ALBERTA LAW REFORM INSTITUTE

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POWERS AND PROCEDURES FOR ADMINISTRATIVE TRIBUNALS IN ALBERTA

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Administrative adjudicators make decisions respecting the rights and interests of citizens across a very wide spectrum of activities and circumstances. Some of these decisions are far more complex, or have far more serious implications or consequences, than others. The resources given to tribunals to perform their adjudicative tasks are equally variable. The challenge of this project was twofold: first, to find a way to develop a toolbox of working rules that are sufficiently generic to be useful to the whole array of adjudicative bodies; and second, because not all the tools would be needed by all tribunals, to find a way to put the appropriate procedural tools in the hands of those who need them.

To do this, we turned at a very early stage in the process of developing procedural rules to the users of the rules themselves. Initially, we looked to a small group to help us develop the template of topics or headings for a Model Code of Powers and Procedures, and preliminary recommendations. Then we turned to a much larger group, of the tribunals themselves and those who appear before them, to help us to fill in and finalize the recommendations under the headings, and to develop an implementation plan.

The first level of consultants, our Project Committee, consisted of the following persons:

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

This group was undaunted by a deluge of source materials over the course of many months and many meetings. Members of the group were highly dedicated and enthusiastic in helping to build the structure for the Model Code, and even claimed to welcome the opportunity to reflect on the theory of the law with which they are daily occupied.

The next tier of consultants consisted of our department representatives, a member from each government department. These people are listed in the Appendix. Not all of the members of this group knew what to expect when they arrived at our sessions, and many are not directly involved in the day-to-day practice of adjudicative tribunals. However, this group enthusiastically shared the benefits of their particular connection or experience with tribunals. Some of the most significant suggestions, particularly with respect to implementation of the Model Code, came from this group.

The third tier of consultants consisted of the tribunals themselves. We invited all of the standing tribunals that we were able to locate, large and small, and we were highly rewarded with almost perfect attendance. We are very grateful for the contributions of all of them. Some took the trouble to attend even though they came to our consultation table already equipped with highly-developed and modernized procedures of their own–perhaps not as much in need of procedures as some of the others, but more than willing to share information about their own processes and experience. Many of the tribunals, in addition to providing responses to our Consultation Document, wrote separate letters expressing support for the project.

The legal profession also provided an invaluable response through the work of the executive committee and membership of the administrative law section of the Canadian Bar Association. The executive group consisted of

- Karen Munro, Sharek Reay
- Michele Annich, Sharek Reay
- Jennifer Head, Alberta Justice, Civil Law
- Janet Hutchison, Chamberlain Hutchison
- David Jardine, Shores Belzil

This group worked through the Code in detail, sought the comments of the membership, and provided a thorough and thoughtful response.

Finally, the Institute Board as a whole reviewed the materials on a number of occasions, providing detailed and helpful commentary and improvements.

All of these levels of consultation were critical to the creation of our product, but we were not treading entirely new ground. We relied on source materials from many jurisdictions, but the most significant single source for our template was the *Federal Administrative Hearings Act* developed by James Sprague for the federal jurisdiction. Not only did we have the benefit of this groundbreaking and comprehensive work on the subject of administrative procedures reform, but the author himself was entirely receptive to any manner of question about the details and direction of our project. The manual for administrative procedures practice co-authored by James Sprague and Robert Macaulay, *Practice and Procedure before Administrative Tribunals,* was equally fundamental to the progress of this report, and particularly helpful as well for developing the Explanatory Notes to the Code.

Acknowledgment must also be given to our counsel, Christina Gauk, who has had carriage of this project from its inception. She has overcome the challenge of gathering and filtering voluminous and sometimes changeable data, and guided the project through the many stages and levels of consultation described above, to produce what many tribunals already acknowledge will be an essential guide to their operations and processes.

The Code is not a static thing–it will need to grow and develop with changing circumstances and jurisprudence. The Institute looks forward to working with the various interested groups to ensure that the Code remains current and helpful.

Table of Contents

PART I — EXECUTIVE SUMMARY

[1] The existing legislation that governs the procedures of adjudicative tribunals in Alberta–the Alberta *Administrative Procedures Act*–is seriously deficient. This act has not kept up to date with developments in the law respecting fairness and fundamental justice, nor with new methods and processes that can help make tribunals more efficient in terms of the use of their resources, and better-equipped to run their hearings effectively. The act is also very limited in its coverage, applying to only a small proportion of Alberta's adjudicative tribunals. Our purpose is to provide procedural rules that take into account case law developments relative to the requirements of natural justice, and new procedures to enhance efficiency and effectiveness, and to make them more widely available. The Model Code of powers and procedures provides such rules and makes them available to all tribunals.

[2] The bodies whose procedures are in question are very diverse in terms of their functions and resources. A serious challenge of the project was to provide a single body of rules that would be useful to all of them. The Institute responded to this challenge in two ways. First, at a very early stage we turned to the users of the procedures–those who appear before tribunals, and the tribunals themselves–for input as to what the Code's provisions should be. We asked our consultants to tell us not only how particular rules would work for their own tribunals, but also to reflect as to how they would serve as part of a generic set of rules. Second, in consultation with these groups, we developed a novel method for implementing the Code's provisions: 'opt-in' legislation under which tribunals may apply for a ministerial order (to the Minister of Justice) to make selected provisions operative for them. This method responds to diversity. It has the added and very important benefit of locating the powers and procedures of administrative bodies in a single, visible location, readily accessible to users and conducive to the development of a common practice and precedent. The role of the Minister of Justice in approving selected provisions will help also ensure consistency in tribunal practice.

[3] The first Chapter of our Report sets out the shortcomings in the existing legislation and the steps we took to address this problem–the development of a modernized Model Code of powers and procedures, to be legislated as an

'opt-in' statute. It describes the intensive consultation process that we undertook to enable us, together with our consultants, to craft provisions sufficiently general for use by many bodies, and to create an implementation plan that would make the Code's provisions operative for those who need them.

[4] Chapter 2 of the Report sets out a number of principles on which the Model Code's provisions are based. The first section recognizes the way in which tribunals are different from courts, and the special powers they need to accommodate these differences. They need to control their own processes to reflect the very disparate types of decision-making in which they engage. In order to fulfill their mandate, many of them also need to obtain information beyond that supplied to them by persons that appear before them. The remaining principles have already been mentioned: fairness and natural justice, efficiency, effectiveness, and the benefits of centralization. This Chapter also notes which of the Code's provisions are tied to the particular principles.

[5] The third Chapter contains the Institute's recommendations with respect to the implementation process. We recommend the enactment of an *Administrative Powers and Procedures Act* that replaces the existing *Administrative Procedures Act*. Under the terms of this proposed statute, tribunals may apply for a ministerial order to make the provisions of the Code that they have selected a part of their own procedural rules. As the existing *Administrative Procedures Act* is administered by the Department of Justice, we recommend that the Minister of Justice be the approving Minister under the new legislation. We also recommend that each government department include in its business plan a requirement that every tribunal established under the legislation for which the department is responsible (or someone on their behalf) undertake a review of the Code and make the appropriate selections from it. We also discuss what use can be made of the Model Code before the recommended legislation is passed.

[6] The next section of the Report is the Model Code itself. The Code is divided into four sections: pre-hearing, the hearing, decision and reasons, and miscellaneous. Each section is prefaced by an overview.

[7] Part 1, 'Pre-hearing procedures', deals with all the matters a tribunal should consider before holding a hearing. It is largely concerned with tribunal efficiency, and includes steps tribunals may take to avoid unnecessary hearings in specified situations, such as where a proceeding would be an abuse of process, or where the participants consent to a disposition. Other examples of ways in which unnecessary hearings can be avoided pursuant to the provisions in Part 1 include the following:

- a tribunal may state a case for a court to determine a matter
- a tribunal may hold a generic hearing that decides a matter of interpretation or policy that avoids a multiplicity of related applications
- a tribunal may combine two or more applications into a single consolidated hearing
- a matter may be rerouted to ADR proceedings to allow the participants to come to a mutually acceptable resolution.

Part 1 also allows for pre-hearing conferences and sets out the matters that may be dealt with in such conferences.

[8] Part 2 deals with the hearing itself. Some of the provisions in this part are meant to ensure that tribunals meet the requirements of natural justice in the hearing context. Others allow hearings to be conducted more efficiently, or effectively. Many of the provisions combine all these concerns. The provisions under this part deal with: who is entitled to participate and what notice and information is to be given to participants; the form of the hearing (whether public or private, whether oral, written or in electronic form); how evidence is to be compelled and received and what evidence is to be admitted; participants' rights to representation and participation; and the duties of the tribunal with respect to creating a record of the proceedings.

[9] Part 3 deals with the matters that pertain to the result of the decision making process–the decision and reasons. The section deals with formal requirements relative to the decision such as the need for a written version, the requirement that notice of the decision be given to participants and that it be publicly available, and that tribunals develop time lines for issuing decisions. The most important requirement is that reasons be given for all decisions, a requirement from which we feel no tribunal should be exempt. The section also sets out guidelines for staff involvement in decision making. Another significant provision is that which allows tribunals to review or

rehear matters in which a decision has already been issued; this provision deals with the propriety of reconsideration in a variety of circumstances.

[10] The final part, Part 4, deals with powers and procedures that do not fall easily within any of the foregoing categories, or strictly within a tribunal's decision-making function. The first question addressed is whether the Model Code should distinguish among classes of cases to which different levels of formality apply, and assign different procedures to each class. (We rejected this approach in favour of the availability of a full continuum of formality for all decision-making, adaptable by tribunals to meet the needs of a given case.) The remaining topics deal with the following discrete subject matters: control over process; enforcement, contempt; appeals; costs; extensions of time; *ex parte* decisions; maintaining order at a hearing; visibility of procedures; bias; provision of interpreters; service of documents.

[11] The Code's provisions are also accompanied by Explanatory Notes, which are meant to help tribunals decide whether they need the provision, and provide guidance as to how it is to be interpreted or applied. Many entries also highlight related case law, which is meant as a starting point for further research where this is needed.

[12] We hope that the legislated 'opt-in' Model Code has met the challenges of bringing administrative procedures legislation up-to-date and making it generally available to tribunals and tribunal users. The next challenge will be to ensure that the Code continues to keep up with developments in law and tribunal practice.

PART II — LIST OF RECOMMENDATIONS

PART III — REPORT

CHAPTER 1. DEVELOPING THE MODEL CODE

A. The existing legislation: shortcomings

[13] Administrative tribunals are bodies that are given a power by statute to make decisions that affect the rights and interests of citizens.[1] The Alberta *Administrative Procedures Act*[2] *("APA")* provides a set of rules to guide tribunals about how to conduct their decision-making functions. This statute was enacted in 1966, and remains basically unchanged. It is outdated and restricted in its scope, and is no longer adequate to help tribunals conduct their processes in the best way possible.

[14] Since the statute was enacted, there have been important developments in the common law about how tribunals are to conduct their proceedings. Administrative tribunals are required to make their decisions fairly, or "according to the principles of natural justice". Many judicial decisions since 1966 have explained what tribunals must do, and what they may not do, to meet this standard. Some of these judicial directions can be captured in standard rules that would help tribunals meet the requirements of natural justice. The *APA* contains only a handful of such rules.

[15] There have also been many developments and refinements in the way that tribunals can conduct their proceedings, which can make them more effective and efficient. The existing *APA* does little to increase the efficiency or effectiveness of tribunal operation.

[16] In contrast to the Alberta statute, Ontario's *Statutory Powers and Procedures Act*[3] *("SPPA")*, which was enacted at approximately the same time as the *APA*, has been amended many times to keep up with the new developments in the common law requirement of fairness and in tribunal

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[1] Examples are the Workers' Compensation Board, the Human Rights Commission, the Environmental Appeal Board, the Driver Control Board, and the Labour Relations Board.

[2] R.S.A. 1980, c. A-2.

[3] R.S.O. 1990, c. S.22

practice. It was amended most recently in 1997, and new proposals have been put forward for 1999.

[17] Another shortcoming of the existing *APA* is that it applies to only those tribunals listed in the schedule to the *Act* (about 10) and a number of others whose constituting statutes incorporate the rules of the *APA*. This is a very small proportion of the tribunals that make decisions affecting the rights and interests of citizens. (In contrast, the Ontario *SPPA* applies to all statutory decision makers that are required to hold hearings except those expressly excepted by the statute.)

[18] This limited coverage of the *APA* has a number of drawbacks.

- Many tribunals have procedures, or some procedures, in their statutes. However, often these were developed as needed. They are therefore often inconsistent with the rules of other tribunals that have the same or very similar functions. There is no reason for such inconsistency.
- Some tribunals have no legislated procedural rules. Some of these may have rules in their policy manuals, but these may not be readily accessible to users.
- Some tribunals have no rules at all, and develop their procedures on a case-by-case basis. This makes their process invisible and unpredictable to users.

[19] A visible body of reasonably consistent tribunal rules would make it much easier for those who appear before tribunals.

[20] The diversity of tribunal rules also hinders development of a coherent body of interpretive case law surrounding the rules. Such precedents would be useful to tribunals as well as to those who appear before them.

B. Our Response

1. A Model Code

[21] A primary goal of our project is to make the new rules and processes mentioned above available to Alberta's tribunals. We have developed a Model Code of procedural rules and powers that is more modern and more comprehensive than that found in the existing *APA*.

[22] We have taken steps to help tribunals meet the requirements of fairness imposed by the common law and the *Charter of Rights*. We have codified the basic rules of procedural fairness to the extent possible, and supplemented these provisions with Explanatory Notes that highlight the related case law.

[23] The rules in the Model Code also allow for more flexibility and efficiency in the conduct of proceedings. They provide for less formal procedures where appropriate, and powers to resolve matters more efficiently (for example, written or electronic rather than oral hearings, or pre-hearing conferences presided over by a single member). They also give tribunals the powers they need to be effective in conducting their processes (for example, powers to obtain information, or to enforce tribunal orders).

[24] We also wish to ensure that the procedural rules of tribunals are consistent and visible for the benefit of users. We have located the procedures in a single comprehensive Model Code. To the extent that they are adopted, this will make the procedures highly visible and readily accessible by those who appear before tribunals. It will also facilitate the development of interpretative decisions relating to the more consistent tribunal practice.

2. Accommodating diverse functions and resources

[25] A critical factor in formulating our response was the diversity in tribunal functions and tribunal resources. Our project covers everything from an informal gathering at a well site to discuss compensation to a land owner for access, to a formal hearing of lawyers, landowners, developers, native groups, environmentalists and public-interest interveners to decide the construction of a major dam, pulp mill, or waste-disposal site.

[26] We recognize that not all tribunals will need all of the Code's rules. Some tribunals deal with matters that don't require some of the powers or procedures at all. Some tribunals already have well-developed rules, suited to their own functions, for all or most of the topics covered by our proposals. *The consultants to our project told us, almost uniformly, that the functions and resources of administrative tribunals are too diverse to try to impose uniform rules.*

3. Implementing the Model Code: 'opt-in' legislation

[27] The fact that tribunals' needs differ, so that a Model Code cannot be uniformly prescribed for all of them, presented us with a serious challenge. How can we provide tribunals with more modern and comprehensive rules, visible to users, and at the same time to take into account this diversity in their needs?

[28] The first part of the answer is to offer the Code to tribunals, leaving it to them to choose the provisions that they regard as necessary. However, this does not deal with the further question of how to make the provisions operative for the tribunals that choose them. By what mechanism are the rules to be adopted by a particular tribunal?

[29] In some cases, the powers listed in the Code are part of the inherent power of a tribunal to conduct its own process under the existing law (for example, the power to conduct a pre-hearing conference to schedule the hearing[4]). So long as the Code provisions do not conflict with the enabling legislation, tribunals can adopt such provisions without legislative authorization. The same is true for the provisions in the Code that ensure that the requirements of fairness and natural justice will be met (for example, the requirement to provide notice of a hearing[5]).[6] For the purpose of making these provisions operative, it is enough to distribute the Code to tribunals with the suggestion that they incorporate those that they need into their own procedural rules.

[30] However, other provisions in the Code must have statutory authorization before a tribunal may incorporate and exercise them (for example, the power to state a case to the court[7]).[8] For these, without more,

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[4] This power is found in Provision 14.2. Other examples of such powers are listed in note 19.

[5] This requirement is found in Provision 21.1. Other examples of such requirements are listed at page 22 *et seq*.

[6] We have included both of these types of provisions in our Code to clarify what the rules are, and to express them in a consistent way.

[7] This power is found in Provision 8.

[8] Many tribunals already have some of these powers in their enabling legislation, and a few have most of them. Other examples of such powers are Provisions 5, 7, 8, 9, 13, 14.3, 16, 18, 22, 27, 32.2, 33, 36, 44.2, 48, 50, 55, 56.

tribunals would have to seek amendment to their enabling statutes or regulations. This would require much legislative activity, and would result in many rules located in many statutes, or in even less visible regulations.

[31] Our solution to the implementation question was to recommend legislation of our Code in the form of an 'opt-in' statute–the *Administrative Powers and Procedures Act*. Under this proposal, every tribunal will compare its existing procedures to our Code, and will choose those powers and procedures from the Code that it needs to help make its decisions fairly and enable it to be as effective and efficient as possible.[9] For the provisions that require statutory authorization, we propose a mechanism that avoids the need to seek amendment to the tribunal's enabling statute or regulations. Under our proposal a tribunal that needs a particular power for the conduct of its business may apply to adopt the related Code provision, and if this application is approved, by ministerial order, the tribunal may thereafter exercise the power. The advantage of using this mechanism is both avoidance of the need for legislative amendment, and consistent and visible rules.[10]

[32] The 'opt-in' legislated Code also has benefits with respect to the rules that codify the powers that tribunals already have and the 'natural justice' requirements to which they are subject. Tribunals that incorporate such of these rules as are appropriate to their function by reference to the provisions

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[9] An implementation option that we considered at an early stage, but rejected, was to categorize tribunals according to function and stage in the decision-making process, and degree of seriousness or complexity of the questions they decide, and to impose appropriate powers, and an appropriate degree of formality in their proceedings, upon the various categories. We rejected this idea because of the high degree of overlap in functions and in the corresponding procedures that are necessary to exercise them.

