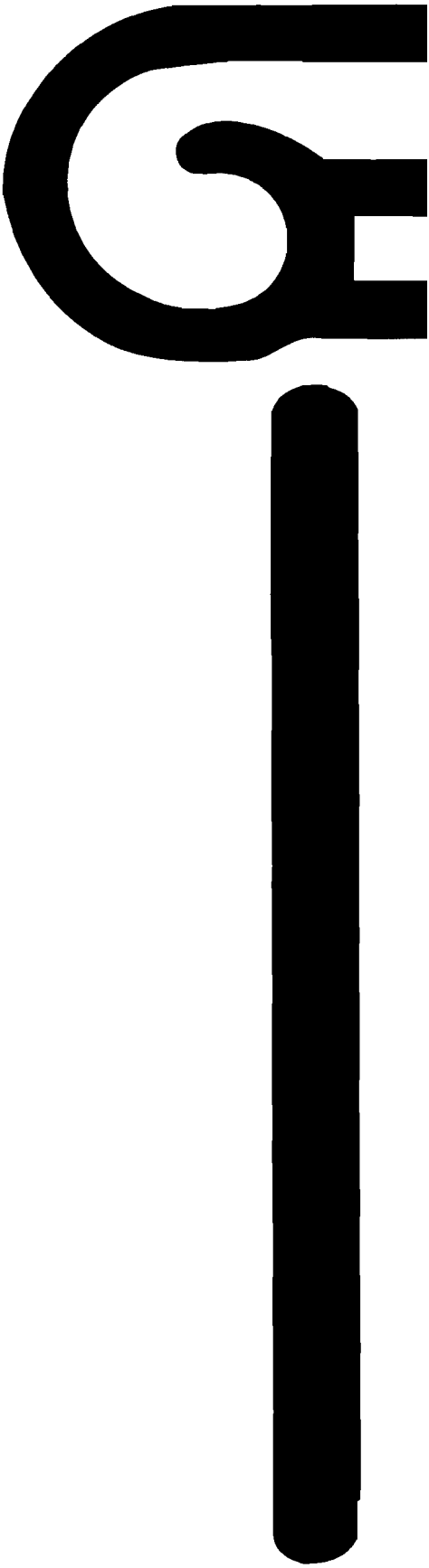

ALBERTA
LAW REFORM
INSTITUTE

Powers & Procedures for Administrative Agencies: MODEL CODE

Consultation Memorandum No. 6
April 1999

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ADMINISTRATIVE LAW REFORM INITIATIVES IN OTHER JURISDICTIONS

In this project we have drawn heavily on reform initiatives in other jurisdictions. These include the following:

Ontario

Together with Alberta, Ontario is one of only two jurisdictions in Canada that have statutes that govern agency powers and procedures. The Ontario *Statutory Powers Procedure Act*, first enacted in the 1971, has undergone amendment on many occasions, most recently in 1997. Many of the recent amendments are the result of changes suggested by the Society of Ontario Adjudicators and Regulators, who relied in turn to a considerable extent on the comments of Robert Macaulay, co-author of the very comprehensive text on administrative law *Practice and Procedure Before Administrative Tribunals*. Most recently, a Task Force created by the Ontario government has conducted a thorough review of the question of how Ontario's regulatory and adjudicative agencies can deliver better service. The September 1997 report of this group, entitled "Excellence in Administrative Justice", includes a section on "Improving Tribunal Hearing Procedures". This section recommends that a new set of rules be created that deal with issues very similar to those suggested in our reform proposals. The Model Rules we suggest draw from all of the following:

- Macaulay, *Practice and Procedure Before Administrative Tribunals*
- Society of Ontario Adjudicators and Regulators - Proposals for amendment to SPPA, 1993
- Society of Ontario Adjudicators and Regulators - Proposals for amendment to SPPA, 1997
- Ontario *Statutory Powers Procedure Act*, as amended to 1997
- Woods Task Force Consultation Document "Excellence in Administrative Justice".

Federal Jurisdiction

In 1995 the federal Department of Justice released a discussion paper outlining a proposal for a federal administrative hearings statute that was to "provide a comprehensive and authoritative source of law for agencies, ensuring that they have the powers they need to effectively conduct hearings and accomplish their statutory mandates." Following extensive public consultations with federal agencies, legal writers, academics, interest groups and other administrative law

practitioners, a revised proposal was issued dated September, 1996. This proposal has not been implemented, but has been suspended owing to a lack of resources. Our proposals draw extensively from this report, which is entitled "Proposal for a Federal Administrative Hearings Act".

United States

In the United States the National Conference of Commissioners on Uniform State Laws first adopted a Model State Administrative Procedure Act in 1946. A revised version was adopted in 1961, and there was a further revision in 1981. Many states have adopted the Model Act, some with only a few changes, some with very substantial changes. The Act "... seeks to simplify government by assuring a uniform minimum procedure to which all agencies will be held in the conduct of their functions. Further, [it] seeks to increase public access to all of the sources of law used by agencies, and to facilitate and encourage the issuance of reliable advice by agencies as to the applicability to particular circumstances of law within their primary jurisdiction. ..." Each provision in this Model Act is accompanied by a comment explaining its purpose and includes an annotation of decisions.

We rely in our proposals on this Model Act, together with an adaptation thereof prepared by the California Law Revision Commission, and enacted in 1997, entitled *Administrative Adjudication by State Agencies*.

United Kingdom

In 1991 the English Council of Tribunals issued Model Rules of Procedure for Tribunals. "This compilation is designed to provide a comprehensive collection of model procedural rules for the use of Departments and tribunals which are engaged in drafting or amending rules for tribunals. ... this compilation is not a code. It is a store from which Departments and tribunals may select and adopt what they need." This set of Model Rules contains very detailed rules not only for tribunals in the conduct of hearings (both first-instance and appeal tribunals), but also sets out the steps to be taken by applicants, respondents, and first instance tribunals whose decisions are under appeal. Our Model Rules tend to contain less detail than those suggested by the Council of Tribunals, but do take a number of suggestions from them.

Uniform Law Conference of Canada

In 1991 the Uniform Law Conference of Canada issued a Model Administrative Procedure Code prepared by Yves Ouellette. The provisions in this Code are somewhat skeletal relative to those mentioned above (though a fuller set of materials prepared specifically for Quebec are extensively used in that jurisdiction). Each provision in the Code is accompanied by a case annotation and comments.

OUR PROCESS FOR DEVELOPING THE PROPOSED MODEL CODE

During earlier stages of our project, we collected two categories of information.

- First we looked at the existing powers and procedures of every agency: how these are consistent, and where they differ. We developed a complete inventory of decision-making agencies in Alberta, grouped according to Department, and their legislated procedures and powers. We relied on this inventory to assess the need for a new set of powers and procedures that would create both flexibility for the decision-making process, and uniformity to the extent possible.

- Second, we gathered the legislation or proposed legislation in jurisdictions in which administrative law reform has been undertaken.

Our next task was to use both categories of information to develop a Model Code. The steps that we took for developing the Code were as follow:

1. We created a Project Committee, which consisted of the following persons:

- Andrew Sims, Q.C., former Chair, Labour Relations Board
- Raylene Palichuk, Neuman Thompson, Chair, Canadian Bar Association Arbitration Section, National Chair; former Chair,
- Frans Slatter, McCuaig Desrochers, former Member, Securities Commission
- Dr. Bill Tilleman, Chair, Environmental Appeal Board.

2. We created a Table of Contents for the Model Code (see the attachment below).

3. Under each major heading and sub-heading, we compiled the relevant provisions, where such existed, from each of the following sources:

- Macaulay, *Practice and Procedure Before Administrative Tribunals*
- Society of Ontario Adjudicators and Regulators - Proposals for amendment to SPPA, 1993
- *Ontario Statutory Powers and Procedures Act*, as amended to 1997
- Society of Ontario Adjudicators and Regulators - Proposals for amendment to SPPA, 1997
- Government of Ontario Task Force Consultation Document, "Excellence in Administrative Justice".
- Federal Department of Justice, *Proposal for a Federal Administrative Hearings Act, 1996*
- *United States Model State Administrative Procedure Act 1981*
- California Law Revision Commission proposal for *Administrative Adjudication by State Agencies*
- English Council of Tribunals, *Model Rules of Procedure for Tribunals*

- Ouellette, Uniform Law Conference of Canada, *Model Administrative Procedure Code*.

4. Relying on the material in the sources, we prepared a set of choices and related questions for each sub-heading. The answer to these questions would allow us to design a tentative provision under each sub-heading.

5. For each major heading, we held one or two meetings of our Project Committee. The Committee reviewed the set of choices and related questions under each sub-heading, and developed a tentative provision.

6. The Project Committee's recommendations were taken to a meeting of our full Institute Board of Directors. Again, there were one or two meetings for each major heading. The Board reviewed each of the tentative provisions developed by the Project Committee, and approved or revised it.

7. We compiled the provisions as approved by the Board into a Model Code.

THE FINAL PRODUCT AND ITS IMPLEMENTATION

The final product that arises from this consultation will be a comprehensive *Model Code of Powers and Procedures*, and an accompanying *Annotation* that sets out important case law that supplements or clarifies the rules. The *Code* will clarify the powers that already exist under the common law, and provide for additional powers necessary to the efficient and effective functioning of agencies.

The Code will not be a rigid set of rules that apply to every agency. Such an approach could not provide the flexibility that is necessary given the diverse tasks of agencies and diverse levels of agency resources. Rather, the Code is intended as a "store" from which Departments and agencies can select the rules that are necessary to the functioning of particular agencies.

Some of the rules, for example the notice requirements or other rules assuring fairness to the applicant or parties, will be required by most agencies. However, those agencies that already have parallel rules in their enabling legislation or regulations may not need to adopt the particular Code rule. Other rules will be needed only by agencies performing certain kinds of functions. For example, the rules relating to investigations will be needed only by agencies that may need information in addition to that provided by the applicant or parties.

The rules in the Code will be designated as either essential or optional. For each essential rule, every agency should compare its existing rule to the Model rule. Where there is a comparable agency rule, the agency may either retain its original rule or adopt the Model rule. Where the agency does not have a comparable rule, it should adopt the Model rule, possibly modifying it to its own needs as necessary. With respect to the optional rules, each agency should consider whether the particular rule would be both useful, and essential, to its functioning. If both criteria are met, the rule should be adopted.

