, a very narrow window. The second way we receive applications for reconsideration is an error of law going to jurisdiction including breaches of natural justice, which is essentially a TJR, if you like, they can come to us and make the same application they would make to court. And we in either one of those we don't permit a rehearing or reweighing of the evidence, rearguing of the case, and I think implicit in it is that -- implicit in the narrow window that both of those define is the finality of outcome. And I notice you've got certainty of outcome here and finality of outcome I think is equally as important. The second thing is I think implicit in it, again, bearing in mind we are speaking among colleagues, is that we are not always right, but again there has to be finality to it. And the system goes on and people -- the decision is within the patent reasonableness test then that's satisfactory.

THE CHAIR: One question that comes up for me in listening is and it's a question dealing with the scope of the AJP in general, to the extent that it's looking at administrative justice mechanisms, would it also be competent to comment on ministry internal review mechanisms before it gets to an external type of tribunal and the layering that might happen there before an issue actually come to an internal review tribunal and --

MR. McKINNON: Certainly from my perspective when it's talking about multiple layers of review, yet the project is focussing on the 60 odd tribunals listed in the terms of reference, but certainly the tribunal is the final appeal level and it's the fourth, five entity to revisit a decision and the several of those were internal, that's certainly of some interest at the very least.

MS. MACKAY: I think some of those will be within the core services review so it's definitely an important issue. We felt that to include the statutory decision-makers and some of the internal government processes in this project at this time was biting off a lot more than we could realistically handle. I think we had a pretty full agenda anyway, but it's definitely an issue we hoped that some of it would be dealt with in the course of review and it would be something that we would look at farther down the road.

SPEAKER: Perhaps I could address the issue of the appellate layers of decisions, because I think that's one certainly from the point of view of a lawyer in private practice it's something that affects its clients enormously. And Maureen Baird and I were talking about this last night so it's still relatively fresh in my mind, when you have a client who feels they have been aggrieved by a decision that -- the administrative tribunals decision, if there is a decision, if there is an appeal to another tribunal that's somewhat similar but it's an appeal tribunal it's almost a no-win situation. If they win at that level then they conclude that obviously they are right and it was a waste of their time and money and everybody is stupid. If they lose at that level they sort of expect to lose because the system, that appellate system within that stream has lost its credibility with this client very often. The courts seem to give credibility to that decision that's being made, regardless of which way it goes. That often clients, at least in my experience, often clients feel that the negative decision is legitimatized by the courts saying that they, the client, are wrong. Or ultimately the court's recognition that the administrative decision was wrong is a vindication of their position. The courts seem to add a credibility that doesn't exist by multiple layers of appeal. And, in fact, the -- at least in my experience clients will often for additional expense, continue to go until there is a judge that tells them what perhaps they should have been told or perhaps even were told three years previous by an administrative panel. So I think, speaking for myself, that there has to be a really good reason for multiple levels of appeal beyond the fact that

they are there. I'm not sure if -- my understanding is there's no really clear -- the rationale for multiple decisions in any one area isn't necessarily, it -- there was no greater decision about why it would happen, it just occurred. They developed statute by statute.

MR. FALZON: That's an interesting observation, because I would have thought the practitioners who see it just the opposite in some ways, because if the court is your only remedy from whatever the first instant decision the courts are more likely to be deferential to that decision, unless there has been a flagrant error, whereas the appeal tribunal is often set up to provide a more detailed and searching review than you would get if you went to court, so it's interesting that you would couch the appeal tribunal as being almost an impediment to justice, when I think the fundamental purpose for a lot of them is to provide people with more access than they would get if they went to JP.

SPEAKER: I don't think it's a less expensive route to go to appeal, and whether we like it or not it doesn't have the credibility that the courts give it, at least in my observation.

SPEAKER: I guess it probably depends on what the constituency base it is that's using that service. I'm thinking if you are trying to decide how many levels, I think you have to look at the function that each level is serving and what kind of decision-makers are available at each of those levels to make the decision. In the case of the B.C. Benefits Appeal Board the tribunal level, there's thousands and thousands and thousands of decisions and the number of decision-makers available to deal with the whole questions of law at the local level, there's just not enough people around, I don't think, with the skill set to be able to render those kind of decisions so that you could get at them, at that level a complete decision that would stand up on a regular basis to a JR kind of application, if it came to that. And so I think that having a tribunal process that allows lay persons to essentially render rough justice, and then the next level to be more concerned with that of questions of fairness of law is much more appropriate, because the only things that end up at that level are those that have sort of already gone through the sort of main fact-based kind of stuff that quite often gets resolved. Obviously not every decision that goes to a tribunal goes up through the -- to the appeals level. And also, there is within the ministry itself a reconsideration process, so that you've already screened for the social worker error – the kinds of error in which they applied the policy incorrectly, so that level has its purpose in terms of getting rid of some decisions are just factually wrong or they have interpreted from the ministry perspective what the policy is. So just looking at the volume of people that have to be served, the availability of people with the training to be able to deliver the decision and what kind of decisions they can be expected to make, to me is critical in trying to determine how many levels you want to have. Because you don't want to have to have a bunch of lawyers or a bunch of specialized boards if you've got thousands and thousands and thousands of decisions to make.

SPEAKER: Going to the depth of inquiry, the B.C. Marketing Board hears appeals from the agricultural boards and we have a trial de novo in each case and I think that it adds a certain level of credibility to the appeal to us to have a trial de novo, which is a complete rehearing, and then the B.C. Marketing Board has the more public interest that it's keeping in mind as well in that hearing.

THE CHAIR: Thank you.

SPEAKER: I guess I should comment on multi layered appeals, because certainly the Workers Compensation system probably one of most complex processes in terms of getting, meeting the objectives of how we started this discussion which is fairness,

timeliness and certainty of outcome. And I think part of the rationale for that is it seems to me a bit of a piecemeal system, bits and pieces were added on without anybody stepping back and looking at the whole structure and saying how do we achieve those very objectives? And so from my own experience I would be hard-pressed to indicate a criteria by which you could have a multi-layered system unless you put time lines within each decision-making level, and if you do that you know the only way you can answer and oblige yourself to follow those time lines is to have the ready staff to make the decisions and that's a cost issue. And it's a cost issue environment that we're in as well. So I think you have to think about the implications of that. Our system, and I think Brian and John may have different views and they are probably equally legitimate as my views, but I think that the problems in the Workers Compensation system are a variety of issues. And I think most of you have similar problems in that the volume that comes through the appeal systems is directly proportional in my view to the volume that comes in to the original decision-makers within whatever scheme you operate in, whether it's the ministry program area or as it is with us, the board itself, the WCB making decisions. We get on average between 60,000 to 80,000 Workers Compensation claims and that's just the workers area, there are also employer appeals, prevention, assessment issues, et cetera, so there's large volume of initial decision-makers. And if we don't focus our efforts in ensuring that those people are well educated in terms of their responsibilities, understanding the law, the legislation, the policy that guides them, we are just encouraging an increased volume into the appellate structure. So I think you start there and you focus your energy and effort in making the best decisions you possibly can, recognizing that with the volume that those people deal with that there is going to be issues and that you have to provide an effective mechanism independent of the organization to resolve those disputes. But I see cases that have gone through our system and I'm sure Brian and John can speak to this as well, where we have individuals that are so angry at the end of the day, that administrative fairness is not within their vocabulary. They've gone through the initial decision, they appeal it to the review board, the review board has taken the position that the board policy doesn't guide their decision, so they can make their decision arguably. It then gets appealed to the appeal division and the appeal division has generally taken the view that policy guides them, but it is a guideline and can be altered for unique circumstances. And then there is the medical review panel that is staffed by doctors. And they say what's board policy? So it's in terms of certainty, in terms of time limits, in terms of outcome, I would say that the system is really broken. And I think the fact of layering is an excuse for trying to resolve the immediate problem. Rather than stepping back and looking at the whole structure the tendency is to put another layer in and think that's going to resolve the issue.

SPEAKER: Could I just follow up? I think that disability management requires you to take into account timeliness and what a lack of timeliness does to individuals. It's very well known that if people are off work for six months only a percentage of them will ever go back to work. If they are off work for a year a very much smaller percentage will ever return to work. So is it fair to someone to give them three levels of appeal because they'll never go back to work because it's taken them three years to get through that or is it fairer to give them one level and get it done quickly even at the expense perhaps of some process or the expense of some thoroughness, but at least the finality is there. I think those of us in disability management might argue a little bit different than other people would because of the impact it has on the client.

THE CHAIR: Vern, you had your hand up a bit ago.

