PROVIDING ADMINISTRATIVE TRIBUNALS WITH ESSENTIAL POWERS AND PROCEDURES

Report and Recommendations

Prepared by

Administrative Justice Project

for the

Attorney General of British Columbia

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FOREWORD

The following report was prepared for British Columbia's Administrative Justice Project. Established in July 2001, the Project is part of the government's commitment to ensure that the administrative justice system is accessible, efficient, fair and affordable.

Since its inception, the Project has examined fundamental questions about the nature, quality and timeliness of administrative justice services in British Columbia. It has also set forth a series of recommendations to address the most significant challenges facing the system today.

This report discusses the powers, procedures and functions of administrative tribunals, emphasizing the need to strike an appropriate balance between flexibility at the individual tribunal level and consistency across administrative tribunals. It recommends a principled, consistent approach to legislative decisions about what powers are appropriately granted to a tribunal and how such powers are described. The recommendations are aimed at ensuring both procedural fairness and effective tribunal administration.

The analysis and recommendations presented here support the Administrative Justice Project's White Paper. Copies of the White Paper, other background papers, reports and further information on the Project are available through the Internet at: www.gov.bc.ca/ajp.

Interested readers are invited to provide comments on the White Paper and related reports before November 15, 2002 by:

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INTRODUCTION

The powers, procedures and functions of administrative tribunals are as diverse as the public policy concerns underlying the statutes that create them. There is a general concern that this diversity in powers and procedures is more a reflection of ad hoc decision making and political circumstance than the result of careful, comprehensive policy consideration of the specific needs of a given tribunal when it is created. Some variation is inevitable because powers and procedures need to be tailored to suit the needs and purposes of specific tribunals. At the same time, a principled and consistent approach to legislative decisions about what powers are appropriately granted to a tribunal, and how such powers are described, is highly desirable.

The comprehensive background paper, The Statutory Powers and Procedures of Administrative Tribunals in British Columbia,[1] the background paper, explores the important link between an administrative tribunal's powers and procedural obligations and its ability to deliver its public service mandate in a fair, efficient and effective manner. It also reviews the many studies that have been undertaken in Canada and elsewhere on the subject of statutory powers and procedures. While these studies universally reject the creation of a single comprehensive code of tribunal powers and procedures, they propose a number of alternatives designed to ensure a proper balance between procedural fairness and effective administration. The background paper outlines four options for reform in this area, aimed at encouraging discussion and debate on which option or combination of options should form the basis for a recommendation for specific reform. These four options can be summarized as follows:

> ***Option 1:*** *take no action and leave both powers and procedures issues to the present mix of legislation and common law relevant to each tribunal.*
>
> ***Option 2:*** *reform tribunals on a case-by-case basis and create a specialized advisory body at arm's length from both tribunals and government.*
>
> ***Option 3****: develop a Statutory Powers and Procedures Act and make decisions about tribunal powers and procedures through a specialized rules committee, the tribunals themselves or tribunals with final approval by either a minister or an external body.*

[1] The Administrative Justice Project's background paper on statutory powers and procedures was released in February 2002 and is available online, at: http://www.gov.bc.ca/ajp.

> ***Option 4:*** *grant rule-making powers to tribunals with no additional legislative reform.*

In response to the background paper, the Administrative Justice Project received submissions from the following bodies:

- British Columbia Council of Administrative Tribunals2
- Office of the Ombudsman3
- West Coast Environmental Law Association
- Dispute Resolution Office, Justice Services Branch, Ministry of Attorney General
- Law Society of British Columbia
- British Columbia Labour Relations Board

This report summarizes responses to the background paper and recommends reforms in the area of statutory powers and procedures for administrative tribunals. Reforms respecting procedural powers are addressed separately from those addressing statutory powers concerns.

RESPONSES TO THE BACKGROUND PAPER

British Columbia Council of Administrative Tribunals

The British Columbia Council of Administrative Tribunals has a mandate to serve the public interest by contributing to the development and improvement of administrative tribunals, government agencies, the legal profession, advocacy groups and others. The British Columbia Council of Administrative Tribunals submitted a lengthy paper in response to the background papers on statutory powers, standard of review and Charter jurisdiction. It expressed strong support for the Project's reform initiatives generally and identified a number of challenges facing the administrative justice system including concerns that:

- tribunal rules of procedure are not always clear and efficient;
- tribunals do not always have the necessary powers to make their proceedings effective and expeditious;
- some tribunals face jurisdictional uncertainties that can delay or disrupt proceedings.

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2 The British Columbia Council of Administrative Tribunal's March 2002 paper, *Administrative Justice in British Columbia: Ensuring Fairness and Accountability*, is available on the internet at www.bccat.net.

3 Entitled *Statutory Powers and Procedures of Administrative Tribunals – Comments and Submission to the Administrative Justice Project of the Ministry of Attorney General, Province of British Columbia,* April 12, 2002.

The British Columbia Council on Administrative Tribunals made the following three recommendations:

> ***Recommendation 1***
>
> *An Administrative Justice Council should be established by legislation. It should consist of members from government, the tribunal community and the public generally. Its role should be to coordinate activities and advise government and tribunals on issues relevant to the effective and efficient functioning of the administrative justice system.*
>
> ***Recommendation 2***
>
> *A comprehensive administrative justice plan should be established for each tribunal. The plan should be developed jointly by the responsible ministry, the tribunal chair and the Administrative Justice Council. It should set out a clear and specific strategy to ensure that the following key requirements of the tribunals are met, in a manner that is appropriate for that specific tribunal:*
>
> - *an appropriate and transparent appointment process;*
> - *a clear understanding of the role of members in a tribunal and all the terms and conditions of their appointment (confirmed by way of an appointment agreement);*
> - *clear and effective powers and procedures;*
> - *adequate resources and remuneration in line with the standards established for the sector, and a clear understanding of the relationship between the tribunal and other government bodies in respect of adequate resources and remuneration.*
>
> ***Recommendation 3***
>
> *Any legislative reform regarding matters such as powers and procedures, standard of review and jurisdiction to decide Charter issues should contain sufficient flexibility to ensure that diversity among tribunals is respected and that increased efficiency and effectiveness is in fact realized. Consideration should be given to the role that an Administrative Justice Council might play in this regard. Examples include: assisting with the development of rules of procedure for specific tribunals, advising government on the appropriate standard of review for various tribunals and issues, and advising government on the issue of which tribunals should be given the authority to decide constitutional questions.*

The British Columbia Council of Administrative Tribunals thus generally supports Option 2, provided that implementation of this option would ensure:

- sufficient flexibility to address the needs and circumstances of each individual tribunal;
- reduction of unnecessary disparity;

- changes "resulting in real improvements that more than offset the costs and complexity that may result from such changes";
- tribunals have a role in determining their statutory powers and procedures.

Law Society of British Columbia

The Law Society of British Columbia submitted a Preliminary Response to the Project's background papers. The response was prepared by the Access to Justice Subcommittee.

The Law Society is in agreement that the administrative justice system in this province is ripe for reform but cautioned that reform initiatives should be carefully undertaken. While it supports the Project's goals, the Law Society says that it:

> *… wishes to ensure that reforms are based on substantive considerations, not simply financial ones. If, for example, the result of reforms leaves the public with a sense of having a significant increase in their access to the justice system for the resolution of disputes with the government on administrative matters, the Law Society would consider the reforms to be a success.*

On the question of statutory powers and procedures, the Law Society says that administrative agencies must have the appropriate powers and procedures to properly discharge their mandates. The Law Society believes that clarification of powers in enabling legislation would be beneficial and that clear and sensible procedures result in easier and more effective access to administrative justice. It generally supports any effort to bring greater clarity to the contents of natural justice and procedural fairness for each individual tribunal. The Law Society also believes that:

> *… the diverse nature of the agencies and tribunals weighs against creating omnibus legislation concerning statutory powers and procedures.[4] A tribunal-by-tribunal review would be necessary before even making any attempt to identify areas of commonality between tribunals.*

[4] While the LSBC "believes that the rationale for rejecting a single code for tribunal powers and procedures extends to rejecting single comprehensive legislation on any aspect of administrative law", it notes that there "may be some common elements in these that can form some sort of 'base' legislation".

Thus the Law Society stressed that such tribunal-by-tribunal review is critical before legislation aimed at process clarification is enacted. The Law Society also stressed the need for legislative clarity:

> *Complex legislation simply leads more frequently than not to the necessity of going to court to obtain judicial interpretation on the meaning of legislation, often at some considerable cost and frequently requiring considerable time. If the legislation is to set out the procedural requirements of administrative agencies or tribunals, legislative clarity is all the more important. It is of little use to set out, in legislation, procedural requirements that are so complex or oblique as to require judicial interpretation. It would simply defeat the purpose. Legislation which has not fully considered the different needs, composition or expertise of all the components of the administrative justice system will do much more harm and create much more confusion than that which is presently thought to exist.*

Finally, the Law Society supports the idea that a tribunal-by-tribunal review be undertaken - either by the government (through the Ministry of the Attorney General), tribunals themselves or an independent body similar to the English Council of Tribunals.

Dispute Resolution Office, Justice Services Branch

The Dispute Resolution Office, Justice Services Branch, Ministry of Attorney General, is responsible for promoting the use of mediation and other dispute resolution processes in the courts and across government. The Dispute Resolution Office supports its work through research that demonstrates the value of alternatives to adjudication and by assisting government agencies and tribunals to develop innovative and effective dispute resolution processes. The Dispute Resolution Office's comments on the background paper focus on its mandate to promote a wide range of dispute resolution initiatives.

The Dispute Resolution Office supports Option 3. It agrees that administrative tribunals are often not given the powers they need to function effectively and creatively and that critical case management and tribunal management powers are often absent or inadequately addressed in individual statutes. The Dispute Resolution Office adds that:

> *While there are a growing number of administrative agencies which have inserted, or are interested in inserting, dispute resolution provisions into their governing legislation, the ad hoc manner in which they are currently developed leads to a number of difficulties. First, it results in inconsistency, the "inexplicable diversity" referred to by Mr. Falzon. Second, not all bodies developing new rules, regulations or legislation turn to experts for advice on dispute resolution processes and so do not consider either the full range of options or all the issues*

> *critical to a successful dispute resolution process. Finally, when some legislation explicitly refers to dispute resolution and other legislation does not, courts may interpret silence on the issue of dispute resolution in a statute to reflect the legislators' intention that the particular tribunal should not have dispute resolution powers.*
>
> *Legislation that provided a menu of powers that included dispute resolution and case management powers[5] could address some of these concerns. Such a menu would encourage administrative tribunals to consider the full range of dispute resolution options and provide some guidance about what issues need to be considered in creating detailed rules.*
>
> *The Dispute Resolution Office supports the development of individual powers and procedures by tribunals who are in the best position to tailor procedures to meet their needs... .*

The Dispute Resolution Office did not express an opinion as to whether final approval of an administrative tribunal's powers by a minister or the executive council was necessary. It was concerned that administrative tribunals be provided with consistent and expert advice in the development of their rules, accompanied by the necessary tools to implement them.