[10] We have also listed a number of powers that would require statutory authorization to be incorporated in a tribunal's rules, but which we do not recommend for inclusion in our legislated Model Code. The powers in this category would in our view be useful, or very useful, for tribunals that have particular functions. However, we have chosen not to include them in the Model Code for one or more of the following reasons:

- the power is likely to be useful to only a small minority of tribunals
- conferral of the power requires a careful balancing of the need for the power against other interests, such as privacy
- the power is unsuitable for a generic provision because it is not possible to frame it in a way that will meet the particular needs of various tribunals
- the power involves the courts so is not properly housed in a set of procedural powers and rules of tribunals.

An example under the second clause is the power to issue search warrants. In our view the powers in this list should be incorporated, if needed, by amendment to the tribunal's enabling statute or regulations.

of the *Administrative Powers and Procedures Act* will gain the advantage of consistency and visibility.

4. The benefits

[33] Our ultimate goal is that all tribunals in the province will adopt as many of the powers and procedures of the Code as they need, by incorporating them by reference from the legislated Model Code.[11] A critical mass of tribunals that have opted into the Code will be very important to achieve the goals of consistency, visibility, and the development of common precedent.

[34] Pooling the provisions and the experience will, in our view, make Alberta tribunals more fair, efficient and effective in their functioning, increase the consistency of tribunal procedures, and make the procedures more visible and predictable to users. We hope that even bodies with highly-developed and up-to-date procedures will find some new method or idea in the Code that is useful.[12]

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[11] Until such time as legislation is enacted, tribunals may include some of the Code's provisions in their own rules, and if others are urgently needed, they may seek legislative amendment or incorporation by regulation.

[12] It is important to add a disclaimer. The provisions in the Model Code come from a variety of sources. Some of the provisions are based, or are based in part, on what the courts have said tribunals should do, often as a function of the requirements of natural justice. The Code does try to capture some of the key principles of natural justice that are amenable to codification. However, other Code provisions come from statutory or other sources, or are simply based on what we concluded was a sensible way to organize the conduct of proceedings to make them fair and efficient. Many of the rules combine all these factors. Thus the Code is both more and less than, *and therefore is not*, a codification of the common law with respect to tribunal procedures. It follows that the Code cannot be used by participants in proceedings before tribunals that have not adopted particular Code provisions to argue about what the tribunals must or must not do. For example, an applicant for standing in a tribunal proceeding could not argue that it meets a criterion for standing under Code Provision 20, if the tribunal in question has not adopted Provision 20.

A related point is that adoption of the rules is not a sufficient condition for ensuring that tribunals will meet the rules of natural justice. Many elements of natural justice are fluid rather than static, continuously developing as new circumstances arise, and many of the rules are framed so as to require tribunals themselves to fill in the content of the principle relative to the matter at hand. The rules and Explanatory Notes are offered in part to help tribunals focus their attention and organize their procedures to address natural justice concerns. However, using the Code as a starting point, tribunals must keep an eye open to variations and developments in these areas of the law.

C. Our Process for Developing the Model Code

[35] During earlier stages of our project, we developed two categories of information:

1. Inventory of decision makers and their rules

[36] First, we looked at the existing rules for every statutory decision maker. We developed a complete inventory of decision-makers in Alberta, grouped according to government department, and listed their statutory powers and procedures under the following headings: powers and duties; investigative/disclosure powers; legislated hearing procedures; powers by incorporation from the *Public Inquiries Act;* procedures under regulation; and provisions for appeals.

[37] This inventory told us that many statutory decision-makers have no legislated rules, and many have only a handful of rules. For those with developed rules, the rules for similar functions are often inconsistent from one tribunal to another. Even if they are basically similar, they are often formulated in different ways. We also saw that a few tribunals had developed modern, sophisticated procedures (for example, pre-hearing conferences, ADR proceedings, and consolidated hearings) that had kept up with recent developments. *However, the vast majority had not advanced beyond the very basic powers and procedures set out at the time the tribunal was created.* There is, therefore, a great disparity in the procedural resources available to tribunals. Our inventory demonstrated the need for more consistent and up-to-date procedures.

2. Advances in other jurisdictions

[38] Second, we gathered legislation or proposed legislation in other jurisdictions in which reform of administrative procedures has been undertaken. We looked to other Canadian jurisdictions, most notably, Ontario and the federal jurisdiction, as well as to the two jurisdictions whose administrative law systems are most closely tied to our own–the United Kingdom and the United States. The state of administrative procedures law reform in each of the jurisdictions described below is more advanced than in our own jurisdiction.

a. Ontario

[39] Together with Alberta, Ontario is one of only two common law jurisdictions in Canada that has a statute that governs tribunal powers and procedures. The Ontario *Statutory Powers Procedure Act*, first enacted in 1971, has undergone amendment on many occasions. Many of the recent amendments are the result of changes suggested by the Society of Ontario Adjudicators and Regulators, and by Robert Macaulay, co-author of the very comprehensive manual on administrative practice, *Practice and Procedure Before Administrative Tribunals*.[13] Recently, a Task Force created by the Ontario government 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", included a section on "Improving Tribunal Hearing Procedures". This section recommended that a new set of rules be created that deal with issues very similar to those suggested in our reform proposals. Since that time the Agency Reform Commission has proposed significant additional amendments to the Ontario *SPPA*, and these were given first reading in the last session of the legislature. In addition, the government of Ontario has issued a comprehensive *Compendium of Model Rules of Practice for Ontario Regulatory and Adjudicative Agencies*.

b. Federal Jurisdiction

[40] 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".[14]

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[13] Macaulay & Sprague, *Practice and Procedure Before Administrative Tribunals*, Carswell (loose-leaf) (referred to herein as *Macaulay*).

[14] This document is reproduced in *Macaulay* (*supra*, note 13) at 38.2.

c. United States

[41] 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.

d. United Kingdom

[42] In 1991 the English Council of Tribunals issued Model Rules of Procedure for Tribunals.[15] "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 for tribunals in the conduct of hearings (both first-instance and appeal tribunals); it also sets out the steps to be taken by applicants, respondents, and first instance tribunals whose decisions are under appeal. Our Model Code rules tend to contain less detail than those suggested by the Council of Tribunals, but do take a number of suggestions from them.

e. Uniform Law Conference of Canada

[43] 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 is extensively used in that jurisdiction). Each provision in the Code is accompanied by a case annotation and comments.

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[15] Cm. 1434.

[44] The sources from each of these jurisdictions on which we relied were as follow:

- Macaulay & Sprague, *Practice and Procedure Before Administrative Tribunals*
- Society of Ontario Adjudicators and Regulators–Proposals for amendment to SPPA, 1993, 1997
- *Ontario Statutory Powers and Procedures Act*, as amended to 1997, and proposals for amendment by the Agency Reform Commission, 1999.
- Government of Ontario Task Force Consultation Document, "Excellence in Administrative Justice".[16]
- 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.*

3. Creating the Model Code

[45] Relying on the material in the sources, we created a Table of Contents for the Model Code. We designated four major headings (pre-hearing procedures, hearing rules, decision and reasons, and miscellaneous powers), with a list of sub-headings under each. For each sub-heading, we compiled the relevant provisions, where such existed, from the sources listed above, and then prepared a set of related questions or choices. The answer to these questions would allow us to design a tentative provision under each sub-heading.

[46] To help answer the questions, we first turned to a small group of experts, our Project Committee. This group was composed of members of a number of prominent administrative tribunals, as well as persons experienced in appearing before tribunals.[17] For each major heading in the

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[16] We have since had the benefit of a new set of procedural rules that complement the most recent suggestions for amendment to Ontario's *Statutory Powers and Procedures Act*–the *Compendium of Model Rules*.

[17] The Committee consisted of the following persons:

(continued...)

Model Code, we held one or two meetings of our Project Committee. The Committee reviewed the set of choices under each sub-heading, and developed a tentative provision.

[47] Next we took the Project Committee's recommendations 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.

[48] We compiled the provisions as approved by the Board into our proposed Model Code. This Code was incorporated into our Consultation Memorandum. The latter document also contained a commentary with explanations of the purpose of the provisions, the options from which we chose, and our reasons for making the choice. It provided a space for consultants to indicate their agreement or disagreement, and comments or suggested revisions, for every provision.

D. Our Consultation

[49] With our tentative Model Code and consultation workbook in hand, we proceeded to arrange sets of consultation sessions with as many people as possible who are actively involved in administrative law and practice in Alberta. These were as follow:

- first, a member from every government department, who had been designated by their Deputy Minister to represent their department
- second, the larger, standing administrative tribunals
- third, smaller part-time or *ad hoc* tribunals
- fourth, members of the legal profession who practice administrative law and represent tribunal users, both individually and through the Administrative Law Section of the Canadian Bar Association.

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[17] (...continued)

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

[50] The response to our consultation was overwhelmingly positive in terms of the level of attendance and response by those whom we invited to participate.[18]

[51] At the meetings with these various groups we gave an introductory explanation of the project, and then reviewed each of the provisions in the Model Code, providing an opportunity for questions and discussion. We asked our consultants to provide us both with the benefit of their general experience, and with an assessment of how a particular provision would operate for the tribunals with which they were associated or most familiar. Participants were then asked to provide a written response by filling in the Consultation Memorandum.

[52] These responses helped us to rethink and reformulate many of our proposals. At the same time they gave us a strong assurance that we were on the right track in terms of the general structure and direction of the Code, and that it would benefit tribunal operation in the ways that we had hoped. In addition to providing answers to our questions, a great many participants expressed a high degree of support and enthusiasm for our purpose and our product–replacement of an outdated *Administrative Procedures Act* limited in its scope and application, with a modern, comprehensive, 'opt-in' legislated code of powers and procedures available to all tribunals.

E. Final Product

[53] The document which begins at page 35 is a list of recommended Provisions. It is derived from our original recommendations, as modified to reflect the comments of our consultants, and reviewed by the Institute's Board of Directors. These recommended provisions would serve as drafting instructions for a new *Administrative Powers and Procedures Act*.

[54] The Model Code also includes Explanatory Notes. These Notes have two purposes:

- to explain the purpose of the provisions and help tribunals decide whether they need them
- to help with the interpretation and application of the provisions once they have been chosen.

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[18] See the list of consultants in the Appendix.

CHAPTER 2. UNDERLYING PRINCIPLES

[55] In this section we set out the guiding principles that underlie our Model Code.

[56] The Code's provisions cover all aspects of the practice of adjudicative tribunals. To help tribunals locate the provisions as they need them, we chose to organize the Code in the chronological order in which a proceeding progresses–beginning with notice of the application and matters the tribunal must consider before a hearing commences, through the hearing, to the decision and reasons stage. (A final section contains a number of miscellaneous matters that do not fit easily into the other three.)

[57] A person who works through the provisions will find reflected in them a number of underlying principles or themes, that cut across the chronologically-ordered sections. The sources of these principles are diverse–tribunal and Court decisions, the Charter of Rights, and academic articles and texts. The principles informed our immediate source materials (the model codes and statutes of other jurisdictions listed at page 16). They are also reflected in the materials found in the Explanatory Notes that accompany the Code provisions. In this section we will describe these underlying principles, and point out which provisions are tied to which principle.

A. The specialized role of administrative tribunals: tribunals are not courts

[58] Administrative tribunals can make adjudicative decisions, but they are not courts. Two important features distinguish them from courts. The first is that they deal with limited subject areas. For some of these, a court-like degree of formality is appropriate; for others, a very informal proceeding, or one designed for the specific purpose, is more apt to the particular business of the tribunal. Second, very often their mandate requires that in making decisions they are to take the public interest into account. Often to do this, they must take into account government policy or agency policy, and also other information that is not supplied to them by the applicant or other participants.

1. The need for flexibility: tribunals should be masters of their process

[59] To meet the first of the two features of administrative adjudication just described, tribunals' processes must vary from one another. The necessary flexibility is created in part by variations in tribunals' enabling rules. It is also created by the first of our underlying principles: that tribunals need a high degree of control over their own process. This control enables them to adapt the procedures to the particular subject matter or type of issue that they are to decide, and to create the appropriate level of formality, depending on the seriousness of the subject matter, sophistication of the participants, and so on.

[60] Our Model Code responds to this distinguishing feature of tribunals in a number of ways. First, it expressly recognizes the principle that a tribunal has power to control its own process (see Provision 47). This provision, which codifies the common law, embraces a host of more specific powers. The more detailed of these are set out in other parts of the Code (for example, the power to hold a hearing in written rather than oral form).[19] Other powers which fall under this general principle are smaller points, or are self-evident. For this reason they are not embodied in a separate Code provision, but are left to be covered by the umbrella principle expressed in Provision 47. Some of the latter powers are listed as examples in the annotation to Provision 47 (for example, the power to set venues for hearings, and hearing times).

[61] Second, the Code recognizes that tribunals may exercise their power over their processes in a concrete and predictable way by adopting rules of procedure (see Provision 19.1). (The Model Code is in fact intended to encourage them to do this.)

[62] Finally, the Code contains a number of more specific provisions that allow tribunals to proceed in ways that suit their particular needs. As well as allowing tribunals to adopt rules of procedure of general application, there is a provision for varying procedures for a given case. (See Provision 19.2) The following provisions also contribute to flexibility: a provision allowing tribunals to hold written, electronic, oral, or mixed hearings; a provision exempting tribunals from the formal rules of evidence; and a provision

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[19] These are the powers which we have earlier described as "part of the inherent power of a tribunal to control its own process". See page 10. Other examples are Provisions 2, 3, 10, 14.1, some parts of 14.2, 15, 19, 24, 26, 31, 32.1, 44.1, 45, 58.

allowing tribunals to define the participation and presentation rights of participants.[20]

2. Access to additional information

[63] The second feature that distinguishes tribunals from courts is their need to obtain information for making their decision without necessarily relying on the applicant or other participants to bring this information forward. This may include information about the public interest. Tribunals may also be expected to rely on their own expertise.

[64] The extra powers needed to address this feature of administrative adjudication are found in many parts of the Code. There are sections dealing with all of the following: investigations and inspections;[21] views (of places or things that are the subject of the hearing); questioning of witnesses by the tribunal; powers of tribunals to order witnesses, documents and evidence on their own motion; power to take judicial notice, and official notice of information within their own specialized knowledge; consultation with non-panel tribunal members, experts and others on matters of policy; and involvement of staff in providing legal opinions and assisting in the decision-writing process.[22]

B. Tribunals must be fair and just

[65] The principle, discussed in the preceding section, that tribunals are the masters of their own process, does not give them an untrammeled discretion. Tribunals are, of course, bound by the principles of fairness and natural

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[20] See Provisions 24, 26 and 34.2.

[21] See Provisions 15 and 16. The latter is one of our "extra-Code provisions" While we recognize that formal investigative powers may be critical to the process of particular tribunals, we think such powers should be located in enabling legislation rather than in the Model Code.

[22] See Provisions 18 (views), 31 (questioning witnesses), 32.2 (ordering evidence), 33.1 and 33.2 (judicial and official notice), 34.3 (consultation), and 43.2 (staff involvement). There are also parts of the Code that directly address a tribunal's mandate to protect the public interest. The provision on withdrawal (6) permits a tribunal to continue a proceeding despite the applicant's wish to withdraw where the public interest requires this. The provision in relation to consent orders (5) precludes an order based on consent where the order agreed on by participants is not in the public interest. The section on standing before tribunals (20) includes provision for granting standing on the basis of the public interest. See also the discussion under the section on Alternative Dispute Resolution (9) which deals with bringing matters back to the tribunal for approval where the tribunal's mandate has a public interest aspect.

justice, and where applicable by the *Charter of Rights*. A large part of the Model Code is intended to capture some of the key principles of natural justice for the guidance of adjudicative bodies.[23] The main principles contained in the provisions are:

- the right of a person who has an interest in proceedings to participate in them (see the provisions on notice of the application and notice of hearing, and on the right to standing[24])
- the right of a person who has standing in a proceeding to make representations about the form of the proceeding (see provisions throughout the Code conferring the right to make submissions on various procedural matters[25])
- the right of a person who has standing in a proceeding to receive information about the case to be met, and to present evidence and argument (see the provision on representation and participation rights[26])
- the principle of openness of the hearing process (see the provisions on public versus private hearings, public access to decisions and to tribunal rules, and the provision regarding keeping records and transcripts[27])
- the duty of the tribunal to be independent and impartial (see the provision on bias, the explanatory note in the "investigations' section with regard to institutional bias, and the explanatory notes on the provisions regarding consultation by the hearing panel and staff involvement in the decision-making process[28])
- the duty of a tribunal to make its decision on the basis of information properly before it, that has been disclosed to the parties (see the provisions on the factors for decision making; on

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[23] It is important to restate the qualifier in note 12. Though many of the Code's provisions have elements that are based on natural justice, the same provisions may have other elements that are founded on other concerns and other sources. Thus the Code provisions could not be used to advance arguments about the state of the common law, or about what is required of tribunals that have not adopted particular provisions.

[24] See Provisions 1, 21, and 20.

[25] See Provisions 11, 12, 13, 19.2, 24, 33.2, 44.

[26] See Provision 34.

[27] See Provisions 23.1, 40, 53, 35.1.

[28] See Provisions 54, 15, 34.3, 43.2.

the 'case to meet' principle and consultation by the hearing panel, and on reasons for decision[29])

- the general overriding duty of the tribunal to treat participants fairly (various provisions throughout the Code make fairness a condition for exercise of a power; these provisions often give participants the right to make representations on this point[30]).

[66] In some cases we have gone a bit beyond the common law, to recommend that tribunals adopt procedures that have not, or have not yet, been mandated by these principles. Thus although reasons for decision are not uniformly required by the common law, in our view all tribunals ought to give reasons. We strongly recommend that all tribunals adopt a rule that contains this requirement. We take a similar view with respect to keeping records and transcripts of proceedings, and with respect to making tribunal procedures available to the public.[31]

C. Tribunals must be efficient

[67] A third fundamental theme in the creation of our Model Code is the imperative to make tribunals more efficient. As noted in our introductory comments, there have been many innovations in tribunal processes in recent decades, geared to utilizing available tribunals resources in the most efficient way possible.[32] These innovations address both the need for spending restraint, and the need for some bodies that have a high-volume caseload to reduce the pressure of backlogs.

[68] Streamlining tribunal proceedings is the major purpose of most of the first part of the Model Code. In this part we concentrate first on ensuring that unnecessary hearings need not be held, by permitting a tribunal to refuse to accept an application, or to refuse to continue a hearing where one has begun, under specified circumstances where to do so would waste resources. The provisions allowing consent dispositions, and allowing

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[29] See Provisions 43.1, 34.2 and 34.3, 38.1.