SPEAKER: I'll just throw in a little bit about the commercial appeals division, it hears appeals I can never remember, 15 to 17 statutes, and all of these have different kinds of decisions being made under them, and yet the commercial appeals division applies the same set of rules to the appeals decision, which is quite interesting and has come up from time to time. Sometimes the decision that is being appealed has had a lot of the indicia of fairness associated with it and sometimes they have less because of the administrative nature of the decision. And that's just something I think that when you are looking at what kind of appeal you have, you might need to look at that first line decision-maker as well.

MR. FALZON: An area of depleting resources, it's actually a different call, a couple of us were talking about it this morning, but it's one thing in your first line decision-maker has a resources to in 5,000 cases a year provide excellent procedural fairness and, which may then lead to one conclusion with respect to the necessity of an appeal structure, on the other hand if you've got to deal with cases in volume as has been pointed out earlier, you may not have the luxury of procedural fairness in first instance, which then may theoretically tend either in favor of an appeal or in review to a court, but in the procedure problems you are not going to want court review very often, and therefore some other structure comes in handy for dealing with those cases which are going to be a fraction of the ones that were made at first instance where some review is maybe necessary.

SPEAKER: Look at the models out there in other areas. Under the Criminal Code, for example, you don't have the ability to appeal beyond the level at which a trial has been dealt with on the merits until you get to the end and then you take all of those issues of the Court of Appeal. Although it might be a bad example it's certainly of a model which has some value which is the immigration appeal board. Decisions made at the tribunal level and then you bring an application for leave for judicial review in a court. It provides a system that has some gates that open when they need to open arguably.

SPEAKER: Well, I'll start with a disclaimer because I'm a lawyer, and that is that I haven't had a chance to consult with the admin law subsection so these are primarily my own views, and my background also is a little different than tribunals than most of you come from. I do a lot of work with self-regulating self-governing professions. But it's been my experience that where you had a hearing, where a person has had a hearing that looks like a trial, in other words, they have been before a panel and the rules of natural justice and the evidence have followed, that certainly the tribunals I deal with some of them have internal review processes and some of them don't. Some of them have statutory appeal and some of them go toward judicial review. My experience is that once somebody has been to that trial-like level they don't want to be in the tribunal anymore. They have been investigated by the tribunal, they have had preliminary decisions made about them, they have been to a hearing before that tribunal, and they're just not happy to be there anymore and they want to be in court and indeed look for ways to get into court, because they feel they are going to get a better or maybe a purer result from the court. My experience with the court is that even though we'll carefully frame our arguments and issues of mistake of laws or mixed facts and law, that the court certainly in my experience looks at everything and so there is a more complete review in these circumstances and my experience is that people like it and they prefer that. And in some ways it goes back to where we were this morning and that is that has to do with rules and procedure. And I found with a lot of tribunals that their procedural framework is very scant or very loose and when I act for them I am often put in the unhappy position of having to kind of make the rules up myself as I go because there isn't a rule when an issue will present itself and I have to do that. And so that puts the person who's rights are in issue in some respects at my mercy. And because there aren't strong explicit

procedural rules I think that the integrity of the tribunal tends to be undermined because an awful lot depends on either counsel's decision-making or on the decision-making of the administrator of the tribunal. And I find that people are wary of those things. So certainly my experience has been that once there has been anything that looks at all like a trial that people want to go to court.

MR. McKINNON: There was one area that I really would appreciate receiving some comments on and that's again from your sort of practical experience, on I don't know whether mechanism of appeal, going to the issue of how much new evidence. Some of you actually have a statutory provision that says you can have de novo hearings, a lot of you don't, there are some cases out there that have some pronouncements on it. My experience that whatever the case law is there is a great tendency or wish, pressure of some sort, to have in fact sort of allow in at least some new evidence. And it would be very interesting to hear especially from the appeal tribunals what your sense of that is, to what extent you feel it is a pressure.

SPEAKER: I think there is pressure in that if you happen -- if you are restricted to the question of law in the first instance the adjudicator kept a lousy record and you really can't put the case together and you've got arguments from a lawyer and maybe from a layperson saying, well, I put this evidence in and they didn't consider it, it becomes necessary to look into a certain amount of evidence just to figure out what the dispute is. So I think the less sophisticated in the first instance of the adjudicator the more difficult it is to be limited to a record and a pure question of law and having some discretion to at least being able to get into it far enough to define the issues is probably useful. I think that's why it happens.

SPEAKER: I would just echo Allen's comments. I think you have to be mindful of the sophistication of the first level and any kind of constraints that they are working under where a tribunal where in the first level they are working within a very tight time constraint, they hear a numerous number of appeals and the record is pretty much non-existent. So you know, I think you really have to sort of balance what kind of decisions are being appealed and what kind of appropriate process and everything the first level has to judge what the second level should be doing.

SPEAKER: If I could just add one more point, I think there is a lot of room between the totally de novo hearings and the purely question of law kind of situation and having some discretion to look a little further to define the issue without necessarily running a whole new hearing, probably the most efficient way for the appeal tribunal to deal with it.

SPEAKER: We tend to look at it more of a spectrum than an either/or depending very much on the nature of the determination before us. What the quality of that first level decision. The one thing that we won't do, though, is to allow a party not to cooperate with the first level of investigation, and then expect them to introduce all their new stuff at appeal. We won't hear that for sure. But if it's new evidence that wasn't available at the time of the first decision, for sure we will. But our I think our main focus is not to undermine the integrity of that first decision, so if someone isn't cooperating at that level they don't get to have a de novo in front of us.

MR. McKINNON: In those cases where new evidence is led in, do you feel you sometimes run into problems we hear the example of trial by ambush but appeal by ambush, in the sense that one person brings in new evidence and it is literally new to the

other side? There's ways you can deal with that, but is that a practical problem or does it not arise?

SPEAKER: The fact is it's not a problem in terms of -- in our case. I don't know if you have a different perspective on it.

SPEAKER: Yeah, with I'm the same tribunal. It's quite common that people will bring in new evidence and it's sort of an ambush. The decision-maker in the first instance in our case is often confronted with one of the parties wanting to delay the process in any event, so that when they get to our appeal body we say unless you can show good reason for that evidence not being available in the first instance we will not normally accept it. And that is not only to ensure the integrity of the first decision-maker but to ensure there is no unnecessary delay in an enforcement of an order. In our case the whole issue comes down to the payment of wages to the employee, so there's clearly often an interest in having that delayed.

SPEAKER: I kind of swing both ways on this issue because there are times when you get an issue of certainly in our of our appeal board tribunal where the record is lacking, to put it mildly, so you're kind of having to conjure up what could have possibly been the considerations in the decision, but what concerns me about changing our current way of doing things is that there really is no new evidence allowable at the appeal level, is that there does need to be some real sort of lines of what is being dealt with at each level. And in terms of fairness to the parties, if there is this moveable line so that there is discretion on the part of the appeal board to accept or not accept what inevitably I think will result in any kind of discretion is that both parties will bring everything new that they can think of to the table, especially if their case is to meet, and that you end up with virtually a trial de novo as a trial on paper as opposed to having actually viva voce evidence. And the result of that would be to, I think, move us out of the reasons for having the specialized appeal board level as opposed to having the tribunal level. And in taking this position I'm sort of mindful of the whole reason of having the administrative tribunals as opposed to having the courts and that is that there are things that -- you have to look at the benefits of a system that isn't entirely perfect and in terms of, yes, there are times when you've got on your table a case that you'd really like to have a few bits more of evidence, but if you apply to the whole system you would be opening it up to a major transformation of the time and energy to actually deal with the issues that come before you. And I say this because even without the right to introduce new evidence it is common that parties bringing appeals to add to the table issues that were never discussed either at the outset or at reconsideration or at tribunals and then all of a sudden it gets to your table and there's all these issues being discussed that the lawyer now dealing with it has thought of but which were never dealt with at the local or tribunal level. So it creates a bit of a problem if you have discretion at the final appeal board level to decide, oh, okay in this particular case we will open it up and have more evidence.

SPEAKER: One of the things that I think should be kept in mind of the nature of the tribunal and how it operates and what it's mandate is under this legislation, because as I hear around the table it's clear there are different kinds of tribunals when the parties in front of let's say one tribunal it's clear there are two parties, an employer and the employee, whereas in some tribunals you don't have that situation, for example, let's say in our hearings sometimes you'll have a public interest mandate and so while you have let's say commission staff introducing evidence the considerations for formality play a role, and that's why, for example, that ability to have the flexibility to reconsider the decisions later on plays a different role in terms of it's necessary to have some finality for some of the parties,

whereas if you let's say impose a ten-year ban on somebody in the public market he can say come back after five years and say circumstances have changed let's vary that order. So you just have to keep in mind the nature of the tribunal. And that applies also to the appeal process, you know, whether you want to vary something because it's for us it's not otherwise contrary to the public interest or it's in the public interest depending on where that test kicks in.