West Coast Environmental Law Association

The West Coast Environmental Law Association did not make any recommendations on the options identified in the background paper. However, it stressed that:

> *… any eventual proposal must be evaluated to see whether it increases the accessibility of administrative tribunals to lay people and to the public generally. Tribunals were created to a considerable degree to be a cheaper and accessible alternative to court processes, but in many cases have become increasingly confusing and esoteric to the lay person.*
>
> *The need to keep public and lay person accessibility front and center is especially important given the wide range of changes to administrative tribunal structures and appeal processes which we understand may be considered as part of the Administrative Justice Project.*

The association referenced several of the recommendations in the Report of the Frank Committee aimed at maintaining or increasing public accessibility to tribunals. These include: advising of right to apply to a tribunal, public hearings unless compelling reasons dictate otherwise, government departments not entitled to legal counsel unless citizen employs lawyer, citizen only to be deprived of lawyers in exceptional circumstances, citizens should never have to

[5] The Dispute Resolution Office makes the point that case management often goes hand in hand with dispute resolution processes and can be a very effective means of getting at issues of costs and delay.

pay costs if dispute is with the government but government should have to pay reasonable expenses of successful applicants and in "party-party" disputes and costs should be awarded only with respect to frivolous applications. The association also noted the potential for improving public access by offering a wider range of dispute resolution processes.

Office of the Ombudsman

The Office of the Ombudsman expressed concerns "about the court-centered focus" of the background paper. The Ombudsman's submissions noted some alternative review mechanisms and identified some matters of particular concern to that office. In particular, the Ombudsman expressed concern that the background paper does not:

> *… consider agencies such as the Office of the Ombudsman and the Office of the Information and Privacy Commissioner which now have authority over administrative tribunals and can and do engage in oversight which has implications for current practice in a wide range of administrative agencies including tribunals and the Information and Privacy Commissioner deals with informational questions which may impact on the operation of tribunals.*
>
> *…*
>
> *Influencing procedural change and appropriate use of power through raising awareness of fairness concepts and practices has been a hallmark of the work of the Ombudsman. Raising awareness has occurred through the investigative process, through both confidential and public comment, and through development and promotion of materials such as the Administrative Fairness Checklist.*
>
> *It is respectfully submitted that due regard should be given to the role of agencies other than the courts which have advisory and supervisory roles to play in the administrative justice system of British Columbia. In addition, enhancement of those roles should be considered in the context of either adoption of statutory powers and procedures legislation or creation of a council or commission which itself would have regulatory power over administrative tribunals.*

Of the options identified in the background paper, the Ombudsman favours a version of the third option. Specifically, the Ombudsman's view is that:

> *… It does… seem useful to establish in legislation a code of minimum standards and minimum procedural requirements which will encapsulate the essence of fair process.*
>
> *Furthermore it seems useful to embody in such legislation recognition of the powers and efforts of bodies such as the Ombudsman which have some supervisory oversight now. One way to do this in legislation related to the*

exercise of statutory powers of decisions is to allow reconsideration of such decisions based on review by the Ombudsman.

While a statutory powers and procedures act could set minimum procedural standards, it would not be appropriate for such legislation to set specific rules for a wide number of differing types of agencies. It seems more appropriate for such legislation to provide guidelines for rule making, to provide for some sort of supervision of rule making and to let tribunals make their own rules within the standards and processes outlined in the legislation.

In terms of supervision of rule making, a variety of possibilities are canvassed in the background paper. These range from Rules Committees through Councils of Tribunals to Ombudsman approval. Examples from the American context which are not reviewed in the paper but which at some point may bear in-depth analysis are Offices of Administrative Law and Regulatory Fairness Boards.

It is suggested that it is appropriate that there be some form of oversight of the rules and rule making processes of administrative tribunals. This supervision should fall to a body which is independent of government and the tribunals over which it will have jurisdiction. Such a body, whatever it is called, should have the task of reviewing and advising on rules made by the various tribunals. It is an issue as to whether or not such a body should be able to order the tribunals to set new rules and, while this might be seen as efficient, it might also be seen as intrusive in the independence of the tribunals themselves. Whether that body is to have an advisory role or will have the power to order changes in rules, review by the body of new and amended rules of tribunals should be mandatory. It is also suggested that the Ombudsman would have jurisdiction over this body.

British Columbia Labour Relations Board

The British Columbia Labour Relations Board limited its comments to the topics that were of direct interest to it. The board observed that section 126 of the *Labour Relations Code* provides it with a rule-making power that is similar to that outlined in Option 4 of the background paper. Specifically, section 126 requires the Labour Relations Board to "determine its own practice and procedure". It also gives the board discretion to "make rules governing its practice and procedure and the exercise of its powers" subject to ministerial approval. In consultation with the labour relations community, the board developed practice and procedure rules that were approved by the minister in 1994.

The Labour Relations Board made the following observations about its rules and rule-making powers:

We have found the statutory rule-making power, and the Rules themselves, to greatly assist in the fair, efficient and effective functioning of the Board. While Option 4 may not be suitable for all administrative tribunals, we believe that the

> *rule-making power status quo with respect to the Board has served the labour relations community well. We note in particular that the process by which the Board developed the Rules (i.e., in consultation with our user community) likely contributed greatly to their effectiveness and acceptability.*
>
> *Accordingly, given the positive experience we have had with the Board's status quo of a statutory rule making power, the Board does not perceive a need for legislative reform which might potentially interfere with our ability to determine our own practice and procedure and to make our own rules (subject to ministerial approval).*
>
> *We recognize that not all aspects of Options 2 and 3 would have that effect. However, we are concerned that some aspects of these options for legislative reform may have such an effect, intentionally or unintentionally. For example, while some tribunals might well wish for the assistance of an Option 2 advisory Council of Tribunals, we would be concerned that such an advisory body might add an unnecessary layer of bureaucracy to the Board's rule-making process. Similarly, we would be concerned that an Option 3 Statutory Powers and Procedures Act might limit or complicate the Board's ability to develop practices and procedures uniquely suited to the labour relations environment.*
>
> *It may well be possible to implement reforms in the nature of Options 2 or 3 in such a way that assistance is provided to those tribunals which need and want it, without hindering the ability of tribunals such as the Board to determine their own practice and procedures and make their own rules. Accordingly, we would ask that, if legislative reform is undertaken, it be done with a clear recognition of the need to protect the practices, procedures and rule-making powers of tribunals such as the Board from unnecessary or unintended regulation or reform.*

MODEL STATUTORY POWERS POLICY DOCUMENT

As the Law Society points out, the administrative justice system is not homogenous. It comprises tribunals and agencies that vary greatly in their expertise and in the complexity of their subject matter. To quote the Law Society "[t]here would be no point in having a sophisticated commission-like administrative system for the issuance of dog licenses".

The jurisdiction and subject matter of some tribunals are narrow in scope. Examples include the Public Service Appeal Board and Mental Health Review Panels. Others, such as the Labour Relations Board and the Securities Commission, have extensive, complex, polycentric regulatory oversight functions that involve many competing economic, political or social interests. Still other administrative tribunals exercise purely appellate functions. Examples here include the Elevating Devices Appeal Board and the Property Assessment Appeal Board. These examples illustrate

that a "one size fits all" approach to administrative justice reform is not sensible, feasible or desirable.

As administrative tribunals are creatures of statute, they only have those powers conferred on them by the legislature, either expressly or by necessary implication. Where a tribunal's powers are not expressly stated, or where they are not expressed with clarity, there is room for argument about their scope and whether other powers are necessarily implied. This may lead to the types of disruptive jurisdictional issues referred to by BCCAT in its submissions.[6] As between tribunals, conferring a specific (or slightly different) power on one tribunal but not another may compel a reviewing court to conclude that silence in the other tribunal's governing statute means such a power is not implied.

Tribunals' diversity necessitates flexibility in statutory provisions providing the source of their powers and procedures. However, to the extent that it is possible, the statutory language used to confer core powers should be consistently ascribed. A different or unique statutory expression of an individual tribunal's powers should signify a different or unique characteristic of that tribunal and not simply be the product of ad hoc, non-integrated policy development.

Statutory powers legislation could be used to establish a range or "menu" of core powers to be applied, as appropriate, to specific administrative tribunals through Schedules to the Act or cross-referencing in the tribunal's statute.[8] The idea of incorporating powers by reference to a more general or external statute is not unprecedented. For example, it is not unusual for a tribunal's enabling statute to incorporate by reference certain powers of a commission under the *Inquiry Act*, R.S.B.C. 1996, c. 224. Examples are found in the *Environment Management Act* (section 11(11)), the *Expropriation Act* (section 26(7)), the *Employment Standards Act* (section 108(1)), the *Human Rights Code* (section 34(3)), the *Labour Relations Code* (section 123) and the *Health Care (Consent) and Care Facility (Admission) Act* (section 29(9)). Incorporation by reference often provides administrative tribunals with the powers of a commissioner under sections 12

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6 Judicial review of administrative tribunal decisions has appropriately been said to involve a specialized branch of statutory interpretation, the central focus of which is a search for legislative intent. Clear and consistent statutory expression of tribunal powers will do much to minimize unnecessary and sometimes protracted judicial review and statutory appeal proceeding.

7 For example, the Alberta Administrative Procedures Act enables the Lieutenant Governor in Council to designate, by order, the tribunals to which that Act applies and to specify which parts of the Act apply to each designated tribunal.