[30] See Provisions 11, 12, 13, 19.2, 24, 26, 55.

[31] See Provisions 38.1, 35.1, 53.

[32] Examples include pre-hearing conferences, alternative dispute resolution, and electronic hearings.

tribunals to state cases to the court on questions of law, also avoid unnecessary hearings. We also set out procedures for declaratory decisions and generic hearings, in each case to allow the development of policy or guidelines for interpretation that obviate the need for a multiplicity of proceedings involving similar matters.[33]

[69] The option of using alternative dispute resolution mechanisms is also raised in this section. ADR[34] not only saves tribunal resources where a dispute can be resolved more efficiently by participant consensus. It has the added benefit of creating a resolution to which the participants have agreed.

[70] Finally, the provision on pre-hearing conferences[35] is designed to enhance efficiency by ensuring that a proceeding is conducted in as orderly a manner, and with as few issues outstanding, as possible. Allowing such conferences to be conducted by a staff member with regard to ordering matters, or by a single adjudicative member for more substantive matters, is also meant to preserve scarce tribunal resources.

[71] Other provisions throughout the rest of the Code are also designed to increase efficiency, for example, the power to consolidate hearings involving similar issues before a single tribunal, or to hold joint hearings with another tribunal where jurisdictions over a matter overlap. The provisions for holding written or electronic rather than oral hearings, and confirming the power of tribunals over the extent of participation and presentation rights, also ensure that resources are not wasted in overly-formal or lengthy proceedings. Tribunal powers to reconsider matters already decided, under specified circumstances, and to correct errors or ambiguities, are motivated by similar concerns.[36]

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[33] See Provisions 2.1, 3.1, 4, 5, 8, 7, 10.

[34] See Provision 9.

[35] See Provision 14.

[36] See Provisions 11, 12, 13, 24, 34.2, 44, 45. Note also the power to create hearing panels (22), and to make ex parte decisions (56).

D. Tribunals must be effective

[72] A fourth theme underlying the Code's provisions is simply that tribunals must have tools that allow them to effectively conduct their proceedings. (If these tools already exist under the common law, tribunals may need guidance that the tools do exist and how they might use them.) As mentioned in the discussion above, many tribunals have few written rules or none at all,[37] and tribunals are frequently composed of people unfamiliar with administrative law practice.

[73] The Model Code tries to provide all such powers as can be dealt with on a generic basis. Many of these powers were already mentioned as serving the other principles just outlined. Generally, they allow a tribunal to collect information, focus the issues, organize and conduct the hearing, and enforce their orders. Some powers not already mentioned in other contexts are the power to subpoena witnesses, to create hearing panels, and to decide by majority.[38] A very significant category of provision under this principle is that related to enforcement–the power of tribunals to bring applications for contempt to enlist the powers of the court in making sure that tribunal orders are followed.[39] This category also embraces matters such as extending time limits, or making orders to maintain order at a hearing.[40]

E. A Centralized Code

[74] The final theme of our Code manifests itself in the fact that we have created a Code of powers and procedures. We see a very important value in centralizing tribunal powers in a single, visible, location. This serves several of the key goals that motivated our project:

- consistency in tribunal practice so far as this makes sense;
- visible and accessible rules both for tribunals themselves and for those who appear before them

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[37] This is most common in the case of bodies constituted on an *ad hoc* basis, to decide a question in a particular case, often an appeal from the decision of a statutory official.

[38] See Provisions 27.1, 22, 42.

[39] See Provision 49.

[40] See Provisions 55, 58.

- the development of precedent in relation to the rules that will help tribunals to which the rules apply to interpret them and know how to apply them.

The combined benefit of placing all the rules in one place will, it is to be hoped, exceed the sum of the individual parts. This approach to structuring administrative practice also has the benefit of reducing the amount of legislation required to create rules.

[75] The provisions found in the Model Code below manifest these fundamental principles, and are meant to enhance the practice of adjudicative bodies accordingly.

CHAPTER 3. IMPLEMENTING THE CODE: RECOMMENDATIONS

[76] In this section we set out the steps that we recommend be taken by government, and by government departments and tribunals, to acquire the Model Code provisions for the tribunals that need them.

A. A legislated 'opt-in' Model Code

[77] As we described in Chapter 1, the *APA* contains only some very basic principles of natural justice that tribunals are, for the most part, required to follow in any case under the common law. The Model Code deals with all these principles, and supplements them, taking into account developments in the law relating to fundamental justice. It also adds many powers and procedures that have been developed in recent decades to help make tribunals more efficient in the conduct of their business. Our first recommendation is that the Model Code be legislated as a replacement for the existing *Administrative Procedures Act*.

> **RECOMMENDATION No. 1**
> **We recommend that the existing *Administrative Procedures Act* be repealed and replaced by the *Administrative Powers and Procedures Act*.**

B. Tribunal Choice of Provisions / Review of the Code

[78] As discussed in Chapter 1, tribunals have diverse needs that reflect the diversity of their functions and resources. This diversity makes it impossible to apply a mandatory, uniform code of powers and procedures to all of them.

[79] An alternative that we considered at an early stage was to create categories of tribunals according to function and stage in the decision-making process, and to impose an appropriate degree of formality and appropriate powers on each category. We rejected this 'mandatory by function' approach because the multiplicity and diversity of tribunal functions made discrete and sufficiently comprehensive categories difficult to draw, and because there is a great deal of overlap in required procedures regardless of the particular decision-making function.

[80] A better approach, and the one which we recommend, is to allow tribunals themselves to choose the provisions they need.

[81] To make the appropriate selection of provisions, tribunals must undertake a review of the Code. During our consultation process many tribunals undertook to conduct a review, and commented favourably on the Code's potential utility for their own process. We might simply rely on the appeal of the Code in terms of its useful features–that it is empowering, comprehensive, up-to-date, and so on, to bring about the desired review. However, some tribunals may not appreciate the benefits of a review before the fact, while others may not have the resources to undertake it.

[82] To ensure that the review be done by or on behalf of all adjudicative bodies, we recommend that every government department include this task in their business plans for tribunals established under the legislation for which the department is responsible. This idea was suggested by some of the department representatives in our consultation process. It would allow departments to apply their normal reporting and performance measures to monitor the process.

[83] We recommend that departments adopt this suggestion. The primary incentive for departments to make reviews mandatory is to ensure that tribunals that presently lack valuable tools found in the Code are given an opportunity to acquire them.

RECOMMENDATION No. 2
We recommend that all government departments include in their business plans a review of the Model Code by or on behalf of all adjudicative tribunals established under legislation administered by the department.

RECOMMENDATION No. 3
We recommend that each adjudicative administrative tribunal (or a person from the government department that administers the tribunal's enabling statute, on behalf of the tribunal) review the Model Code and select from it the provisions which the tribunal needs to conduct its proceedings.

[84] The selection process undertaken by tribunals should include consultation with the tribunal's stakeholders.

[85] The Code provisions should also be reviewed, and appropriate provisions selected, whenever a new tribunal is constituted by legislation.

C. Making the provisions operative: Incorporation by Ministerial Regulation

[86] The next question is as to the mechanism by which tribunals are to adopt their chosen provisions. How is a particular selected provision to become operative for a particular tribunal?

[87] In seeking an answer to this question, we were guided to some extent by the approach taken to administrative powers and procedures in Ontario. The Ontario *Statutory Powers and Procedures Act* allows tribunals to exercise some of the powers contained in the *Act* by making their own rules that deal with the power. With respect to the provisions that operate in this way, the *SPPA* is an 'opt-in' statute.[41]

[88] Our recommendation is also for 'opt-in' legislation. However, the mechanism we have chosen for opting in to the proposed legislation is different from the Ontario model. Under our recommendations, in order for a tribunal to incorporate provisions formally from the proposed *APPA*, it must apply for a ministerial order. When approval is granted, the power will become operative for the tribunal by ministerial regulation.

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[41] The *SPPA* has some procedural provisions that apply to all tribunals covered by it. It also has a provision, s. 25.1, that "a tribunal may make rules governing the practice and procedure before it". Many of the other powers in the *Act* become operative for a particular tribunal if the tribunal makes rules that deal with the subject matter of the power pursuant to s. 25.1. Thus, for example, if a tribunal makes rules that deal with written hearings, the tribunal may hold a written hearing under s. 5.1, and if it makes rules that deal with reviews, it may review its own decisions and orders under s. 21.2. The choice of procedures is left to the tribunals themselves.

[89] We recognize that tribunals already possess many of the powers contained in the proposed legislation by virtue of their inherent powers over their process. However, we strongly urge tribunals that exercise or propose to exercise such powers (but do not have them expressly set out in their enabling legislation or regulations) to adopt them formally from the Code. This will make the rules visible, and facilitate the development of a consistent practice and precedent. For the same reasons, we urge tribunals to incorporate formally such of the provisions that embody the requirements of natural justice as are appropriate for them. Approval of incorporation of provisions from either of these categories is likely to be simply a matter of form.[42]

[90] The approval process that we recommend is especially significant with respect to the additional powers in the proposed legislation that cannot be implied as essential to the performance of a tribunal's mandate. Some of these powers can enable tribunals to affect participants' rights significantly. Examples are the power to reconsider a decision, or to extend a statutory time period. We think it is important that before a tribunal can appropriate such powers, there be a check on whether the powers are suitable and necessary given the function of the tribunal. It is primarily for powers such as these that we recommend the ministerial approval process. However, for the sake of simplicity and uniformity, we recommend a common process, through ministerial regulation, for formal incorporation of any of the proposed *APPA* provisions.

[91] We also recommend that where a new tribunal is constituted by legislation, the procedures from the *APPA* that are suitable to it be appropriated by the method set out in the new *Act*.

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[42] An exception is where a tribunal tries to incorporate a rule in relation to which its enabling legislation has a more onerous or otherwise conflicting requirement. For example, the enabling legislation may have a provision that all hearings must be oral (in contrast to the Code provision allowing written or electronic hearings unless significant unfairness would be caused), or it may require that proceedings must be transcribed (in contrast to the Code provision that transcripts are at the discretion of the tribunal (unless there is a request from a participant)). In such a case the enabling legislation should prevail, and it should not be possible for the tribunal to avoid it by incorporating a Code provision dealing with the same subject matter; ministerial approval should be withheld.

It is also important to insure that where a tribunal adopts a power, it adopts the associated conditions for its exercise, for example, that no significant unfairness is caused, that participants be heard on the question, or that the public interest is met.

[92] As the *APA* is administered by the Department of Justice, we think the Minister of Justice should be the approving Minister. Approval by one Ministry will facilitate the development of a body of experience as to the propriety of particular powers relative to particular functions. It will also help ensure consistency where this is appropriate.[43]

[93] The criteria to be applied by the Minister of Justice may be set out in regulations. (Alternatively, they could be included in the legislation itself.) In our view they should include the following factors:

- that a review of the Code was undertaken
- that the provision sought does not conflict with the terms or purpose of the tribunal's enabling legislation
- where the provision confers a power, that the power is suitable and necessary for the tribunal's decision-making process
- where the provision confers a power, that the selection includes the appropriate criteria for the exercise of the power.[44]

[94] The selections (and resulting tribunal rules) can be included in a single regulation under the Act that sets out which provisions have been incorporated by particular tribunals.

RECOMMENDATION No. 4
We recommend that the *APPA* contain a provision enabling tribunals to apply to incorporate particular sections of the *Act* by reference. Approvals should be by ministerial regulation, made by the Minister of Justice.

[95] Part V contains a draft *Administrative Powers and Procedures Act,* which incorporates the recommendations in this Chapter. This draft act

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[43] The Explanatory Notes to the provisions highlight case law that is relevant to the application and interpretation of the provisions. This is a developing body of law, and will require periodic updating. It would be desirable if the office responsible for issuing approvals were also to develop a centrally-located repository of developments in law and practice, to which tribunals themselves could contribute their experience. This could be incorporated periodically into a loose-leaf version of the Model Code.

[44] In some cases tribunals may need only parts of a provision, as other parts are inapplicable, or the subject is already covered in the tribunal's existing rules. In such cases, apart from the qualification that tribunals select appropriate criteria for the exercise of a power when they select a power, selections may be made of all or part of a provision.

adopts the Model Code, establishes the 'opt-in' procedure, and enables regulations to be made to govern the ministerial approvals.

D. Incorporation of the Provisions Before Legislation Is Enacted

[96] The process of incorporating provisions from a new *Administrative Powers and Procedures Act*, and the full benefits of visibility and consistency that come with this process, will be possible only after the new legislation is passed. In the interim, tribunals may undertake a review of the Model Code.

[97] It is possible for tribunals to adopt some of the provisions of the Code informally, namely

- those provisions of the Code that embody powers that tribunals have under the common law by virtue of their inherent control over their own process, and
- requirements that tribunals are required to meet under the common law.

Where they do so, they should ensure that the provisions so adopted are printed as part of their rules and made available to the public.

[98] With respect to the provisions that do require statutory authorization, where the changes are immediately necessary, tribunals may seek amendment to their enabling statutes, or, where their statutes allow procedural rule making by regulation, adoption of the rules by regulation.

[99] It is important to note, however, that incorporation of the Model Code's provisions by any of the methods just described does not achieve the goal of placing tribunal rules in a highly visible and common location, with the concomitant benefits of accessibility and the development of common interpretive precedents. Thus where incorporation is done informally, we urge tribunals to take the additional step of formal incorporation through the mechanism in the Code when this becomes possible.

[100] Equally or more important, it is necessary to recognize that our primary recommendation is that the Model Code be legislated as an 'opt-in' statute. Assuming that this recommendation will be followed, the provisions that appear in the legislation may not be exactly as we have recommended them. Tribunals that adopt the Model Code provisions by means other than by

reference from a legislated *Administrative Powers and Procedures Act* may need to make further revisions once the legislation becomes available.

PART IV — MODEL CODE

Use of Terms

Agency/tribunal

Throughout this document we speak of both 'agencies' and 'tribunals'. These terms are commonly used interchangeably. However, in the context of this document, we use 'agency' and 'tribunal' to refer to different things. 'Agency' as we use it has a broader meaning then 'tribunal'. Some administrative bodies have a variety of functions, often conducted by separate individuals or branches within the organization. These might include the following:

- providing services
- setting rates and standards
- setting or advising on government policy
- promoting or conducting research into particular activities
- providing advice to the public
- investigating, and prosecuting, violations of the enabling statute
- making other types of adjudicative decisions with respect to such violations
- adjudicating with respect to other kinds of issues or disputes affecting rights or interests that arise under the enabling statute, in particular cases.

When we speak of an agency, we are referring to an administrative body in terms of the totality of all such functions and the personnel that perform them. When we speak of a tribunal, we are referring to the part of the organization that has an adjudicative function: that decides issues or disputes with respect to rights and interests in particular cases.

Party/participant

Under Provision 20, we set out the rules for determining standing to participate in the proceedings of a tribunal. Participants may be either 'parties', or 'non-party' or 'other' participants.

As discussed in the Explanatory Notes under that provision, a party is a person who is directly involved in and affected by an issue or dispute, and who is granted standing under Provision 20.1. (Such a person has, accordingly, all the participation rights conferred on parties in various provisions in the Code.)

'Non-party' or 'other' participants may be either

- persons who are entitled to be granted such standing by statute, or by virtue of the fact that they will be "directly affected" by the tribunal's decision (see Provision 20.2), or
- persons who are granted standing at the discretion of the tribunal because they have some less direct interest, or may make a useful contribution (see Provision 20.3)

(Such participants have only such participation rights as the tribunal grants them).

Unless specifically qualified (as 'other' or 'non-party'), 'participants' is used in this document to refer to both parties and other participants

Extra-Code Provisions

A handful of powers listed in the document that follows are designated as 'Extra-Code Provisions'. The powers in this category would require statutory authorization to be incorporated in a tribunal's rules, and would be useful, or very useful, for tribunals that have particular functions. Despite this, we do not recommend these powers for inclusion in the proposed *Administrative Powers and Procedures Act*. Rather, we raise them so that tribunals may consider whether the powers are necessary to their function. Tribunals that regard such powers as necessary may seek to have them included in their own rules by legislative amendment or regulation.

Powers are included in this list for one or more of the following reasons:

- the power is likely to be useful to only a small minority of tribunals
- conferral of the power requires a careful balancing of the need for the power against other interests, such as privacy
- the power is unsuitable for a generic provision because it is not possible to frame it in a way that will meet the particular needs of various tribunals

- the power involves the courts so is not properly housed in a set of procedural powers and rules of tribunals.

The powers in this list should be incorporated, if needed, by amendment to the tribunal's enabling statute or regulations.

The 'extra-code provisions' are included in the parts of the Code in which they fall by subject-matter, and are also listed together on page 183

The use of square brackets

Some of the Provisions contain a series of square brackets. This means that a tribunal may make one of a number of available choices for its own rules.

The numbering of Code provisions

There is an occasional gap in the sequence of Model Code provision numbers. This is because some provisions were proposed, but rejected during the consultation and review process. Where this is so, the section heading has usually been retained, and a comment or discussion included, but there is no 'Provision'. The original numbers for the remaining provisions were kept for the sake of ease of reference to the Consultation Memorandum. The provisions should be renumbered in the legislated Model Code. (The 'extra-code provisions' should also be removed in the legislated document.)

PART 1. PRE-HEARING POWERS AND PROCEDURES

Overview:

This part on pre-hearing procedures deals with all the matters a tribunal should consider before holding a hearing. These are as follow:

A. Acknowledgments and notifications: This provision 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: A series of provisions under this heading deal with situations in which a tribunal can avoid holding a hearing where a hearing is unnecessary, as follows:

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

There is also a provision dealing with withdrawal. This last provision assumes that a tribunal may allow withdrawal, but reserves the right to continue the proceeding in specified circumstances. It also provides for deemed withdrawal in specified circumstances.

C. Generic hearings: This provision allows a tribunal to hold special hearings to establish tribunal policy, or to indicate factors it may consider in exercising its discretion, and to issue policy statements arising therefrom.

D. Consolidation, joint hearings, etc.: This section contains a provision that allows a tribunal 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. Provision is also made for joint hearings of more than one tribunal.