THE CHAIR: Frank?

MR. FALZON: It might be worth, although it's a bit of a delicate topic, to discuss the observation that has been made by two very senior practicers that sort of the presumption among their clients who may be unrepresentative of the kinds of clients that appear before your boards, but the presumption that courts are just more legitimate places to get the answers to problems than tribunals are. And it might be worth exploring to some extent whether that is true in your experience and if it is why. And maybe some of it has to do with issues around some of the tenure that courts have that the tribunals don't, but maybe some of it has to do with the point that Joyce has raised about subject matter, because I know that if the Law Society was investigating me and the issue was to do with my livelihood, I probably would eventually want to get the court to resolve it. On the other hand if you've got a specialized area dealing with economic interests that are not specific kind of direct livelihood issues or benefits or licencing and indeed, you know, the day care operator who is not going to be able to do to court let alone have the interest to do so necessarily or issues dealing with volume or, indeed, issues where it's just the question is there's been a government decision made and you know the courts are not going to be particularly accessible to people to challenge a government decision as opposed to some tribunals like WCB that makes sort of first instance decisions, government sort of not directly involved, sort of as an independent body but are making the decision of first impression. Those are all factors that seem to me that sort of play into the idea about where the client go to get justice or perceive that they can get it. I think I would be curious as to that notion of the role of courts vis-a-vis tribunals because it's fundamental in almost all the literature that you read and some of it does seem sort of academic at times and it's kind of interesting to me to hear that the practitioners taking it as a given that people want to go to court and the tribunal appeal just isn't sort of a satisfactory kind of model.

SPEAKER: I found that interesting too because in labor law, which I've practiced for 16 or 17 years now, we have been trying to keep people out of court because our view was that courts didn't understand labor law principles, and I think in labor law we are pretty happy with the way that it works in that you have a reconsideration before the Labour Board and there are some narrow grounds that you can take a reconsideration up there on. And we are pretty, at least I am pretty happy to explain to my clients that we have to win in the first instance because we really, there's no real appeal, we have got three narrow shots at a reconsideration, judicial review is way out there and an expert sophisticated standing tribunal I think a reconsideration on narrow grounds is just the ticket. Because you do need finality and you do need certainty ultimately. On questions like should this bargaining unit be certified and what's the appropriate bargaining unit, those kind of issues there is no way that anyone would want those things to have to end up in court. However, if you have got tribunals which are unsophisticated ad hoc, I can see clients saying, well, you know, I'm tired of that whole mickey mouse organization, I want to go to court and have somebody with robes on hear my story, because I think I'll get a better hearing. I mean, I can see that now, I can see what the dichotomy is there. It's a three-dimensional issue between sophistication and quantum, obviously quantum and as you say livelihood, those issues play into it so I

guess it's a free dimensional issue as to quantum, sophistication and maybe the technical nature of the subject matter.

SPEAKER: Maureen Baird and I were speaking about this very briefly earlier, but one of the things that as a member of -- former member of the bar and now as the chair of the tribunal that I've noticed that least dramatically different with respect to administrative decision-makers versus the court is the support that the members of the bar give to judges who render sometimes complicated sometimes controversial decisions, when the decisions come out the members of the bar the administrative law section whoever it is the Canadian Bar Association will come out in support of the judges and will explain the very complicated circumstances in which these adjudications are made. And that same support doesn't seem to come for administrative decision-makers making sometimes just as controversial and sometimes more difficult decisions. And so that's one aspect of it. The other aspect is sort of echoing what Victor said, and that is the recognition that experts in standing tribunals should get the level of respect that the Labour Board has engendered over the years, and that speaks to an appointments process that is open and transparent and has some merit based appointments so that the people making the decisions earn and maintain the respect of the communities that they serve. So I see this all this as part of a piece, not as separate piece. But the bar does a lot to harm decision-makers and not a lot to assist them, they are critical and not talking about generally the very difficult circumstances in which some of these decisions are made.

SPEAKER: If I could just ask a question, is there a sense that the courts -- my sense is the courts are reluctant to hear a particular case unless you have gone through all of the normal appeal mechanisms that are available to you. Is that a general sense that people have?

THE CHAIR: I think you're getting a lot of nods.

SPEAKER: Because I think that's a factor that we have to think about also. We have appeal systems and it may be that people wish to run off to court, but the courts may not be all that receptive if there are appeal mechanisms available to them. So I think it's a practical consideration.

SPEAKER: Just to pick up on what Heather was saying a little bit, one of the frustrations that I think the bar feels is the lack of discovery that is available in front of tribunals, and this reverts back to the thing we were talking about this morning about pre-hearing procedures and the ability to order disclosure. Because if you've been through a hearing where you haven't had disclosure completely and/or you feel you've been hampered in some way you are not going to respect the decision, so that sorts of feeds into that view of that.

SPEAKER: I want to follow up and I'm a former member of the bar and I used to practice a lot in tribunals, I think a little bit of problem with the legal profession is they don't realize that administrative law has changed from 20 years ago to what it is now. It's very, very different and echoing what Victor has said is you have your one kick to get your evidence in and you have to make sure you do it well. Often times practicers don't view the tribunals with the respect that they should for whatever reason, they come, they don't necessarily make good cases, practitioners will come without having talked to the registrar, they don't know the rules, they don't know the case, and then complain about the decision they get. So I think there is sort of an obligation there on the legal profession to recognize that administrative law has become more sophisticated and to make the proper effort to

become more familiar with it. You can't just across the board apply tribunal practice across because we're all very different and we all have very different mandates, so it's an obligation on the practitioners to become familiar with the specific mandates to the boards have. But I also think part of that is then and I think there is a very different level if you've got full-time qualified boards that have engendered respect as opposed to sometimes and some of you and I appreciate it's very difficult, you've got part-time boards, you don't have the level of respect, and those are the kinds of things that I think cause problems within the legal community. And so there tends to be broad brush statements of all administrative law tribunals generally, which don't apply across the board. And I do have deference to Heather's comments that the tribunals just don't get the support from the bar association and their independence type things that the courts do, and it would be quite helpful I think to have a little bit more support from the legal community for the administrative law process and tribunal system.

SPEAKER: We are an appeal body that's housed within the same ministry of the group that we review. And the users of our system, our clients, the employees and the employers in the province don't distinguish between the two organizations and that's a real uphill battle for our tribunal, to try and convince those individuals that we are separate and independent. So I think structurally there is a real issue around housing your appellate body in the same ministry versus having a stand-alone structure.

MR. McKINNON: I suppose there was one other question that I posed at the beginning and we haven't addressed it directly, but my sense is we may well have addressed it indirectly. That was any thoughts that you may have on grounds of appeal. Some of the appeal boards your grounds of appeal restricted to point of law only and I guess I was curious whether looking from those boards you felt that that was inappropriate, given sort of your actual cases coming before you, whether you felt that justice was not happening because you could only address points of law. I don't know if there are any thoughts on that issue. We certainly addressed it indirectly to the extent -- we probably all recognize that -- this morning as well there that is this diversity and one really does have to look at the whole range of factors in deciding what is an appropriate appeal structure in any given situation. If anybody has any thoughts on appeal on law only.

SPEAKER: I had one simple thought which is of course if you restrict the grounds of appeal what you've done is open up the door a little bit wider for judicial review down the other corridor, so you haven't necessarily solved the problem, you've perhaps made it more complex by restricting the grounds for review within the actual administrative stream.

MR. McKINNON: I'm saying law only, the tribunal is tempted to look at some other than law.

SPEAKER: No, no, then what you would do is if your only recourse then is to provide an application for judicial review to the courts on some grounds of mixed fact and law, so it would be reconsidered, well, Frank is shaking his head, but I think that's right, that if you restrict the appeal you still have -- it widens the ability to judicially argue what's not appealable.

MR. FALZON: I don't think you would.

SPEAKER: I think Matsqui speaks to that.

SPEAKER: That's one of the ways in the local government area that you get at the decision-making of local government because you can't attack it frontally, but you can in terms of how it got to its decision. And once you examine a lot of those tribunals or in this case the local government to make mistake the administrative bodies makes lots of mistakes, if you want to start taking them apart for judicial review.