*One of the primary tasks of our consultation will be to ask our consultees how to implement our recommendations. What is the best way of ensuring that the process of selecting appropriate rules is undertaken by agencies, (or in the case of smaller or ad hoc agencies, by the responsible Department on their behalf)?*The ultimate goal of our project is that all agencies have a set of powers and procedures that enable them to make decisions in the most efficient manner possible. Each agency should also adopt rules that adequately protect the rights of agency users, and provide adequate information about the agency process to these users. *We will ask our consultees about the best process for ensuring that this task of making the appropriate comparisons and selections is undertaken and completed. How can we place the valuable tools contained in the Code into the hands of agencies, as quickly as possible?* The range of options for implementation that have been identified so far are in a list at the end of this document (see page 93). We wish to discuss these with our consultees, as well as any other suggestions for implementation they might put forward.

I. PRE-HEARING POWERS AND PROCEDURES

Overview:
This section on pre-hearing procedures deals with all the matters an agency should consider before holding a hearing. These are as follow:

A. Acknowledgments and notifications: First it deals with how an agency is to respond on receipt of an application, and who it is to notify that an application has been brought.

B. Decisions not to hold a hearing: Second, it provides for steps an agency can take to avoid holding a hearing where a hearing is unnecessary. Here we deal with the following:

1. refusal to accept an application, or early dismissal
2. decision on the basis of consent of the parties
3. withdrawal of proceedings
4. declaratory orders
5. stating a case
6. re-routing to an ADR (alternative dispute resolution) proceeding

C. Generic hearings: Third, it allows an agency to hold special hearings to establish agency policy, or to indicate factors it may consider in exercising its discretion, and to issue policy statements arising therefrom.

D. Consolidation, joint hearings, etc.: Fourth, it permits an agency before whom two or more applications involving the same or similar issues of fact or law have been brought, to deal with the matters in a common hearing or to apply the evidence received in one hearing to another hearing. This section also allows for joint hearings of more than one agency.

E. Pre-hearing conferences: Fifth, provision is made for an agency to hold a pre-hearing conference that will allow it to conduct a hearing in the most efficient and orderly manner possible. We suggest allowing a pre-hearing officer (possibly a staff rather than agency member) to deal with issues of scheduling and preliminary matters that will allow a hearing to proceed (for example, the issuance of subpoenas). We also ask agencies to consider whether it would be useful to allow for the designation in appropriate cases of a single agency member to deal with more substantive preliminary matters (for example, the status of intervenors, or objections to subpoenas).

F. Investigations: The final part of this section, on investigations, is relevant to agencies that by virtue of their particular function need to obtain information on their own motion (in contrast to relying on the parties to present it). Here we deal with authorizing staff to conduct informal investigations, as well as

with an agency's powers to order disclosure of information outside the context of the hearing. (Witnesses and powers to order disclosure within the hearing context are dealt with in the "Hearing Powers and Procedures" section.)

A. Acknowledgments and Notifications

RECOMMENDATION 1
The agency should notify the following of receipt of the application:
- the applicant
- all named parties
- all persons who have participated in earlier proceedings
- all other persons whom the agency determines are directly and necessarily affected by the proceedings.

❒ *Agree* ❒ *Disagree*

Revisions

Annotation entry

The rules of natural justice require that persons "necessarily and directly affected" by a decision to be made by an agency should be involved in the proceeding. The annotation will contain the cases that set out the meaning of "directly and necessarily affected".

Comments:
We considered how much detail should be provided with respect to steps to be taken by the agency on receipt of an application. The English Council of Tribunals' Model Rules provide very detailed steps - not only those to be taken by the agency in terms of acknowledgment of receipt, processing of the application, and required notifications, but also by respondents, third parties, authorities whose decisions are at issue, and so on. Other sets of rules provide that the agency is to take such of the following steps as are necessary:

- acknowledgment of receipt
- notification of errors or omissions in pleadings
- requests for additional necessary information
- notification of registration number, name, title, address of contact person
- notification of any sources of information, advice, for applicant
- means and time for replying, consequences of failure
- notification of any sources of information, advice, for other parties
- notification of conciliation machinery.

In our view, this level of detail is unnecessary in the Code, as much of it would involve codifying common sense. (However, we thought it would be useful for agencies to develop a routine procedure for this stage, involving some or all of the steps listed, and to make this procedure, as well as its procedure for other stages, available to users of the agency. See Recommendation 53, which requires agency procedures to be made public.)

With respect to notification, because there may be persons, besides named parties, who have a sufficient interest that they ought to be notified of the proceedings, and because the rules of natural justice require that persons "necessarily and directly affected" by a decision to be made by an agency should be involved, the Code makes such notification a requirement.

B. Decisions not to Hold a Hearing

1. Refusal to accept an application, or early dismissal

a) refusal to accept an application (or refusal to continue to hear it without having heard all evidence) where a want of jurisdiction or similar defect

RECOMMENDATION 2.1

An agency, on its own motion or on that of a participant, should be empowered to refuse to accept a matter without holding a hearing into the merits, or to refuse to continue where a hearing has begun, if it lacks jurisdiction over the matter, or if the application contains some other fundamental defect.

❒ ***Agree*** ❒ ***Disagree***

Revisions

Annotation entry

The annotation will contain examples of the types of defects which can ground a refusal to hear, as follows:

- the matter was submitted out of time, or the person initiating the proceeding has not taken other necessary steps to advance it
- the agency is without jurisdiction to make any order or decision or grant any other remedy in the matter before it
- the supporting reasons show no apparent grounds that would allow the requested remedy to be granted, or show no cause of action .

RECOMMENDATION 2.2

The applicant's access to the dispute resolution should be safeguarded, in one of two ways:

1) before deciding to refuse to hear or to continue to hear a matter, the agency should notify the applicant of its concern with the application, and provide an opportunity to respond, in a manner (oral or written) as directed by the agency;
2) if there is a body within the agency to which a refusal to hear could be appealed, provision for such an appeal should be made; if not, there should be an appeal to a court.

❒ *Agree* ❒ *Disagree*

Revisions

Annotation entry

The annotation will point out that where appropriate, it should be possible for an agency staff member (in contrast to a member of the adjudicative branch of the agency) to make the initial decision to refuse to hear, so long as there is an appeal to another appropriate body within the agency.

Comments:

Screening can preserve scarce resources. The power to refuse to hear the merits is necessary as many agencies are obliged to set applications down for adjudication (see *Wassilyn* v. *Ontario Racing Commission* (1993), 10 Admin. L.R. (2d) 157), though some have a statutory power to refuse.

However, restricting access to the dispute resolution process raises serious public policy issues. Therefore, it is necessary to give the applicant an opportunity to respond to an agency that indicates it may not hear a matter, and to ensure a right to an appeal of such a determination.

1. Refusal to accept an application, or early dismissal

b) refusal to accept an application (or refusal to continue to hear it without having heard all evidence) where proceeding an abuse of process

RECOMMENDATION 3.1

An agency, on its own motion or on that of a participant, should be empowered to refuse to accept a matter without holding a hearing into the merits, or to refuse to continue where a hearing has begun, if it determines that the proceeding is an abuse of process.

❒ *Agree* ❒ *Disagree*

Revisions

Annotation entry

Examples of situations that could constitute abuse of process will be listed in the annotation. This will include the following:

- the supporting reasons are frivolous or trifling
- the proceeding was initiated or continued only for the purpose of delay
- the proceeding was initiated or continued primarily with the intent to cause distress or harm to others.

RECOMMENDATION 3.2

The applicant's access to the dispute resolution should be safeguarded, in one of two ways:

1) before deciding to refuse to hear or continue to hear a matter, the agency should notify the applicant of its concern with the application, and provide an opportunity to respond, in a manner (oral or written) as directed by the agency;
2) if there is a body within the agency to which a refusal to hear could be appealed, provision for such an appeal should be made; if not, there should be an appeal to a court.

❒ *Agree* ❒ *Disagree*

Revisions

RECOMMENDATION 3.3
Where an agency decides to dismiss on the basis that the proceeding is an abuse of process, it should give reasons for its decision.

❒ *Agree* ❒ *Disagree*

Revisions

Comment:
As with the foregoing section, screening of this type preserves scarce resources.

The power to refuse to commence a hearing to prevent an abuse of process exists in the common law. (See *S.(N.)* v. *Norris* (1992), 6 Admin. L.R. (2d) 228. 93 D.L.R. (4th) 238). For this reason, and because abuse of process could take many forms, the annotation will contain only examples, rather than an exhaustive list.

1. Refusal to accept an application, or early dismissal

c) dismissal without hearing from all participants where evidence does not support the application

RECOMMENDATION 4

An agency, on its own motion or on that of a participant, should be empowered to dismiss a matter without hearing from all the participants where it has before it all the evidence which the applicant wishes it to consider, and the evidence, if taken to be true and given the most favourable meaning that can reasonably be attributed to it, including every legitimate and reasonable inference which could be drawn, cannot support the thing sought on the application.

❒ ***Agree*** ❒ ***Disagree***

Revisions

Annotation entry

The annotation will point out that an unsuccessful request for an early dismissal is not to prohibit those making the request from participating as fully as they might otherwise have done.

Comment:

We regarded this as the equivalent of a non-suit in civil court proceedings.

2. Deciding (disposing of a matter, or granting particular order or provision therein) on the basis of consent, or on default

RECOMMENDATION 5

There should be provision that:

- a disposition can be made, or a consent order or provision therein can be granted, on the consent of all the parties (and intervenors depending on the terms of their participation), at the discretion of the agency.
- failure of a participant to oppose an application or participate in a proceeding may be taken as consent to a disposition.
- an order may include such terms as the parties (and intervenors depending on the terms of their participation), with the approval of the agency, determine are appropriate.
- a consent order should not be granted where its terms offend the general spirit and purpose of the statute under which the matter arose, or where it is not in the public interest.

❒ *Agree* ❒ *Disagree*

Revisions

Annotation entry

In addition to orders that deal with the substance of the matters in dispute, consent orders may also deal with procedural issues. Thus, for example, a consent order could deal with any of the following:

- a decision that a participant in one application before the agency represent other partiicipants in other pending applications, or somewhat similarly,
- a decision to run a "test case" on a matter within the agency's jurisdiction (that is, to stay the proceedings for one or more cases and proceed with a single one); the order could also deal with application of the resulting decision or order to the remaining proceedings.

In all such cases, a discretion remains with the agency whether to grant the consent order.

Comment:

The discretion of the agency must be retained to protect the interests of all those directly affected, as well as the public interest.