(protection of commissioners), 15 (power to summon witnesses) and 16 (power to enforce summons and punish for contempt) of that Act. These sections provide:

> 12 A commissioner appointed under this Part has the same protection and privileges, in the case of an action brought for an act done or omitted to be done in the execution of the commissioner's duties, as are by law given to the judges of the Supreme Court.
>
> 15(1) The commissioners acting under a commission issued under this Part, by summons, may require a person
>
> (a) to attend as a witness, at a place and time mentioned in the summons, which time must be a reasonable time from the date of the summons, and
>
> (b) to bring and produce before them all documents, writings, books, deeds and papers in the person's possession, custody or power touching or in any way relating to the subject matter of the inquiry.
>
> (2) A person named in and served with a summons must attend before the commissioners and answer on oath, unless the commissioners direct otherwise, all questions touching the subject matter of the inquiry, and produce all documents, writings, books, deeds and papers in accordance with the summons.
>
> 16(1) The commissioners have the same powers, to be exercised in the same way, as judges of the Supreme Court, if
>
> (a) any person on whom a summons has been served by the delivery of it to the person, or by leaving it at the person's usual residence,
>
> (i) fails to appear before the commissioners at the time and place specified in the summons, or
>
> (ii) having appeared before the commissioners, refuses to be sworn, to answer questions put to the person by the commissioners, or to produce and show to the commissioners any documents, writings, books, deeds and papers in the person's possession, custody or power touching or in any way relating to the subject matter of the inquiry, or
>
> (b) a person is guilty of contempt of the commissioners or their office.
>
> (2) All jailers, sheriffs, constables, bailiffs and all other police officers must assist the commissioners in the execution of their office.

The *Inquiry Act* was enacted to address the powers to be given to judges of the Supreme Court who were appointed from time to time to carry out inquiries and report on government departments or conduct. Although this legislation was not intended or designed to provide a source of powers for administrative tribunals, it came to be used for that purpose. In more recent years, in part due to concerns about purporting to give administrative tribunals powers traditionally associated with the inherent jurisdiction of superior court judges (and as the occasion presented itself), legislative counsel have drafted similar provisions that are specifically tailored to

administrative tribunals and are expressed in simpler language. For example, sections 15 and 19[9] of the *Commercial Appeals Commission Act*, R.S.B.C. 1996, c. 54 provide:

> ***Witnesses***
>
> 15(1) The commission or a member has the same power
>
> (a) to summon and enforce the attendance of witnesses,
>
> (b) to compel witnesses to give evidence on oath or in any other manner, and
>
> (c) to compel witnesses to produce records and things,
>
> that the Supreme Court has for the trial of civil actions.
>
> (2) When the commission or a member exercises a power under subsection (1), a person who fails or refuses
>
> (a) to attend,
>
> (b) to take an oath,
>
> (c) to answer questions, or
>
> (d) to produce the records or things in the person's custody or possession,
>
> is liable, on application to the Supreme Court, to be committed for contempt as if in breach of an order or judgment of the Supreme Court.
>
> (3) Section 34(5) of the *Evidence Act* does not apply.
>
> ...
>
> ***Order for compliance***
>
> 19(1) If it appears that a person has failed to comply with an order or decision of the commission or a member, the commission or a party may apply to the Supreme Court for an order
>
> (a) directing the person to comply with the order or decision, and
>
> (b) directing the directors and senior officers of the person to cause the person to comply with the order or decision.
>
> (2) On an application under subsection (1), the court may make the order requested or another order it thinks proper.
>
> (3) An application may be made under subsection (1) even though a penalty has already been imposed on that person for the noncompliance.

These types of provisions are clearly more tailored to the nature and function of administrative tribunals and dispense with the need, for example, to grapple with (or litigate) difficult issues

[9] Shortly after the *Commercial Appeals Commission Act* was enacted, similar provisions to those set out in sections 15 to 17 of that Act were added to the *Securities Act* (s. 144). Subsequently, several similar provisions have been included in other statutes: e.g., *Assessment Act*, ss. 39, 58 and 59; *Credit Union Incorporation Act*, s. 97; *Employment Investment Act*, s. 38; *Business Venture Capital Act*, s. 32; *Trade Practice Act*, s. 10 (2.3) and (2.4).

related to the extent to which a tribunal can exercise contempt powers. They also provide clear procedures for enforcement, rather than leaving such questions to be determined by courts. Provisions of this nature lead to a more efficient and effective means of administering the tribunal's enabling statute.

Other Canadian jurisdictions have enacted statutory powers legislation which applies in whole or in part to certain categories or types of administrative tribunals. The examples canvassed in the background paper are the Alberta *Administrative Procedures Act*, the Ontario *Statutory Powers Procedure Act* and, from Quebec, *An Act Respecting Administrative Justice*. It is apparent that there is some support for establishing similar legislation in this jurisdiction.

The advantage of legislated statutory powers is that reform initiatives are mandatory rather than reliant on a commitment to apply guidelines. However, there are two main drawbacks to the use of statutory powers legislation.

The first is that such legislation does not allow for individual powers to be crafted in a way that reflects the unique and specific needs of each tribunal, as discussed earlier in this report. For example, some administrative tribunals (like the Labour Relations Board) have been given statutory discovery powers that are designed to reflect their specific mandate and needs.[10] In such cases, the unique statutory expression of the tribunal's powers is reasonably and explicably justified and should not be interfered with.

The second drawback is that the idea of incorporating powers by reference (or some like mechanism) means that a review of the enabling statute will not provide the reader with an immediate understanding of the administrative tribunal's powers and procedures. An important feature of access to justice is ensuring that the parties appearing before the administrative tribunal have clear, understandable, "reader-friendly" information about the tribunal's powers and procedures. It is therefore desirable that the tribunal's constituent statute provide the source of all of the administrative tribunal's powers.

It is proposed that, as a first step, a policy document entitled the Model Statutory Power Provisions for Administrative Tribunals be developed through the Legislative Counsel's Office with the policy and legal advice of a special advisory body. This body would be established within the Ministry of the Attorney General and would include the staff of the Administrative Justice

[10] Other examples are found in the *Assessment Act* with respect to review panels (section 38).

Office, representatives of the Dispute Resolution Office, host ministry representatives and administrative law experts. The Circle of Chairs and the BCCAT would be invited to participate and make representations on behalf of their memberships. The work of the advisory body would be coordinated by the Administrative Justice Office.

The resulting policy document would set out a menu of model statutory power provisions that could be selectively applied (with any necessary adjustments) to individual administrative tribunals, with alternative provisions in respect of some powers. For example, the type of practice and procedure rule-making power appropriate for a first instance adjudication body will generally be different from the type of rule-making power appropriate for an appeal tribunal. Similarly, the type of rule-making power appropriate for tribunals processing a high volume of matters within limited and fixed time constraints will likely be different from those appropriate for tribunals like the Human Rights Tribunal and the Expropriation Compensation Board.

These model powers would be developed having reference to the existing statutory powers of some administrative tribunals, statutory powers legislation in other jurisdictions and the model provisions developed by the Society of Ontario Adjudicators and Regulators[11] and the English Council on Tribunals.[12]

As an alternative to the enactment of a *Statutory Powers Act*, the Model Statutory Power Provisions for Administrative Tribunals could be implemented as Legislative Counsel Office guidelines. This approach would provide drafting flexibility. It would also achieve significantly greater uniformity and consistency in the types of statutory powers that administrative tribunals have and ensure that each tribunal's enabling statute is the only source of its powers.

Once a policy document has been developed and the tribunal-by-tribunal review process discussed below is completed, the government will be better situated to assess whether the model powers set out in the policy document should be implemented through guidelines or through legislation.

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11 Ontario Rules: A model for administrative justice agencies (November 2000), http://www.soar.on.ca/soar-rules_prac.htm.

12 Model Rules of Procedure for Tribunals, http://www.council-on-tribunals.gov.uk/specialreports/mrp/modelrules.htm.

Differentiating between Powers and Procedures

At common law (and absent contrary or overriding statutory direction) administrative tribunals are masters of their own procedures. Drawing the line between those types of powers that are more procedural than substantive in nature (and therefore may not require express statutory authority) and those that must be grounded in legislation is not always straightforward. This point was made in the background paper (p. 62):

> *It is not clear at common law whether the power to make rules regarding "practice and procedure" encompasses important powers some may seek to characterize as "substantive" – for example, powers to summarily dismiss appeals, grant interim relief, compel witnesses to give evidence, order costs or reconsider decisions. Such uncertainty tends to invite litigation. Nor does it address important issues such as the role of the chair and the ability of members to complete work after the expiry of their terms.*

A similar point was made by the English Council of Tribunals in its interim revision to the earlier Report on Model Rules of Procedure. The council observed that it "is highly desirable when drafting legislation which will establish a new tribunal to give early and detailed consideration to the powers and procedures of the tribunal so as to ensure that the rule-making power is adequate. A power to make rules for 'the practice and procedure' of the tribunal or for 'regulating the exercise of the right of appeal' is unlikely to suffice for the needs of a modern tribunal". To provide guidance on the matter, the council included a Checklist of Matters to be Considered when Preparing Legislation Establishing a Tribunal or other Adjudicative Body which:

> *… lists common form elements relating to the establishment, functioning and procedure of tribunals and other bodies with adjudicative functions. It is divided for convenience into two parts; part A lists those matters which in many cases are to be found substantively in the principal legislation; part B lists those matters which are frequently the subject of rule-making powers. There is no hard and fast practice as to whether matters fall into part A or part B … .*

In order to eliminate any room for legal debate about whether a certain power requires express statutory authority or whether it is of a procedural nature (and thus within the tribunal's domain, subject always to natural justice considerations), it is recommended that the administrative tribunal's core powers be detailed in the tribunal's enabling statute.

What types of core powers should administrative tribunals have? The English Council of Tribunals (Annex A, Interim Report) lists a number of broad categories of "matters for consideration for inclusion in rule-making powers". These broad categories may be generally described this way: matters relating to the establishment, composition and sittings of the

tribunals; general provision for practice and procedure; and specific matters that may be the subject of rules expanding. These specific matters include: time limits, parties, preliminary questions, evidence, sanctions for failure to comply with procedural requirements, appearance/representation, hearing powers, decisions, delegation of powers, costs, enforcement, publicity and notice (e.g. service of documents) and ancillary powers.