MR. FALZON: But the reason I shook my head is that on judicial review even in the absence of privative clause the most you're going to get from the court is review on the correctness of the legal interpretation that the -- or an error of law. If it's a factual matter you are concerned with the court is going to apply Toronto and Board of Education and a straight JR application, so you are going to get no further ahead on JR, so I think a court on JR is going to punt you back even to an appeal on a question of law because they are going -- -- there's nothing you can get that's broader on judicial review that you couldn't get on appeal on a question of law.

SPEAKER: I'm not sure that's correct. I think if you talk to judges Supreme Court judges, Court of Appeal judges they say they read the newspapers, they know what's going on out there. And if appeal structure has a narrow scope of review from a human point of view they are inclined to dig a bit deeper than if there is a broader review. That's what the judges have told me. Now, I think on a technical level I think you're right but from a point of view of individual justice of a judge I think they would apply a different level of scrutiny to a situation where the decision before them is from one level of appeal on very narrow grounds than if it was from one level of appeal with very broad grounds.

MR. FALZON: Never seen an adequate remedies case where a court has said that an error of law -- an appeal board on a question of law is an adequate remedy of law.

SPEAKER: I'm not talking about -- I'm talking about how judges talk about how they do their work.

THE CHAIR: Anyone else?

MR. McKINNON: One other question is going to the remedial powers of appellate body. Obvious is one confirming, varying, denying, what about power of remitting back? A few of you have that. I guess those of you who don't have that power do any of you have those circumstances where it would be useful? It comes up to you on appeal and for whatever reason you decide, no, we shouldn't make the final decision, we are going to send it back to the original decision-maker. I mean I have my personal thoughts on that, but I'm interested in hearing what you have to say.

SPEAKER: We don't have the -- set out in the regulations that that power exists but a number of us decision-makers have actually chosen that avenue to deal with a situation that arises where the record is so inadequate as to not really give us enough information or where you simply can't render a decision just on the questions of law because it appears that something went wrong in the process. I can't really recall a circumstance, but I know that personally on two occasions we sent it back to tribunals because the fact finding process was flawed in some way shape or form so badly that it was impossible to just render a decision and it seemed like the only fair and just thing to do and in the circumstances usually it involves some kind of issue of having to do with whether or not natural justice was observed. But it isn't in the regulations, we just read it into our ability to control our own processes.

SPEAKER: Yeah, we do actually run up against that quite a bit and it's basically from the standpoint the first decision-maker that gets the authorities having the jurisdiction and the code provides under one section of the code, you could propose a decision solution which is equivalent to what the code actually says and the authority having jurisdiction is the only one that can make that decision. The appeal board can't make that decision. So we do get some appeals that are actually -- the ruling is in fact the board can't make that decision, it's returned back to the decision of the authority having jurisdiction and that does happen quite often.

THE CHAIR: The next topic is the standard of review. And as I in my crude way understand this, I understand this is about through the lines through by the courts will examine tribunals, processes or decisions in terms of how much deference to give my decisions. Frank has listed a number of topics on page 10 of the work plan including what he's looking at in his research, including whether legislation should speak to the issue. And I'll just use my prerogative to start the ball rolling with a question: Frank, should I care about this the issue and why?

MR. FALZON: Two reasons, one is because the Attorney General mentioned it in his address this afternoon, but the second is and I should perhaps preface my comments because we are on the record by saying for the record that I think in hindsight Bob's passing was right during our little exchange earlier, so I wanted to, while I acknowledged it to him informally I thought given that a reporter was here it would be important to have it on the report.

SPEAKER: Thank you, it took me till Friday afternoon to get one, but I got one this week.

MR. FALZON: And hopefully you've given one or two over the course of the week as well. So, a large part of my practice when I was with government and certainly less so in the last six years that I've been in private practice had to do with what happens after the tribunal has made its decision and you are in court. And you are in court usually in one of two ways, hopefully it's not a damages civil litigation trial, so one of two ways either you are in court on a judicial review application or on a statutory appeal. And as we've heard around the table today there are statutory appeals to the Court of Appeal with leave, there are statutory rights of appeal to the Court of Appeal which is the case, for example, with Bernd Walter's board where you go from the review board to the Court of Appeal, and then there's the judicial review application, there are rights of appeal to the Supreme Court with leave or as a right on questions of law or not. And in all of these fora the case law tells us that the question of law that needs to be considered is the standards of review. And as you'll note in the work plan David Mullen in a very excellent article in the year 2000 has said that the result at least of the Supreme Court of Canada decisions on the subject is -- has only been to increase uncertainty and encourage litigation and to place a premium on the advocacy skills and creativity of counsel. That's in my experience limited as it is, an accurate statement. And I know that Phil and Sandra have both written about the standard of review, it's almost impossible to teach or practice administrative law without at some point having to weigh in and try to understand the issues. And I know as well that it takes a lot of time to prepare standard of review arguments and it takes a lot of time to argue them in court and it's not uncommon for the court decision to review your decision to have large chunks of them devoted to the standard of review before they even get to review of the decision.

In some Supreme Court of Canada cases you get three or four times the amount of space and effort and toner spilled on the standard of review than you will on the actual

decision itself. And the course is because it's an important question and a fundamental question that relates to the role of the course vis-a-vis the tribunal. And so the question as to what the court's role is an important one that has to be examined up front. You know, for example, if you are a civil trial lawyer in going to the Court of Appeal that you are not going to get a finding of fact disturbed unless it's unreasonable pursuant to the Kathy K test. So there is not a lot of argument about the standard of review when you get to the court of appeal on a question of fact on a civil trial, you just go and argue it and try and kind of fit it into to the test, but there's not a lot the argument as to what the test is. But there is a lot of argument as to what the test should be in the Canadian courts. And part of the reason for that is because the courts have said, well, this is all about respecting the intention of the legislature, leaving aside what are called jurisdictional issues. Determining standard of review is all about respecting legislative intent but of course the legislature doesn't tell us what its intent is in many cases, so we have to try and glean the intent from different indications in the statute, and in some cases we almost have like a flow chart or a page where they divide it down the middle and say these are the indicia in favor of deference and these are the indicia against deference and they come up with a standard at the ends of the day and go ahead and do whatever they think is the right way in reviewing it. And if you go to seminars when judges and practitioners and academics talk about the standard of review it is quite common that you hear the statement made that it's all a bit of an illusion anyway, because if the courts feel they need to intervene they intervene and deference is always easier in respect of decisions that you agree with than in respect of decisions that you don't.

So the question occurred to me as to whether it might be time for the legislature just to say, leaving aside those tribunals that warrant to full privative clauses like the Labour Board and the WCB I guess has the whole privative cause whether the legislature might say, here is the presumptive standard for all questions of law, for example, they are all going to be reviewed for correctness unless the enabling statute provide to the contrary. They are all going to be reviewed based on a test of unreasonableness unless the enabling statute provides to the contrary. Recognizing that the concept of correctness and unreasonableness are not definable in any kind of meaningful way beyond what the court has done in the Southam case. But just getting it over with and then getting on with the issue of actually arguing before the court whether the decision is unreasonable or incorrect or whatever so that we are not engaging in these intellectual acrobatics in some cases, trying to argue whether or not deference is -- and now we have the specific principle of deference so it isn't enough to have one precedent that says that the tribunal should get deference on this issue, it's a whole new argument if it's a different subsection, as a result of the Pushpanathan case.

So the questions that I've posted I guess, is whether this is an issue that maybe is just a concern to a very few practitioners that have to struggle through reading cases and arguing the issues, or whether alternatively relitigating the standard of review has been an ongoing source of cost and difficulty for boards on judicial review and appeal, that's one question, should we care, that Bernd had raised. Secondly to what extent is the issue legislatively remediable? As a matter of constitutional law you can never insulate a tribunal from review for jurisdictional error and there are some difficulties even in figuring out what a jurisdictional error is, which I'm not sure legislature could particularly help on. And then thirdly having a presumptive standard for review or appeal is -- sorry, is that a valid idea, what should the standard be? Should the resumption be correctness or some other standard? And for example, in a case called Northwood Forest Products, Justice Lambert at the Court of Appeal said, well, it's obvious that in the interpretation of public statutes tribunals have to be right. And he in fact defined any interpretation of public statutes as

incorrect as being a jurisdictional error. Which is very different from the message that you get in a lot of Supreme Court of Canada cases around that. But there is I think a judicial kind of mind set behind Justice Lambert's statement which is that it would be unusual for the judiciary not to have the final word in interpreting public statute. It seems to me that that's a legitimate issue for legislative discussion and debate and policy. And then perhaps finally in the list of issues that I'll be thinking about is the ongoing relevancy of statutory appeals to the Supreme Court versus just plain judicial review. The convergence of the case law on statutory appeals to the Supreme Court on questions of law and judicial review is such that I'm not sure that there's a big meaningful distinction between the two anymore. And so the question would be why would a legislature go to the lengths of creating a statutory right of appeal to the Supreme Court anyway, if you've got judicial review out there to begin with? Now, you can see why you might have a right of appeal to a court of leave, whether it's the Court of Appeal or the Supreme Court to sort of provide kind of a filtering function, but a right of appeal to the Supreme Court you've got the right of judicial review anyway, so is there some reason why legislature out to be looking at statutory rights of appeal to the courts on questions of law particularly as distinct from JR? This subject is something that gets me real excited for some strange reason, but Bernd quite delicately and diplomatically did pose the question when I raised it, is this one that's going to resonate with anyone? And I think it's a legitimate question, because it may in fact not be a source of ongoing cost or concern for many or any of you.