3. Withdrawal of proceedings: refusal to permit

RECOMMENDATION 6
Agencies should be empowered to refuse to permit withdrawal of an application, to deal with costs, or to protect the public interest. It should be possible to impose conditions on withdrawal where such is permitted.

❒ *Agree* ❒ *Disagree*

Revisions

Comment:
The exercise of this power in order to deal with costs assumes that the agency is authorized to award costs.

4. Declaratory orders: (decisions as to the application of the law [statute, rule, decision or order] to unproven, uncontested or hypothetical facts)

RECOMMENDATION 7 [Optional Provision]
The power to declare how the law applies to hypothetical facts should exist only for agencies whose subject matter is suitable for such rulings. Thus such a power, if required, should be contained in a particular agency's enabling legislation. The exercise of such a power should be at the agency's discretion.

❒ *Agree* ❒ *Disagree*

Revisions

Annotation entry

The annotation will provide that such a decision should not be made where:

- the decision would substantially prejudice the rights of a person who would be entitled to notice and opportunity to be heard and who does not consent in writing to a declaratory decision procedure, or;
- the decision involves a matter that is the subject of pending administrative or judicial proceedings.

Comment:
Decisions on the basis of admitted or agreed-upon facts are not dealt with here as such decisions are part of the hearing process (the facts are admitted at the hearing).

5. Stating a case

RECOMMENDATION 8
An agency, on its own motion or on that of a participant, should be empowered to state a case to a court on questions of law or jurisdiction. Where such a proceeding is initiated by a participant, whether to exercise the power should be at the discretion of the agency.

❒ *Agree* ❒ *Disagree*

Revisions

Comment:
This procedure can save costs. It might also avoid placing the onus of appealing an agency ruling on one of the participants.

6. Re-routing to ADR proceedings

RECOMMENDATION 9.1
There should be a provision as follows: An agency may engage in alternative dispute resolution proceedings. A resolution reached by the participants through ADR can, at the discretion of the agency, become an order of the agency, subject to the purpose and provisions of the agency's constituent Act.

❒ *Agree* ❒ *Disagree*

Revisions

Annotation entry

ADR as used here does not include arbitration or final offer selection.

The annotation will contain guidelines as to when ADR is appropriate or otherwise, for example, whether:

- the participants are willing to take part in the process;
- the process would expedite the resolution of the matter before it;
- a definitive or authoritative resolution of the matter is required for precedential value and the consensual dispute resolution process would not be likely to give rise to that type of resolution;
- the matter involves or may bear upon significant questions of government policy that require additional procedures before a final resolution may be made, and such a process would not likely serve to develop such a recommended policy for the agency;
- the matter significantly affects persons or organizations that are not participants to the proceeding;
- a full public record of the proceeding is important and a consensual dispute resolution process cannot provide such a record;
- the agency must maintain continuing jurisdiction over the matter with the authority to alter the disposition of the matter in light of changed circumstances, and a consensual dispute resolution process would interfere with the meeting of that requirement by the agency.

Comment:
Purpose: The availability of ADR mechanisms is desirable to increase the efficiency of the agency. ADR also potentially affords to participants the advantages of a resolution they have agreed on.

Necessity for an authorizing provision: Some ADR-type proceedings may not require authorization, for example, convening a pre-hearing conference which includes defining the issues in dispute. However, an agency has only the powers conferred on it by its enabling statute. Many enabling statutes provide the mechanism by which agencies are to resolve the matters that arise before them. Even where the statute permits consent orders, the involvement of an agency in instituting other dispute-resolution mechanisms, for example designation of a negotiator or mediator from outside the agency, would require authorization.

Types of proceedings: Various of the Model Codes and recommendations for model codes that we surveyed speak of different types of ADR proceedings, for example, negotiated settlement, settlement conferences, and mediation/conciliation. However, the actual procedures that are followed will vary greatly, and may be the same under any of these. The same considerations apply regardless which of the labels is used.

Criteria and limitations regarding approval of resolutions: Various criteria were considered, for example public interest, consistency with other agency orders, power imbalances, and conflict with the provisions of, or spirit of, the statute. However, we thought the limitation that the process, including approval, should be conducted in accordance with the purpose and provisions of the constituent statute, was adequate.

RECOMMENDATION 9.2 - ADR procedures, requirements:
The Model Code should contain rules as to who is entitled to participate in ADR proceedings. (Reference should be made to the rules for standing in hearings.) It should also contain provisions as to confidentiality where a resolution is not approved, including:

- the non-compellability of participants in the subsequent hearing
- privilege for documents and communications, including the record, and work-product of participants.

Beyond these, the Code should not contain procedural requirements for the conduct of ADR proceedings; however, the annotation will contain suggestions for procedures. These could be adopted by particular agencies and set out and distributed to users of the agency.

❒ *Agree* ❒ *Disagree*

Revisions

Annotation entry

The procedural rules for ADR of particular agencies could include the following:

1) a provision for designating a person to preside in ADR proceedings, or to designate such a person on the default of, or at the request of, the participants. (The designated person could be either from outside the agency, or a member of the agency or a staff member. The agency could also maintain a roster of suitable persons.)
2) a provision as to what records of the ADR proceedings should be kept and information provided to the agency when its approval is sought.
3) a provision as to recalling of the conference for amendments to the resolution, and a provision that the agency cannot unilaterally amend the resolution proposal without the participants' further involvement.
4) a provision for interim confirmation of the proposed resolution (where the agency has determined that in the public interest, public hearings should be held with respect to the proposed resolution).
5) rules regarding participation of the presiding officer, and participating staff, at subsequent hearing
   - precluded?
   - permitted on consent?
6) rules for termination of the ADR process by the agency.
7) rules regarding the effect of cooperation in the ADR process, or otherwise, on the awarding of costs.

C. Generic Hearings (to establish agency policy, or to indicate factors which it may consider in exercising its discretion)

RECOMMENDATION 10

The code should contain provisions for generic hearings, as follows:

(1) An agency may on its initiative (or at the initiative of the responsible ministry or the LG in C) inquire into any issue or matter of general application within its jurisdiction by means of a generic hearing.

(2) The agency may permit or require such persons as it considers advisable to participate in the generic hearing.

(3) The agency shall give notice of a generic hearing.

(4) The agency may retain anyone with technical or special knowledge to assist it.

(5) The agency may issue policy statements, guidelines, opinions, decisions or orders.

❒ *Agree* ❒ *Disagree*

Revisions

Annotation entry

The annotation will refer to the cases that deal with fettering of discretion by agency policy statements.

Comment:

This provision is a codification of the common law. It is provided for the guidance of agencies which might benefit from holding such proceedings. The issues of appropriate notice and standing are left up to the agency so as not to be too inflexible.

D. Consolidation, Application Of Evidence, Severance, Joint Hearings

a) consolidation: joining matters or participants in a common hearing; severance

RECOMMENDATION 11

The Model Code should provide that where two or more cases are pending before an agency and involve the same or similar questions of fact or law or policy, the agency may, on its own motion or on the motion of an interested person, order that:

- the proceedings, or any part of them, be combined
- on consent of the parties (or intervenors, depending on the terms of their participation), one participant is to represent others; the right of appeal of the participants who are not heard should be preserved.

The agency should be empowered to make any related orders regarding the procedures to be followed.

The agency should also be empowered to sever a single application, possibly involving more than one participants, into two or more separate hearing dealing with separate participants or separate issues.

Before granting an order to combine (or sever) the proceedings, the agency should be required to consider:

- representations by the parties (or intervenors, depending on the terms of their participation) as to whether the proceedings should be combined (or severed)
- whether combining (or severing) the proceedings would cause significant prejudice to any participant.

❒ *Agree* ❒ *Disagree*

Revisions

Annotation entry

Privacy concerns: It may be undesirable for an agency to order consolidation where one of the applications before it involves matters that require the hearing to be closed to the public in the interests of persons affected or the public interest.

Costs sharing: Where the participants agree that one should represent others, that a test case is to be run, or that the result in one case is to be applied to other pending cases, consideration should be given to sharing of costs. (The power to make all such orders is part of the general power of an agency to make orders, at the discretion of the agency, on the basis of the consent of the participants.)

Scheduling: Some model codes contain provisions allowing agencies to order the following:

- that the proceedings be heard concurrently before different panels;
- that the proceedings be heard one immediately after the other;
- that the proceedings be stayed until after determination of any other of them.

We think it should be possible to order any of these. However, they are within the power of an agency to conduct - in this case to schedule - its own proceedings, and require no special authorization.

Comment:
The purpose of the rule is to avoid the cost and time of duplication, and to avoid inconsistent decisions.

The limitation as to prejudice to participants by combining or severing the proceedings has been included to ensure that expediency does not override fairness. Participants should be heard, but should not have a veto.

b) application of evidence

RECOMMENDATION 12
Agencies should be empowered to admit evidence heard at an earlier proceeding, either before the same agency or before another agency or a court, or at a concurrent proceeding before another panel, as evidence in a later or other proceeding, if admission would be expedient, and would cause no significant prejudice.

❒ ***Agree*** ❒ ***Disagree***

Revisions

Annotation entry

The annotation will contain guidelines as to the conditions under which prejudice is avoided. These are derived from the law of admission in civil proceedings of evidence taken on oath in other proceedings. They are as follows:

- the issues in the earlier or concurrent proceedings are substantially the same, and
- the latter or concurrent proceeding involves the same parties (or those privy to them), and the party against which the evidence is adduced has had an opportunity to cross-examine the witness at the earlier proceeding, *or*
- the previously-admitted evidence includes cross-examination on the testimony by a party with the same interest, and on the same issues, as the party against whom the evidence is presented in the later or concurrent proceeding, and
- there is no issue as to credibility of the witness and thus no need to observe his or her demeanour.

A condition that is sometimes added is that the witness be unavailable. This derives from the hearsay rule, but it is unclear whether such evidence is appropriately regarded as hearsay, and therefore whether this precondition should be applied.

Though the agencies should address their attention to any concerns regarding admission of evidence given at an earlier proceeding that parties (or intervenors depending on the terms of their participation) may have, consent of the participants should not be required.

c) joint hearings

RECOMMENDATION 13
Where more than one agency has jurisdiction over the same or a similar matter, it should be possible for the participants, an agency or agencies, the responsible ministry, or the LG in C to make a request to the agencies to conduct a joint hearing. Approval of the agencies themselves should be sufficient for a matter to proceed in a joint hearing; if agency approval cannot be obtained, it should be possible to apply to the LG in C for an order in council.