E. Pre-hearing conferences: Provision is made for a tribunal to hold a pre-hearing conference that will allow it to conduct a hearing in the most efficient and orderly manner possible. Under this provision it is possible for a pre-hearing officer (possibly a staff rather than tribunal member) to deal with issues of scheduling. There is also a provision that allows for the designation in appropriate cases of a single tribunal member to deal with more substantive preliminary matters (for example, objections to subpoenas, or the status of interveners).

F. Investigations: The final section in Part 1, on investigations, is relevant to tribunals that by virtue of their particular function need to obtain information on their own motion (in contrast to relying on the participants to bring forward necessary information). Here there is provision for authorizing staff to conduct informal investigations. The section also deals with a tribunal's powers to order disclosure of information, or to authorize others to obtain 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' part of the Code.)

A. Acknowledgments and Notifications

PROVISION 1.1

Where a tribunal receives an application that will give rise to further proceedings it shall ensure that the following persons are notified, within a reasonable time, of receipt of the application:

- the applicant
- all persons named in the application
- all persons who have had standing in earlier proceedings of the tribunal with respect to the subject of the application
- all persons whom the tribunal knows or reasonably believes are entitled by statute to standing in proceedings with respect to the subject of the application
- all other persons whom the tribunal knows or reasonably believes will be directly affected by the proceedings.

A tribunal may, at its discretion, give notice of the application to any other person.

Explanatory Notes

Purpose of the provision / relation to rules for standing

This provision is meant to ensure, so far as possible, that the persons who are entitled to, or may be permitted to, be involved in an adjudicative administrative hearing are notified.

The provision is related to Provision 20, which sets out the rules respecting party and non-party participant standing in proceedings arising from an application.

Provision 1.1 ensures that all persons who are entitled to standing under Provisions 20.1 or 20.2, either as parties or as non-party participants, will be notified and thereby given an opportunity to apply for standing.

Provision 20.3 also provides for standing to be granted on a discretionary basis to those who are not entitled under Provisions 20.1 or 20.2, but whose participation is warranted on some other ground, for example, those who may have a novel argument or perspective, who are indirectly affected, or who represent the public interest. The final clause under Provision 1.1, under which a tribunal may give notice to any other person, allows a tribunal to alert such potential participants to the opportunity to apply for standing.

'that will give rise to further proceedings'

The qualifier "that will give rise to further proceedings" indicates that the requirement for notification of persons other than the applicant is not applicable to applications that are not accepted by the tribunal, for example, because the tribunal has no jurisdiction (see Provision 2.1) or because it decides that the application is an abuse of process (see Provision 3.1).

"directly affected"

Provision 1.1 includes a requirement to notify persons who are "directly affected" by a decision to be made by a tribunal. The common law rules of natural justice require that such persons should be given an opportunity to be involved in the proceeding. (As noted above, such persons are entitled to standing under Provisions 20.1 or 20.2.)

The common law requirement to give notice, despite the absence of a statutory requirement, to persons who are directly and necessarily affected by the decision to be made in a proceeding, is set out in *Canadian Transit Co. v. Public Service Staff Relations Board (Can.)* (1989), 39 Admin. L.R. 140 (F.C.A.).[45] This case also provides some clarification of "directly and necessarily affected", per Marceau J.A., at 151, as follows:

> It is clear to me that mere interest in the eventual outcome of a proceeding before a tribunal, whether financial or otherwise, is not in itself sufficient to give an individual a right to participate therein. The demands of natural justice and procedural fairness certainly do not require so much and in any event it would be

[45] We have omitted the qualifier "and necessarily" on the basis that "directly affected" means what it says and does not import some notion of a merely speculative or contingent effect. Many of the cases dealing with this concept use only the words "directly affected".

> impossible in practice to go that far. In my judgement, to be among the interested parties that a tribunal ought to involve in a proceeding before it to satisfy the requirements of the audi alteram partem principle, an individual must be directly and necessarily affected by the decision to be made. His interest must not be indirect or contingent, as it is when the decision may reach him only through an intermediate conduit alien to the preoccupation of the tribunal, such as a contractual relationship with one of the parties immediately involved.

MacGuigan, J.A. also suggested, at 149, that it is relevant to inquire "whether the interests denied a hearing would be adequately represented by a party more directly involved".[46]

Additional procedures on receipt of an application

Procedural rules from a number of other jurisdictions provide additional steps to be taken by a tribunal on receipt of an application, such as the following:

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

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[46] MacGuigan J.A., also said, at 146:

> Probably no principle is more fundamental to administrative law at common law than that of audi alteram partem, a rule of natural justice that parties be given adequate notice and opportunity to be heard, and at least from the time of *Cooper v. Wansworth Bd. of Works* (1863), 14 C.B. (N.S.) 180 at 194, 143 E.R. 414 at 420, the Courts have used "the justice of the common law" to "supply the omission of the legislature" where a statute authorizing interference with property or civil rights is silent on the question of notice and hearing.

For other cases relevant to the topic of entitlement to notice and the meaning of "directly affected" see: *Nova Scotia Nurses' Union v. Sacred Heart Hospital* (1995), 145 N.S.R. (2d) 62, 418 A.P.R. 62 (N.S. S.C.); *Re Mannion (No. 2)* (1983), 44 O.R. (2d) 37 (H.C.); *Foothills v. Alta. Assess. App. Bd.* (1986), 72 A.R. 370 (Q.B.); *T.W.U. v. Canada (CRTC)* (1996), 31 Admin. L.R. (2d) 230, at 245 (S.C.C.); *C.U.P.E. Local 30 v. WMI.* (1996), 34 Admin. L.R. (2d) 172, at 176-179 (Alta C.A.); *Schaefer v. Yukon Liquor Corporation*, [1997] Y.J. No. 146 (Q.L.) (Yuk. S.C.); *Appleton v. Eastern Provincial Airways* (1983), 6 Admin. L.R. 128 (F.C.A.); *Okanagan Helicopters v. Canadian Helicopter Pilots Association* [1986] 2 F.C. 56 (Fed C.A.); *Re Bradley and Ottawa Professional Firefighters Association* (1967), 63 D.L.R. (2d) 376 (Ont C.A.); *Hoogendoorn v. Greening Metal Products and Screening Co.* [1968] S.C.R. 30 (S.C.C.). See also the discussion in *Macaulay* (*supra*, note 13) at 12.3(c)(i).

For some tribunals it would also be useful to have a rule requiring applicants to provide the tribunal with the necessary information for identifying other potential participants who meet one of the criteria in Provision 1.1.

Rules such as these are too detailed for the Model Code. However it would be useful for tribunals 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. See Provision 53, which requires that tribunal procedures be made public.

PROVISION 1.2
In appropriate circumstances the tribunal may direct that notice under this provision be given by the applicant.

PROVISION 1.3
The tribunal may approve alternate forms of notice where notice to individuals is impracticable, or where a person to be notified is avoiding service of notice.

Explanatory Notes

An example of an alternate form is publication in a newspaper that is under general circulation in the relevant area, 30 days in advance of the proceeding.

Apart from provisions 1.2 and 1.3 (and parallel provisions under the 'Notice of Hearings' section), the Model Code does not include rules respecting service of notice (or of other documents), as such rules were thought to contain too much detail. However, tribunals are encouraged to develop and adopt rules for service. See Part 4, N,[47] which refers to the standardized rules in relation to the service of documents contained in the *Federal*

[47] At page 181.

Administrative Hearings Act,[48] and lists the kinds of things covered by the rules.

[48] This document is reproduced in *Macaulay* (*supra*, note 13) at 38.2.

B. Decisions not to Hold a Hearing

1. Refusal to accept an application, or early dismissal

a) refusal to accept or proceed with an application (or refusal to continue where proceedings have begun) where there is a want of jurisdiction or other fundamental defect

PROVISION 2.1

A tribunal may, on its own motion or on the motion of a participant, refuse to accept or proceed with an application, or refuse to continue where its proceedings have begun, if it lacks jurisdiction over the matter, or if the application contains some other fundamental defect.

Explanatory Notes

Purpose

The purpose of the provision is to preserve scarce resources.

Jurisdictional defects: examples

Examples of the types of defects which can ground a refusal to proceed are as follow:

- the matter is submitted beyond the statutory time limit, or beyond an extended time limit[49]
- the applicant has not taken steps or met conditions that are required for advancement of the proceedings (this may include the pursuit of another avenue of appeal that is a precondition to an application)
- the subject matter or particular circumstances of the application is outside that defined by the statute as within the jurisdiction of the tribunal
- the tribunal does not have the power to grant the remedy or make the decision or order requested by the applicant, or to grant any other remedy or relevant decision or order
- the supporting reasons show no basis for triggering the tribunal's process, or no basis for granting a remedy or making a relevant decision or order.

[49] See Provision 55, which gives tribunals power to extend statutory time limits.

Provision 2.1, and in particular the second of the examples listed thereunder, is not primarily aimed at merely technical defects in an application, for example, a failure to supply certain minor items of information, or to pay an application fee. Matters such as these should be covered by the procedural rules that tribunals develop in accordance with the suggestion in the Explanatory Notes under Provision 1.1.[50] (There should be provisions whereby the applicant is notified of such minor defects by tribunal staff and given an opportunity to correct them.) However, failure by an applicant to rectify such a deficiency in the application may prevent the tribunal's proceeding further. For example, there may be insufficient information to demonstrate that the matter is within the tribunal's statutory mandate. An unrectified failure to pay application fees, or to follow a tribunal directive such as one to notify others, may also preclude continuation of the process.

PROVISION 2.2

Before deciding not to proceed or not to continue to proceed with a matter under this section, the tribunal shall notify the applicant of its concern and provide an opportunity to respond, in such manner (oral, written, electronic) as the tribunal directs.

Explanatory Notes

Where the tribunal's structure allows it, it should be possible for an agency staff member in very clear cases, or a single member of the adjudicative branch in less certain matters, to exercise the initial screening function. The tribunal should then notify the applicant of the perceived absence of jurisdiction or other fundamental defect, and of the applicant's right to respond to the concern. If the applicant responds when so notified and indicates a desire that the application proceed, the decision whether to proceed should be made by a tribunal panel under Provision 2.1, taking into account the applicant's response.

[50] See page 43.

PROVISION 2.3
The decision of a tribunal not to proceed or not to continue to proceed with a matter under this section may be appealed to [another appropriate body within the agency] [the tribunal chair].

Explanatory Notes

Provision 2.3 is another measure to safeguard ready access to dispute resolution. This recommendation provides that the panel's decision under Provision 2.1 should be subject to appeal to another appeal body within the agency (possibly the tribunal Chair) where the agency's structure allows this. Whether or not such an appeal mechanism is available, the decision will be subject to judicial review.

b) refusal to accept or proceed with an application (or refusal to continue where proceedings have begun) where the proceeding is an abuse of process

PROVISION 3.1
A tribunal may, on its own motion or on the motion of a participant, refuse to accept or proceed with an application, or refuse to continue where its proceedings have begun, if it determines that to proceed would be an abuse of process.

Explanatory Notes

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

Abuse of process: examples
Examples of situations that could constitute abuse of process include the following:

- the supporting reasons are frivolous or trifling

- the proceeding was initiated or continued primarily with the intent to cause distress or harm to others
- the proceeding was initiated or continued only for the purpose of delay
- the proceeding is an unjustified attempt to have a matter redetermined that has already been resolved in an earlier proceeding.[51]

(This list is for the purpose of illustration only, and is not meant to be exhaustive.)

Common law power

In *S.(N.) v. Norris* (1992), 6 Admin. L.R. (2d) 228 (Ont. Gen. Div.), at 238-239, a case involving repeated applications before a mental health review board, Misener J. commented that the power of a tribunal to prevent an abuse of its process exists in the common law quite apart from the statutory power to do this under s. 23 of the Ontario *Statutory Powers and Procedures Act*. The court affirmed the tribunal's power to refuse to commence a hearing.[52]

PROVISION 3.2

Before deciding not to proceed or not to continue to proceed with a matter under this section, the tribunal shall notify the applicant of its concern and provide an opportunity to respond, in such manner (oral, written, electronic) as the tribunal directs.

[51] There may be circumstances in which an attempt to have a matter reconsidered is justified, as where an error has been made, or circumstances have changed. See Provision 44, which deals with reconsiderations.

[52] See also *Re C. (J.)* (1991), 2 Admin. L.R. (2d) 92 (Penetanguishene Psychiatric Review Board), which involved the exercise of the statutory power to prevent abuse of process under s. 23 of the *SPPA*. In that case the action characterized as abuse of the tribunal's process was the application by a mental hospital to have a Psychiatric Review Board rehear issues and evidence already adjudicated upon by a different panel of the Board (after the hospital had launched and abandoned an appeal from the original decision). The second Board agreed to hear further evidence as to the patient's involuntary status, but excluded the evidence and issues upon which there had already been an adjudication.

Explanatory Notes

The concern that a proceeding may be an abuse of process involves consideration of the merits. Therefore the notification to the applicant that the tribunal has such a concern should be based on the consideration of the application by an adjudicative member. If the applicant responds when so notified and indicates a desire that the application proceed, the decision whether to accept the application should be made by a tribunal panel, taking into account the applicant's response. (Where the concern arises during the course of the proceeding, the decision not to continue will be made by the hearing panel.)

PROVISION 3.3

The decision of a tribunal not to proceed or not to continue to proceed with a matter under this section may be appealed to [another appropriate body within the agency] [the tribunal chair].

Explanatory Notes

Provision 3.3 is another measure to safeguard ready access to dispute resolution. This recommendation provides that the panel's decision under Provision 3.1 should be subject to appeal to another appeal body within the agency (possibly the tribunal Chair) where the agency's structure allows this. Whether or not such an appeal mechanism is available, the decision will be subject to judicial review.

PROVISION 3.4

Where a tribunal decides to refuse to accept or proceed with an application or to dismiss a matter on the basis that the proceeding is an abuse of process, it shall give reasons for its decision.

Explanatory Notes

Reasons should be given for all tribunal decisions (see Recommendation 38.1). However, a reasons requirement is specifically set out for a decision under this provision because such a decision restricts access to the dispute resolution process, and may for some types of cases be largely a matter of personal judgement. These factors make it especially important that the basis for the decision be visible.

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

PROVISION 4

A tribunal, on its own motion or on the motion of a participant, may 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, cannot support the application.

Explanatory Notes

The purpose of Provision 4 is to allow the tribunal to discontinue a hearing that has commenced where it becomes apparent that the evidence completely fails to support the application. It is meant to avoid wasting tribunal resources.

The provision is not meant to be exhaustive in the sense of setting out the only condition under which a proceeding that has been initiated may be discontinued. (Other possible circumstances are set out under Provisions 2.1 and 3.1. A tribunal may also decide to discontinue a proceeding for other reasons that are unrelated to the strength of the evidence.[53])

[53] For example, under section 59(1) of the *Legal Profession Act*, a matter involving a member's conduct may be discontinued before a hearing is commenced where the Conduct
(continued...)

In some cases a tribunal may prefer to decline to exercise this power in favour of allowing participants to "have their say".

An unsuccessful request for an early dismissal is not to prohibit those making the request from participating in the remainder of the hearing as fully as they might otherwise have done.

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

PROVISION 5

A tribunal may, at its discretion, make a determination or disposition, or grant an order or provision therein, on the consent of all the parties (and other participants, depending on the terms of their participation).

A determination, disposition or order under this section may include such terms as the parties (and other participants, depending on the terms of their participation), with the approval of the tribunal, determine are appropriate.

A determination, disposition or order under this section shall 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.

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[53] (...continued)
Committee is satisfied that the circumstances of the conduct do not justify the continuation of the proceeding. (Similarly under s. 59(2) a hearing already commenced may be discontinued by the Hearing Committee on the basis of the same criterion.) Under a criterion such as this, a matter may well be discontinued although the condition of Provision 4–that the facts as put forward provide no support for the application–has not been met. The reasons for discontinuing may well be quite different from the strength of the evidence relative to a particular allegation of fact. For example, a proceeding may be discontinued where there is an effective alternative to prosecution, such as a practice review. Provision 4 is not meant to displace or guide the interpretation of such rules.

This point is also illustrative of the more general point that the Model Code is not meant as a statement of the common law relative to tribunal practice, and it would be inappropriate to rely on its provisions to argue about what a tribunal that has not adopted such provisions should or should not do. See note 12.

Explanatory Notes

Public interest concerns

The third clause of Provision 5 is based on the recognition that a tribunal's statutory mandate may require it to take into account matters which the participants will not raise or advocate, for example, agency or government policy, the spirit or purpose of the statute, or the interests of the public or unrepresented persons. In such cases it may be necessary for the tribunal to make an independent determination regardless of the position of the participants, and possibly to obtain information in addition to that which the participants have put forward.

As a sub-head of the more general point, the need for an independent determination may arise where the tribunal is given the responsibility to make factual determinations. The purpose of the statute may dictate that these be made accurately regardless of the position taken by participants.

Relation to ADR

Provision 5 should be read together with Provision 9, which deals with ADR proceedings, and resolutions agreed to thereunder.

Consent orders for procedural matters

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

- a decision that a participant in one application before the tribunal represent other participants in other pending applications, or somewhat similarly,
- a decision to run a "test case" on a matter within the tribunal'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 cases such as these, a discretion remains with the tribunal whether to grant the consent order.

Jurisdiction by consent

Jurisdiction cannot be conferred on a tribunal by consent.

(See *Essex Incorporated Congregational Church Union v. Essex County Council* [1963] A.C. 808 (H.L.); Wade, H.W.R., *Administrative Law*, 6th ed.,[54] at 264-65.)

PROVISION 5.1

Where a person has standing to participate in a proceeding, and has been notified of the proceeding, but does not participate, the tribunal may make a determination or disposition, or grant an order or provision therein under this section, on the basis of the consent of those participants who do participate.

3. Withdrawal of proceedings: refusal to permit; deemed withdrawal

PROVISION 6

A tribunal may refuse to permit withdrawal of an application in the following circumstances:

- to deal with costs, where this is appropriate and the tribunal has the power to do so
- to protect the public interest.

A tribunal may impose conditions on withdrawal.

Explanatory Notes

Where a tribunal refuses to permit withdrawal, it cannot, as a practical matter, force the applicant to continue to carry the proceeding or to participate, except as a compelled witness. However, if the public interest so requires, the tribunal can go on to make a determination based on matters already raised, or on further evidence or submissions provided by other participants, or it may itself order further investigation or the production of further evidence if it has the power to do so. (See Provisions 16 and 32.2 with respect to the power of tribunals to compel evidence on their own motion).