SPEAKER: I sort of, in the ballpark of your last statement there, apart from us paying your bill to defend our decisions it's -- that's something that directly affects our work. And I should say first of all, I was in private practice for 15 years, I was a petitioner respondent and a co-respondent in a number of judicial reviews. In my current position I decide reconsiderations on the basis of error of law in jurisdiction and I just recently had one of my decisions upheld in court, so I come at this from a number of different directions. And I was looking at your draft here, the standard of review is one of the most if not the most costly and time consuming of law in preparing for it, from a counsel's point of view on a judicial review I think that's absolutely correct. And again that's what we pay the bill for. But in terms of getting our decisions out in a timely manner and so on, again I don't think it has direct benefit -- direct application to us. Now, and I'm sure you and Bruce you give advice about how to draft things and you can put this in here to protect that and that's all helpful too, but there is some application issues here. So I guess you sort of alluded to this, Frank, I think we have to be really careful if we start to change the standard of review. When I went to law school we were studying articles by Paul Weiler on the basis of the old sershorian clauses and if you read those literally they say there will be no intervention by the courts at all. The courts weren't troubled for a second with that language and they intervened in any case. So the courts will do what they think is just in their own definition of justice. And if they want to retain a superintending jurisdiction over us I think the historical record is that they will do that, despite what the language of legislation is.

MR. FALZON: One of the things I have always been interested in is the difference between Canadian and American law and my understanding in this area, and I'm not as up on this as I wish, but my understanding is that they just generally apply a reasonableness test across the board and then do whatever they want. And to me the beauty of that system is that it's just, you know, you are applying a reasonableness test, there is kind of a principal deference that underlies the theory, but you are not going to allow a clearly unjust -- a party once said they were apply an, oh, my good gracious test, and if I say to my self oh my good gracious then I'll intervene and if I don't I won't. And it allows the judiciary to do that which as you say they'll do in any event.

SPEAKER: I mean, and I also agree with you in the multiplicity of tests, we thought we were sort of figuring things out and then Southam comes along and the reasonable simplicitor is there and I don't know how that fits in, and then Mr. Justice Lambert in the reasonable case talked about correctness with deference. So I agree it's very complicated. But in a large sense that's out of our control, that's a judicial issue as opposed to our issue.

MR. FALZON: Do you have a full privative clause in your statutes?

SPEAKER: Yes.

MR. FALZON: Would it make a difference if you didn't? Would it become your issue because the judiciary would be more inclined to substitute its decision on the merits of questions than it does now?

SPEAKER: I think we would be into a full-blown issue to what extent our specialization should give us the deference that we have now.

SPEAKER: I listened to what you said, Frank, and I think probably the only other person in the room that's excited about judicial review is our counsel, who spends an inordinate amount of time on judicial review, as to what the legislature intended with respect to reviewing human rights decisions and -- our decisions to determine what it is a decision-maker is doing in any particular piece of the decision. And it may vary throughout a decision as to what the standard of review might be applicable. Having said that, we think that the law with respect to the human rights tribunal decisions is fairly settled. We've had a number of decisions that have set a standard of review that we can live with and we are happy with and I would certainly not be happy to see a legislated standard of review that was at a lesser level or a lower level of judicial deference than what we've been able to achieve through significant litigation over the years in this field across the country.

SPEAKER: To some extent what Heather had to say answered the point that I wanted to raise. And that is does it make a difference to tribunals what the -- assuming that for whatever set of reasons the government wants to put forward a set of standards and review, does it make a big difference to you what that standard is, whether it's a correctness standard or a reasonableness standard? Typically, when you look at the reason for judgment in judicial review applications you see that the counsel for the tribunal, if the tribunal is appearing, asks for the highest standard of deference that they can get, so you'll have one person arguing the standard is correct and the other one arguing it's patently unreasonable. That's in the light of that particular case. But the sort of larger issue is would it be a big problem if the standard were set as correctness, would it be okay if the standard were set as reasonableness and then you just sort of go from there.

SPEAKER: I'm just wondering if you set, for example, standard of correctness in the legislation would it mean that we all should be more worried about having each of our individual chairs and panel deciding issues the same way? Has anybody put into the legislation what the standard of review would be?

MR. FALZON: Only where deference is required.

SPEAKER: Just as a privative clause?

MR. FALZON: Yeah, I don't think there's ever been a legislative statement that the standard is correct this way.

SPEAKER: Okay. Frank, I think board members don't really -- don't really think it's an issue for them. I think it's really something that's important to counsel. I think the issue of standard of review is really the privative clause of the 21st century. Right after privative clauses have been gutted by the courts for a variety of reasons and have come to the point where they are simply one of the indicia of what the standard of review ought to be. It seems to me that the way if you really want to confront the issue the extent to the way courts ought to intervene in those decisions the legislature should say it, rather than letting Madam Mahood Debay pick through the entrails of the legislation to reach her own conclusion. And of course counsel's job, I think, is that's where we earn our money in appeal or judicial review is to first of all get the court to accept our characterization of the error and once they have accepted that characterization of the error then a certain standard applies to that, in a civil appeal much like a judicial review. So if the standard of review as difficult as it is, is actually set in the legislation, that means that half our job is over. Now, can you do it appropriately? Because you're right, depending on the section that's being questioned you might arguably have a different standard of review that applies. The question of application is a very difficult one, I think, but I think the issue of whether it would advance the simplification of the issue is probably yes, probably by setting a standard of review we know what it is. The courts don't have to make it up, the legislature has made it up, which is what the courts have been telling them all along anyway. And just add to go that, the Supreme Court has also gone at us and said when you are trying to make a collateral attack on a decision in a different context you again have to look at the legislative intent, you have to sort of pick through the statute where there is no intent and try to gather what the legislature is really trying to say. And it seems to me is that it's another area that's much like standard of review where you ought to consider actually expressly adding your let me say it this way, when this decision has been made on its merits, to what extent that it can attacked in a criminal proceeding or an enforcement proceeding on an execution proceeding?

MR. FALZON: I'll tell you another reason why I think it's a big issue, if you know for example that the standard of review is a deferential one like John's board, you got to put your best foot forward at John's board because you know it's going to be a hell of a thing to get it disturbed. And that I think does have an impact on the -- on the other hand if you get another kick at it in the Supreme Court is that can have implications as well.

SPEAKER: Following on what Victor said, I think the more deference the courts give over time to a particular board the more credibility it develops as a result of that.

SPEAKER: I think it's just dependent on what Heather said is we would be considered if an imposition of sort of a general standard such as reasonableness that doesn't necessarily fit with the established jurisprudence that we already have in the Supreme Court of Canada for example with respect to our commission, which is quite definitive and so again, when we are considering that issue of an imposition of a standard I think we have to be mindful about the nature of the board and what their mandate is and is already established in jurisprudence. We don't have a privative clause but the case law is quite definitive with respect to Securities Commissions' decisions and the issue of deference.

SPEAKER: It was actually quite interesting, I actually thought who cares, but it's actually interesting you know what I'm actually thinking of I think a standard of review actually should be more of a statement of what the government views your board and the respect with which they are telling other people to respect your board what is doing and basically saying, we have the confidence in this board that on these kind of decisions we don't wan the courts to go and mess around with them. So I actually think it is more of an

issue for tribunals than maybe I would have even thought at the beginning of the discussion today, in the sense that if the legislature is going to say the only way you can mess with their decisions is within this narrow range, in a sense the government is saying we have confidence in this board's ability and that we say they are the ones who should be the final -- and I think that does sort of -- so we're talking about deference not just by the courts but by the community generally. The other thing just too and I think we should keep in mind the sort of the big picture, is fast simple and affordable and that's an important thing, but if you are looking at the people who appear before you the notion of standard of review is very much tied in this with sort of finality issue and having things completed in a timely and affordable way.