Recognizing that each tribunal will need statutory powers suited to its individual mandate and functions, the following types of powers could form the subject of the Model Statutory Power Provisions for Administrative Tribunals:

- power to make rules governing the administrative tribunal's practices and procedures
- power to issue practice directives
- power to make orders in respect of pre-hearing matters such as document production, exchange of will-say statements, provision of particulars and pre-hearing examination of a party on oath or solemn affirmation or by affidavit
- power requiring parties to attend pre-hearing conferences to consider such matters as the settlement of any or all of the issues, defining and simplification of the issues, facts or evidence that may be agreed upon, dates by which steps in the proceeding are to be taken or begun, time estimates or like matters aimed at simplifying or accelerating the conduct of the hearing[13]
- powers relating to dispute resolution, such as powers to: issue orders giving effect to consensual agreements, engage in alternative dispute resolution at any point, protect confidentiality of statements made and materials used during alternative dispute resolution, engage in mandatory alternative dispute resolution and authorize tribunal members to participate in alternative dispute resolution processes
- power to summon witnesses and administer oaths/affirmations
- power to disallow late documents
- power to shorten or extend deadlines or time periods
- power to make interim or consent orders
- power to retain expert witnesses

[13] For example, section 54 of the *Assessment Act* gives the Property Assessment Appeal Board powers, subject to the Act and regulations, to make "any order the board considers necessary to facilitate just and timely resolutions of appeals" and without limitation to makes orders: (a) requiring the parties to the appeal to file written submissions with the board in respect of all or any part of the proceeding, (b) respecting the filing of admissions by parties, (c) respecting disclosure, including, without limitation, prehearing examination of a party on oath or solemn affirmation or by affidavit, (d) respecting exchange of records by parties, (e) directing the joining of appeals, issues or parties, and (f) requiring the parties to attend a confidential, without prejudice, prehearing conference in order to discuss issues in the appeal and the possibility of simplifying and disposing of those issues, and for this purpose, the board may order that the conference not be open to the public.

- power to summarily dismiss claims if, for example, a proceeding is outside the tribunal's jurisdiction; is frivolous, vexatious or commenced in bad faith; or if an applicant fails or refuses to comply with the tribunal procedures;[14]
- power to dismiss an appeal for failure to comply with a tribunal order[15]
- discretion to grant or refuse to grant adjournments if, for example, adjournment will not cause unreasonable delay in the proceeding or a denial of justice, or if for the purpose of fostering a settlement
- power to add parties or intervenors[16]
- power to consolidate or sever proceedings
- power to relieve against technical irregularities or procedural errors that do no result in a denial of fairness, on just and reasonable terms
- discretion to conduct oral, written or electronic hearings[17]
- power to proceed with a hearing in the absence of a party where notice has been given and the party does not attend or participate[18]
- power enabling the chair of the administrative tribunal to specify tribunal size[19] and clarification that panels have the power and authority of the board where such panels are established
- provision defining the role of chair
- discretion to consider evidence whether or not it is admissible in a court of law
- discretion to hear evidence in public or *in camera*
- power to award costs
- power/requirement to publish decisions[20]
- power to stay or suspend a decision of the administrative tribunal pending appeal
- power to refer a question of law to the Supreme Court.[21]

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14 See, for example, section 114 of the Employment Standards Act which gives the Chair of the Employment Standards Tribunal the discretion to dismiss an appeal "without a hearing of any kind" if she is satisfied that the appeal was not requested within the statutory time limit, is not within the Tribunal's jurisdiction, is frivolous, vexatious, trivial or brought in bad faith.

15 See, for example, section 54(3) of the *Assessment Act.*

16 See Report and Recommendations on Standing before Administrative Tribunals on Judicial Review.

17 See, for example, section 55 of the *Assessment Act* and sections 5.1 and 5.2 of the Ontario *Statutory Powers Procedure Act*.

18 See, for example, section 54(4)-(5) of the *Assessment Act* and section 7 of the Ontario *Statutory Powers Procedure Act*.

19 See for example, section 11(7) of the *Environment Management Act*, section 106 of the *Employment Standards Act,* and section 22(2) of the *Elevating Devices Safety Act*.

20 See, for example, section 111 of the *Employment Standards Act* which requires the Chair of the Employment Standards Tribunal to "ensure that all orders made by the tribunal on appeals and reconsiderations and all recommendations made by the tribunal on exclusions are available in writing for publication".

21 Section 64 of the *Assessment Act* gives the Property Assessment Appeal Board the power to refer questions of law to the Supreme Court in the form of a stated case.

It might also be appropriate to include the following types of provisions in statutory powers legislation:

- basic or minimum procedural fairness provisions, such as those referred to below
- power to decide all questions of fact and law[22] arising in the proceedings[23]
- clarification of an administrative tribunal's immunity from suit
- power to reconsider the administrative tribunal's decisions on specified grounds[24]
- power enabling a party (and/or the tribunal) to file and enforce an order of the administrative tribunal as an order of the Supreme Court.

Selected Examples and Some Issues

A brief discussion of some of the specific types of powers enumerated above will help to illustrate the diversity between different administrative tribunals. It will also highlight some of the policy considerations that should be taken into account in drafting statutory powers legislation and determining which powers are appropriate for individual tribunals. (This discussion and subsequent discussions will, for illustrative purposes, include references to provisions in legislation that is the subject of proposed repeal or amendment.)

Power to Organize the Composition of the Board

Many statutes provide that the administrative tribunal can establish panels, including panels of one member, although there is little consistency in the statutory language used. For example, section 18(6) of the *Public Service Act* provides that a member of the Public Service Appeal Board "may sit alone or the chair may appoint a panel consisting of 3 members to hear and decide an appeal". Section 34 of the *Human Rights Code* provides an example of a similar but more detailed power:

> 34(1) A complaint … is to be heard by
>
> (a) a single member of the tribunal designated by the chair, or
>
> (b) a panel of 3 members of the tribunal designated by the chair.
>
> (2) If a panel is designated under subsection (1)(b), the chair must designate one of the members of the panel to preside.

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22 With exceptions for some constitutional questions: see Report and Recommendations on Charter Jurisdiction.

23 An example of this is found in section 108(2) of the *Employment Standards Act*.

24 See Report and Recommendations on Designing Administrative Processes.

(3) A member or panel has, the for the purposes of this Act,

(a) the protection and privileges of a commissioner under section 12 of the Inquiry Act, and

(b) the powers of a commissioner under sections 15 and 16 of that Act.

(4) A member of the tribunal who resigns or whose appointment to the tribunal terminates may continue to act as a member in a hearing that has begun until an order is made under section 37 regarding the complaint.

Section 44 of the *Assessment Act* provides a good example of a comprehensive provision respecting the organization of an administrative tribunal, the Property Assessment Appeal Board. It provides:

Organization of the board

44(1) The chair of the board[25] may organize the board into panels, each comprised of one or more members,

(2) If the chair organizes a panel comprised of more than one member, the chair must designate one of those members as chair of the panel.

(3) The members of the board may sit

(a) as a board, or

(b) as a panel of the board,

and 2 or more panels may sit at the same time.

(4) If members of the board sit as a panel,

(a) the panel has the jurisdiction of, and may exercise and perform the powers and duties of the board, and

(b) an order, decision or action of the panel is an order, decision or action of the board.

(5) The decision of a majority of the members of a panel of the board is a decision of the board and, in the case of a tie, the decision of the chair of the panel governs.

(6) If a member of a panel is unable for any reason to complete the member's duties, the remaining members of that panel may, with consent of the chair of the board, continue to hear and determine the matter, and the vacancy does not invalidate the proceeding.

(7) A member who resigns or whose term expires may continue to sit and make determinations in a proceeding if the member was assigned to the proceeding during

[25] The statute also provides that the board chair "is the chief executive officer of the board". Where the chair is unable to act, the vice chair is able to act in the chair's place: section 43(4), (5).

> office and all determinations made by that member are as effective as though he or she holds office.

Not only does this comprehensive language provide sufficient flexibility to enable a tribunal to organize itself in the most efficient and effective way, it also ensures there is no room for debate about such questions as the powers of individual panels, the effect of the expiration of a member's appointment and the effect of panel decisions.[26]

Power to Admit Evidence

The power to admit evidence is dealt with in many ways. Some statutes are silent on the question while others express the tribunal's ability to consider and admit evidence in diverse ways. Compare, for example, the following provisions from a number of different statutes:

> ***Labour Relations Code***
>
> 124(1) The board may receive and accept such evidence and information on oath, affidavit or otherwise as in its discretion it considers proper, whether or not the evidence is admissible in a court of law.
>
> ***Property Assessment Appeal Board***
>
> 56(1) In an appeal under this Part, the board may admit any oral or written testimony or any record or thing as evidence in the appeal, whether or not admissible as evidence in a court of law or given or proven under oath or solemn affirmation.
>
> (2) The board may not admit as evidence in an appeal anything that is privileged under the laws of evidence.
>
> ***Commercial Appeals Commission Act***
>
> 17(1) The commission may admit as evidence in an appeal, whether or not given or proven under oath or admissible as evidence in a court,
>
> (a) any oral testimony, or
>
> (b) any record or other thing
>
> relevant to the subject matter of the appeal, and the commission may act on the evidence.
>
> (2) Nothing is admissible in evidence before the commission or a member that is inadmissible in a court because of a privilege under the law of evidence.

[26] Similar examples of this type of comprehensive provision are found in the *Elevating Devices Safety Act* and the *Electrical Safety Act*.

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

Coroners Act[27]

41(1) Subject to subsections (2) and (3), a coroner may

(a) admit as evidence at an inquest, whether or not admissible as evidence in any court, any oral testimony and any document or other thing relevant to the purposes of the inquest,

(b) act on the evidence admitted under paragraph (a),

(c) exclude anything unduly repetitious or anything that the coroner considers does not meet the standards of proof commonly relied on by reasonably prudent persons in the conduct of their own affairs, and

(d) comment on the weight that ought to be given to any particular evidence.

(2) Nothing is admissible in evidence at an inquest

(a) that would be inadmissible in a court because of any privilege under the law of evidence, or

(b) that is inadmissible by the Act under which the proceedings arise or any other Act.

(3) Nothing in subsection (1) overrides the provisions of any Act expressly limiting the extent to or purposes for which any oral testimony, documents or things may be admitted or used in evidence.

Human Rights Code

35(3) A member of a panel may receive and accept on oath, by affidavit or otherwise, evidence and information that the member or panel considers necessary and appropriate, whether or not the evidence or information would be admissible in a court of law.