[54] Clarendon Press, Oxford, 1988.

Note also Provision 9 respecting ADR, and in particular the discussion about matters in which a tribunal has responsibility to ensure that settlements reached by the participants accord with the purpose and provisions of the statute.[55]

PROVISION 6.1
Where a matter is adjourned to an unspecified later time and no steps are taken by the applicant within a reasonable time to advance it, the tribunal may, after notifying the applicant, and after a suitable further period has elapsed, treat the matter as withdrawn.

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

This provision should not be included in the proposed *Administrative Powers and Procedures Act*.

PROVISION 7 [Extra-Code Provision]
On the motion of an interested person a tribunal may, at its discretion, issue a decision with respect to how the law (statute, rule, decision or order) applies to unproven or hypothetical facts.

Explanatory Notes

This provision is included in Part 1 because a general interpretive statement of how the law applies may obviate the need for hearing a multiplicity of cases involving the same or similar facts.

However, the legislated Model Code will not contain a provision empowering a tribunal to declare how the law applies to unproven or hypothetical facts.

[55] An illustration of a circumstance in which it would be inappropriate to permit withdrawal is the case of a human rights complaint brought by an employee where the employer subsequently offers some monetary or other incentive (other than relief from continued discrimination) for the employee to withdraw the complaint.

Instead, this power will be included in the list of powers that tribunals may consider for inclusion, by amendment, in their enabling legislation. (This list is at page 183.)

The provision is not included in the proposed *Administrative Powers and Procedures Act* for two reasons. First, in contrast to a policy-making or rule-making function that is performed internally by a tribunal,[56] the process contemplated here is initiated by persons outside the agency, who put forward the hypothetical facts. Many tribunals may prefer not to be open to applications that would expend tribunal resources in this manner at the instance of private interests. Second, a power such as this should be accompanied by rules as to entitlement to notice, participation rights, what information is required before a decision is made, and what rights of appeal or review are conferred. What is appropriate under each of these headings would vary according to the nature of the decision to be made.

Where this power is incorporated in tribunal rules, a declaratory decision should not be made where:

- the decision would directly affect the rights of persons who do not consent to or participate in the declaratory decision procedure, or
- the decision involves a matter that is the subject of pending administrative or judicial proceedings.

Admitted facts

In some of the materials from which the Model Code provisions were drawn, declaratory orders cover decisions based on agreed or admitted facts as well as on hypothetical facts. However, Provision 7 does not cover decisions on the basis of admitted or agreed facts. Such decisions are covered under the rules for the hearing process in the next part of the Model Code (the facts are proved by admission at the hearing).

[56] Tribunals may develop policy or interpretive statements informally, or by more formal means such as under the 'Generic Hearings" process under Provision 10.

5. Stating a case

PROVISION 8
A tribunal may, on its own motion, or at its discretion on the motion of a participant, state a case to a court on questions of law or jurisdiction.

Explanatory Notes

Purpose
This procedure can save costs. It might also avoid placing the onus of appealing a tribunal ruling on one of the participants.

Circumstances for exercise
A tribunal can be guided in deciding whether to exercise this power by the principles developed in relation to the separate trial of points of law in civil proceedings (Alberta *Rules of Court*, R. 220.). The question of law should be given over to the court only if it is determinative of the case if decided one way. If the point of law turns on facts supplied by the tribunal, these should be finally and totally decided or agreed for all purposes.

6. Re-routing to ADR proceedings

PROVISION 9.1
A tribunal may engage in alternative dispute resolution proceedings. A resolution reached by the participants through ADR can, at the discretion of the tribunal, become an order of the tribunal, subject to the purpose and provisions of its enabling legislation.

Explanatory Notes

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

Propriety of ADR

To decide whether ADR is appropriate for a given case or class of cases, a tribunal should consider 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 an ADR process would not be likely to give rise to such a 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 an ADR process would not likely serve to elucidate or develop such policy;
- the matter significantly affects persons or organizations that are not participants to the proceeding;
- a full public record of the proceeding is important and an ADR process could not provide such a record;
- the tribunal must maintain continuing jurisdiction over the matter, with authority to alter the disposition of the matter in light of changed circumstances, and an ADR process would interfere with the meeting of that requirement by the tribunal.

The decision whether to engage in ADR should be that of the tribunal, taking into account the views of the participants. Even where participants, or some of them, are reluctant, a tribunal may direct them to attend ADR sessions. (Where they fail to do so, a tribunal that has costs powers might take such a failure into account in awarding costs.) However, for many situations there may be little point in initiating proceedings with uncooperative participants.

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, a tribunal has only the powers conferred on it by its enabling statute. Even where the statute permits consent orders, the involvement of a tribunal in instituting other dispute-resolution mechanisms, for example designation of a negotiator or mediator from outside the agency, would require authorization.

Conflict with statutory directives

Many enabling statutes provide the mechanism by which tribunals are to resolve the matters that arise before them. Where a tribunal's statutory rules require it to hold a hearing, the ADR provision might be regarded as in conflict with the statutory requirement (and on this account not capable of being adopted without a legislative amendment). However, the statutory requirement to hold a hearing could likely still be met so long as the tribunal required that any proposed resolution be brought back for its approval/incorporation into a tribunal order. See the discussion under *'additional procedural rules'* clause 3, below at page 61.

Types of proceedings

Various of the model codes and recommendations for model codes in the materials surveyed for the preparation of this Code 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.

"Engaging in" ADR includes directing the participants to an ADR process involving a mediator, negotiator, etc. from outside the agency.

Timing

Resort to ADR may be had at any point in the tribunal's process, including after the hearing has commenced.

PROVISION 9.2

Parties as designated under Provision 20.1 [or under the tribunal's equivalent rules] are entitled to participate in ADR proceedings. Participation of those granted standing under Provision 20.2 or 20.3 [or under the tribunal's equivalent rules] is at the discretion of the tribunal.

PROVISION 9.3

Where an ADR process has been conducted but a resolution is not achieved, or a proposed resolution is not approved,

- participants in the ADR process are not competent or compellable to testify about the process in any proceeding of a tribunal or court
- the notes and work product of participants made in the course of an ADR proceeding may not be admitted as evidence in any proceeding of a tribunal or court
- documents submitted in the course of an ADR proceeding may not be disclosed to any other person without the permission of the person who submitted them; such documents may not be filed in any proceeding of a tribunal or court by a participant other than the person who submitted them
- communications made in the course of an ADR proceeding may not be disclosed to any other person without the permission of the person who made them; any record of such a communication may not be filed in any proceeding of a tribunal or court without the consent of the person who made the communication.

'Participant' in this section includes the person presiding.

Explanatory Notes

Additional procedural rules

Aside from the procedures in Provisions 9.1 to 9.3, the Model Code does not include procedural requirements for the conduct of ADR proceedings. However, tribunals should develop their own procedural rules to suit their function and allow them to fulfill their statutory mandate. These rules could, and in some cases should, include the following:

1) a provision for designating a person to preside in ADR proceedings, or to designate such a person where the participants request it, or where they fail to designate someone to preside. (The designated person could be

either from outside the agency, or a member of the agency or a staff member.[57] 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 what information should be provided to the tribunal when its approval is sought

3) a provision requiring that any proposed resolution be brought back to the tribunal for its approval/incorporation into a tribunal order.

Note: Provision 9.1 does not require that every resolution reached through ADR be brought back to the tribunal for approval. Whether this should or should not be done depends on the tribunal's statutory mandate. Some matters with which tribunals deal involve purely private conflicting claims between competing private participants. For these, unless a tribunal order is required for enforcement purposes, the tribunal's approval need not be sought. The participants may reach a resolution and then enter an agreement between themselves (possibly a binding contract). The parties may then simply withdraw their application, or the tribunal may have a rule that a matter that is not brought back within a specified time period will be deemed withdrawn.[58]

For some tribunal decision making, however, the enabling legislation expressly or impliedly confers on the tribunal a responsibility to protect the public interest or public policy, or the interests of persons other than the participants. In such cases, the tribunal must ensure that any resolution achieved through ADR that is initiated by or involves the tribunal does not conflict with this responsibility. (In fact, the existence of such an interest may be a reason not to use ADR .) Tribunals whose mandate involves such an element and that use ADR should have ADR rules that require resolutions so achieved to be

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[57] Where the presiding person is a staff member, appropriate systems should be put in place for ensuring confidentiality relative to the adjudicative arm of the agency.

[58] Note Provision 6.1, which allows a tribunal to treat a matter as withdrawn where a matter is adjourned to an unspecified later time and no steps are taken by the applicant within a reasonable time to advance it.

brought back for tribunal approval.[59] This matter should be addressed by all tribunals that engage in ADR whose mandate has a public interest or similar component.[60]

Note also Provision 6, which allows a tribunal to refuse withdrawal where an issue has been raised that necessitates a ruling by the tribunal in the public interest.

4) a provision that the tribunal cannot unilaterally amend the proposed resolution without the participants' further involvement and a provision for recalling the conference for amendments to the resolution.
5) rules regarding participation of the presiding officer, and participating staff, at a subsequent hearing
   - precluded?
   - permitted on consent?
6) rules for termination of the ADR process by the tribunal.
7) rules regarding the effect of cooperation in the ADR process, or otherwise, on the awarding of costs. (This assumes a power in the tribunal to award such costs.)

[59] Appointing a person to represent the public or other interest in the ADR proceeding is another mechanism whereby the tribunal may try to fulfill this responsibility. However, unless the matter is brought back, the responsibility is in essence delegated to the appointee, exercisable in a closed setting, which may leave the tribunal with insufficient control.

[60] The tribunal might also consider what duties it will impose on its staff or appointed negotiators in terms of informing participants of their statutory rights, and their continued participation where the participants are inclined toward a resolution that conflicts with the requirements, standards or purpose of the enabling legislation. An extensive discussion of this issue is found in the Ontario *Compendium of Model Rules*.

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

PROVISION 10

A tribunal may inquire into any issue or matter of general application within its jurisdiction by means of a generic hearing.

The tribunal may permit or require such persons as it considers advisable to participate in the generic hearing.

The tribunal shall give notice of a generic hearing.

The tribunal may retain anyone with technical or special knowledge to assist it.

The tribunal may issue policy statements, guidelines, opinions, decisions or orders.

Explanatory Notes

Purpose

Provision 10 is included in Part 1 of the Model Code because a generic hearing may avoid the necessity for a multiplicity of hearings related to the same subject in particular cases.

The provision is a codification of the common law. It is provided

- to bring to the attention of tribunals that they may develop policy by means of a formal hearing,
- to provide some structure for the conduct of such hearings, including guidance as to participation by persons from outside the tribunal, and
- to provide guidance, by highlighting related cases, as to the kinds of guidelines that may be formulated, and how they can, and cannot, be applied in particular cases (whether developed informally or through a formal hearing process).

Limitations

Guidelines that indicate policy or that assure some conformity in the application of discretionary rules are permitted. There are three limitations on the ability of administrative tribunals to issue guidelines and other non-binding instruments:

- guidelines may not contradict a statutory provision or regulation;
- they may not preempt the exercise of a decision-maker's discretion in a particular case (in other words, fetter discretion); and
- they cannot impose mandatory requirements enforceable by sanction.

See *Ainsley Financial Corp. v. Ontario (Securities Commn.)* (1994), 21 O.R. (3d) 104 (C.A.); *Sebastian* v. *Saskatchewan (Workers' Compensation Board)* (1994), 119 D.L.R. (4th) 528 (Sask. C.A.).

Advantages

The formulation of guidelines has many advantages. It creates effective and fair administration. It enhances the quality of decision-making and administrative justice by increasing certainty. It reduces inconsistencies and raises the level of accountability to the public.

See *Maple Lodge Farms Ltd. v. Canada (Minister of Economic Development)*, [1982] 2 S.C.R. 2 (S.C.C.); *Braden-Burry Expediting Services v. Northwest Territories (Workers' Compensation Board)*, [1998] N.W.T.J. No. 172 (Q.L.) (S.C.).[61]

Form

Where a policy is outlined in clearly mandatory language, it tends to erode the discretion of the decision-maker.

See *T.C. and J.T. v. Langley School District No. 35* (1985), 65 B.C.L.R. 197 (C.A.), at 206-7); *Ainsley Financial Corp. v. Ontario (Securities Commn.)* (1994), 21 O.R. (3d) 104 (C.A.), at 111; *Ontario (Highway Transport Board) v. Ontario Trucking Association* (1988), 33 Admin. L.R. 166 (Ont. Div. Ct.), at 201.

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[61] See also *Dawkins v. Canada (Minister of Employment & Immigration)* (1991), 45 F.T.R. 198 (T.D.), at 204; *Duggan, Re* (1988), 72 Nfld. & P.E.I.R. and 223 A.P.R. 328 (Nfld. S.C.); *Western Forest Products v. British Columbia (Workers' Compensation Board)* (1983), 8 Admin. L.R. 43 (B.C. S.C.), at 47; *Burke v. Canada (Employment and Immigration Commission)* (1994), 79 F.T.R. 148 (T.D.), at 159.

A highly detailed and definitive policy may be regarded as an exercise of a legislative power that the tribunal does not possess. Such a policy is so specific it removes the element of discretion.

See *Ainsley Financial Corp. v. Ontario (Securities Commn.)* (1994), 21 O.R. (3d) 104 (C.A.), which involved a policy statement that "sets out a minutely detailed regime, complete with prescribed forms, exemptions from the regime, and exceptions to the exemptions" (at 111).

Fettering discretion by applying guidelines

An administrative tribunal may not fetter the exercise of its statutory discretion, or its duty to interpret and apply the provisions of its enabling statute, by mechanically applying a rule that it had previously formulated (other than where the rule is properly enacted pursuant to a statutory power to make subordinate legislation). The test for determining whether a tribunal has fettered its discretion by policy is not whether the rule, guideline, or policy was a factor, or even the determining factor, in the making of a decision. Rather, it is whether the decision-maker treated the guideline as binding or conclusive, without the need to consider any other factors, including whether it should apply to the unique circumstances of the particular case. If the decision-maker blindly applies the policy without looking at the merits of the particular case, it will be an unlawful fettering of discretion.

See *Maple Lodge Farms Ltd. v. Canada (Minister of Economic Development)*, [1982] 2 S.C.R. 2 (S.C.C.); *Sebastian* v. *Saskatchewan (Workers' Compensation Board)* (1994), 119 D.L.R. (4th) 528 (Sask. C.A.).

Proof of fettering discretion

Fettering of discretion can be shown by

(a) direct evidence (a statement by the decision maker at the hearing, or a statement in the reasons, that the guidelines or policy were treated as binding)

See *Braden-Burry Expediting Services v. Northwest Territories (Workers' Compensation Board)*, [1998] N.W.T.J. No. 172 (Q.L.) (S.C.), but see *United Messenger Co-op Ltd .v. Manitoba (Workers Compensation Board)*, [1994] 8 W.W.R. 663 (Man. Q.B.), where the decision-maker actually stated it was

bound by a policy, yet the court held there was no fettering of discretion because the Board had considered many factors and not only the policy.

(b) the decision-maker may refuse to entertain submissions designed to persuade it either to make an exception to the policy or to consider relevant factors omitted from the policy

See *Burke v. Canada (Employment and Immigration Commission)* (1994), 79 F.T.R. 148 (T.D.), at 159; *Sebastian* v. *Saskatchewan (Workers' Compensation Board)* (1994), 119 D.L.R. (4th) 528 (Sask. C.A.). In each case the fact that the opportunity to make submissions was given to the applicant was significant in the court's finding that there had been no fettering of discretion.[62]

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[62] Speculation is not sufficient to establish fettering.

See *Clare v. Thomson* (1993), 83 B.C.L.R. (2d) 263 (C.A.).

The court may look at the record to make an assessment or draw an inference.

See *Alkali Lake Indian Band v. Westcoast Transmission Co.* (1984), 7 Admin. L.R. 64 (B.C. C.A.); *Cabre Exploration v. Arndt* (1986), 69 A.R. 293 (Q.B); *Brown v. Alberta* (1991), 82 D.L.R. (4th) 96 (Alta. Q.B.), at 103; but see *North Coast Air Services, Re,* [1972] F.C. 390 (C.A.), in which a challenge to a decision-maker on the basis of a fettering of discretion by the application of a policy was refused because there was no positive evidence to show that the decision-maker had not taken specific facts relative to the applications into account in refusing to except applicants from certain regulations.

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

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

PROVISION 11

Where two or more cases are pending before a tribunal and involve the same or similar questions of fact, law or policy, the tribunal may, on its own motion or on the motion of a participant, order that

- the hearings, or any part of them, be consolidated, or
- on consent of the parties (and other participants, depending on the terms of their participation), one participant is to represent others; any right of appeal of the participants who are not heard shall be preserved.[63]

The tribunal may make any related orders regarding the procedures to be followed.

A tribunal shall sever a consolidated hearing where it appears in the course of it that consolidating the hearing is causing or will cause significant unfairness to a participant. Where a consolidated hearing is severed, the evidence and submissions already made may be applied to the separate hearings that ensue, to the extent that doing so causes no significant unfairness to the participants.

The tribunal may sever a single application into two or more separate hearings dealing with separate participants or separate issues.

Before granting an order to consolidate or sever the hearing(s), the tribunal shall consider representations by the parties (and other participants, depending on the terms of their participation) as to whether the hearing(s) should be consolidated or severed.

A tribunal shall not consolidate the hearings

- unless it would be expeditious to do so
- if consolidation would cause significant unfairness to a participant.

[63] As part of its general power to make orders, at the discretion of the tribunal, on the basis of the consent of the participants (see Provision 5), a tribunal may also order that a test case is to be run, or that the result in one case is to be applied to other pending cases.

Explanatory Notes

Purpose

The purpose of the rule is to avoid the cost and time of duplication, and to avoid inconsistent decisions. However, expediency must not be permitted to override fairness.

Application of decision

Consolidation involves the possibility that the tribunal's findings and final determinations or orders will be applied to all the participants in the consolidated proceeding. A particular remedy may be granted in favour of all applicants, or against all respondents. This idea is distinct from that of simply holding two separate proceedings before the same panel at the same time, for the sake of efficiency in the presentation of evidence or submissions. In the latter case the tribunal's findings, and resulting remedies, remain separate and particular to the parties to the original separate applications. The latter idea is addressed in Provision 12 below.