THE CHAIR: I agree with you, if we're talking about something that lends more affordability and allows the better use of legal tribal resources and then it's probably well worth debating.

SPEAKER: I would like to think that the standard of review has settled for our tribunal, but I have no such confidence that that's the case. The course over the years for a number of years the Court of Appeal certainly showed a great deal of curial deference to the decisions of the board and applied to the patently unreasonable test. Then the Supreme Court of Canada in a case was looking at the activities of the decisions of the Ontario municipal board and said that there the standard to be applied to the decisions of the Ontario board was that of correctness. The Ontario board performed the same function in terms of expropriation compensation matters that we do here, but of course the Ontario board does I guess a lot of other things, issuing dog licences I don't know, but I meant there is some distinction. So our Court of Appeal with reference to the Ontario's board Supreme Court's decision in the Ontario matter, concluded that well, there's really not a great deal of distinction between the Ontario municipal board and the B.C. board. They have an appeal as a right to the Court of Appeal in Ontario whereas ours is with leave but that's not much of a distinction there. We think the -- the next decision of the Court of Appeal was, well the standard of correctness should apply to issues of law but on issues of mixed fact and law patently unreasonableness, so that kind of dichotomy that we are confronting. And I in light of that level of uncertainty see some attraction to the notion of having a statutory reasonableness standard or some such presumptive --

MR. FALZON: It's also a statement to some extent, just touching on Diane's comment, such a statement by government not only to the community but also to itself in a way, that these tribunals are doing important work. We've gone through all these processes of reviews and when the dust settles there appears to be these people left standing that they are there for a reason, and doing things all over again in court on one view at least might not be seen as promoting core values. Leaving aside, of course, the courts always being there to correct egregious errors and jurisdictional mistakes, I have not yet thought of a way for the legislature to help the court to figure out what a jurisdictional issue is any easier and I don't think it's possible unless anybody else in the room has any bright ideas.

SPEAKER: Can I ask maybe another question of people, the idea of variable standards of review was to establish some sort of mechanism for saying not all tribunals are created equal, that some have certain kinds of specialized expertise and what have you. Do people think that it's a useful think to try and develop a development of A list, B list and C list tribunals or do they think that that's kind of offensive and there should be one standard for everybody? And there's some of a subset to that that because Labour Board and the Workers Compensation board are already A list tribunals and do they think they should come down to the standard of everyone else, because I don't think the government is likely

to want to put everybody else up to the Workers Compensation Board, Labour Board, privative clause kind of standard. You know, what is people's reaction to that sort of thing? Should it be one sort of level across the board with a couple of anomalies or should it be a number of factors that go into deciding that this tribunal get this kind of deference and this kind gets this deference and what are the factors?

MR. FALZON: Well, if I might engage then in dialogue with you, one of the things occurs to me in answer to your question is because the courts tend to use expertise and specialization, at least their view of it as being the defining factor in determining whether you get deference and how much deference you get, maybe there is some value in just governments biting the bullet and making their own decision as to one which they regard as specialized tribunals as opposed for example to tribunals there are just there to deal with cases in volume but without any particular expertise, so in those kind of instances government nonetheless bites the bullets. I think even with respect to human rights, I mean, my observation is that the battle is still being fought across the country depending on the wording of the enabling statute and the different jurisdictions, so the notions that there is sort of a generic human rights deference standard isn't maybe as well established as it might be in the securities context where there seems to be a more specific application of concepts across the country. Is it the case, I don't know what the case in Alberta is, but the Alberta tribunal, is there not a right of appeal to the courts?

SPEAKER: As there is in Ontario, there is a statutory right of appeal and judicial review and as a result of the statutory review is the method of choice, because why go through the fight about standard of review and what it is the tribunal is engaged in. And Ontario it's an appeal on fact and law, which is quite different than it is in B.C.

SPEAKER: I'm just wondering how appropriate this issue is to this project. What we've been talking about before and this morning is creating ways of improving the procedure or decision-making abilities of the boards or things like that. What we are really talking about now is some way of trying to get the court to come to a common definition of something and we are never going to do that. The government can't do that and lawyers can't do that and the administrative boards can't do that. I suspect that no matter what we put in legislation what you'll end up with is just a bunch of new court decisions giving different interpretations to that when the Supreme Court of Canada gets a chance to look at it, in which case they might come up with three or four different ways of doing it. It's an important issue and I have a vague recollection when I was taking this in law school of being very confused about the whole issue and trying to figure out what patently unreasonable meant. But I don't know if it's something that's really going to be that useful for this project to get too deeply into.

SPEAKER: I would think that it would for the reason that if it involves the tribunal's resources going to court a lot to talk about this issue, it would be useful for the tribunal to have some specific guidance and it's an issue of resources of the efficiency of the tribunal itself so sometimes it may be some help there, if it's not clear. If the jurisprudence isn't clear or the test isn't clearly set out on the tribunal is regularly arguing those issues in court every time there is a case, then yeah, it would make sense to have some guidance I would think, because I think in some cases a lot of those are the preliminary issues that are argued in court. I mean, sometimes we are in court not to talk about what the test is, but how to massage the case on the facts to either fit it in or not to fit in it, and I think that's where practically there is a lot of argument. Say we know what the test is, we fit it, we don't fit it.

MR. FALZON: In many cases I would expect, I know for many boards that I've acted for we wouldn't be in court at all if the standard was clear. If we knew what the standard was going to be we just wouldn't appear, it wouldn't be seemly to be appearing to try a take an advocacy position with respect to the outcome. So --

SPEAKER: Well, the board may not be but one of the parties might be. I mean privative clauses are pretty clear and yet there's been 20 years of litigation to basically make privative clauses pretty unclear.

MR. FALZON: But the privative clause cases, I find they are clear on what the test is at least, they all apply it differently and I think that's the part that we can't fix. But given what you've just described being a reality that we'll never get away from, just like in the U.S. it's the case of kind of having a generic standard to put us through the antecedent question in every case, what should the standard be, seems to be something that even the courts are saying it would be great to have a little more guidance on the issue than they're getting.

SPEAKER: Maybe the classification of three levels of the A, B, C, I mean maybe that is a useful exercise to go through, because I think you keep in mind that way the different kinds of tribunals ones that really need a privative clause, other ones that the issue of correctness is really the appropriate test. You just have to say it.

SPEAKER: Going back, there was a thread earlier about the bar's criticism of administrative tribunals and I reflect on what Mr. Attorney said about trying to advise clients of what you are going to be doing before different tribunals, because lawyers have to brief themselves and come up with exactly how they're getting before a particular tribunal because it doesn't, it isn't standard, so I guess to the extent that any of the things that you are talking about create more of a standard way of getting there, a client is going to understand the process a whole lot better as well and if it is simplified. And I think that looking classifying tribunals is a good idea and also trying as much as possible to make the rules standard, I think is beneficial. So long as it doesn't just become another court system, which I see could actually come out of the process that we're talking about, that it simply mirrors the court system, we have rules of evidence, but they only apply, so that you end up with the parallel court. But at least we might know what we're doing.

SPEAKER: I, as I said earlier, I'm troubled by turning over, creating more issues that the courts will ultimately determine and I think the idea of a ranking of tribunals is appealing on one level, but I wonder what the courts would do with that. For example expropriation of someone's home might be judged to require a different level of review than the expropriation of some logging land on Galliano Island, or the reverse, and it seems to me that we would be opening up a whole area of sort of a ten-year jurisprudence before those sort of issues would be settled. I wanted to also raise another issue which was related to this and this comes from my experience as counsel, I think it's a utility which says a tribunal and judicial review cannot appear and defend the correctness of its decision. They can only argue the jurisdictional issue. And my experience is that requires great adroitness on the part of counsel. And one way around it is so that the co-respondent talks about the correctness but otherwise -- and the point was made over here about trying to communicate the specialty of the tribunal to the judge without talking about the correctness of the decision. And I think I understand why the court has said tribunals shouldn't be there arguing correctness, I think that's rationale, on the other hand I think it also creates some very serious practical difficulties in terms of educating the court and frankly defending the tribunal's decisions. So I don't know how to solve that problem but it's a real one.

MR. FALZON: The issue of the role of counsel.

SPEAKER: Well, not the role of counsel but how do you educate the court about the specialty of the tribunal when you can't talk about the correctness of the decision?

SPEAKER: Well, one point I think from what Phil and Joyce were saying, there was some point in time in the far distant past when the legislature actually determined when was on the A list and what was on the B list by the strength or absence of the privative clause. So there is no reason that this round of politicians isn't as able as the last round in actually making those choices.