There should be more consistency in the power to admit evidence. Additionally, absent special circumstances, this power should reflect common law principles. Consideration should also be given to the question of setting out what evidence is not admissible. This could include privileged evidence or information or evidence otherwise rendered inadmissible by express statutory provision.

[27] See also sections 42 (written record of evidence) and 43 (copies of documents) of that Act.

Open or *In Camera* Hearings

Many statutes are silent on the question of whether the administrative tribunal has power to accept and consider evidence on an *in camera* basis. Examples include the *Expropriation Act*, the *Employment Standards Act* and the *Health Care (Consent) and Care Facility (Admission) Act*. Other statutes address the question directly. For example, section 14 of the *Commercial Appeals Commission Act* presumes that, as a general rule, commission hearings will be open to the public. However, under that statute, the commission is given a discretion to exclude the public for all or part of a hearing if the commission is of the view "that a public hearing would be unduly prejudicial to a party or a witness and that it would not be contrary to the public interest".

In Ontario, the *Statutory Powers Procedure Act* (section 9) provides that oral, written and, if practicable, electronic hearings must be open to or accessible by the public unless the tribunal is of the opinion that in matters involving public security or in intimate financial or personal matters the desirability of avoiding disclosure, in the interests of any person affected or in the public interest, outweighs the desirability of adhering to the principles that hearings be open to the public.

The Quebec legislation, *An Act Respecting Administrative Justice*, requires that the hearings of tribunals exercising adjudicative functions "shall be held in public" unless the tribunal orders the hearing to be held in camera "where necessary to maintain public order". Section 131 of that Act further elaborates on non-disclosure or publication of certain evidence:

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

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

Other Issues Relating to Pre-Hearing Disclosure

One issue that arises indirectly as a result of providing administrative tribunals with effective pre-hearing disclosure powers concerns the *Freedom of Information and Protection of Privacy Act.* It

is not unusual, in either an administrative tribunal or civil litigation context, to see this legislation used as a means of pre-hearing discovery. At present, the Act does not give the Information and Privacy Commissioner discretion to decline a request in circumstances where the type of information sought can be obtained through administrative tribunal pre-hearing disclosure processes.

Where a tribunal has established, effective pre-hearing powers to require disclosure of records relevant to the issues before it, some consideration should be given as to whether the *Freedom of Information and Protection of Privacy Act* should be amended to give the Information and Privacy Commissioner the discretion to decline access requests in these circumstances.

A related question concerns the confidential nature of information relating to mediation and settlement processes.[28] This question is considered in a separate report for the Administrative Justice Project titled Dispute Resolution.[29]

Enforcement Powers

Some statutes are silent as to how an administrative tribunal order or decision can be enforced in the event of non-compliance with it. Examples include the *Environment Management Act* and the *Community Care Facility Act*.[30] Other statutes specify enforcement mechanisms but do so in different ways. For example, section 19 of the *Commercial Appeals Commission Act* gives both the commission and the parties the ability to apply to the Supreme Court for an order directing compliance. Similarly, section 39 of the *Human Rights Code* gives a party the ability to "file a certified copy of the order with the Supreme Court" in which case such order is expressed to have

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28 Some statutes expressly address the confidential nature of these processes. For example, section 146 of the *Labour Relations Code* provides: "(1) The minister may receive and hold in confidence a proposal made by a party for settlement of a dispute or difference. (2) If information relates to the business or affairs of any person, whether or not a party to a dispute, difference or other reference, the minister, if he or she believes disclosure of the information would be prejudicial to the person, may direct that the information must not be made public or that it be made public in the manner he or she directs. (3) Information obtained for the purpose of this Code in the course of his or her duties by a member of the board, an industrial inquiry commission or other tribunal under this Code, a special officer, a mediator or other person appointed under this Code, an employee of any of them or an employee under the administration of the minister is not open to inspection by a person or a court, and the member, special officer, mediator or other person appointed under this Code or employee must not be required by a court or tribunal to give evidence relative to it".

29 The report on Dispute Resolution is available on the Project's website, at: http://www.gov.bc.ca/ajp.

30 Although Bill 16, the *Community Care Facility Act*, has a provision enabling the chair of the Board to file a Board order in the Supreme Court. Once filed such an order "is enforceable in the same manner as an order of the Supreme Court" (section 19).

"the same force and effect, and all proceedings may be taken on it, as if it were a judgment of the Supreme Court". Section 26(4) of the *Expropriation Act* provides that certificates issued by the Expropriation Compensation Board "may be filed in a registry of the supreme court and may be enforced as though it were an order of that court". Section 135 of the *Labour Relations Code* provides that:

> 135(1) The board must on request by any party or may on its own motion file in a Supreme Court registry at any time a copy of a decision or order made by the board under this Code, a collective agreement or the regulations.
>
> (2) The decision or order must be filed as if it were an order of the court, and on being filed it is deemed for all purposes except appeal from it to be an order of the Supreme Court and enforceable as such.

Section 59 of the *Assessment Act* contains a slightly different provision. It provides:

> **Order for compliance**
>
> 59(1) The board or a party to an appeal under this Part may apply to the Supreme Court for an order
>
> (a) directing a person to comply with an order or decision of the board under this Part, and
>
> (b) directing any directors and officers of the person to cause the person to comply with an order or decision of the board under this Part.

Statutory mechanisms for enforcement are preferable to statutory silence on the point. As the examples above illustrate, where such provisions do exist, there are varying descriptions of them. While there may be policy considerations relating to the question of who should be able to apply to court for a compliance order, there is no obvious reason why the mechanism itself cannot be described across statutes in more uniform terms.

Power to Reconsider

At common law, all administrative tribunals have a limited ability to reopen their decisions. Where the tribunal's enabling statute is silent on the point, the extent to which such a power exists may be the subject of some uncertainty and thus the subject also of litigation. Specifying the circumstances in which an administrative tribunal has power to reconsider its decisions is desirable. Similarly, policy choices should be made as to whether the reconsideration power should be a general one or be narrowly circumscribed, similar to the court's limited ability to reopen cases under the *functus officio* doctrine.

Some statutes enable the administrative tribunal to reconsider its decisions either generally or in limited circumstances. For example, the *Coroners Act* allows the Chief Coroner to direct a coroner to reconsider an inquiry on grounds that new evidence has arisen or been discovered, if that evidence is "substantial and material to the inquiry" and "did not exist at the time of the inquiry or did exist at that time but was not discovered and could not through the exercise of due diligence have been discovered" (section 20(5) and (6)).

Section 141 of the *Labour Relations Code* gives the Labour Relations Board the power to grant leave to reconsider and, if leave is granted, power to "vary or cancel the decision that is the subject of reconsideration or … remit the matter to the original panel". Leave to apply for reconsideration may only be granted if the Labour Relations Board is satisfied that: (a) evidence not available at the time of the original decision has become available, or (b) the decision of the board is inconsistent with the principles expressed or implied in this Code or in any other Act dealing with labour relations. Section 116(1) of the *Employment Standards Act* gives the Employment Standards Tribunal broad power to reconsider any of its orders or decisions.

The Quebec *Act Respecting Administrative Justice* gives tribunals the discretion to "confirm, vary or quash the contested decision and, if appropriate, make the decision which, in its opinion should have been made initially". The legislation further specifies the circumstances in which a review or revocation of a tribunal decision would be appropriate, namely:

- where a new fact is discovered which, had it been known in time, could have warranted a different decision;
- where a party, owing to reasons considered sufficient, could not be heard;
- where a substantive or procedural defect is of a nature likely to invalidate the decision.

The Ontario *Statutory Powers Procedure Act* contains an express provision enabling the tribunal to "at any time correct a typographical error, error of calculation or similar error made in its decision or order" (section 21.1). This provision reflects the common law "slip rule" developed in judicial proceedings and extended to administrative tribunal proceedings. Section 21.2 gives an administrative tribunal a broad discretion to "review all or part of its own decision or order, and ... confirm, vary, suspend or cancel the decision or order".

Administrative Tribunal Protection or Immunity Provisions

Through the mechanism of incorporation by reference to the *Inquiry Act*, some administrative tribunals are granted "the same protection and privileges, in the case of an action brought for an

act done or omitted to be done in the execution of the [tribunal's] duties, as are by law given to the judges of the Supreme Court". See, for example, section 14 of the *Parole Act*.

In other cases, the administrative tribunal's enabling statute will contain an express provision respecting immunity from suit. Typically the protection from liability extends to damages caused by an act or omission in the good faith exercise/performance or purported exercise/performance of duties and powers. Where this occurs, the statutory expression of the immunity varies from tribunal to tribunal. For example, section 13 of the *Environment Management Act* provides that "[n]o action may be brought against the board, a panel or any person for anything done or omitted in good faith in the performance or intended performance of a power conferred or a duty imposed under this Act or any other enactment administered by the minister". Section 33(1) of the *Health Care (Consent) and Care Facility (Admission) Act* provides that "[n]o action may be brought or continued against a person for any act or omission in the performance of a duty or the exercise of a power or function under this Act if the person has acted in good faith and used reasonable care".

Section 19 of the *Community Care Facility Act* provides in part that "[a]n action for damages does not lie and must not be instituted against the director, a medical health officer or a member of the board or a panel or a person acting on behalf or under the direction of any of them because of anything done or omitted in good faith in the performance or intended performance of any duty or the exercise or intended exercise of any power under this Act or the regulations". Section 24(3) of the proposed *Community Care Facility Act* (tabled in the Spring Session in 2002 as Bill 16) further provides that "[a] member of the board is not, in a civil action to which the member is not a party, required to testify or produce evidence about records or information obtained in the discharge of duties under this Act".

In still other cases, the administrative tribunal's enabling statute is silent on the point. Examples include the *Human Rights Code* and the *Labour Relations Code*.

Thus immunity provisions appear to be included on a rather ad hoc basis, indicating a lack of a clear policy rationale for determining when to appropriately include such provisions and to whom they should be extended.

In determining whether a general immunity provision should be incorporated into statutory powers legislation, the first policy question to be addressed is whether such a provision is legally necessary. If not, then consideration should be given to the question of whether there other

compelling policy reasons why such a provision should be included in statutory powers legislation (as has been done in Ontario).