Privacy concerns

It may be impracticable for a tribunal 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.

Appeals

The implications for the various participants of the possible appeal of a decision in a consolidated case may be relevant to the issue of fairness.

Costs sharing

Where the participants agree that one should represent others, (or 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.

b) application of evidence

PROVISION 12

A tribunal may, on its own motion or on the motion of a participant,

- admit evidence heard at an earlier proceeding, before the same tribunal, another tribunal or a court, as evidence in the later proceeding, or
- hold two or more proceedings at the same time and admit the same evidence for both proceedings.

Before deciding whether to admit evidence pursuant to this provision, the tribunal shall consider representations by the parties (and other participants, depending on the terms of their participation) as to whether the evidence should be so admitted. It shall not so admit the evidence

- unless it would be expeditious to do so
- if admission would cause significant unfairness to a participant.

Explanatory Notes

Conditions for admission

In deciding if admission of evidence taken at an earlier proceeding would be unfair, the tribunal should consider if the following conditions are met:

- the issues in the earlier proceeding were substantially the same, and
- the latter proceeding involves the same parties (or those privy to them[64]), and the party against whom 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 proceeding, and
- there is no issue as to credibility of the witness and thus no need to observe his or her demeanour.

[64] This refers to parties that share an interest in an action.

These conditions are derived from the law of admission of earlier evidence in civil proceedings.[65]

It is not necessary to show that the witness is unavailable at the new proceeding, or that it is impractical to call him or her. Assuming there is no prejudice, expediency is a sufficient precondition to the order.

[65] See Sopinka, Lederman & Bryant, *The Law of Evidence in Canada*, Butterworths, 1992, at 270 *et seq*., where the authors discuss relevant cases. The authors note the precondition to admission that the case involve the same parties (or those privy to them), and question whether this should be a requirement. In their view trustworthiness of the evidence is guaranteed by the identity of interest between the earlier party who had conducted the cross-examination, and the new party (at 273). In Stevenson & Côté, *Civil Procedure Guide*, Juriliber, 1996, the annotation to R. 263 of the Alberta *Rules of Court* contains a discussion of similar issues. This discussion does not contemplate that the earlier suit may have been other than between the same parties. See the discussion at 1161.

c) joint hearings

PROVISION 13

Where more than one tribunal has jurisdiction over the same or similar matters, the participants, a tribunal or tribunals, the responsible ministry, or the LG in C, may make a request to the tribunals to conduct a joint hearing. Approval of the tribunals themselves is sufficient for a matter to proceed in a joint hearing. If tribunal approval cannot be obtained, the request may be made to the LG in C for an order in council.

Before deciding whether to hold a joint hearing, the tribunals shall consider representations by the parties (and other participants, depending on the terms of their participation) as to whether a joint hearing should be held. A joint hearing shall not be held

- unless it would be expeditious to do so
- if a joint hearing would cause significant unfairness to a participant, or
- if it is not possible to comply with a participating tribunal's enabling legislation using the joint process.

The tribunals conducting a joint hearing may sever it if it appears in the course of the hearing that

- holding it jointly is causing significant unfairness to a participant, or
- it is not possible to comply with a participating tribunal's enabling legislation using the joint process.

Where a joint hearing is severed, the evidence and submissions already made may be applied to the separate hearings that ensue, to the extent that doing so causes no significant unfairness to the participants, and does not conflict with the enabling legislation of the tribunals.

Explanatory Notes

Purpose
This provision is intended to allow a tribunal to participate in joint hearings with tribunals outside the jurisdiction as well as with other tribunals in the province.

It is meant to increase efficiency by essentially running two parallel hearings side-by-side, admitting the same evidence and submissions, or parts thereof, for both proceedings. It is not meant to create a third tribunal with jurisdiction over both matters. (If this were desirable it could be done in the enabling legislation of both tribunals, with additional provisions as to panel representation, quorums, and so on.)

Procedures for joint hearings
Prior to conducting a joint hearing, the tribunals involved should meet to determine matters such as

- who will chair the hearing
- which tribunal's procedural rules will govern
- the procedure for reaching the decision or decisions
- the implications for appeals.

Though some of each tribunal's procedural rules could be compromised for this type of hearing (deviation from procedural rules for a particular case is permitted under Provision 19(2)), the joint hearing procedure cannot conflict with the enabling legislation of any of the tribunals involved.

For example, if the same decision is to be applied to a matter as it arises before two tribunals, it will be necessary to require that the decision of the joint panel must be concurred in by at least as many members from any single tribunal as comprise the majority of the panel of that tribunal. (Alternatively, a panel from each tribunal may make its own decision.)

E. Pre-hearing Conference

PROVISION 14.1
A tribunal may conduct a pre-hearing conference.

PROVISION 14.2
A tribunal may designate a person, who need not be a member of the adjudicative branch of the agency, to preside at a pre-hearing conference and to make orders relating to scheduling of the proceeding. Such orders may include, among others,

- fixing the commencement, and estimated duration, of the hearing
- orders and dates for
  - filing or exchange of: documents; witness statements; medical examinations; experts' reports; experts' qualifications; admissions
  - proof by affidavit
  - agreed statements of facts
  - provision of particulars
- 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 (e.g. jurisdictional challenges, extensions of time limits, bias, constitutional questions).

Where a tribunal has the power to issue a subpoena on the request of a participant, this may be done by a person presiding at a pre-hearing conference under this provision.

Appeal of an order under this provision may be made to a single adjudicative member designated under Provision 14.3, or if none, to the tribunal.

Where a participant does not comply with an order under this provision, the tribunal may limit or bar participation and the presentation of issues or evidence that were the subject of the order at the hearing, subject to the requirements of fairness

PROVISION 14.3

The tribunal may designate a single member of the adjudicative branch of the agency to preside at a pre-hearing conference and to act with the full powers of the tribunal to make orders in relation to the following matters:

- appeals from orders under Provision 14.2
- objections to subpoenas
- standing of parties and non-party participants
- identification, simplification of issues
- the exploration of settlement possibilities; re-routing of the matter to separate ADR proceedings
- orders for disclosure of evidence by the tribunal 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.

Appeal of an order under this provision may be made to a full panel of the tribunal.

Where a participant does not comply with an order under this provision, the tribunal may limit or bar participation and the presentation of evidence that was the subject of the order at the hearing, subject to the requirements of fairness.

NOTE: Adoption and approval of this provision for a tribunal's rules need not include all of the powers listed. For some tribunals it may be better to have some of these matters decided at the inception of the hearing by the full panel.

PROVISION 14.4

Notice of a pre-hearing conference under Provision 14.2 or 14.3 shall be given to all persons who are entitled to receive notice of a hearing.

Explanatory Notes

Purpose

These provisions provide a mechanism for conducting proceedings in an efficient and orderly manner. They also save resources by allowing a staff member or single adjudicative member, as appropriate, to make ordering and preliminary decisions.

Relation to statutory minimum for size of hearing panel

The power to designate a single adjudicative member to make orders under Provision 14.3 is significant only if the enabling legislation provides that a panel of more than one person is to hear a matter, or if it is silent on the point (in which case it may be presumed that matters are to be heard by all members of the tribunal).[66] Provision 14.3 is meant to be available, subject to ministerial approval, to tribunals in either of these categories. The clause allowing appeal of an order to the full panel would resolve any conflict between 14.3 and the statutory minimum for the hearing.[67]

Even where a single tribunal member has power to make orders such as those listed in Provision 14.3 independently of the provision (either under its enabling legislation or by virtue of Provision 22.1), the provision is still useful to provide guidance as to the types of matters that can be dealt with in a pre-hearing conference.

Provisions complement existing powers

The listing of matters under these provisions such as,

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[66] But note Provision 22.1, under which the tribunal (or tribunal chair) may, in the absence of a statutory minimum, designate one or more members to carry out any of the functions of the tribunal (and may do so despite a statutory minimum with consent of the participants). Adoption of this provision would allow designation of a single member to make orders in relation to the matters listed in 14.3 in the absence of a statutory minimum (or if there is a minimum, would allow this if there is consent).

[67] A member whose decision was the subject of an appeal under Provision 14.3 could not participate in hearing the appeal. Therefore in order to designate a single member under 14.3, the structure of the tribunal must be such as to allow a quorum of members to hear an appeal in the absence of the member making the order.

- orders for filing and exchange of documents
- issuance of subpoenas and rulings on objections thereto
- orders for disclosure of evidence on the participants' or a tribunal's own motion, or
- determination of standing

as matters that may be dealt with at a pre-hearing conference, presumes for a given case that a tribunal possesses the power to do these things under its enabling legislation or the common law (or by virtue of the adoption of other provisions in this Code). Their inclusion in Provision 14.2 and 14.3 would make it possible for staff member or a single adjudicative member, as appropriate, to decide issues, at an early stage, that would otherwise fall to be decided by a full panel in the full hearing context. A tribunal should adopt only those parts of Provisions 14.2 and 14.3 that reflect powers they otherwise have.

Subpoenas under Provision 14.2
Provision 27 sets out rules for issuing subpoenas.

Participation of presiding officers in adjudication
To retain flexibility and accommodate limitations in tribunal staffing, the Code does not contain a rule prohibiting the participation of a tribunal 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 should not normally preside at the hearing unless the participants give their consent.*

Enforcement
Provisions 14.2 and 14.3 include sanctions for failure to comply with pre-hearing orders. A tribunal may also have power to award costs and hearing expenses under its enabling legislation. Depending on the nature of the costs power, consideration may be given in determining the costs award to whether or not the participants complied with orders issued at a pre-hearing conference. Note also Provision 49, which deals with the power of tribunals to bring contempt proceedings for failure to obey particular types of tribunal orders.

F. Investigations

1. Authorizing staff to conduct informal investigation

PROVISION 15

A tribunal may direct staff to carry out an 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.

Explanatory Notes

The mandate of many tribunals implies that they may obtain and rely on such information. This is often true for tribunals whose mandate is not primarily or necessarily to adjudicate between opposing party-driven positions, but requires them to take into account other relevant information and the public interest. Many such tribunals have express powers relative to investigations. Tribunals that have such a mandate and therefore an implied power, but no express power, may select this provision for their rules for the sake of certainty. (Note that no coercive power is attached, in contrast to Provision 16, which follows.)

A tribunal that directs investigations or relies on information derived from them should have regard to the law related to the subject of institutional bias created by overlapping of investigative and adjudicative functions. There is authority that an overlap of functions that is authorized by statute is permissible.

See *Barry v. Alberta (Securities Commission)* [1989] 1 S.C.R. 301, (1989) 35 Admin. L.R. 1 (S.C.C.); *E.A. Manning Ltd. v. Ontario (Securities Commission)* (1995), 32 Admin. L.R. (2d) 1 (Ont. C.A.), at 9; *Zundel v. Canada (Minister of Citizenship & Immigration)* (1997), 7 Admin. L.R. (3d) 126 (F.C.A.).

But see *2747-3174 Quebec Inc. v. Quebec*, [1996] 3 S.C.R. 919, 42 Admin. L.R. (2d) 1 (S.C.C.); *Tanaka v. Certified General Accountants' Assn. (Northwest Territories)* (1996), 38 Admin. L.R. (2d) 99 ((N.T. S.C.); *MacBain v. Canadian Human Rights Commission* [1985] 1 F.C. 856; (1985) 16 Admin. L.R. 109 (F.C.A.).

Note also that the use of information obtained outside the hearing context is subject to the requirements in Provision 34.2 (which sets out the rights of parties to know and respond to the case they are to meet), and Provision 43.1 (which provides that a decision-maker may not take into account in reaching a decision facts whose substance was not disclosed, and in relation to which no opportunity for comment was given).

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

This provision should not be included in the proposed *Administrative Powers and Procedures Act*.

PROVISION 16 [Extra-Code Provision]
A tribunal may [obtain information by way of agency officers who have statutory powers of inspection] [obtain information by issuing warrants for search and seizure] [obtain information by applying to the court for warrants of search and seizure].

Explanatory Notes

Provision 16 will be contained in the list of powers to be considered for inclusion in a tribunal's procedural rules by amendment to its enabling legislation or by regulation (this list is at page 183). It will not be included in the proposed *Administrative Powers and Procedures Act*. The demand for the provision would likely be small, as tribunals whose mandate calls for such powers are normally invested with them at the time the tribunal is constituted. Further, 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 tribunal'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 a tribunal-by-tribunal 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.)

A tribunal seeking such investigative powers should have regard to the 'institutional bias' concerns raised in the Explanatory Notes under Provision 15, as well as to the limitations regarding use of information that are noted there.

3. Views

PROVISION 18

Where it appears to be in the interests of justice, a tribunal may direct that its members and the parties (and other participants, depending on the terms of their participation) and their counsel or agents shall have a view of any place or thing. Prior representations by participants need not be required, but parties (and other participants, depending on the terms of their participation) shall be given prior notice, and entitled to attend.

Explanatory Notes

Views in civil proceedings are permitted under Alberta *Rules of Court*, R. 253. The cases relative to this provision contain a discussion of the purposes for which views may be used, that is, whether they may be used only to explain or interpret existing evidence, or whether the view is evidence itself. There is contrary authority on this point. In *G. & J. Parking Lot Maintenance v. Oland Construction* (1979) 16 A.R. 293 (S.C., T.D), it was said at 296 that:

> The Alberta rule is that once the view has been taken, the trial judge sitting alone is entitled to take into consideration that which he sees on his inspection as being, in itself, evidence which is to be related to all of the other evidence before him for the purpose of making his decision.

This case was cited in *Mangion v. Managen Project Management* (1989) 96 A.R. 122. (Q.B.). But see *Sunnyside Nursing Home v. Bldrs. Centr. Mgmt.* [1985] 4 W.W.R. 97 (Sask. Q.B.), where it was said at 123 that the better

approach is "that a view may be used only to assist the judge to better understand and apply the evidence given at trial".[68]

[68] The judge's reasoning included the observation that there is no right to cross-examination of judge-made evidence. In Sopinka, Lederman and Bryant, *The Law of Evidence in Canada*, Butterworths, 1992, the authors comment, citing authorities, that in Alberta and Manitoba, the trier of fact is entitled to base findings of fact on views, while in Ontario, Saskatchewan, New Brunswick and Newfoundland, a view may be used only to clarify a witness' testimony.

PART 2. HEARING POWERS AND PROCEDURES

Overview:
This part deals with the rules that are to govern the hearing itself.

A. Power of tribunal to adopt procedures, give directions: This provision ensures not only that a tribunal can adopt procedures of general application that are tailored to its needs; it also allows adoption of special procedures where such are called for in a particular circumstance, so long as the requirements of the enabling legislation and of fairness to the participants are met where this is done.

B. Standing: This provision clarifies the basis on which standing is to be granted to participants, both parties and non-party participants, 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: This provision sets 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 larger tribunals. They allow for panels to be constituted with less than the full number of tribunal members. They also provide for the designation and duties of the panel chair, deal with how a quorum is to be determined, and make provision for completion of hearings where a member of a panel ceases to be a member or is incapacitated.

E. Public/ Private: This provision sets out the exceptions to the principle that hearings are to be open to the public, and deals with what may be ordered when one of the exceptions is met. It also deals with how openness can be achieved in written and electronic hearings.

F. Written/ Electronic/ Oral: Again to promote efficiency, this provision authorizes a tribunal to hold hearings in various forms, and in mixed forms.

H. Evidence: This provision hinges on the power of tribunals to control their process. It affirms the power to deviate from the formal rules of evidence, but imposes a requirement that this not be done where it would cause unfairness.

I. Witnesses: The section on witnesses covers the power of tribunals to compel the attendance of witnesses and the production of documents or other evidence. It also deals with the power to administer oaths, and to receive evidence from panels of witnesses heard at the same time. It addresses the interaction between the hearing panel and witnesses. Finally, it deals with the ability of the hearing panel to obtain information by consultation, and the duties imposed on the panel in relation to participants when this is done.

J. Disclosure: This section authorizes tribunals to order disclosure of information as between participants. It also includes a provision that can empower tribunals 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? Because of the diverse nature of tribunal decision making, the Code does not provide for 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, it sets out a standard for participation that can be adapted to suit the case–the right in participants to know and respond to the case they are to meet.

The remaining provisions (*G, K and M)* address the power to grant adjournments, matters of which the tribunal may take notice without receiving evidence, and the duties of tribunals with respect to compiling records and recording the proceedings.

A. Power of Tribunal to Adopt Procedures, Give Directions

PROVISION 19.1
Subject to its enabling statute and regulations, a tribunal may adopt rules of procedure of general application to govern its proceedings.

Explanatory Notes

A tribunal that adopts the powers and procedures in the Model Code, or has or adopts parallel procedures, may wish to include this provision in its rules to signify that it may supplement such procedures with additional rules of its own making.

The power of tribunals to determine their own procedural rules, subject to the requirements of fairness, is set out in *Kane v. University of British Columbia* [1980] 1 S.C.R. 1105 (S.C.C.). Commenting on the powers of the university's Board of Governors, deciding the suspension of a faculty member, to determine its own procedures, the Supreme Court said, at 1112:

> The Board is free, within reason, to determine its own procedures, which will vary with the nature of the inquiry and the circumstances of the case.

The Supreme Court also affirmed the ability of tribunals to tailor their procedures to meet the requirements of their mandate, subject to fairness and the requirements of the enabling legislation, in *Innisfil (Township) v. Vespra (Township)* [1981] 2 S.C.R. 145 (S.C.C.). The court said, at 169-70:

> The procedural format adopted by the administrative tribunal must adhere to the provisions of the parent statute of the Board. The process of interpreting and applying statutory policy will be the dominant influence in the workings of such a tribunal. Where the Board proceeds in the discharge of its mandate to determine the rights of the contending parties before it on the traditional basis wherein the onus falls upon the contender to introduce the facts and submissions upon which he will rely, the Board technique will take on something of the appearance of a traditional court. Where, on the other hand, the Board, by its legislative mandate or the nature of the subject matter assigned to its administration, is more concerned with community interests at large, and with technical policy aspects of a specialized subject, one cannot expect the tribunal to function in the

> manner of the traditional court. This is particularly so where Board membership is drawn partly or entirely from persons experienced or trained in the sector of activity consigned to the administrative supervision of the Board. Again where the Board in its statutory role takes on the complexion of a department of the executive branch of government concerned with the execution of a policy laid down in broad concept by the Legislature, and where the Board has the delegated authority to issue regulations or has a broad discretionary power to licence persons or activities, the trappings and habits of the traditional courts have long ago been discarded.