Before deciding whether to hold joint hearings, the agencies should hear the submissions of the participants.

❒ ***Agree*** ❒ ***Disagree***

Revisions

Annotation entry

Though the agencies should address their attention to any concerns regarding joint hearings that parties (or intervenors depending on the terms of their participation) may have, consent of the participants should not be required.

E. Pre-hearing Conference

RECOMMENDATION 14.1
Agencies should be authorized to conduct pre-hearing conferences, and in particular, to designate a presiding officer to make orders relating to:

- the ordering or scheduling of the hearing
  Examples include:
  - the order in which cases are to be heard
  - setting dates for exchange of documents and particulars, for admissions, for written briefs
  - fixing commencement of hearing, estimated duration of hearing
  - order of matters, of evidence and cross-examination
  - the identification of issues that should be heard by the full panel at the inception of the hearing (jurisdictional challenges, bias, constitutional questions)

- matters that will allow the hearing to proceed
  Examples include:
  - issuance of subpoenas
  - orders for disclosure of evidence between participants (exchange of documents, filing of witness statements, filing or exchange of medical examinations, experts' reports, experts' qualifications; provision of particulars)
  - orders pertaining to admissions of facts, proof by affidavit, agreed statements of facts.

The presiding officer under this recommendation need not be a member of the adjudicative branch of the agency.

❒ ***Agree*** ❒ ***Disagree***

Revisions

RECOMMENDATION 14.2 [OPTIONAL PROVISION]
It may also be useful for some agencies to be able to permit a presiding officer to act with the full powers of the agency to deal with more substantive matters prior to or at the inception of a hearing. Thus each agency should consider whether its enabling legislation should provide that it may designate a presiding officer to act with the full powers of the agency to decide:

- substantive matters relating to the hearing process
  Examples include:
  - identification, simplification of issues
  - orders for disclosure of evidence by the agency on its own motion
  - limitation on the numbers of witnesses, on the extent of the presentation of evidence, rebuttal evidence, or cross-examination
  - whether the hearing should be held in private, or privacy concerns accommodated
  - the use of telephonic or other electronic means
  - whether cases should be consolidated

- substantive matters that should be decided prior to or at the inception of the hearing
  Examples include:
  - standing of parties and intervenors
  - the exploration of settlement possibilities, whether the case should be re-routed to separate ADR proceedings
  - objections to subpoenas, to orders for disclosure

The presiding officer under this recommendation should be a member of the adjudicative branch of the agency.

❒ ***Agree*** ❒ ***Disagree***

Revisions

RECOMMENDATION 14.3
Notice of a pre-hearing conference of either type should be given to all persons who are entitled to participate in the hearing or who have applied to participate.

❒ *Agree* ❒ *Disagree*

Revisions

Annotation entry

To retain flexibility and accommodate limitations in agency staffing, the Code need not contain a rule prohibiting the participation of an agency member who presided at a pre-hearing conference in the subsequent hearing. However, a member who presided at a conference *at which the participants attempted to settle issues* would not normally preside at the hearing *unless the participants gave their consent.*

Where an agency has the power to award costs and hearing expenses under its enabling legislation, consideration should be given in determining the award to whether or not the participants adhered to the orders issued at the pre-hearing conference.

Comment:
The listing of matters in this section such as issuance of subpoenas and objections thereto, orders for filing and exchange of documents, orders for disclosure of evidence by the agency, or determination of standing, as matters that may be dealt with at a pre-hearing conference, complement such powers found in the Code Section II: "Hearings". Listing them here simply makes it possible for a single adjudicative member (or possibly a staff member in relation to Recommendation 14.1) to decide issues, at an early stage, that would otherwise fall to be decided in a full hearing.

F. Investigations

1. Authorizing staff to conduct informal investigation

RECOMMENDATION 15
Agencies should be authorized to direct staff to carry any out any informal enquiry or investigation or otherwise gather information relating to a matter, in order to determine whether to conduct a hearing, or for consideration at a hearing.

❒ *Agree* ❒ *Disagree*

Revisions

Comment:
A general power to conduct informal investigations is not strictly necessary, as no coercive power is attached. However, we think it useful to instruct agencies that they may obtain and rely on such information, particularly those agencies whose mandate is not primarily or necessarily to adjudicate between opposing party-driven positions, but requires them also to takes into account other relevant information and the public interest.

2. Disclosure, inspection and coercive investigative powers outside the hearing context

RECOMMENDATION 16 [Optional Provision]
It may be useful for some agencies to be able to obtain or order disclosure of information outside the hearing context (whether by agency order, or by conferring inspection powers or coercive powers on an investigative officer).[1] Thus each agency should consider whether its function is such that its enabling legislation ought to provide powers to obtain information outside the hearing context, how extensive these powers need be, and what prior authorization should be required for exercise of the powers.

❒ *Agree* ❒ *Disagree*

Revisions

Annotation entry

The annotation will highlight the case law dealing with agency regulatory inspections, search and seizure, subpoenas issued outside the hearing context, and requirements for prior authorization of the latter two by agencies themselves or by courts.

The annotation will also point out that information obtained by the use of such powers that is ultimately relied upon in the agency's decision must be made available to the participants, and they must be given an opportunity to respond. (This requirement is contained in Recommendation 43.3.)

Comment:
The propriety of subjecting persons to the requirement to disclose information or otherwise undergo investigation outside the hearing context requires the balancing of factors such as the public interest in the agency's having the information, the expectation of privacy of persons engaged in the investigated conduct, and the safeguards that may be afforded by prior authorization. This balancing must be done on an agency-by-agency basis. (The considerations are different from those that apply in the context of a hearing, where there is a right to know of allegations and other evidence, an opportunity to prepare, and to contest orders for disclosure.)

[1] Such information may be useful either to the decision whether to conduct a hearing, or to supplement the information available in the hearing itself.

3. Separation of investigative and adjudicative functions

RECOMMENDATION 17
Where powers under Recommendation 16 are conferred, the investigative function of the agency should be separated from adjudicative functions.

❒ *Agree* ❒ *Disagree*

Revisions

Annotation entry

The annotation will refer to case law on the subject of separation of functions.

The annotation will also refer to Recommendation 54, which contains a requirement that decisions are to be made by a fair and impartial tribunal.

4. Views

RECOMMENDATION 18
Agencies should be empowered, where it appears to be in the interests of justice, to direct that the agency and the participants and their counsel or agents shall have a view of any place or thing. Prior representations by participants need not be required, but participants should be given prior notice, and entitled to attend.

❒ *Agree* ❒ *Disagree*

Revisions

Annotation entry

The annotation will refer to the procedure for views taken by the court.

II. HEARING POWERS AND PROCEDURES

Overview:
In this section we consider the rules that are to govern the hearing itself.

A. Power of agency to adopt procedures, give directions: First, we ensure that an agency can not only adopt procedures of general application that are tailored to its needs; we also allow it to adopt special procedures where such are called for in a particular circumstance, so long as the requirements of fairness to the participants are met where this is done.

B. Standing: Second, we clarify the basis on which status is to be granted to participants, both parties and interveners, in a particular application, and the ways in which the rights of participation can be varied for persons with less than full status.

C. Notice of hearing: Third, we set out to whom and how notice is to be given, and the contents of notice.

D. Hearing panels: The provisions in this section are important for the efficient functioning of the larger agencies. Here we allow for panels to be constituted with less than the full number of agency members. We also provide for the designation and duties of the panel chair, deal with how a quorum is to be constituted, and make provision for completion of hearings where a member of a panel ceases to be a member or is incapacitated.

E. Public / Private: In this section we set out the exceptions to the principle that hearings are to be open to the public, and consider what may be ordered when one of the exceptions is met. We also deal with how openness can be achieved in written and electronic hearings.

F. Written / Electronic / Oral: Again to promote efficiency, this section authorizes an agency to hold hearings in various forms, and in mixed forms.

H. Evidence: This section hinges on the power of agencies to control their process. We affirm the power deviate from the formal rules of evidence, but impose a requirement that this not be done where it would cause unfairness.

I. Witnesses: The section on witnesses covers the power of agencies to compel the attendance of witnesses and the production of documents or other evidence. We also deal with the power to administer oaths, and to receive evidence from witness panels. We consider the interaction between the hearing panel and witnesses. Finally, we deal with the ability of the hearing panel to obtain information by

consultation, and the duties imposed on the panel to the participants when this is done.

J. Disclosure: In this section we authorize agencies to order disclosure of information as between participants. We also ask agencies to consider whether they require the further power to order the production of evidence on their own motion.

L. Rights of Participants: This section deals with participants' rights to representation. More importantly, it covers their rights to participate in the proceeding: what information is to be made known to participants, and what entitlements do they have to present their own case? In light of the diverse nature of agency-decision making, we opted not to confer court-like rights to participants to have control of the presentation their case, including the right to call witnesses and cross-examine, and present oral arguments and rebuttals. Rather, we opted for a standard that could be adapted to suit the case in terms of the way the evidence and arguments are presented: the right in participants to know and respond to the case they are to meet.

In the remaining sections *(G, K and M)* we consider the power to grant adjournments, matters of which the agency may take notice without receiving evidence, and the duties of agencies with respect to compiling records and recording the proceedings.

A. Power of Agency to Adopt Procedures, Give Directions

RECOMMENDATION 19.1
Subject to its enabling statute and regulations, an agency should be permitted to adopt rules of procedure of general application to govern its proceedings. (If the powers and procedures in the Model Code, or parallel procedures, are adopted, this would be a power to supplement such procedures.)

❒ *Agree* ❒ *Disagree*

Revisions

RECOMMENDATION 19.2
Notwithstanding that it has adopted procedures of general application, an agency should be empowered to adopt particular procedures for a given case, or to vary existing procedures for a given case, subject to the requirements of fairness, and subject to its enabling statute or regulations. Parties (and intervenors depending on the terms of their participation) should have a right to make submissions on the question of whether a variation would compromise fairness, and should be granted an adjournment where a variation affects their ability to prepare.

❒ *Agree* ❒ *Disagree*

Revisions

RECOMMENDATION 19.3
There should also be a provision that on consent of the agency, participants may waive procedural rights accorded to them, provided they are aware of the right and the consequences of waiver. This would include deemed waiver where a participant knowingly fails to take advantage of a procedural right.