The common law provides immunity in negligence for the good faith exercise of quasi-judicial powers.[31] Arguably, the common law has been codified by section 3(2) of the *Crown Proceeding Act* which provides immunity for actions of a "judicial nature". Additionally, the government has developed policy directives, under the *Public Service Act*, indemnifying employees who act in good faith in the course of their employment and, as a matter of policy, the government will defend legal actions against these employees and indemnify them for the costs of judgments or out-of-court settlements. Moreover, through the Risk Management Branch, the government provides similar indemnity protection to persons appointed to government agencies, boards and commissions (as well as those appointed to boards of Crown corporations or nominated by government to non-government boards). Thus many would say that statutory immunity clauses are neither necessary nor useful and further, are not necessarily effective as courts tend to construe these types of liability exceptions very narrowly (see, for example, *Dorman Timber Ltd. v. British Columbia,* [1997] B.C.J. No. 2117 (C.A.) (Q.L.)). Finally, the statutory interpretation questions raised by the inclusion of these types of provisions have led to some unanticipated developments in the law.

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

Basic Procedural Fairness Provisions

At common law, all administrative tribunals exercising decision making functions are bound by the principles of natural justice and procedural fairness. A tribunal's general common law duty to act

[31] See, for example, *French v. Law Society of Upper Canada* (1975), 61 D.L.R. (3d) 28 (Ont. C.A.), *Voratovic v. Law Society of Upper Canada* (1978), 87 D.L.R. (3d) 140 (Ont. H.C.J.), *Calvert v. Law Society of Upper Canada* (1981), 121 D.L.R. (3d) 169 (Ont. H.C.J.), *Harrington (Public Trustee of) v. Pappachristos* (1992), 5 Admin. L.R. (2d) 131 (B.C.S.C. Master), affm'd (1992), 75 B.C.L.R. (2d) 121 (S.C.), *Harrison v. Camgoz*, [1997] 2 W.W.R. 615 (Sask. Q.B.), *Edwards v. Law Society of Upper Canada*, (2000) 188 D.L.R. (4th) 613 (Ont. C.A.); upheld [2001] S.C.J. No. 77.

fairly is incapable of precise definition. In *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653, the Court held that:

> *¶49 ... every administrative body is the master of its own procedure and need not assume the trappings of a court. The object is not to import into administrative proceedings the rigidity of all the requirements of natural justice that must be observed by a court, but rather to allow administrative bodies to work a system that is flexible, adapted to their needs and fair ... the aim is not to create "procedural perfection" but to achieve a certain balance between the need for fairness, efficiency and predictability of outcome ....*

The issue that arises for consideration is whether the tribunal's enabling statute should expressly provide for some basic or core procedural fairness requirements (especially in relation to hearings and decision making) or whether the appropriate fairness requirements should be left to be determined by the common law.

At common law, the contents of procedural fairness will vary depending on such factors as the nature of the decision maker and the decision, the impact of the decision on the party or parties appearing before the decision maker and the statutory context. At minimum, common law procedural fairness rules require that parties appearing before an administrative tribunal be provided with a right to know the case against them and an opportunity to be heard. These rules also require the administrative tribunal to be unbiased and impartial. The general duty to act fairly has been described this way:

> *Administrative action is subject to judicial review on the ground of procedural impropriety. In particular, many public decision-makers are under a legal duty to afford to interested persons a fair opportunity to participate in the decision making process before any action is taken that is detrimental to their interests. These participatory rights may be found under different labels. At common law, the notions of the "rules of natural justice" and more recently, "the duty of fairness", are frequently used to denote the several rules and principles that provide those participatory rights. As well, of course, statutes may require an opportunity for a "hearing" or impose a duty to "consult" before a particular statutory power is exercised … .*
>
> *… because of the wide range of circumstances in which the duty of fairness applies, its content is not monolithic. In some situations it may call for a procedure that is barely distinguishable from that followed in the courts of law, including, for example, personal service of notice, full disclosure of relevant information, and an oral hearing before the decision-maker, with the right to be represented by counsel, to call witnesses, to produce evidence, and to cross-examine. In other settings, however, procedural fairness may be satisfied by an informal and simple procedure that could never be mistaken for a trial, such as*

> *an opportunity to make submissions, or to have an interview with an official who will in turn report to the decision-maker.*
>
> *The contents of the procedural protections that an agency may be required to offer before taking administrative action should match in diversity the statutory powers to which the duty of fairness applies. In the absence of statutory rules, the task of prescribing for a particular agency a procedure that gives individuals who may be affected by its decisions a fair opportunity to participate in the decision making process, and at the same time is consistent with the public interest in effective, expeditious and efficient decision making, is among the most regularly encountered and difficult issues in the law of administrative procedure.*[32]

Many statutes are silent with respect to procedural fairness requirements. Other statutes specify very minimal protections. For example, the *Elevating Devices Safety Act* (section 25(2)) and the *Electrical Safety Act* (section 23(3)) provide that "unless the parties to an appeal agree otherwise, the board[33] must hear an appeal by holding a hearing at which all parties are entitled to be heard".

Some other statutes contemplate more formal proceedings with the full panoply of procedural protections. For example, the *Environment Management Act* (section 11(13)) requires the Environmental Appeal Board to give those persons with "full party status" the rights to be represented by counsel, to present evidence, to "ask questions" (in oral hearings) and to "make submissions as to facts, law and jurisdiction". Similarly, the *Coroners Act* contains provisions respecting the examination of witnesses (section 34), questions by the jury (section 35), the right to call evidence and cross examine (section 36), and the right of witnesses to counsel (section 40). The *Human Rights Code* requires the Human Rights Tribunal to give the parties before it "the opportunity to be represented by counsel, to present relevant evidence, to cross examine witnesses and to make submissions" (section 35(2)). Finally, the *Expropriation Act*, while silent in respect of most other procedural matters, expressly requires the Expropriation Compensation Board to "give written reasons for its decision" (section 26(2)).

While the common law identifies general principles for determining the content of natural justice and procedural rules in a given case, it is clear that the precise requirements will always be open to some (often considerable) debate. Accordingly, clearly articulated basic procedural requirements and rules will contribute significantly to reducing uncertainty in the law and

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[32] Brown and Evans, *Judicial Review of Administrative Action in Canada*, Volume 2 (Canvasback Publishing) at pp. 7-1 to 7-2.

demystifying the administrative tribunal's process for those appearing before it. In appropriate cases, the tribunal's "core" or minimum procedural fairness requirements should be expressed in its enabling statute. However, most of the information about the tribunal's procedures should be contained its detailed rules of practice and procedure.

Common law principles of natural justice and fairness may be abrogated by statute (within constitutional limitations). Abrogation of common law fairness requirements must be clearly spelled out in the administrative tribunal's enabling statute. In some circumstances there may be public policy reasons to remove certain procedural fairness rights (in the least intrusive fashion possible) by express statutory provision. An example of this would be where serious and impending public health or safety issues arise.

The *Community Care Facility Act* illustrates this point. In very general terms, this legislation regulates the licensing of child care and adult residential care facilities (collectively called community care facilities). The recipients of child care and adult residential care services represent a particularly vulnerable and reliant population. Where the director has reasonable grounds to believe that the health or safety of such persons is at risk, she has a discretion (under section 7 of the Act), without notice or a hearing, to attach terms or conditions to, or suspend, a licence or interim permit issued under the Act pending commencement or completion of a hearing under section 6 of the Act. Where this occurs, the director must commence the section 6 hearing as soon as is practicable (if a hearing is not already in progress).

In other cases, for reasons of institutional efficiency, the statutory abrogation of common law fairness principles may be seen to be necessary. For example, institutional bias concerns arise if a tribunal exercises several different functions such as investigative, "prosecutorial" and adjudicative. Clear and express statutory authority is required to permit an administrative tribunal to exercise overlapping functions. If such authority is expressly granted (and absent constitutional considerations), the tribunal should only be vulnerable to institutional bias allegations if it exercises overlapping functions unnecessarily. An example of where express statutory provision is made to guard against such unnecessary overlap is found in section 5.3(4) of the Ontario *Statutory Powers Procedure Act*. It provides that a tribunal member "who presides at a pre-hearing conference at which the parties attempt to settle issues shall not preside at the hearing of the proceeding unless the parties consent".

[33] The board refers to the Elevating Device Safety Appeal Board in the case of the *Elevating Devices*

Although aimed at apprehended rather than institutional bias concerns, section 16 of the *Coroners Act* illustrates a provision intended to guard against perceptions of bias and conflict of interest in the decision maker. It sets out the specific circumstances in which a coroner will be disqualified from conducting an inquiry, inquest or investigation. In a similar vein, section 31(5) of the *Assessment Act* requires a property assessment review panel member to "faithfully, honestly and impartially perform his or her duties and must not, except in the proper performance of those duties, disclose to any person any information obtained as a member".[34]

It might be helpful to make provision respecting applications requesting the removal of a tribunal member (often referred to as recusal) as the adjudicator for reasons of apprehended bias. For example, in Quebec, the *Act Respecting Administrative Justice* requires such applications to be made to the chair of the tribunal "at any time before the decision" if brought "with dispatch" and if there is "good reason to believe that a cause for recusation exists". Such applications are determined by a three person panel of the tribunal, one of whom is the chair.

RULES OF PRACTICE AND PROCEDURE

Some administrative tribunals have an express statutory rule-making power in their enabling statute. As noted, the Labour Relations Board is one such tribunal and it reports that such a statutory rule-making power has greatly assisted it in its fair, efficient and effective functioning. The Labour Relations Board's rule-making power is as follows:

> 126(1) The board must determine its own practice and procedure, but must give full opportunity to the parties to a proceeding to present evidence and make submissions.
>
> (2) The board, subject to the minister's approval, may make rules governing its practice and procedure and the exercise of its powers and establish forms it considers advisable.

The Labour Relations Board's rules include general rules, rules relating to specific applications, strike and lockout votes and applications to the associate chair of the mediation division. These rules canvass a broad range of procedural matters, including filing of applications, service and delivery, consolidations, pre-hearing and settlement conferences, adjournments and withdrawals, decisions and non-compliance by a party.

Safety Act, and the Electrical Safety Appeal Board in the case of the *Electrical Safety Act*.

[34] Section 43(8) of the *Assessment Act* is a parallel provision that applies to the Property Assessment Appeal Board.

In addition to its rule-making powers, the Labour Relations Board has the power to make guidelines:

> 132(1) The board may formulate general guidelines to further the operation of this Code but the board is not bound by those guidelines in the exercise of its powers or the performance of its duties.
>
> (2) In formulating general guidelines the board may request that submissions be made to it by any person.
>
> (3) The board must make available in writing for publication all general guidelines formulated under this section, and their amendments and revisions.