See also *Knight v. Indian Head School Division No. 19* [1990] 1 S.C.R. 653, at 685, (1990), 43 Admin. L.R. 157, at 189 (S.C.C.); *Baker v. Canada (Minister of Citizenship and Immigration)* [1999] S.C.J. No. 39 (S.C.C.) (Q.L.).

Note Provision 53, which requires that a tribunal's procedures of general application be made public.

PROVISION 19.2

Notwithstanding that it has adopted procedures of general application, a tribunal may, on its own motion or on the motion of a participant, adopt particular procedures for a given case, or vary existing procedures for a given case, subject to the requirements of fairness, and subject to its enabling statute or regulations.

Before deciding whether to vary existing procedures for a given case, the tribunal shall provide parties (and other participants, depending on the terms of their participation) with an opportunity to make representations on the question of whether procedures should be varied. It shall not vary procedures where to do so would cause significant unfairness to a participant.

Explanatory Notes

In *Kane v. University of British Columbia*,[69] in affirming a tribunal's powers to determine its own procedures, the Supreme Court recognized that

[69] This case is cited in the Explanatory Notes under the preceding section.

procedural needs "will vary with the nature of the inquiry and the circumstances of the case." (at 1112).

PROVISION 19.3

Participants may waive their procedural rights provided they are aware of the right. Waiver of a procedural right may be deemed where a participant knowingly fails to take advantage of it.

Explanatory Notes

There is some authority to the effect that at common law there cannot be waiver of a serious breach of natural justice, based on the theory that such a breach goes to jurisdiction.[70] The authors in *Macaulay* take the view, however, that a breach of the rules of natural justice does not go to jurisdiction "in the narrow sense of the ability of a body to enter upon an enquiry" (citing *S.E.I.U., Local No. 333 v. Nipawin District Staff Nurses Association* [1975] 1 S.C.R. 382 (S.C.C.).) Jurisdiction is lost by the breach only because a statutory authority must impliedly be exercised fairly, and failure to apply a rule is not unfair to a party that has waived application of the rule.[71] Therefore procedural rights may be waived even though they would otherwise constitute breaches of natural justice.

There are many cases holding that participants have impliedly waived their procedural rights. For a case dealing with implied waiver of the 'he who hears must decide' rule, see *Protection Society v. British Columbia (Environmental Appeal Board)* (1988), 34 Admin. L.R. 51 (B.C. S.C.).[72] See

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[70] See *Mayes v. Mayes*, [1971] 2 All E.R. 397.

[71] (*Supra*, note 13) at 22.3.1(f).

[72] The court accepted the principle that serious breaches of the 'he who hears' rule could not be waived, but concluded that the breach of the rule in the case before it (a six-minute absence by a member of the panel) had not been serious. The court did not consider the point noted in *Macaulay (supra, note 13), at 22.3.1(f)*, that breaches of natural justice do not go to jurisdiction in the narrow sense, and therefore can be waived. The authors in Macaulay take the position that the "audi alteram" principle is capable of waiver at common law. However,
(continued...)

also *Re Imperial Tobacco Co. and McGregor*, [1939] O.R. 627 (C.A.), and *Yassine v. Canada (Minister of Employment and Immigration* [1994] F.C.J. No. 949 (Q.L.), (1994), 172 N.R. 308 (F.C.A.). The first of these cases involved a tribunal's failure to supply information from an investigative proceeding, and the second involved a reliance on information received after the hearing (but in relation to which an opportunity for comment had been given). In each case the procedural right was held to have been impliedly waived by conduct. See also *Canada (Human Rights Commission) v. Taylor* [1990] 3 S.C.R. 892 (S.C.C.), in which the right to raise an allegation of bias was impliedly waived by the failure to raise it at the earliest opportunity.[73]

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[72] (...continued)
they add that waiver must be explicit.

[73] See also the discussion and cases on waiver in *Macaulay* (*supra*, note 13) at 12.22(a). The authors note that procedural rights can be waived only where the right is for the benefit of participants, rather than for the public, citing relevant cases (and see 16.3(c)).

B. Standing

PROVISION 20.1

A tribunal shall grant party standing in a proceeding before it to

- persons who qualify as parties under statute
- persons who are named as parties in the application who are directly involved in the matter before the tribunal and directly affected by the tribunal's determination therein, and
- persons who apply who are directly involved in the matter before the tribunal and directly affected by the tribunal's determination therein.

PROVISION 20.2

A tribunal shall grant standing to participate in a proceeding before it to

- applicants who qualify as participants or interveners under statute
- applicants who are directly affected by the tribunal's determination of the matter before it.

PROVISION 20.3

A tribunal may, at its discretion, grant standing to participate in a proceeding before it to

- applicants who are affected by the tribunal's determination of the matter before it
- applicants who represent the public interest
- applicants who can contribute a novel argument or perspective.

PROVISION 20.4

Where a tribunal grants standing to persons under Provisions 20.2 or 20.3, it may specify the extent of their participation rights, including their rights under any rules of the tribunal that deal with participation rights.

Explanatory Notes

Purpose

The provisions in this section are available for adoption by tribunals whose enabling legislation does not address, or does not fully address, the question of who is entitled to participate in the tribunal's proceedings. Some tribunals may need only some parts of the provision. Where a selection is to supplement existing provisions in the enabling legislation that deal with standing, it should be clear that the existing provisions are not meant to be exhaustive, and that the selected provisions conform with the purpose of the enabling statute.

Categories of participants

Provision 20.1 identifies those who are involved in and affected by a matter in such a way that they are to be given full party standing under the provisions of the Model Code (or the tribunal's equivalent rules). It captures both those recognized by the enabling legislation as being directly involved in and affected by the matters with which the statute deals, and those who the tribunal determines have such an involvement. The standard in this provision adds an element to the "directly affected" test. It includes the requirement of "direct involvement" in the sense that a person granted standing under the second and third sub-clauses must have an interest with which the matter before the tribunal is directly concerned. Whether a person is named in the application as a party is not determinative of the standing issue under the provision, as an applicant may fail to name a person who should have been included in the sense that they have an immediate and direct involvement in and are directly affected by the issue raised by the application. Conversely, a person may be named who does not have the requisite interest.

Provision 20.2 sets out those who have an interest in the matter such that, though they are granted an entitlement to participate, it may be appropriate to limit their participation rights to reflect the nature of their interest. Again, this provision captures both those recognized by the enabling legislation as having an important interest in the matters which the statute addresses, and

those who the tribunal determines have such an interest. Persons who are "directly affected" in this category are included because the common law requires that such persons be given an opportunity to participate,[74] but the appropriate level of participation may be varied depending on the interest and how it is affected.

Provision 20.3 allows for participation by others who are affected to some degree by, or may make a useful contribution to, the tribunal's determination, but who do not meet the criteria in Provisions 20.1 or 20.2. Standing under this provision is discretionary, and again, the tribunal may limit the extent of participation.[75]

Rights for each category

Various provisions of the Model Code provide specific rights to parties to participate in the proceedings. For example, some confer a right to make submissions on particular questions, or require consent, or require that particular information or presentation opportunities relative to the substance of the matter be given. 'Parties'–persons granted standing under Provision 20.1–will have full rights under these provisions (or the tribunal's equivalent rules). (However, party standing is not meant to indicate that persons with

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[74] See the discussion of "'directly affected" in the Explanatory Notes under Provision 1, at 42.

[75] On the question of whether any parts of Provision 20 could be used by an appellate tribunal to grant standing in a proceeding to the decision maker whose decision is the subject of the appeal, see *Bambrick, Re* (1992), 10 Admin. L.R. (2d) 112 (Nfld. T.D.). The court said at 133 that "in principle, the role of an administrative tribunal on the hearing of an appeal or judicial review of its own decision should be limited to questions of jurisdiction in the strict sense [this excludes the issue of denial of natural justice], coupled with (presumably where necessary) an explanation of the record which was before the tribunal itself". The court was concerned to avoid discrediting the impartiality of the decision maker by allowing it to engage in adversarial confrontation as to whether it had observed natural justice, or as to the merits of the matter, before the appeal tribunal. This principle applies even where the right to appear is given by statute. But see *C.A.I.M.A.W., Local 14 v. Cdn. Kenworth Co.*, [1989] 2 S.C.R. 983, where the court granted standing to the Canadian Labour Relations Board with respect to alleged breaches of natural justice. See also *Canada (Attorney General) v. Canada (Human Rights Tribunal)* (1994), 19 Admin. L.R. (2d) 69 (F.C.T.D.); *Mocyk v. East Peace No. 131 (Municipal District)*, [1996] 2 W.W.R. 497 (Alta. C.A.).

A first-level decision maker might be granted standing to participate under the third sub-clause of Provision 20.3, but the appellate tribunal could limit the terms of the participation in accordance with the case law cited.

this status have full control over the proceedings. Pursuant to Provision 34.2, tribunals are required to provide parties with a fair opportunity to know and respond to the case they are to meet. The form and extent of the rights to receive information, present evidence, cross examine, make submissions on substantive matters, and so on, that will meet this standard will vary depending on the nature of the decision to be made.)

For those granted standing under Provisions 20.2 and 20.3, the tribunal has discretion to determine their participation rights, including their rights under the various rules relating to participation. Thus such a person may or may not be given a right to make a submission on a particular procedural question, or to veto a settlement. The tribunal also retains a discretion under Provision 34.2 to decide the form and extent of the right of such participants to be provided with information, to present evidence, make submissions on substantive issues, etc. This reflects the fact that fairness and efficiency may require that non-party participants be given only a limited role in a proceeding (for example, as one of many participants with the same interest, or as having an interest in only one of many issues, or a minor interest). In such cases, the discretion allows the tribunal to tailor the extent of the non-party participant's participation rights to suit the more limited role, by providing only such information and presentation opportunities as enable them to fulfill this role effectively.

Public interest standing: interveners/ applicants

In some cases, persons who represent the public interest may be applying to intervene in an application brought by another, and may be granted non-party participation standing under Provision 20.3.

Persons representing the public interest might also appear before a tribunal seeking to initiate a proceeding, either before a first-level decision maker, or before an administrative body that has authority to review or hear an appeal from the decision of another statutory decision-maker.[76] Such persons might

[76] A number of cases have granted public interest standing to challenge the validity of the exercise of administrative authority *before the courts* to persons or groups meeting the criteria for public interest standing under the common law rules for civil litigation. The criteria are:
(continued...)

be granted party standing under the third sub-clause in Provision 20.1 on the basis that their public interest (a 'genuine interest' coupled with their status as the only persons who will bring the matter forward effectively) qualifies them as directly involved in and affected by a matter. In *Friends of the Island Inc. v. Canada (Minister of Public Works)* (1993), 102 D.L.R. (4th) 696 (T.D.), at 735-737, the court held that persons representing the public interest met the "directly affected" requirement in legislation that allowed applications for judicial review of the decision at issue in the case.[77] There may be circumstances in which persons who seek to initiate a proceeding on the basis of public interest meet the criteria under Provision 20.1.[78]

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[76] (...continued)

1) the issue is justiciable
2) a serious issue is raised
2) the applicant has a genuine interest as a citizen
3) there is no other reasonable and effective manner in which the issue may be brought forward.

See *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607, (1986) 23 Admin. L.R. 197 (S.C.C.); *Friends of the Island Inc. v. Canada (Minister of Public Works)*, [1993] 2 F.C. 229 (T.D.); *Friends of the Old Man River Society v. Assn. of Professional Engineers, Geologists and Geophysicists (Alberta)* (1997), 2 Admin. L.R. (3d) 206, at 223 *et seq.* (Alta. Q.B); *Sunshine Village Corp. v. Banff National Park (Superintendent)* (1996) 44 Admin. L.R. (2d) 201 (Fed. C.A.).

[77] The legislation was s. 18.1(1) of the *Federal Court Act*, R.S.C. 1985, c. F-7, which provides that "An application for judicial review may be made by ... anyone directly affected by the matter in respect of which relief is sought.". The court said, at 737, that

> ... the wording in s. 18.1(1) allows the court discretion to grant standing when it is convinced that the particular circumstances of the case and the type of interest which the applicant holds justify status being granted. (This assumes there is a justiciable issue and no other effective and practical means of getting the issue before the courts.)

[78] This approach has not been successful in Alberta in the circumstances in which it has been tried so far. *C.U.P.E. Local 30 v. WMI* (1996), 34 Admin. L.R. (2d) 172 (Alta. C.A.) involved an application for standing before the Public Health and Advisory Appeal Board to appeal a decision of the Edmonton Local Board of Health to approve a waste management facility. Under the relevant legislation, appeals can be brought by persons who are "directly affected" by a decision of the local board. The court held that "the establishment of a public interest is not sufficient to constitute a direct affect" (at 179) The court also noted that "no authorities have been cited to suggest that the expansion of the principle of public interest standing has been applied to administrative tribunals" (at 178). (But see *Friends of the Old Man River Society v. Assn. of Professional Engineers, Geologists and Geophysicists (Alberta)* (1997), 2 Admin. L.R. (3d) 206 (Alta. Q.B), at 234, in which the Alberta Court of Queen's Bench pointed out that there is authority to extend the principle of public interest standing to administrative law. Presumably the Court of Appeal meant that there was no authority where the appeal was from one statutory decision-maker to another.) See also *Friends of the*

(continued...)

Considerations under Provision 20.3

In making a discretionary decision whether to grant standing under Provision 20.3, a tribunal should consider whether the addition of participants will add disproportionately to the cost of the proceeding, or cause delay in a time-sensitive matter, for example, some labour relations, environmental or economic matters. It may also be inappropriate to add participants to assist the tribunal where there are privacy concerns and the additional information can be supplied by other means.

Notification of persons who may apply

The provisions in this section are related to Provision 1.1, which sets out the persons who are to be notified of an application. Provision 1.1 ensures, so far as possible, that persons who are entitled to standing , or who might be granted standing on a discretionary basis, will be notified and thereby given an opportunity to apply.

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[78] (...continued)
Athabasca Environmental Assn v. Alberta (Public Health Advisory & Appeal Board) (1996), 34 Admin. L. R. (2d) 167 (Alta. C.A.) in which two environmental groups had sought standing before the PHAAB to appeal a decision of a Health Unit approving a waste management facility; the application was denied because in the court's opinion the environmental groups did not meet the "directly affected" test in the circumstances. The court also said that showing a "genuine interest" does not qualify an applicant for standing under the "directly affected' criterion.

There may, nevertheless, be circumstances in which persons who represent the public interest do meet the criteria in Provision 20.1.

C. Notice of Hearing

PROVISION 21.1

A tribunal shall ensure that the following persons are notified of a pre-hearing conference or hearing

- parties
- persons granted standing under Provisions 20.2 or 20.3 (or a tribunal's equivalent rules)
- persons who have applied for standing whose standing has not been determined.

Note: This Provision assumes that the persons listed in Provision 1 have been notified of the application. Where a pre-hearing conference or hearing is to be held and some or all of these persons have not been so notified, the list in Provision 1 setting out who is to be notified of receipt of an application is to apply to notification under Provision 21.1.

PROVISION 21.2

The timing of the notice shall be such as is required by statute, or where there is no statutory requirement, it shall be reasonable notice.

PROVISION 21.3

The notice of a pre-hearing conference or hearing shall contain

- a general 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 tribunal, and about the tribunal's procedural rules
- where a tribunal proposes to conduct the hearing in a form other than an oral hearing, notice of this fact, together with notice of the opportunity to object to the proposed or chosen form.

Explanatory Notes

Purpose

The purpose of Provisions 21.1 to 21.3 is to ensure that persons who are entitled to be involved in a proceeding, or whose involvement may be permitted by a tribunal, are notified and thus given an opportunity to participate. It also ensures that persons will be given sufficient information to know whether they wish to be involved. More detailed provisions with respect to the information with which they must be supplied to enable them to participate effectively in the hearing, or before the final decision is made, are set out in Provisions 34.2 , 34.3 and 43.1.

Objections to forms other than oral

With respect to the final sub-clause of Provision 21.3, the effect of objecting to written or electronic hearings is addressed in Provision 24.

PROVISION 21.4

In appropriate circumstances the tribunal may direct that notice under this provision be given by the participants.

PROVISION 21.5

The tribunal may approve alternate forms of notice where notice to individuals is impracticable, or where a person to be notified is avoiding service of notice.

Explanatory Notes

An example of an alternate form of notice is publication in a newspaper that is under general circulation in the relevant area, 30 days in advance of the proceeding.

Apart from Provisions 21.4 and 21.5 (and parallel provisions under the 'Acknowledgments and Notifications' section), the Model Code does not include rules respecting service of notice (or of other documents), as such

rules were thought to contain too much detail. However, tribunals are encouraged to develop and adopt their own rules for service, and to make them publicly available. See Part 4, N,[79] which refers to the standardized rules in relation to the service of documents contained in the *Federal Administrative Hearings Act*,[80] and lists the kinds of things covered by the rules.

[79] At page 181.

[80] This document is reproduced in *Macaulay* (*supra*, note 13) at 38.2.

D. Hearing Panels

PROVISION 22.1

The [tribunal] [tribunal chair] may do the following:

- designate hearing panels comprised of one or more tribunal members to preside over a hearing and decide any matters, with the full power of the tribunal (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 parties (and other participants, depending on the terms of their participation).
- designate a panel chair

Explanatory Notes

The choice between tribunal and tribunal chair is included, in this and subsequent provisions, because not all enabling legislation makes provision for the appointment of a chair.

Ad Hoc Tribunals

The first sub-clause is not meant to apply to (and should not be selected in relation to) tribunals that are constituted to decide a particular matter. In such cases the legislation commonly sets out the number of persons to be appointed, and may also give some instruction as to their qualifications. It would not be appropriate for such bodies to delegate the substantive part of their function to fewer than the full number of appointees.

Pre-hearing conference decisions

Note also Provisions 14.2 and 14.3, which enable tribunals to designate a staff member or single adjudicative member to decide ordering and preliminary substantive matters in the context of a pre-hearing conference. These provisions are meant to apply, where incorporated, regardless of a statutory minimum of panel members. They could also apply, where

appropriate, to *ad hoc* tribunals, though consideration would need to be given to whether there would be a quorum to hear an appeal in the event there is an appeal from the pre-hearing order of the single decision-maker (noting that this person could not participate in the appeal).