❒ *Agree* ❒ *Disagree*

Revisions

Annotation entry

The annotation will note as to waiver that it is not possible to consent to jurisdictional defects.

The annotation will also note the requirement in "Miscellaneous Powers", Recommendation 53, that an agency's procedures of general application should be made public.

B. Standing

RECOMMENDATION 20.1
There should be a provision that deals with the agency's power to grant party status and intervenor status to persons other then applicants and named parties.

❒ *Agree* ❒ *Disagree*

Revisions

RECOMMENDATION 20.2
The criteria for each type of status should be specified. For parties, this should be:

- named parties
- those entitled to party status under the enabling legislation
- those who have a direct involvement in the issue before the agency.

For intervenors, the criteria should be:

- those who qualify as intervenors under provision of law
- those who are affected by the agency's determination, who can contribute a novel argument or perspective
- those who represent the public interest.

❒ *Agree* ❒ *Disagree*

Revisions

RECOMMENDATION 20.3
There should be a power to specify the extent of participation of those granted a less than full status.

❒ *Agree* ❒ *Disagree*

Revisions

Annotation entry

The annotation will provide examples of the ways in which participation rights may vary. Possible differences are in relation to the following: the extent of the right to present evidence and cross-examine; the form and extent of the right to make submissions; the right to be involved in or veto a settlement; and whether and in relation to what matters costs can be awarded.

Note: In many of the recommendations within, we refer to "participants". This term is meant to include both parties and intervenors. However, where a recommendation confers a participation right, this right may be curtailed by the agency in the case of intervenors. Thus, for example, where we confer a right to make a submission on a particular question, persons with full status will have this right, but persons with lesser (or "intervenor") status, may have the right curtailed by the agency. For intervenors, the extent of participation rights will always be at the discretion of the agency.

C. Notice of Hearing

RECOMMENDATION 21.1
Agencies should provide notice of the hearing to the following persons:

- parties
- intervenors
- persons who have applied for status whose status has not been determined.
- persons affected by the proceedings who have not been notified that an application has been made.

❒ *Agree* ❒ *Disagree*

Revisions

RECOMMENDATION 21.2
The notice should be reasonable notice.

❒ *Agree* ❒ *Disagree*

Revisions

RECOMMENDATION 21.3
The notice should contain:

- a description of the subject matter and purpose of the hearing
- any information required to be included by the enabling statute
- information about how to contact the agency, and about the agency's procedural rules
- where a determination has been made to conduct the hearing in a form other than an oral hearing, notice of this determination, together with notice of the opportunity to object to the chosen form.

❒ *Agree* ❒ *Disagree*

Revisions

Annotation entry

With respect to written or electronic hearings, the effect of objecting is discussed in Recommendation 24.1 under the heading "Written, Electronic, Oral".

Comment:
We considered whether there should be a requirement that the agency give notice to participants of sufficient information to permit them to participate meaningfully, including any relevant information in the possession of the agency, investigator, or prosecutor on which it intends to rely. We also considered a requirement to give notice of any allegations. We rejected these suggestions on the basis that it is sufficient to include a provision that an agency not take into account in its decision information in relation to which it has not made disclosure to the participants and given a reasonable opportunity to respond. (See Recommendation 43.3. Recommendation 30 also provides that agencies that receive new information through consultation must give participants an opportunity to make submissions thereon. See also Recommendation 34.2, which deals with participation rights.)

RECOMMENDATION 21.4
It should be possible for the agency to require that notice be given by the participants rather than by the agency itself.

❒ *Agree* ❒ *Disagree*

Revisions

RECOMMENDATION 21.5
There should be provision permitting alternate forms of notice where notice to individuals is impracticable.

❒ *Agree* ❒ *Disagree*

Revisions

D. Hearing Panels

RECOMMENDATION 22

The agency chair should be empowered to do the following:

- designate hearing panels comprised of one or more agency members to preside over a hearing and decide any matters, with the full power of the agency (unless the enabling statute sets out a minimum number of panel members)
- where the enabling statute sets out a minimum number of panel members, designate a panel smaller than the minimum, with the consent of the participants
- designate a panel chair

There should also be provision for the following:

- the role of the panel Chair (responsibility for the general conduct of the proceeding and the related decision-making process, subject to the requirement that all decisions be concurred in by a majority)
- the quorum for a panel
  - the statutory quorum for a panel (or the statutory minimum of members for a panel), or,
  - where a smaller panel has been designated with consent, the panel, or
  - where neither of the above, the quorum designated by the agency chair, or
  - where no designation or statutory minimum, the majority of members of the panel
- deemed continuance where a member's term expires, and remuneration for work done after expiry (subject to the administrative direction of the agency chair)
- where incapacity of a member of a single-member panel, provision for re-hearing, or decision on basis agreed on by participants (for example, on the basis of the record)
- where incapacity of member of a multi-member panel, provision for completion by the remaining members, either where a quorum without the member, or where the participants consent
- rehearing where incapacity of a member, and completion by the above methods is not possible.

❒ *Agree* ❒ *Disagree*

Revisions

Annotation entry

The annotation will note that s. 17(2) of the *Interpretation Act*, R.S.A. 1980, Chap. I-7, provides for the quorum for a meeting of a statutory board of three or more members, (1/2 the number of members provided for under the enactment). It also provides that a vacancy in the membership does not impair the right of a board to act, if the remaining members constitute a quorum. See also s. 17(1).

Comment:
This recommendation is to be read in conjunction with optional Recommendation 14.2, which provides that a single adjudicative member may decide preliminary matters that have a substantive component.

We considered allowing delegation of the authority of the agency chair with regard to the matters listed above to other agency members or staff. However, though we recognized that in some larger agencies these functions are routinely performed by staff, it is not onerous to have the designation approved (signed) by the chair, usually as a formality.

We also asked whether the provision was appropriate given that some agencies may not have an official chairperson.

We considered, but rejected, providing for re-exercise of some of the powers mentioned, on the basis that this was self-evident. We thought the same of a requirement that in designating panel members the agency follow statutory rules regarding representation of specific interests. As to setting out specific considerations for determining the time and place of hearings, we regarded this as containing too much detail.

E. Public/Private

RECOMMENDATION 23.1
The Code should provide that a hearing should be open to the public, except where any of the following factors outweigh the desirability of holding the hearing in public:

- matters involving public security would be disclosed
- there is a possibility of danger to life, liberty or security of a person
- intimate financial or personal matters would be disclosed.

❒ *Agree* ❒ *Disagree*

Revisions

Annotation entry

The annotation will note that there are some types of proceedings that should always be private; for these a determination need not be made in every case.

A practical exception is where a person who is the subject of a hearing is detained in a correctional facility. The hearing must then be subject to the rules of the place of detention.

Comment:
We considered a further exception in the case of an electronic hearing, where openness may be difficult to achieve as a practical matter because of the location of computerized or video conference facilities. However, we rejected this exception on the basis that the crowding of facilities does not normally justify closing a hearing.

RECOMMENDATION 23.2

There should be a provision that the principle of openness is satisfied by the following:

- in the case of a written hearing, open means an opportunity to inspect the agency's record or any transcript
- in an electronic hearing, open means right of access to the agency locale (in contrast to access to the electronic communication itself)

❒ *Agree* ❒ *Disagree*

Revisions

RECOMMENDATION 23.3
There should be a provision that where one of the exceptions in Recommendation 23.1 is met, any of the following may be ordered:
- persons may be excluded
- persons may be admitted on terms and conditions
- restrictions may be placed on the disclosure and publication of evidence.

❒ *Agree* ❒ *Disagree*

Revisions

Annotation entry

Regarding restrictions on publication and disclosure of evidence or documents filed with the agency, we noted that the provision for restrictions should not be taken to indicate a general openness of an agency's files. For some agencies, closed files may be the rule as one of the exceptions may be routinely met.

Comment:
We considered whether to specify that exclusion of persons can include the possible exclusion of participants. We concluded that because this would happen under only very specific circumstances, it did not merit mention in the rules. However, the circumstances under which this might be done could be mentioned in the annotation, (for example, where there is an informant).

F. Written/Electronic/Oral

RECOMMENDATION 24.1
There should be a provision that an agency may hold written, electronic, oral or mixed hearings.

Where a party (or intervenor, depending on the terms of the participation) objects to a written or electronic hearing, the agency should hear submissions from the participant. The hearing (or relevant part thereof) should be oral where a participant can show a reason why it would be unfair to use another format.

❒ *Agree* ❒ *Disagree*

Revisions

RECOMMENDATION 24.2
There need not be a provision that the agency ensure that in the case of electronic hearings, the form of the hearing allows the participants to participate effectively.

❒ *Agree* ❒ *Disagree*

Revisions

Comment:
Effective participation is desirable, but need not be specified. It may be assumed that tribunals will ensure effective participation as much as in oral hearings, in accordance with the requirements of fairness. The requirement is also met by the terms of Recommendation 24.1.

As to the right to copies of documents where the hearing is written in whole or in part, a right to inspection is sufficient. Recommendation 23.2 is to this effect.

G. Adjournments

RECOMMENDATION 25
There need be no provision authorizing adjournments.

❒ *Agree* ❒ *Disagree*

Revisions

Comment:
We did not regard an adjournment provision as necessary as it is part of the agency's power to control its own process. This power is stated in Recommendation 47.

H. Evidence

RECOMMENDATION 26.1
There should be a provision that an agency is not bound by the formal rules of evidence to the extent that deviation from these rules would not cause unfairness to the participants.

❒ *Agree* ❒ *Disagree*

Revisions

Annotation entry

The annotation will make note of certain categories of evidence that should not be admitted, for example, privileged information, matters inadmissible under a statute or the constitution, and offers of, or responses to, a settlement.

RECOMMENDATION 26.2
There need not be a provision permitting the exclusion of irrelevant, repetitious evidence, or evidence not constituting a material contribution.

❒ *Agree* ❒ *Disagree*

Revisions

Comment:
We did not it think it necessary to specify that irrelevant or repetitious evidence can be excluded, as this would suggest, wrongly, that generally such evidence need be admitted. We also strongly disagreed with the idea (found in the English Council of Tribunals' *Model Rules*) that relevant admissible evidence may not be refused, as this could force the admission of repetitious or marginal material. Control of the

admission of this type of evidence falls within an agency's right to control its process. (This power is stated in Recommendation 47.)

RECOMMENDATION 26.3
There should be a provision allowing copies of documents to be admitted in evidence.