The Employment Standards Tribunal has a statutory power to make rules "about how appeals and reconsiderations are to be conducted and about the steps to be followed before making recommendations". Like the Labour Relations Board, the Employment Standards Tribunal's rules are subject to ministerial approval (*Employment Standards Act*, section 109(c)).

The Expropriation Compensation Board has the power "subject to the approval of the Lieutenant Governor in Council, [to] prescribe rules, consistent with this Act, that govern the board's practice and procedure and the exercise of its powers" (section 27(1)). Thus the Expropriation Compensation Board's rules of practice and procedure, once approved, are spelled out in Regulations to the *Expropriation Act* (B.C. Reg. 452/87, O.C. 2530/87). Among other things, the regulations setting out the Expropriation Compensation Board's rules deal with its powers to extend or abridge time limits, grant adjournments, admit expert evidence and issue practice directives. These regulations also contain the following provision:

> ***Pre-hearing matters***
>
> 12 The rules of court relating to
>
> (a) discovery and inspection of documents,
>
> (b) examination for discovery,
>
> (c) pre-trial examination of witnesses, and
>
> (d) discovery by interrogatories,
>
> (e) apply to proceedings before the board.

Tribunals such as the Public Service Appeal Board, the Health Care and Care Facility Review Board, the Mental Health Review Panel and the Parole Board do not have any statutory rule-making powers. The procedures applicable to hearings before these tribunals are provided for in regulations (i.e., the Public Service Appeal Regulations, B.C. Reg. 133/94, O.C. 554/94, the

Health Care Consent Regulations, B.C. Reg. 20/2000, O.C. 89/2000), the Mental Health Act Regulations and the Parole Act Regulation, B.C. Reg. 61/93, O.C. 195/93).[35]

An example of an administrative tribunal with statutory rule-making powers that are not subject to any external approval mechanism is the Human Rights Tribunal. While the Labour Relations Board's enabling statute gives it a broadly expressed rule-making power, the Human Rights Tribunal's statutory power is expressed in inclusive terms but is more specific in its description of the types of rules it may make. Section 35 of the Code provides in part:

> ***Hearings***
>
> 35(1) Subject to the Code and the regulations, the tribunal may make rules respecting the practice and procedure for the conduct of pre-hearing matters and hearing the tribunal considers necessary to facilitate just and timely resolution of complaints.
>
> (1.1) Without limiting subsection (1), the tribunal may make rules as follows:
>
> (a) requiring the parties to attend a pre-hearing conference in order to discuss issues relating to a complaint and the possibility of simplifying or disposing of issues;
>
> (b) respecting the disclosure of evidence, including but not limited to pre-hearing disclosure and pre-hearing examination of a party on oath or solemn affirmation or by affidavit;
>
> (c) specifying the form of notice to be given to a party or by the tribunal requiring a party to diligently pursue a complaint and the time within which and the manner in which the party must respond to the notice;
>
> (d) respecting service of notices and orders, including substituted service;
>
> (e) requiring a party to provide an address for service or delivery of notices and orders;
>
> (f) providing that a party's address of record is to be treated as an address for service.

Relying on this more particularized type of rule-making power, the Human Rights Tribunal has, following wide consultation with interested groups, developed comprehensive rules of practice and procedure (the Human Rights Tribunal Rules) to facilitate "the just and timely resolution of complaints". Like the Labour Relations Board Rules, the Human Rights Tribunal Rules deal with a broad range of procedural matters and include provisions specifically tailored to address unique aspects of the Human Rights Tribunal's mandate and responsibilities.

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[35] Where the tribunal does not have a statutory rule-making power and where, despite a regulation-making power dealing with practice and procedure, no regulations have been passed, the tribunal will rely on the common law "master of its own procedures" principle to establish practice and procedure rules.

Other examples of administrative tribunals with broad rule-making powers that are not subject to any external approval mechanism include the Property Assessment Review Board (*Assessment Act*, section 38(7)(a) "[the review panel chair may] determine the procedures to be followed at proceedings of the review panel"), the Property Assessment Appeal Board (*Assessment Act,* section 46(1) "[t]he board may make rules of practice and procedure, consistent with this Act and the regulations, for conducting proceedings before it"),[36] and the Medical and Health Care Services Appeal Board (*Medicare Protection Act*, section 44, power to make "rules governing practice and procedure for all appeals before the board").

As the above examples illustrate, some administrative tribunals' express rule-making functions are not subject to any external approval mechanism. In other cases, the rule-making function is subject to either ministerial or Cabinet approval. In yet other cases, the administrative tribunal has no statutory rule-making function but is subject to regulations detailing its hearing procedures. In these cases, the function of establishing appropriate practices and procedures is given to Cabinet. Additionally, in some cases, tribunals' rule-making power is expressed in very general terms while, in other cases, the types of rules tribunals can make are specifically enumerated in an inclusive fashion.

It is not clear why some tribunals are given a statutory rule-making power while other tribunals are not. Similarly, where statutory rule-making powers are contained in a tribunal's statute, it is not clear why ministerial (or even Cabinet) approval is required in some cases, but not in others. It is also unclear why some rules have the force of regulations and others do not.

Power to Make Rules About Practice and Procedure

It is recommended that, as a general rule, administrative tribunals be given the power to make their own rules of practice and procedure. The specific enumeration of broad statutory powers that may be procedural in nature serves to establish beyond doubt which administrative tribunals have such powers. Through the rule-making function, administrative tribunals can develop the details of the exercise of those powers and tailor their rules to suit their unique needs and responsibilities.

[36] While the Property Assessment Appeal Board has been given broad rule-making powers, many of its procedures are highly detailed in its enabling statute. For example, section 50(4) details what must be contained in a notice of appeal.

Power to Issue Practice Directives

In addition to having a statutory rule-making power, administrative tribunals should be given the power to issue practice directives. This power might, in appropriate cases, circumscribe what subjects a tribunal must be address. For example, the statutory power might be general with a specific requirement that the tribunal issue a practice directive respecting the timeframes for its decision making. For illustrative purposes, the directive might indicate that the tribunal's decisions will be released within 60 days of the conclusion of the hearing.

Such a practice directive would create greater certainty for the parties in understanding when to expect a decision. It would also overcome the problems associated with a tribunal's failure to comply with a statutory timeline for decision making and dispense with the need to litigate about whether the tribunal's statutory duty to release its decision within the statutory deadline is mandatory or permissive. While the practice directive would not have statutory force, it would place some pressure on the tribunal to keep within the general time estimate contained in the directive.

Ministerial Approval Requirement

Consideration must be given to the question of whether administrative tribunals should have complete rule-making autonomy or whether their rule-making powers should be subject to an external approval or review process, such as ministerial or Cabinet approval. Such an external check would be aimed at ensuring that the tribunal's rules are consistent with its statutory mandate and powers and consistent in expression, to the extent possible, with the rules of tribunals with similar rules of practice and procedure. David Mullan has made the point that an external review mechanism (like the former Ontario Statutory Powers Procedure Rules Committee) is "important in ensuring that agency self-interest does not impede the development of procedures that are responsive to constituency needs and the even-handed dispensing of administrative justice".[37]

Many advocate an external review mechanism (like the English Council on Tribunals) that is independent of both government and tribunals. Other approaches include tribunal rule-making autonomy (as in Ontario) and ministerial approval. In Quebec, tribunals receive advice from the

[37] See the background paper, The Statutory Powers and Procedures of Administrative Tribunals in British Columbia, p. 60.

Administrative Justice Council in respect of the exercise of their rule-making powers. As summarized in the background paper:

> *... one's preference for a particular implementation strategy depends very much on one's assessment of who would do the best job in establishing truly credible and functional rules for individual tribunals. Some may argue that wherever rule-making is involved, governments should always be the final decision-maker because rules are "legislative" in nature. Others would argue that governments do not know enough about individual tribunals, and may have a self-interest in establishing rules that suit their ministries (who are often parties) rather than the larger public interest. Some persons objecting to rule-making by government may argue that tribunal members know their boards best and that they should have exclusive rule-making authority. Others argue that agencies are subject to their own types of narrow interests, and that the appropriate safeguard can only come with participation [of] an outside body such as a rules committee.*

It is recommended that the power to enable administrative tribunals to establish their own rules of practice and procedure be subject to ministerial approval. This would ensure an appropriate balance between tribunal input into its rules and ministerial accountability. The role of the advisory body in respect of tribunal rules (discussed below) should counteract concerns about potential ministry "self-interest" through establishment of rules to suit ministry needs.

Where it is reasonable and sensible to do so, an administrative tribunal should also solicit input into its rules from those parties that routinely appear before it as, for example, the Labour Relations Board and Human Rights Tribunal have done.

Statutory Powers and Procedures – Advisory Body

The diversity between administrative tribunals – their differing roles and mandates – means that statutory powers appropriate to one tribunal would not be necessary or even appropriate for another. For example, administrative tribunals that adjudicate disputes between parties will require more traditional court-like "trial" procedures than those which perform a purely appellate function. Similarly, administrative tribunals required to make decisions within tight time constraints would not require many of the case management tools that are critical to other types of adjudication. It is therefore proposed that policy guidelines be established, setting out the types of considerations relevant to determining the types of statutory powers appropriately given to a tribunal.

Such guidelines could be developed as part of a Model Statutory Power Provisions for Administrative Tribunals policy document. The work could be led by a special advisory body in the Ministry of Attorney General (as described earlier in this report), in conjunction with the Office of Legislative Counsel. The advisory body would also be responsible for establishing model rules of practice and procedure, drawing from existing model rules, such as the Ontario Rules developed by the Society of Ontario Adjudicators and Regulars (SOAR) and the Model Rules of Procedure for Tribunals established by the English Council on Tribunals.

Additionally, as discussed below, the advisory body would have a key role in developing administrative justice plans for individual administrative tribunals and in making recommendations to the Attorney General with respect to appropriate legislative powers and procedural reforms.

ADMINISTRATIVE JUSTICE PLANS

Individual administrative tribunals are in a good position to assess and identify the tools that suit their individual practice and procedure needs. Each tribunal should therefore be given the opportunity to identify and justify the specific powers it sees as necessary to its efficient functioning. The vehicle for such a task would be an administrative justice plan for each tribunal.