THE CHAIR: Counsel for the human rights tribunal.

SPEAKER: I think Heather has already indicated, I spend a huge chunk of my time in -- there is some merit in having some clear guidelines when you go to court to advise a judge as to where a particular decision should be reviewed, but I wouldn't be in favor personally of having sort of a system of A, B and C tribunals. I think the tribunals are all so complex and the types of decisions vary from day to day and the nature of the decision I think it would actually be quite problematic to reduce everyone to A, B and C categories. And to the extent that government has decided that it wanted to have a legislative standard it may make some sense to do it in a -- the nature of a tribunal itself and that way it could be tailored a bit more specifically to the expertise of the tribunal and can be tailored to the types of decision that tribunal makes.

SPEAKER: Just a small point related to the classifying into A, B and C, I don't like that route, because it seems to me that there is not a deference to the expertise of the tribunal for everything it does, the deference is to the specialized jurisdiction on certain matters. So if you put the whole tribunal into A, B or C I think that clouds it. So I think that there is a trend amongst some of the jurisdictions or the courts to recognize the specialized jurisdiction on certain issues but not the expertise of the individual members. It's a side issue but I notice that one of the Justices in the Ontario Court of Appeal is now talking about the expertise and we have had cases whereby the people have put in their c.v's and that's to show that they are expert in something. And that's clouding the issue further. So I think it's important that we differentiate between the so called experts and the tribunal members which I think they have to prove and the way the government has given the tribunal and I think there may be room in the jurisdiction of the tribunal.

SPEAKER: I guess I'm not sure it matters and we have a privative clause and yet spend much of our budget on our lawyer doing that particular thing in court, which is to just not to do the unseemly thing, you can't defend the correctness of the decision, but that in fact is what is happening in the its own unique kind of way. I think, so it would be nice if there was a way to avoid that because it's going to judicial reviews is one of those horse for tribunal chairs it's very costly and it's one of those things that you have no control over, suddenly your budget is broken and there you are at JR again, depending where it's the my goodness test or the any of test, notwithstanding our full privative clause a judge does not like to let, likes to be able to agree with the decision in discussing jurisdictional issues so I really don't think at the end of the day we can do much about this issue. Unless it's something that the court decides to do. Maybe it's different if you are being reviewed at Court of Appeal as opposed to Supreme Court, but judicial review at Supreme Court regardless of the standard of review that's being established in prior cases, I think each judge likes to think they're doing the right thing.

THE CHAIR: Frank, do you have any other --

MR. FALZON: Just one more question that had to do with the issue of the continued utility statutory appeal rights on questions of law as distinct from judicial review, is there anyone here whose enabling statute authorizes statutory right of appeal to the court? I think the environmental appeal court --

SPEAKER: The forest commission does, yeah.

MR. FALZON: Ands is there some special rational for that as to why that wasn't just left to judicial review?

SPEAKER: Well, I recall from my drafting days there was a great discussion of whether or not there should be a privative clause and then a policy decision was made there should not be a privative clause, that it should be something more than just a right of appeal. So they decided to make it a right of appeal with leave to the Supreme Court.

MR. FALZON: I see.

SPEAKER: But every appeal that was going up with leave was getting leave so they then decided let's get rid of the leave thing because it's just a waste of time, so it's now just a regular right of appeal to a court.

MR. FALZON: That's for the forest appeal commission, but on the environmental appeal side it's just --

SPEAKER: JR.

MR. FALZON: Is there a difference in the way the counsel approaches those cases?

SPEAKER: It's basically the same because the way the forest practices code is written it's identical language to the judicial appeal and so you appeal basically for the same reasons.

THE CHAIR: Anything else on this topic?

SPEAKER: I was going to tell Frank about ours but we can wait until later. We have an odd procedure, we have a stated case procedure on questions of law which is a little odd.

MR. FALZON: Who states the case?

SPEAKER: The questions are stated by the appellant. We basically prepare the documents.

MR. FALZON: That's very helpful.

SPEAKER: Yeah, for you guys, not for us.

THE CHAIR: All right. Can we move on then? Let's roll ahead. The next issue -- maybe these two could be enacted together, not that they're not important issues, but this deals with the competence of tribunals of course to engage in charter arguments and to offer some form of relief with respect to those. I've been the subject of a number those, and

while the argument is always enjoyable I think most tribunals try to stay away from the issue in any event but it may be just us. Bruce, what would you like to say about this?

MR. McKINNON: As Bernd noted there's real similarity between the question of whether the tribunal has jurisdiction to apply the charter and standard of review and the similarity being the court looks, struggles, try to divine what the legislative intent was, that a particular tribunal had jurisdiction to apply the charter. And as I say, unfortunately but it's a statement of fact, the provincial legislature has nowhere at least to my knowledge has expressly stated whether a particular tribunal in fact has jurisdiction or does not have jurisdiction. So we're left in every single case with the court having to infer whether that intent exists implicitly in the enabling statute for the tribunal. I think this is my own sense is that this is an area that might well be remedied relatively easily by legislation. The legislature could state that all tribunals have jurisdiction by the charter, state that none have jurisdiction to apply to the charter or could constituent that the tribunals A, B and C have jurisdiction to do that. What I would like to get in the remaining few minutes is some sense from the tribunals where this issue is raised how you feel about this issue when it comes up. Bernd certainly indicated that it wasn't sort of one of the favorite topics at his tribunal. I know some of you do deal with charter issues. What would be interesting to hear is when these issues are raised whether your sense is that your particular tribunal is an appropriate and useful forum for the issue to be raised or whether you would much rather it was left to the courts. On the other hand there are arguments that if this issue is left to the courts does it impede the ability of your tribunal to reach a final decision quickly and relatively efficiently without having to go through a series of proceedings.

SPEAKER: That issue has certainly come up at the human rights tribunal, we are one of those tribunals where the courts have now said that we have the ability to apply and interpret the charter. They are complicated arguments they, are time consuming arguments and they are difficult for adjudicators to write. On the other hand it's our responsibility and we can't abdicate it to the courts and the courts in the Abraham decision says it's ours to decide and they will review. So we're stuck with it. I'm afraid I disagree with you Bruce, I don't think it's as simple as these tribunals can and these tribunals can't. The courts may not buy it.

MR. McKINNON: Well the test they have to apply is did the legislature intend that this particular tribunal apply the charter. As a matter of policy I think it's open to the legislature to say in virtually all situations with a sort of few exceptions that a tribunal doesn't have jurisdiction to apply the charter.

SPEAKER: I don't think the provincial legislature can amend unilaterally the constitution of the country. I think that that's a big problem.

MR. McKINNON: It's not a question of amending the constitution, there's cases like the Supreme Court of Canada decision in Tuheart where at the end of the day they concluded that that particular tribunal because of the language in the enabling statute did not have jurisdiction to apply the charter.

SPEAKER: I think it's different in the courts whether it's the Supreme Court of Canada or the Provincial Court to interpret the charter, I think that's different than the legislature saying that -- interpreting the courts jurisdiction as the supreme law of the land in a certain way. I think those are very different ideas.

MR. McKINNON: I guess I should have clarified at the beginning the section of the issue under section 24 of the charter is the tribunal a court of competent jurisdiction. Certainly cases like Hooper it's been more of the context of the ability to apply section 52 and rule that a particular provision of an enabling statute is unconstitutional. So it's not the section 24 issue per se.

SPEAKER: Just from our experience we've considered charter issue at the commission and we have come to the conclusion certainly I have is that there are difficult issues of course, but for us as a tribunal considering that each of them worked out we do, it's useful to have the arguments made in front of us at first instance because what we do then, and I think it's important for the courts thereafter is that we set the factual matrix for the court to consider around the constitutional or the charter issue. So that we lay out, off the charter issues to decide them sometimes in a vacuum is problematic and it's easier for the courts, if you subsequently do go the court to have the factual matrix set in the first instance. So we've come to the conclusion, we might as well do it first that way because at the end of the day it works out better. So we don't have as many constitutional questions or charter issues as we used to because the Supreme Court of Canada some of those cases have already gone up so a lot of the issues that were issues for litigants in front of us have been now determined so there's just not as many, but it was useful to have them come before us first.

THE CHAIR: That's how we've dealt with them.

SPEAKER: We have a number of charters brought before both the environmental board and the appeals commission without any, and the language we use, which I think most -- because we can consider questions of law we can take on questions of the constitutional law and accordingly consider those and have had no difficulty when it's become charter issues or other constitutional issues until very recently with the forest appeals commission in a case called Paul, at the Court of Appeal where the Court of Appeal has said, no, you don't have the ability to consider such a 35, which is not part of the charter but it is part of the contusion, and I don't know where that's going to go, it may be well on its way to the Supreme Court of Canada. But it's hard to see the difference between section 35 and the charter and so there is, I think there is some confusion in the courts right now about that issue.