❒ *Agree* ❒ *Disagree*

Revisions

Annotation entry

The annotation will refer to the law respecting document copies.

I. Witnesses

1. Subpoenas/notices to attend and produce evidence

RECOMMENDATION 27.1
There should be a power in agencies, on the request of participants, or on their own motion, to issue notices requiring persons to attend to answer questions and produce documents and other evidence in their possession and control.

❒ *Agree* ❒ *Disagree*

Revisions

RECOMMENDATION 27.2
With respect to the power to subpoena,

- exercise of the power should be subject to a pre-condition that the evidence to be presented by the person to be summoned appears to be relevant to the matter, and that the person summoned is reasonably likely to be able to supply it.
- it should be possible to issue the subpoena *ex parte*
- it should be possible to delegate the function to issue subpoenas to agency staff, but this decision should be reviewable by the full panel, or by a designated member
- there should be provisions for the method of service [personal], fees and allowances, proof of service [by affidavit], method of proof (for enforcement purposes) that the presence of the person subpoenaed, or the evidence sought, is material to the ends of justice [by certificate of chair or designate]; method of proof [by affidavit] where the application for enforcement is other than by the agency
- it should be possible to enforce subpoenas by bench warrant (to bring a person who refuses to attend or be sworn before the agency), or to institute contempt proceedings, in either case by application to a court

❒ *Agree* ❒ *Disagree*

Revisions

2. Swearing

RECOMMENDATION 28.1
Evidence received by an agency must be given on oath or affirmation. Written evidence is to be by affidavit.

❒ *Agree* ❒ *Disagree*

Revisions

Comment:
Recommendation 28.1 was contentious. Some of our Board and Project Committee members felt strongly that whether evidence is to be sworn should be discretionary, as some agencies may wish to preserve the informality of proceedings.

RECOMMENDATION 28.2

Agencies should be empowered to administer oaths or affirmations (the choice of procedure to be made by the witness). The form of oath should be in an appendix to the statute or in regulations.

❒ *Agree* ❒ *Disagree*

Revisions

3. Witness panels

RECOMMENDATION 29
Agencies should be authorized to receive evidence from panels of witnesses composed of two or more persons; panel members should be sworn and qualified individually.

❒ *Agree* ❒ *Disagree*

Revisions

Annotation entry

Parties (or intervenors depending on the terms of their participation) should be given an opportunity to make submissions on the propriety of this procedure.

4. Consultation by the hearing panel

RECOMMENDATION 30
There should be a provision regarding consultation by panel members as follows: Consultation by panel members with one another, with other adjudicative members of the agency, with staff of the agency or with any other person having technical or special knowledge at any stage in the proceedings, including the drafting of reasons, should be permissible on the following condition: where a member engages in such consultation, and new facts or evidence, policy, or legal issues arise which are likely to affect the reasons or order, the panel should apprise the participants of the nature of this new information and give them an opportunity to make submissions.

❒ *Agree* ❒ *Disagree*

Revisions

Annotation entry

The provision regarding apprising participants of new arguments or information complements the requirement in Recommendation 43.3 that precludes making a decision on the basis of information on which the participants have not had an opportunity to make a submission

The annotation will refer to cases dealing with the subject of consultation by the panel with other members, staff, or experts. (Note particularly *Consolidated-Bathurst Packaging Ltd. v. International Woodworkers of America* (1990) 42 Admin. L.R. 1.)

5. Questioning of witness by the agency

RECOMMENDATION 31
Agencies should be empowered to ask any questions of witnesses and participants and their representatives which the agency considers reasonably necessary to disclose fully and fairly all matters relevant to the issues in the proceeding, provided that the agency does not prevent a participant from presenting its case.

❒ *Agree* ❒ *Disagree*

Revisions

Annotation entry

The annotation will note that the questions asked may include those the answers to which may establish a particular case.

Comment:
We thought that the questions described in the annotation should be permissible because they may be unavoidable.

J. Disclosure

RECOMMENDATION 32.1
There should be a provision authorizing an agency, at the request of participants, to order the following at its discretion:

- the exchange of document between parties or intervenors
- the filing or exchange of witness statements, or experts' reports and qualifications
- the exchange of medical examinations
- the provision of particulars

❒ *Agree* ❒ *Disagree*

Revisions

RECOMMENDATION 32.2 [Optional Provision]
Agencies should consider whether their function is such as to necessitate a provision authorizing them, on their own motion, to order

- the production of documents
- the examination of witnesses, and the filing of witness statements
- the examination of experts, and the creation and filing of experts' reports
- the creation and filing of medical examinations
- any other form of disclosure

❒ *Agree* ❒ *Disagree*

Revisions

K. Taking Official Notice

RECOMMENDATION 33.1
Agencies should be authorized, in making a decision in any proceeding, to:
- take notice of facts that may be judicially noticed; and
- take notice of any technical facts, information or opinions within their scientific or specialized knowledge.

❒ *Agree* ❒ *Disagree*

Revisions

RECOMMENDATION 33.2
Where an agency proposes to take notice of matters within its own specialized knowledge, it should give notice of its intention to the participants, and give them an opportunity to make representations.

❒ *Agree* ❒ *Disagree*

Revisions

Annotation entry

Recommendation 33.2 should be taken to apply only in relation to matters and policies which are within the knowledge only of the agency; it should not apply in relation to matters that the participants may be presumed to know are within the knowledge of the agency.

Comment:
There are many matters within the knowledge of the agency that are evident to the participants. With respect to these, the notice and comment provision would be overly cumbersome. However, the procedure is important for matters of the former type.

L. Rights of Participants [to representation, participation]:

RECOMMENDATION 34.1
There should be provisions respecting representation as follow:
- a party has the right to self-representation, or to be represented by counsel
- representation of intervenors is at the discretion of the agency
- a witness has the right to be advised by counsel or agent; other participation is at the discretion of the agency.

❒ *Agree* ❒ *Disagree*

Revisions

RECOMMENDATION 34.2
There should be provisions respecting participation as follow:
- parties should be given a fair opportunity to present a case and to know and respond to the case they are to meet, including any representations of other participants that are relevant to an issue in that case
- participation rights of intervenors are at the discretion of the agency.

❒ *Agree* ❒ *Disagree*

Revisions

Annotation entry

This Recommendation should be read together with Recommendation 30 (which deals with consultation by panel members) and Recommendation 43.3 (which precludes decisions on the basis of information not disclosed to participants).

Where an agency allows presentation of evidence to be by way of witnesses, it should also allow cross-examination and rebuttal by way of witnesses.

Comments:

With regard to rights of participation, we strongly rejected the suggestion that there should be a universal right to call and examine witnesses, present evidence, and cross-examine witnesses (though this may be appropriate to particular kinds of hearings). This judicialized, adversarial procedure is often inappropriate to the proceedings of agencies.

M. Keeping Record, Transcript

RECOMMENDATION 35.1
There should be a duty on agencies to compile a record of any proceeding in which a hearing is held.

❒ *Agree* ❒ *Disagree*

Revisions

Annotation entry

The record should contain the following: the document by which the proceeding was commenced; the notices of receipt of the application and of the hearing; any interlocutory orders; other written decisions made in course of proceedings; documentary evidence; any transcript of oral evidence; any video or audio recording made by the agency; the decision and reasons.

The record should not include the personal notes of panel members.

RECOMMENDATION 35.2
There should be no requirement that an agency record or transcribe the hearing. However, where a request that either of these be done is made by a participant, this should be done by the agency. Where necessary the participant may be required to pay the cost of transcription.

❒ *Agree* ❒ *Disagree*

Revisions

Comment:
We considered but rejected the view that agencies should also have the power to resist recordings on the basis that this can change the informal tone of hearing to a very significant degree.

III. DECISION AND REASONS

Overview:
In this section we deal with the matters that pertain to the result of the decision making process - the decision and reasons. We consider all of the following:

- the power to make interim decisions,
- the requirement for a written version of the reasons
- the very important question of whether reasons for decision should be mandatory - *we conclude that they should be*
- the requirements that notice be given to the participants, and that the decision be publicly available
- whether there should be mandatory timelines for decisions, and what is to be done where a decision is not rendered within a reasonable time
- decision by the majority, and how the decision is to be reached where the panel is divided
- the requirement that agency decisions be based only on information whose substance has been disclosed to participants, and in relation to which they have been given an opportunity to make submission
- the involvement of staff in the drafting of the decision
- reconsideration of the decision
- the correction of errors.

A. Interim Orders

RECOMMENDATION 36.1
Agencies should be authorized to do the following:
- to make interim orders and decisions
- to impose conditions on the grant of an interim order
- to vary the interim order by the final order
- to make the final order retroactive to the date of the interim order.

❒ *Agree* ❒ *Disagree*

Revisions

Annotation entry

The provisions regarding variation of the interim order by the final order, and retroactivity, arise from an issue that arose before the FCA and the SCC over whether the power to issue interim decisions includes the power to vary these by a subsequent decision, making the latter retroactive. The annotation will refer to this decision.

RECOMMENDATION 36.2
There should be no requirement to give reasons for an interim decision or order. (This is an exception to the general duty to give reasons in Recommendation 38.1)

❒ *Agree* ❒ *Disagree*

Revisions

Annotation entry

Reasons should be provided where appropriate.

Comment:
We did not approve a reasons requirement, on the basis that often interim orders are meant to preserve the status quo, or protect the public interest, until the matter is heard. These are largely discretionary judgements. The giving of reasons might also give rise to the perception that a matter is being pre-judged.

B. Decision in Writing

RECOMMENDATION 37
There should be a provision that decisions are to be in writing. Oral decisions should be permissible, but not effective until provided in writing.
The transcript of an oral decision should be taken to satisfy this requirement.
A decision may be given in an electronic format provided that format is as secure from tampering as is a written document, and is as capable of immediate verification as being the decision of the panel as is a signed document. However, a permanent or paper record is to be provided on the request of a participant.

❒ *Agree* ❒ *Disagree*

Revisions

Annotation entry

The annotation will note that because reserved decisions can create a backlog, oral decisions should sometimes be encouraged, to be followed by a written decision or transcript of the oral decision.

C. Reasons

RECOMMENDATION 38.1
An agency should be required to give reasons for its final decision.

❒ *Agree* ❒ *Disagree*

Revisions

Comment:
We considered the argument that reasons are sometimes routine or trite, and a formal requirement can involve expense or delay without significantly advancing participants' rights. However, we rejected this view on the basis that the extent of reasons can reflect the complexity of the issue. The provision that a transcript of a oral reasons satisfies the requirement also meets this argument.