This idea was advanced but not fully developed by BCCAT in its submissions to the Project. The administrative justice plan envisaged here would provide detailed comment on tribunal operations and activities and an opportunity for each tribunal to propose the inclusion of selected statutory powers in its enabling statute. For tribunals that either have or propose to have broad rule-making powers, administrative justice plans would also include their existing or proposed rules of practice and procedure – along with a description of the efforts made to use model provisions. If uniformity is not practical or appropriate for particular tribunals, then their administrative justice plans should indicate why this is so.

The plans would be developed by each tribunal chair with the assistance of the advisory body and the host ministry, guided by the Model Statutory Power Provisions for Administrative Tribunals document. The tribunal chair would be required to advance a solid policy justification for any proposed powers or proposed amendments to existing powers.

Public Access to Information about Administrative Tribunal Statutory Powers, Procedures, Directives and Decisions

Access to administrative justice is an essential feature of reform initiatives. The public should have easy access to information about a tribunal's enabling statute, its rules of practice and procedure and its practice directives.

Some statutes require tribunals to publish their decisions or make their orders and decisions open for public inspection. This is the case for the Property Assessment Appeal Board, for example. In many other cases, the enabling statute is silent on the point. Regardless, many tribunals have ensured public access to the greatest extent possible through, for example, the publication and distribution of the rules and directives to interested groups and parties and their inclusion on tribunal websites. In other cases, the process or means for obtaining such information is unclear.

Administrative justice plans should identify how the public can access its enabling statute, its rules of practice and procedure, its practice directives and its decisions. Consideration should also be given to whether a central repository for, or links to, tribunal statutes, rules, directives and decisions should be available through the Ministry of Attorney General on an administrative justice website.

THE ROLE OF THE ATTORNEY GENERAL

It is anticipated that, as a result of the tribunal-by-tribunal review and the development of administrative justice plans, legislative amendments to the enabling statutes of most administrative tribunals will be necessary. Additionally, in some cases, regulations detailing tribunal procedures will need to be repealed.

Proposals for legislative amendment to tribunals' enabling statutes are ultimately the responsibility of host ministries. A central review mechanism should nevertheless be established to ensure the greatest degree of consistency possible in tribunal powers and procedures. Such review would also ensure that the proposed powers in a tribunal's administrative justice plan are necessary and appropriate to its mandate and responsibilities. Without a form of central agency review, consistent application of underlying policy rationales cannot be achieved. Similarly, without a form of central agency review of existing or proposed rules of practice and procedure,

there will be no ready means for ensuring, to the greatest extent possible, tribunal-by-tribunal consistency in applicable procedures.

It is proposed that an appropriate "external" check on the proposals set out in the administrative justice plans would consist of the "sign off" of the plan by the Attorney General. In many cases, the Attorney General may not be the minister responsible for the tribunal's constituent legislation and thus will not have final "approval" of any proposed request for legislation. However, Attorney General "sign off" would signal to the sponsoring minister that the Attorney General is satisfied that the amendments sought are consistent with the goals underlying the Project. The advisory committee would be responsible for making recommendations to the Attorney General as to whether such "sign off" is appropriate.

While the advisory body would not have formal oversight of the approval of tribunal rules, it would strive for greater uniformity in the types of procedures employed by tribunals and in the language used to describe them. It is recommended that a "sign-off" process similar to that proposed for statutory powers be implemented whereby the advisory body would make recommendations to the Attorney General about whether to "sign off" or approve a tribunal's rules of practice and procedure.

SPECIAL CONSIDERATIONS

There are some types of administrative tribunals where statutory reform may not be either appropriate or possible. For example, the Criminal Code Review Board is established under the Mental Disorder Provisions (Part XX.1) of the *Criminal Code* and is responsible for making or reviewing dispositions concerning accused persons who have been found either unfit to stand trial or not guilty by reason of a mental disorder. The constitution and powers of the review board are extensively spelled out in sections 672.38 to 672.43, 672.1, 672.5 and 672.83 of the *Criminal Code*. As the Criminal Code Review Board is created by and given powers under federal legislation, its powers and composition can only be altered by federal legislation.

However, section 672.44 of the *Criminal Code* provides:

> 672.44(1) A Review Board may, subject to the approval of the lieutenant governor in council of the province, make rules providing for the practice and procedure before the Review Board.

> (2) The rules made by a Review Board under subsection (1) apply to any proceeding within its jurisdiction, and shall be published in the Canada Gazette.
>
> (3) Notwithstanding anything in this section, the Governor in Council may make regulations to provide for the practice and procedure before Review Boards, in particular to make rules of Review Boards uniform, and all regulations made under this subsection prevail over any rules made under subsection (1).

As section 672.44(1) illustrates, the federal legislation allows the Criminal Code Review Board to make rules providing for its practice and procedure subject to Cabinet approval. Any such rules can be superceded by any uniform federal rules established under section 672.44(3).

An example of where statutory reform of the nature considered in this report is likely inappropriate concerns the Securities Commission and its principal statute, the *Securities Act*.

Although the securities markets in Canada are now essentially national in scope and operation, the field of securities legislation has been historically occupied by provincial securities legislation, relying on the provincial constitutional "property and civil rights" head of power.[38] While Parliament may have constitutional authority to regulate the securities industry federally,[39] it has so far declined to do so.[40] One likely explanation is that proposals for a national regulatory model have never garnered the confidence of all the regulators and their governments.

Because of disparities between the various provincial securities statutes, the overall regulatory framework has been described as "fragmented" and "unwieldy from a national perspective".[41] To address these concerns, Canadian securities regulators have taken various steps to advance a *de facto* harmonized Canadian regime, including the establishment of the Canadian Securities Administrators[42] and the adoption of inter-provincial mutual recognition and reciprocal assistance

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38 The three territories also have securities legislation.

39 Most likely under the "trade and commerce" or "peace, order and good government" federal constitutional head of power.

40 Exceptions have been legislation governing the corporate attributes of federal corporations and criminal laws concerning certain aspects of the securities markets.

41 See, for example, David Johnston and Kathleen Doyle Rockwell, Canadian Securities Regulation, 2nd ed. (Butterworths 1998) at pp. 7-9 where the authors write that "[a]lthough this system is relatively effective in each province, it is unwieldy when viewed nationally. A person wishing to conduct business (issuing, investing, advising, counseling) in more than one province must be familiar with the structures and personalities in each province. A securities lawyer attempting to clear a prospectus in more than one province must deal with several commissions".

42 The 13 Canadian securities regulators work closely together under the umbrella organization of the Canadian Securities Administrators to ensure the national markets are regulated fairly, efficiently and

models. More recently, in October 2001, the Canadian Securities Administrators agreed to develop uniform securities legislation and rules to be enacted in identical form throughout Canada. The target date for proclamation of such uniform legislation and rules is March 31, 2004.

It is envisaged that this uniform legislation will authorize each provincial regulator to delegate powers to regulators in other jurisdictions and to accept delegated powers from other regulators. Such delegation will encompass powers to hold administrative hearings and make enforcement orders on a multi-jurisdictional basis. Such a system of delegated decision making across regulatory jurisdictions will require uniform administrative powers and procedures.

In light of these developments, it is important to ensure that provincial administrative justice reform initiatives are sensitive to the unique circumstances of the Securities Commission. It may well be appropriate to exempt the commission altogether from the reform initiatives proposed in this paper.

CONCLUSION AND RECOMMENDATIONS

As noted at the outset, it is recognized that the diversity of administrative tribunals precludes uniform treatment. To be effective, powers and procedures must be specifically and carefully tailored to suit each tribunal's statutory mandate and responsibilities. However, it is apparent that there are many points of commonality between tribunals and many opportunities to express the same types of powers and procedures in the same way.

It is hoped that the recommendations set out in this report will generate considerable comment and debate to ensure that the steps ultimately taken will best serve the interests of the public, the parties to administrative tribunal proceedings and the tribunals themselves. While reform of this nature may appear daunting, it is necessary to ensure an efficient, effective and accessible administrative justice system – and to ensure the greatest possible uniformity and consistency across tribunal powers and procedures.

in the public interest. A significant focus of this organization's work relates to harmonizing legislation, developing uniform rules and guidelines and reducing duplication through a mutual reliance system (where the principal jurisdiction works on an application or project and other jurisdictions rely on that work in making their decisions). It includes the development of national electronic filing systems through which one regulatory filing can be made and processed for all jurisdictions.

Recommendations

It is the responsibility of government to provide administrative tribunals with the statutory tools they need to make their processes more accessible and transparent. In striking an appropriate balance between flexibility at the individual tribunal level and consistency across administrative tribunals, it is recommended that government adopt a principled approach to legislative decisions about what powers are appropriately granted to a tribunal and how such powers are described. To achieve these objectives and ensure both procedural fairness and effective tribunal administration, it is recommended that government:

Develop a policy document, Model Statutory Powers Provisions for Administrative Tribunals, setting out a comprehensive "menu" of statutory powers that can be selectively applied (with any necessary adjustments) to individual administrative tribunals. It will include alternative provisions in respect of some powers and guidelines governing the application of all tribunal powers. The statutory powers appropriate to each administrative tribunal will be determined by a tribunal-by-tribunal review. As a general rule, administrative tribunals will be given the power to establish rules of practice and procedure (subject to ministerial approval) and to issue practice directives.

Establish a special advisory body within the Ministry of Attorney General that includes representatives of the Office of Legislative Counsel, the Administrative Justice Office, host ministries and the Dispute Resolution Office, with access to administrative law and policy experts in the Ministry of Attorney General. The advisory body will be responsible for developing the Model Statutory Powers Provisions for Administrative Tribunals policy document and guidelines, developing uniform rules of practice and procedure, assisting individual tribunals in the development of administrative justice plans and rules and making recommendations to the Attorney General about legislative reform.

Require administrative tribunals to develop administrative justice plans identifying and justifying the statutory powers each tribunal sees as being essential to its efficient functioning, having regard to the policy document and guidelines established by the advisory body. These plans will include existing or proposed rules of practice and procedure.

Establish a central review mechanism to ensure consistency in tribunal powers and procedures. This review mechanism will consist of a "sign off" of tribunal administrative justice plans and proposed rules of practice and procedure by the Attorney General. The advisory body will be responsible for making recommendations to the Attorney General as to whether this "sign off" is appropriate.