SPEAKER: There also appears to be a distinction in the court as to tribunals deciding whether or not their enabling legislation is consistent with the charter for example, and also a tribunal deciding a section 7 right whether a person's actual right has been infringed, so to the extent you are considering a legislative solution to that it's quite complex and there is all sorts of different categories of cases that could arise whether they are charter cases or otherwise constitutional cases, and what type of rights.

MR. McKINNON: What I was hoping to get and have got to some degree as sense of, as whether it was the sort of thing we thought was useful to argue in front of you or when these issues were raised that part of your enabling statute was going to be to the charter sort of metaphorically threw up your hands and wished the issue would go away.

SPEAKER: Probably only, Bruce, clarity would be useful. If there is a restriction in your ability to strike a section of the enabling statute, it should say so. If you're allowed to interpret your statute consistently with charter values it should say so.

THE CHAIR: Don't tell me we've run out of debate. We did say early on that if there was still lots of enthusiasm in the room when we got through the agenda we could go back to issue number one, the procedural tools. Don't be smiling at me now. Does anybody wish to revisit any issue at all in the interest of being heard on these matters? If not we will wrap up surprisingly a little bit early.

SPEAKER: If we go back to the procedural issues there were a couple of items that I wanted some discussion about. Just a couple of items that I wanted to come back to to reinforce some of the discussions that we had this morning. One concerned the issue of the freedom of information as it pertains to the disclosure discovery before administrative tribunals, and Jessie made the point earlier that she had found when it came to issues of discovery that she felt that there were occasions where she really wanted people to go through the freedom of information process and I found that very interesting, because I have found the opposite to be the case, that sometimes going through the freedom of information process takes a considerable amount of time and that I feel that it is more appropriate when we are dealing with a tribunal matter with an appeal or claim, that we deal with it in the context of the hearing process. And this brings into play the whole bundle that we were talking about this morning of what is included in case management and procedures and I think that I guess I would like to see it properly within that context. The difficulty that we run into, though, is in indicating to people what are the proper items for disclosure for discovery. And I don't have answers to that and I would just raise it as a concern that I would like to see addressed in some codification, some ability, some reference for people to be able to go to to find out the types of things that would normally be addressed in discovery. Now, I say that taking into consideration that often we're dealing with lay people who don't know what to ask for and it's not always appropriate for the person in the tribunal just who is doing the case management to try to second guess what might be in the file of the government agency or it might be a private person. I was interested in Heather's comment about enforcement of rules and that I think is a major difficulty for a number of tribunals. What do you do if somebody is not complaining with the time frames that you set? Because a lot of case management is moving the case along and trying to ensure timeliness trying to ensure that there is an even playing field, so enforcement becomes difficult unless the legislation has the teeth to allow us to enforce. The two enforcement tools that I'm aware of are if it's the claimant who has not complied there is the big stick of dismissing the claim, and there may be some jurisdictional procedure trappings that go along that with that would have to be considered. If it's the respondent that has not complied of course you don't have that ability so there would be the unevenness in the way that you apply the rules. And the answer to that is frequently costs, awarding costs against the respondent in favor of the claimant or in favor of the tribunal, and that's a big policy item particularly if you are talking about awarding them for the tribunal, a big policy item. And that was something that Fern raised earlier, the possibility of awarding costs in favor of the tribunal or the agency. And I think that it certainly has a place and it has a place in the discussion and it has a place in the consideration of whether it's a -- well, we were talking about it in terms of statutory procedures act or some other instrument that sets out possible alternative procedures for tribunals. The template was being referred to.

The only other comment that I would have about the discussion this morning is I think my preference would be for some form of template, my preference is not for statutory procedures act. I think that a template that possibly would have some regulatory effect, I don't know, but it would be there for consideration for drawing from for particular tribunals to custom build the rules of the tribunal. We've talked about there being difference in needs of the tribunals and I would note that there are a couple of differences that we have talked

about, one is whether the tribunal model, the tribunal that we are looking at deals with party, party, private citizens or whether one of the parties is a government agency. And I think that it would make a difference what rules you adopted depending on which model that is. And the other is the type of appeal and we've talked about this whether it's an appeal on the record or appeal de novo. Those are my comments.

THE CHAIR: Thanks again. Anyone else have any of the comments that have been discussed or any of the issues that have been left kind of in the air? Nothing. Well, I'm assuming that although the agenda says I might have some comment by way of assuming up you don't want me to adjourn for half an hour to collect my thoughts on the two pads of themes and issues that I've written down here. I guess, well, maybe one I would do is just invite Frank and Bruce to just perhaps, if they wish, to give us a sense of in terms of what they heard or perhaps whether what else they would like to have submissions on. Are there any particular comments in terms of what you have heard that you would like to make, Frank?

MR. FALZON: Well I think that our main purpose today and I'm glad actually to have a chance to acknowledge Wendi Mackay in this respect is that when Bruce and I were given this project at the very ambitious time line, we have to get our background paper out by the end of November and so that's what we're going to do, we felt strongly that it was important to consult with members of the tribunal community even before we produced the options paper which we said earlier is kind of not maybe the usual way that this kind of works get done and it took Wendi all of three seconds to say, sure, how do we do it? And this day was the product of that. I think it was less than a month ago that we had the idea. And the advantage of this sort of setting is that it gives you an opportunity as much as us an opportunity to get to know your benefits, you an opportunity to get a sense from us as to what we're doing it and the sometime line on which we're doing it and the questions that we're asking and also perhaps to rest a little easier that there will be opportunities later in the process for those of you who are undergoing core services reviews and other sorts of reviews that if you are having to make resource allocations to what the target your resources on the next month and if you are as excited about the review as I am please send a letter. But otherwise there will be other opportunities as the matter goes along and also the chance for everyone to get together and meet. So I think somebody during the breaks described this as sort of the appetizer for the main course. And so I really feel that it's been very valuable for me and I do want to thank Wendi very much for making it happen because it wouldn't have otherwise and it would have been way more difficult for me and Bruce to have gone to each of us and spoken to you individually.

THE CHAIR: Bruce.

MR. McKINNON: Yes, I would like to re-echo Frank's comments or thoughts. We had meeting with a considerable number of you and then we had visions of flying over to Vancouver every day for a number of weeks in September or as he indicated this is just a portion of it and Wendi has been responsible for organizing it. The only other comment I would like to make is I came obviously came into this meeting I think fully aware that there was an enormous diversity but the one -- a number of things but the one that really stands out for me is the reinforcement that there really truly is an enormous diversity and a whole range of ways between the 60 or 74 whatever the number is of tribunals that we are looking at. And that diversity, we really have to take that into account very, very carefully when we are looking at what might be sort of general issues that we are looking at. So for myself I would like to thank you all for coming. I certainly found it very valuable.

THE CHAIR: My cold has held off which I appreciate and I appreciate all of you being so patient with me and my rather rudimentary skills at this sort of thing. I probably would have ended up by saying something along the lines of some of the comments this morning around the insert of the consultation effort. I actually feel very reassured in that respect. I also, having been involved in other provinces in as well as here in some fairly high profile and very sensitive social policy consultation areas and policy development law enforcement areas, would probably want to leave on the table that it probably would be unrealistic for us to think that everything that we've said here will be remembered or shaped into the final product but nonetheless I personally feel that we've been given the fundamental indicator of justice and due process and that is the opportunity to be heard, and I feel that our voices have been respected and afforded a great deal of dignity in our comments today. So I guess rather than commenting about the consultation effort, what I would do is perhaps leave back a challenge to the project team and to the government to at least continue the process and continue to try to ensure to the extent that is possible, that our voices have been heard, when we see the final product to the extent that it's appropriate. And of course I want to thank Frank and Bruce for their excellent scholarship and participation. I also want to I guess echo what Frank has said. I'm not part of this project but it's been my intuition that Wendi has been instrumental in bringing this day about and I would just like to compliment her on her willingness to risk and go outside the box which is the kind of talk that we've been hearing in the last week or so in agreeing to this process in the first play. They are not here, I would like to thank Gilliam and Mr. Plant the Attorney General for taking time from their schedules to participate. And I'll just leave it at that. Thank you all. It's been great to get together, especially I guess in the events of the last few weeks to be together and put our minds around something else and spend some time together. I think that's been an added benefit here and at that point I think I'll let Wendi close up.

THE CHAIR: Thank you all. (PROCEEDINGS ADJOURNED)