Having taken the view that the giving of reasons is part of the proper disposition of the matters before an agency, we considered whether a mandatory requirement is necessary, or whether sufficient encouragement is provided by courts. Recently some courts have sent matters to be reheard or rewritten on the basis that had satisfactory reasons been available, they would have been given. However, we concluded that the issue was sufficiently fundamental to impose a mandatory requirement.

RECOMMENDATION 38.2
Where a panel member dissents, the dissenting reasons should be included with the majority reasons, at the election of the panel member. Participants should also be entitled to receive the dissenting reasons on their request.

❒ *Agree* ❒ *Disagree*

Revisions

RECOMMENDATION 38.3
There should not be a provision specifying the content of reasons.

❒ *Agree* ❒ *Disagree*

Revisions

Annotation entry

The annotation will summarize the common law regarding the content of reasons.

RECOMMENDATION 38.4
It should not be possible for the duty to give reasons to be waived by the participants.

❒ *Agree* ❒ *Disagree*

Revisions

Comment:
Even for cases of consent orders, the agency should be required to state that the participants consented, and the reasons, if any, for its concurrence.

D. Notice of Decision/Provision to Participants

RECOMMENDATION 39
There should be a provision that the agency is to give notice to the participants of its decision and reasons.

❒ *Agree* ❒ *Disagree*

Revisions

Comment:
We rejected the suggestion that the rule should contain detailed technical provisions as to the manner of notice or deeming provisions in the case of indirect notice.

E. Availability of Decision to Public

RECOMMENDATION 40
There should be a provision that decision of an agency be available to the public on request.

There should be a requirement that where the conditions for privacy under Recommendation 23.1 have been met, the relevant private information should be deleted from the reasons.

❒ *Agree* ❒ *Disagree*

Revisions

F. Timely Decisions

RECOMMENDATION 41.1
There should be no provision setting out mandatory timelines for decisions.

❒ *Agree* ❒ *Disagree*

Revisions

Annotation entry

Agencies should be encouraged to set out guidelines for the timing of decisions that are appropriate to their own decision-making function.

Where a panel member retires, a 6-month time limit to render a decision would be useful as a guide.

Comment:
We rejected the idea of mandatory timelines in favour of guidelines because there is no practical sanction. The timeliness of decisions is an administrative matter which should be the responsibility of the agency chair, and the chair should, as part of his or her mandate to manage the agency, take action against a panel member who fails to render a decision. Mandamus is also available as a remedy.

RECOMMENDATION 41.2
There should be a provision allowing application by the participants for a rehearing where no decision is forthcoming after the expiry of a time period that is reasonable in light of the complexities of the matter.

❒ *Agree* ❒ *Disagree*

Revisions

Annotation entry

The rehearing may be held in such manner as is agreed by the participants, for example, partially or entirely on the basis of the record.

G. Decision by Majority

RECOMMENDATION 42

There should be provisions regarding decisions of multi-member panels as follows:

- the decision of the majority of the members of the panel is a decision of the panel
- where a panel is equally divided
  - the decision may be made by the agency chair on the basis of the record or otherwise as the parties (or intervenors, depending on the terms of their participation) agree, or
  - where the participants do not agree that the chair is to decide, or the chair regards a rehearing to be warranted, the matter is to be reheard.

❒ *Agree* ❒ *Disagree*

Revisions

H. Consultation by Panel

RECOMMENDATION 43.1
There should be a provision that a panel Chair must consult all panel members before a decision is issued.

❒ *Agree* ❒ *Disagree*

Revisions

RECOMMENDATION 43.2
There should be provisions regarding consultation with staff, and staff involvement in decision-writing, as follows:

- whether consultation with staff is permissible depends on the nature of the participation of the staff in the hearing; consultation is permissible where
  - staff merely assisted with the neutral mechanics of the hearing, or
  - staff provided the agency with legal or policy advice at the request of the agency
- consultation with staff is subject to the requirements of Recommendations 30 and 43.3.
- staff drafting of the decision, or review of drafts, is permissible, but staff must make no changes to the findings of fact or conclusion of law, and the decision so drafted must be reviewed by the presiding panel members.

❒ *Agree* ❒ *Disagree*

Revisions

Annotation entry

The annotation will refer to the relevant law on staff involvement in the decision-making process.

RECOMMENDATION 43.3
There should be a provision that in reaching a decision the agency may not take into account any facts or evidence, policy or legal issues (other than matters which may be judicially noticed) whose substance was not disclosed to the participants and in relation to which they have not had an opportunity to make submissions.

❒ *Agree* ❒ *Disagree*

Revisions

Annotation entry

This provision complements the requirement in Recommendations 30 and 34.2. The former provision requires that an agency that consults with others is to apprise participants of new information derived from such consultation on which it intends to rely in its decision. The latter sets out the rights of participants to know and respond to the case they are to meet.

I. Reconsideration

RECOMMENDATION 44
There should be a power, at the discretion of the tribunal, on its own motion or that of a participant, to review or rehear an order or decision, and to confirm, vary, rescind or suspend it.

There should be no time limit for the exercise of this power.

❒ *Agree* ❒ *Disagree*

Revisions

Annotation entry

Factors for exercising the power should be:
- where a matter has not been dealt with that ought to have been dealt with
- where there is a patent error on the face of the record
- where there is new evidence that was not obtainable with due diligence for the original hearing, and this evidence is likely to affect the outcome
- where there has been a change in economic or other circumstances or in the public interest that affects the propriety of earlier decision(s), or a related change in the policy position taken by the agency
- where there has been fraud
- where there has been a procedural defect or lack of due process that could not have been raised at the hearing

Other considerations are:
- whether the request was made within a reasonable time
- whether reconsideration will adversely affect a participant
- the interest of participants or the public in the finality of the decision.

In some cases, the reconsideration could be by the same panel (as where there are new facts), in others by a different panel (as where there has been an allegation of breach of due process), and in others by a higher or larger panel (for example, to decide a policy matter).

J. Correction of Errors

RECOMMENDATION 45
It should be possible for an agency to correct clerical or typographical errors or errors of calculation, on the motion of a participant or the agency's own motion, within a reasonable time.

❒ *Agree* ❒ *Disagree*

Revisions

IV. MISCELLANEOUS POWERS

Overview:
This section deals with the powers and procedures of agencies which do not fall easily within any of the foregoing categories, or strictly within an agency's decision-making function.

We consider firstly whether the Model Code should distinguish amongst classes of cases to which different levels of formality apply, and assign different procedures to each class. We reject this approach in favour of the availability of a full continuum of formality, adaptable by agencies to meet the needs of a given case.

We affirm the power of agencies to control their own process. We also affirm the right of persons in relation to whom agency decisions are made to have the decision made by a fair and impartial tribunal.

We deal with enforcement of agency orders, by filing with the court, and by contempt proceedings. We conclude that the former option (enforcement by the courts in like manner as court orders) is not properly housed in our Model Code, but that the latter (enforcement of particular classes of agency orders by contempt proceedings) should be available on application to the court.

We consider whether the Code should contain substantive or procedural rules for appeals to the court, but conclude that the substantive rules for appeals must be made on a case-by-case basis, and court-related procedural rules belong elsewhere. We do provide supplemental rules for the conduct of appeals to appellate bodies within an organization. These are to be read together with the hearing rules of general application considered earlier.

We consider the power of agencies to award costs, extend time, make *ex parte* decisions, and maintain order at a hearing.

Finally, we impose a requirement that we regard as fundamental. To ensure that the rules adopted by agencies are accessible to users, we require that they be published and available for public inspection. We also encourage agencies to index and make available their precedent decisions.

A. Categories/Procedures for Hearings Other Than Full/Formal

RECOMMENDATION 46
The Model Code should not contain provisions that distinguish amongst classes of cases to which different levels of formality apply. It should not be necessary to formally choose a suitable level of proceeding for every case. Rather, the full continuum of formality should be available for all hearings. This single hearing process can be adapted by the agency so as to provide a process that meets the "fair opportunity" criterion described in Recommendation 34.2.

❒ *Agree* ❒ *Disagree*

Revisions

Annotation entry

To highlight for agencies the full range of possibilities with respect to degrees of formality, the annotation will outline the various categories of proceedings, with attendant levels of formality, that are found in our source materials. These are as follow:

a) informal / conference hearing: This applies to situations in which there is no disputed issue of material fact, or where there is such an issue, but the matter involves a limited monetary amount (less than $1000) or a specified minor sanction. The presiding officer is required to permit the parties and may permit others to offer written or oral comments on the issues, but may limit the use of witnesses, testimony, evidence, and argument and may limit or eliminate the use of pleadings, intervention, discovery, pre-hearing conferences, and rebuttal.

b) emergency hearing: This applies in a situation involving an immediate danger to the public health, safety, or welfare that requires immediate agency action necessary to prevent or avoid the danger. The agency is required, *if practicable*, to give the person to which the agency action is directed notice and an opportunity to be heard. The hearing may be conducted in the same manner as an informal hearing. The temporary, interim relief granted is subject to judicial review, and the underlying issue giving rise to the temporary, interim relief is subject to an adjudicative proceeding. After issuing an order pursuant to this section, the agency is to proceed as quickly as feasible to complete any proceedings that would be required if the matter did not involve an immediate danger.

c) summary hearing: This category applies to matters even less serious than those to which the conference-type hearing applies (for example, a monetary amount of less than $100, or a purely verbal disciplinary sanction with no continuing impact), and where there is no necessity to give notice and an opportunity to participate to anyone other than the parties. The procedure requires the presiding officer, before taking action, to give each party an opportunity to be informed of the agency's view of the matter and to explain the party's view of the matter. The decisions are subject to review upon the request of a party.

d) declaratory decision: This allows an application for a decision as to the applicability to specified circumstances of a statute, regulation or decision within the jurisdiction of the agency.

The section on emergency orders highlights for agencies the possibility of adopting a procedure that will allow immediate action to protect the public interest, but that includes the safeguard that the agency will also move promptly to have a hearing to resolve the underlying issues.

Comment:
We began by considering our recommendation with regard to the participation rights of parties in the hearing. This recommendation (Recommendation 34.2) was that while the parties should be given a fair opportunity to present a case and to know and respond to any case they are to meet, this would not necessarily involve the parties' having complete control over the conduct of the proceedings (though in some cases this might be the best mode of proceeding). It would be in the jurisdiction of the tribunal to limit the presentation of evidence, cross-examination, rebuttal and presentation of arguments, so long as the "fair opportunity" criterion was met. The question was thus whether it is preferable, for the guidance of the agency, to try to segregate different classes of cases to which different levels of formality will apply.

We concluded that the availability of the full continuum of formality is to be preferred to the approach of creating distinct categories with attendant procedures. This allows more flexibility and is more consonant with the Canadian approach to the requirements of fairness. To some extent emergencies can be dealt with by the provisions regarding interim orders. The provision allowing an agency to vary its procedures for a given case also permits adaptation of the procedures to conform to the needs of a particular emergency, possibly in the manner suggested in section (b) above. We have already rejected the inclusion of declaratory orders in the Model Code (though provisions for such decisions might be contained in the enabling legislation of particular agencies), on the basis that decisions based on agreed facts are part of the routine procedure, and it may be inappropriate to expend agency resources on hypothetical facts.

However, the Committee did recognize the possible benefit to *ad hoc* or otherwise inexpert agencies of pointing out the range of levels of formality that might be applied. Such a review of possibilities may create a difference in mind set, suggesting that for appropriate cases, a decision-maker may exercise a higher degree of control over the presentation of evidence and argument than might otherwise be thought appropriate. In order to create an awareness of the possibilities, we chose to include the categories of hearing procedures in the annotation.

B. Power of an Agency to Control Its Process

RECOMMENDATION 47
Subject to its enabling statute and regulations, an agency should have the power to control its own process.

❒ *Agree* ❒ *Disagree*

Revisions

Annotation entry

This power is a codification of the common law. The annotation will refer to particular powers that are subsumed in this general power, for example, the right to set hearing times, or to grant adjournments.

C. Enforcement of Agency Orders by Filing with the Courts

RECOMMENDATION 48
The Model Code should not contain provisions regarding the enforcement of agency orders by filing with the court.

❒ *Agree* ❒ *Disagree*

Revisions

Comment:
Though legislation permitting such a procedure may be necessary, it is not appropriate to house it in a Model Code of agency powers and procedures.

D. Contempt of Agency Orders

RECOMMENDATION 49

An agency may bring proceedings for contempt, by application to the court, under circumstances where a person does any of the following:

- refuses to be served a subpoena to attend, to be sworn, or to produce documents, or makes false statements
- fails to comply with an order necessary to maintain order at a hearing or to prevent abuse of the agency's process
- fails to obey a decision of the agency prior to the final decision
- interferes with the orderly accomplishment of the agency's mandate.

❒ *Agree* ❒ *Disagree*

Revisions

Comment:

We rejected suggestions that there should be a power in the agencies themselves to punish for contempt, as by imposing a fine, or restrictions on participation. Court involvement is preferable where the liberty of the subject is at stake. Another important advantage is that the body offended is not also the prosecutor and judge.

E. Costs

RECOMMENDATION 50 [Optional Provision]
The power to award costs and hearing expenses should be decided on an agency-by-agency basis, and there should be no general provision in the Model Code. All agencies should consider the propriety of costs provisions in their enabling legislation.

❒ *Agree* ❒ *Disagree*

Revisions

Annotation entry

Where legislation authorizes the agency to award costs, it should be possible to make such awards at any stage of the proceedings, not only at the end (this could be especially important for intervenors).

Comment:
With regard to both costs and hearing expenses, but particularly the latter, we thought that there were some types of agencies for which making such awards would be completely inappropriate, and therefore the power should be selected on an agency-by-agency basis.

Some of our source materials contained lists of factors to be taken into account in awarding costs or hearing expenses. We considered including these lists in our annotation, but decided not to do so, as the lists are not sufficiently comprehensive to be useful.

F. Appeals to the Court

RECOMMENDATION 51
The Model Code should not contain the substantive or procedural rules relating to appeals to a court. These should be either in the enabling legislation of an agency, or in the Rules of Court.

❒ *Agree* ❒ *Disagree*

Revisions

Comment:
The Macaulay Manual suggests a substantive provision for the decisions of all agencies that no appeal to a court should lie except *with leave of the court, on a question of law,* and that there should be *no appeals de novo.*

In our view, whether an appeal should lie from a particular type of agency decision, whether it be an interim decision, a procedural decisions that has substantive implications, or a final decision, depends on the nature of the decision, the level of expertise of the decision-maker, the availability of an appeal to another body within the agency, and so on. Thus the question must be decided on a case-by-case basis. The relevant legislation providing for appeals from particular classes of decisions (or conversely, precluding appeals by including privative clauses) should therefore be housed in an agency's enabling legislation.

As to the procedure for applying to the court, this is a matter of court procedure, and is thus outside the scope of Model Rules for agencies.

G. Appeals to Appeal Bodies Within the Agency

RECOMMENDATION 52
Where the enabling legislation provides for an appeal from a first-level decision-maker to an appellate body within the agency, there should be rules that govern the appeal, as follow:

- the appeal should be brought within 30 days
- the time for appeal should run from the date of notification of the decision to the participants
- if leave is required, this should be requested within the time for bringing the appeal
- the fact that an appeal has been brought should not automatically create a stay of the decision or order from which the appeal is brought
- with respect to both leaves and applications for a stay, it should be possible to seek the leave or stay from either the first-level body or the appellate body
- notice of appeal should be given to all persons who participated in the previous proceedings
- the appellate body may receive a summary or record of the first instance evidence
- a participant may give notice that it wishes to adduce further evidence; after hearing submissions, the agency may request and receive further evidence, if such is necessary to enable a proper determination.

❒ *Agree* ❒ *Disagree*

Revisions

Annotation entry

With respect to the admission of further evidence, if the mandate of the appellate body is to decide only questions of law or jurisdiction (rather than to reconsider factual matters as well), only evidential information relevant to the question of law or jurisdiction (eg. to allegations of absence of evidence, or unfairness in the process) would need to be admitted to make a proper determination.

Comment:
The general Model Code rules with respect to hearings govern appeals, so far as they are applicable. Thus, for example, the appellate body may adopt procedures

and give directions for the conduct of the appeal, or it may decide, after considering submissions, to hear the appeal on a written rather than oral basis. We include the foregoing provisions because these govern matters pertaining specifically to appeals. This is especially important where, as is sometimes the case, statutes provide for the appointment of appeal bodies on an ad hoc basis, but provide no rules, or only very minimal rules, for the conduct of the appeal.

With regard to whether an appeal should operate as a stay, we thought that the question of staying the original decision should be determined on a case-by-case basis, to allow the balancing of factors such as prejudice, and to ensure that parties do not use the appeal procedure as a tactic for delaying the effect of a decision.

H. Visibility, Accessibility of Procedures, Precedents

RECOMMENDATION 53
The Model Code should contain a requirement that the powers and procedures of agencies be published and available for public inspection.

❒ *Agree* ❒ *Disagree*

Revisions

Annotation entry

The annotation will contain guidelines to the tribunal for making the availability of its processes known, for example, participation guidelines, plain language, brochures/videos, etc..

With respect to agency decisions, agencies are encouraged to have those decisions that are to be used as precedents (including those existing prior to the Model Code) indexed and made publicly available. There should be provision for deletion of material that would invade privacy.

I. Bias

RECOMMENDATION 54
Decisions of the agency are to be made by a fair and impartial tribunal.

❒ *Agree* ❒ *Disagree*

Revisions

Comment:
We considered whether to include detailed provisions in the Code creating a duty in agency members to disclose the potential for bias or for a reasonable apprehension of bias, and setting out when and by whom the question is to be determined. On the basis that such provisions involved too much detail, we opted to simply make the statement in Recommendation 54, as a corollary to the rights of the participants to fairness.

Annotation entry

This provision also covers the law with respect to the separation of functions. This law, including the separation of prosecutorial, advocacy, and preliminary determination functions (whether to issue a complaint, conduct an investigation, or conduct a prosecution or other proceeding) from the adjudicative, will be described in the annotation.

J. Extensions of Time

RECOMMENDATION 55
Agencies should be given the power to extend or abridge time periods (with conditions) found in enabling or other legislation.

❒ *Agree* ❒ *Disagree*

Revisions

Comment:
Where there is a justification for failure to meet a statutory timeline, for example, for filing an appeal, unfairness can result where there is no provision for extension.

K. Ex Parte Decisions

RECOMMENDATION 56
Agencies should be authorized to determine matters *ex parte* under circumstances where not to so proceed would cause incompensable serious harm to a participant.

❒ *Agree* ❒ *Disagree*

Revisions

Annotation entry

Decisions so made should be minimally intrusive.

L. Interpreters

RECOMMENDATION 57
The Model Code need not contain requirements for the provision of interpreters.

❒ *Agree* ❒ *Disagree*

Revisions

Comment:
Many of our source materials contained provisions respecting interpreters. However, we concluded that this matter is adequately covered by the requirement that the agency ensure that participants have a reasonable opportunity to present a case and to know and respond to the case they are to meet.

M. Maintenance of Order at Hearing

RECOMMENDATION 58

There should be a provision allowing agencies to exercise the following powers to maintain order at a hearing:

- the power to give orders and directions
- the power to exclude persons for failure to comply
- the power to impose conditions on participation
- the power to call for the assistance of a peace officer.

❒ *Agree* ❒ *Disagree*

Revisions

V. IMPLEMENTATION OPTIONS

The list below covers the full spectrum of possible methods of implementing the rules - from mandatory imposition on all agencies at one extreme, to purely voluntary adoption by agencies who choose to consider the issue at the other. Our view at present is that the best method for implementing the Code lies somewhere between these two extremes. The possibilities are as follow:

- mandatory legislation applicable to all statutory agencies or decision makers whose decisions affect rights or interests (or those that are required to hold "hearings", or hear representations from persons affected, by statute or by the common law)

- mandatory legislation applicable to bodies set out in a schedule

- a plan for ensuring that each agency considers, and adopts or adapts the Code or parts thereof; monitoring of this process may be either:

    - by a single body (Council of Tribunals?)
    - by a person assigned this task from every Department
    - by including the adoption of procedures as a performance goal for agencies, (applying the reporting and accountability processes already in place within Departments)

- voluntary adoption (the Code as a "store" of rules, at which agencies may shop, when and how they see fit)

The Code might also be legislated as a set of default procedures for agencies that have few or no rules at present.

Please include your comments on the best way to implement our Model Code, whether by choosing one of the suggested options, or by suggesting some other method, in the space below.