PROVISION 22.2

A tribunal's rules shall contain the following:

- the panel chair is responsible 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 shall be
    - 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 [tribunal] [tribunal chair], or
    - where no designation or statutory minimum, the majority of members of the panel
- where a member's term expires, that member may continue to hear any matter which they began to hear before the term expired; the member may be paid for work done after their term expires (subject to the administrative direction of the [tribunal] [tribunal chair])
- where the member of a single-member panel is incapacitated, the decision may be made on a basis agreed on by parties (and other participants, depending on the terms of their participation), or if there is no agreement, the matter may be re-heard by a different panel
- where a member of a multi-member panel is incapacitated, the hearing may be completed by the remaining members, either where there is a quorum without the incapacitated member, or where the parties (and other participants, depending on the terms of their participation) consent; where a member of a multi-member panel is incapacitated and completion by the above methods is not possible, the decision may be made on a basis agreed on by the parties (and other participants, depending on the terms of their participation), or if there is no agreement, the matter may be reheard by a different panel.

Explanatory Notes

Some tribunals may need only some parts of this provision.

Interpretation Act

Section 17(2) of the *Interpretation Act*[81] provides for the quorum for a meeting of a statutory board of three or more members, (½ 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).[82]

Examples, for the purpose of the last two sub-clauses, of methods for decision to which parties/participants may agree are:

- a decision by the by the tribunal chair on the basis of the record
- a decision by a different panel on the basis of the record.

Where the hearing has not been completed, the parties/participants could agree to have the chair or a different panel complete the hearing and rely on the record for the part they did not personally hear.

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[81] R.S.A. 1980, c. I-7.

[82] 17.1 If in an enactment an act or thing is required or authorized to be done by more than 2 persons, a majority of them may do it.

E. Public/Private

PROVISION 23.1

A hearing shall 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
- a public hearing would compromise the ability of a witness to testify
- any other matter sufficiently important to justify a hearing in private.

A hearing shall be held in private where this is required by statute.

The decision to hold a hearing in private may be made on the tribunal's own motion or on the motion of a participant.

Explanatory Notes

There are some types of proceedings that should always be private because one of the exceptions to openness is routinely met. This provision should not be selected for the purpose of such proceedings.

Some tribunals have broad powers in their enabling legislation to hold private hearings, and permit exclusions and restrictions on disclosure. See, for example, the *Freedom of Information and Protection of Privacy Act*,[83] the *Dependent Adults Act*,[84] and the *Child Welfare Act*.[85]

(However, where the matters with which a tribunal deals are of public importance, and there is accordingly a strong public interest in the openness of the proceedings, a provision in a tribunal's rules that hearings shall

[83] S.A. 1994, c. F-18.5.

[84] R.S.A. 1980, c. D-32.

[85] S.A. 1984, c. C-8.1.

always be held in private may be in conflict with the right to freedom of the press under s. 2(b) of the *Charter of Rights*.

See *Canadian Broadcasting Corp. v. Summerside (City)* [1999] P.E.I.J. No. 3 (Q.L.) (S.C.); *Southam Inc. v. Canada (A.G.)* (1997), 36 O.R. (3rd) 721 (Gen. Div.).

A practical exception to application of this Provision 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.

Another possible exception to the requirement for a public hearing that was considered is the case of an electronic hearing where openness is difficult to achieve as a practical matter because of the location of computerized or video conference facilities. However, this exception to the requirement was rejected, on the basis that the crowding of facilities does not justify closing a hearing in other contexts.

PROVISION 23.2

The principle of openness is satisfied by the following:

- In the case of a written hearing or the written part of a hearing, open means an opportunity to inspect the tribunal's record.
- In an electronic hearing, open means right of access to the place in which the hearing is held (in contrast to access to the electronic communication apparatus).

PROVISION 23.3

Where one of the exceptions in Provision 23.1 (or a tribunal's equivalent rules) is met, the tribunal may order any of the following:

- that the hearing be held in private
- that persons be excluded
- that persons be admitted on terms and conditions
- that restrictions be placed on the disclosure and publication of evidence
- that restrictions be placed on inspections of the tribunal's record under Provision 23.2 (or a tribunal's equivalent rules).

Explanatory Notes

With regard to restrictions on publication and disclosure of evidence or documents filed with the tribunal, the Code provision for restrictions should not be taken to indicate a general principle of openness for tribunals' files. For some tribunals, closed files may be the rule as one of the exceptions may be routinely met.

In some circumstances, for example where a witness is intimidated by a participant, exclusion of persons could include the exclusion of a participant. In such cases, the participant's counsel should be permitted to remain.

F. Written/Electronic/Oral

PROVISION 24

A tribunal may hold written, electronic, oral or mixed hearings.

Where a party (or other participant, depending on the terms of the participation) objects to a written or electronic hearing, the tribunal shall hear representations from the party or participant. The hearing (or relevant part thereof) shall be oral where the party or participant can demonstrate that it would cause significant unfairness to use another format.

Explanatory Notes

Onus

For some tribunals, for example some tribunals that deal with unrepresented participants, it may be inappropriate to place an onus on participants to establish that a hearing should be oral. Such tribunals could choose the first clause of the provision only. When contemplating a hearing in a form other than oral, such a tribunal should itself make the inquiry as to whether the contemplated format would cause unfairness.

Effective participation

For electronic hearings, fairness would require that this form of hearing did not interfere with the ability of participants to participate effectively.

Notice

A tribunal that proposes to hold a hearing in a form other than oral should give notice of this fact. See Provision 21.3, which provides that such notice is to issue together with the notice of the pre-hearing conference or of the hearing.

Cases

A tribunal's power to choose an appropriate form of hearing exists in the common law. In *Knight v. Indian Head School Division No. 19* [1990] 1 S.C.R. 653, at 685, 43 Admin. L.R. 157, at 189, (S.C.C.), the Court commented generally that "every administrative body is the master of its own procedure". With regard to a tribunal's having chosen a written rather than an oral form of hearing, the Court said:

> A 'hearing' will normally be an oral hearing. But it has been held that a statutory board, acting in an administrative capacity, may decide for itself whether to deal with applications by oral hearing or merely on written evidence and argument, *provided that it does in substance 'hear' them*;[86]

See also *Baker v. Canada (Minister of Citizenship and Immigration)* [1999] S.C.J. No. 39 (Q.L.) (S.C.C.). The court made the following comments with reference to an immigration matter:

> ... it cannot be said that an oral hearing is always necessary to ensure a fair hearing and consideration of the issues involved. The flexible nature of the duty of fairness recognizes that meaningful participation can occur in different ways in different situations.

After reviewing the opportunity given in the case for the appellant to put forward information relevant to humanitarian and compassionate considerations in written form through her lawyer, the court concluded that

> The opportunity, which was accorded, for the appellant or her children to produce full and complete written documentation in relation to all aspects of her application satisfied the requirements of the participatory rights required by the duty of fairness in this case.

In *Sarg Oils v. Alberta (Environmental Appeal Board)* (1996), 36 Admin. L.R. (2d) 134, at 156 (Alta. Q.B.), the court provided some guidance as to circumstances that demand an oral rather than merely written hearing. The tribunal had issued a decision on the basis of written submissions although

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[86] This portion of the Court's judgment is a quotation from Wade, H.W.R., *Administrative Law*, 5th ed., Oxford, Clarendon Press, 1982. (The Court added the emphasis, and omitted footnotes.)

applicant's counsel requested that an oral hearing be held.[87] The tribunal did not advise counsel that no oral hearing would be held, nor did it give counsel the opportunity to make further representations concerning the filed material. The court held that in the circumstances there was a denial of natural justice in the case, commenting that it was "not obvious that the Board would have come to the same conclusion if an oral hearing had been held".

For a general discussion of the common law requirements with respect to oral hearings see Jones and de Villars, *Principles of Administrative Law*, 3rd ed., Carswell, 1999, at 253-55.

Alberta *Administrative Procedures Act*[88]
Section 6 of the Act provides that the entitlement to make representations is not to be taken as an entitlement to make oral representations so long as the party is given an opportunity to make representations adequately in writing.

[87] Relevant sections of the governing regulation clearly referred to an oral hearing.

[88] R.S.A. 1980, c. A-2.

G. Adjournments

We recommend that a provision authorizing adjournments not be included in the proposed *Administrative Powers and Procedures Act*.

The power to grant an adjournment is a self-evident part of the tribunal's power to control its own process. (This power is stated in Provision 47). For this reason the *APPA* need not include a provision that specifically authorizes adjournments.

However, a tribunal may find it useful to set out factors to be considered when exercising its implied power to grant adjournments. The Ontario *Compendium of Model Rules* recommends that each tribunal create its own list of factors for deciding whether to grant an adjournment, and sets out a list of possible factors. These factors may be useful for Alberta tribunals that wish to develop such criteria. They are:

(a) whether all parties consent to the request;
(b) whether the purpose of the adjournment is to help to resolve the case through alternative dispute resolution;
(c) whether granting the adjournment would prejudice any party;
(d) whether denying the adjournment would prejudice any party;
(e) the number of previous requests already made and by whom;
(f) the reasons provided to support the adjournment request;
(g) any public interest urgency;
(h) the cost to the tribunal and the other parties of re-scheduling;

(i) evidence that the party made all reasonable efforts to avoid the need for the adjournment request;

(j) whether the adjournment is necessary to provide an opportunity for a fair hearing.[89]

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[89] The Compendium also provides an optional rule for adjournments as follows:

Adjournment requests will normally be handled in the following manner, although the Tribunal may adopt other practices for unusual circumstances:

- an adjournment to retain counsel will be granted only once;
- subsequent adjournment requests in order to change counsel will not usually be granted;
- an adjournment to allow a recently retained counsel or consultant to prepare will not usually be granted;
- a limited adjournment to permit the filing of a counter-application may be granted, on condition that the counter-application is filed within the time period directed by the Tribunal;
- an adjournment pending a court ruling on a similar issue in another case will not usually be granted;
- an adjournment to explore reasonable settlement possibilities may be granted with or without conditions;
- other reasons for an adjournment request will be considered on a case-by-case basis.

H. Evidence

PROVISION 26

A tribunal is not bound by the formal rules of evidence unless deviation from these rules would cause significant unfairness to the participants.

Explanatory Notes

Common law principle

The freedom of administrative tribunals from the technical rules of evidence that determine admissibility in courts of law is a principle of common law. Many cases that deal with the admissibility of evidence in administrative hearings note that tribunals are entitled to act on relevant material even if it is not evidence in a court as long as in so doing they adhere to the principles of natural justice.

See, for example *T.A. Miller v. Minister of Housing and Local Government*, [1968] 1 W.L.R. 192 (C.A.); *Canadian National Railways Co. v. Bell Telephone Co. of Canada and Montreal Light, Heat and Power Consolidated*, [1939] S.C.R. 308.[90]

There are also statutory provisions freeing tribunals from the formal rules of evidence in the enabling legislation of many tribunals.

Matters that should be excluded

The following should not be admitted as evidence in a hearing:

- information that is subject to privilege under the common law
- matters inadmissible under a statute[91] or under the *Charter of Rights* sections 13 or 24(2)[92]

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[90] See also *Hamilton v. Alberta (Labour Relations Board)* (1993), 19 Admin. L.R. (2d) 172 (Alta. Q.B.), in which the Labour Relations Board's application of an exclusionary rule of evidence was held to interfere with its overriding duty to find the facts.

[91] The freedom from the rules of evidence under Provision 26.1 probably frees a tribunal from restrictive rules under the provincial *Evidence Act*. See the discussion in *Macaulay* (*supra*, note 13) at 17.1(e).

[92] The Ontario *Statutory Powers and Procedures Act* expressly excludes evidence

- that would be inadmissible in a court by reason of any privilege under the law of

(continued...)

- settlement discussions.[93]

Common law privilege

In Brown and Evans, *Judicial Review of Administrative Action in Canada*,[94] the authors state that common law privilege applies to administrative law proceedings. The text entry, at 10:5470, is as follows:

> ... even where an administrative adjudicator had a statutory power to admit evidence that would not be admissible in a court of law, it was said that "failure to give effect to a rule of privilege or an exclusionary rule of evidence which embodies an important aspect of public policy might, without more, attract review" (citing *C.J.A. Local 579 v. Bradco Construction* [1993] 2 S.C.R. 316, at 344 (S.C.C.)).

The authors go on to comment that "the Ontario *SPPA specifically incorporates the common law rule* by providing that nothing is admissible in administrative proceedings covered by the Act that would be inadmissible in a court by reason of any privilege under the law of evidence." [emphasis added][95]

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[92] (...continued)
evidence, or
- that is inadmissible by the statute under which the proceeding arises or any other statute.

[93] See Provision 9.3 regarding admission of material relative to an ADR proceeding.

[94] Toronto, Canvasback Publishing, 1988.

[95] However, there are some cases in which administrative tribunals have been held to have the power to admit material that is privileged under the common law rules. See, for example, *Law Society (Sask.) v. Robertson Sromberg* (1996), 36 Admin. L.R. (2d) 158 (Sask. Q.B.), where the court said with respect to solicitor-client privilege:

> As a matter of public policy the Law Society, in conducting an investigation in the affairs of a solicitor, should be entitled to override any privilege claim for the public good. In my view the public interest in the ethical practice of law outweighs any solicitor-client privilege." (at 168).

The court also cited *Solosky v. Canada* [1980] 1 S.C.R. 82, a case allowing the director of a penitentiary to read mail passing between an inmate and his solicitor, in support of the proposition that "Competing policy considerations may override solicitor-client privilege." (at 171).

(continued...)

Copies

Copies of documents may be admitted in evidence if the tribunal is satisfied that they are authentic.

Irrelevant or repetitious evidence, or evidence not constituting a material contribution

Irrelevant or repetitious evidence can be excluded. Control of the admission of this type of evidence falls within a tribunal's right to control its process. (This power is stated in Provision 47.) However, the discretion to exclude marginally relevant material should be exercised with due caution to avoid unfairness.[96]

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[95] (...continued)

These conflicting views as to whether administrative tribunals may admit evidence that is the subject of a common law privilege might be reconciled on the basis that a privilege, even one embodying an important aspect of public policy, may be overridden by a tribunal where there is some other more important public policy consideration mandating admission of the evidence. See also Brown & Evans, (*supra*, note 94), at 9:6221.

[96] Some of the materials from which this Code is drawn (these are listed at Chapter 1, page 16), as well as the enabling legislation of some tribunals, contain a provision that relevant admissible evidence may not be refused. Such a provision has not been included because this could force the admission of repetitious or marginal material.

I. Witnesses

1. Subpoenas / notices to attend and produce evidence

PROVISION 27.1

A tribunal may, at the request of participants, issue notices requiring persons to attend to answer questions and produce documents and other evidence in their possession and control.

Explanatory Notes

This provision deals with subpoenas issued at the request of a participant. The power of a tribunal to subpoena a witness on its own motion is addressed in Provision 32.2.

PROVISION 27.2

With respect to the power to subpoena,

- a subpoena may be issued where it appears that the evidence to be presented by the person to be summoned is relevant to the matter, and that the person summoned is reasonably likely to be able to supply it
- a subpoena may be issued *ex parte*; if this decision is challenged it shall be reviewed by a designated member under Provision 14.3 or 22 (or under the tribunal's equivalent rules), or if none then by a full panel
- a subpoena may be issued by agency staff; if this decision is challenged it shall be reviewed by a designated member under Provision 14.3 or 22 (or under the tribunal's equivalent rules), or if none then by a full panel
- a subpoena shall be served by personal service
- service may be proved by affidavit
- a tribunal's rules shall contain provisions for fees and allowances for attendance pursuant to a subpoena
- subpoenas may be enforced by bench warrant (to bring a person who refuses to attend or be sworn before the tribunal), or by contempt proceedings, in either case by application to a court.

Explanatory Notes

The requirements of the first sub-clause can be met at first instance by a sworn assertion to this effect by the person who is requesting the subpoena.

Though the power in Provision 27.1 is discretionary, the refusal by a tribunal to issue a subpoena where this interferes with an individual's ability to secure such information as is necessary to present their case may be overturned.

See *R. v. Alberta Board of Industrial Relations, Ex parte Furniture Workers' Union* (1969) 6 D.L.R. (3d) 83 (Alta. S.C.), in which the court compelled the Board to subpoena management witnesses in an application for revocation of union certification; *Carter v. Phillips* (1987), 59 O.R. (2d) 289 (Div. Ct.), in which the court ordered the Residential Tenancy Commissioner to issue a summons for the production of the commission's records, and a summons to the landlord to produce its records pertaining to a particular rental unit.[97] See also the discussion in *Macaulay*[98] at 12.10(f).

2. Swearing

PROVISION 28.1
Any fact that is to be proved by the oral or written evidence of a witness shall be proved on oath or affirmation or by solemn declaration.

Explanatory Notes

Some tribunals may be hesitant to adopt this provision because it interferes with the informal nature of their proceedings. It is important to note, however, that a sanction can be applied against those who make false statements under oath or false affidavits, but not against persons who

[97] The latter decision was overturned on appeal on the basis that the applicant should have tried to prove the case without the witnesses sought to be summoned; had this failed the applicant could then have brought an appeal. See (1988) O.R. (2d) 293 (Ont. C.A.).

[98] *Supra*, note 13.

provide false unsworn evidence. Tribunals that choose not to require evidence to be sworn may have no effective way to respond where false statements have been made.

The *Alberta Evidence Act*,[99] gives tribunals power to administer oaths, affirmations and solemn declarations (as persons having power to receive evidence by law). Sections 15 to 21 contain the rules and forms for administering the oath, affirmation, etc.

3. Witness panels

PROVISION 29
A tribunal may receive evidence from panels of witnesses composed of two or more persons. Panel members shall be sworn and qualified individually.

Explanatory Notes

Parties (or other participants, depending on the terms of their participation) should be given an opportunity to make representations on the propriety of this procedure. The procedure should not be used where credibility may be an issue and separating the witnesses would help determine credibility.

The procedure may save time, and may also enable the presentation of a clearer picture. It may be appropriate to address questions to the entire panel, and to allow witnesses to supplement one another's answers.

[99] R.S.A. 1980, c. A-21.

4. Questioning of witness by the tribunal

PROVISION 31

A tribunal may ask any questions of witnesses and participants and their representatives which the tribunal considers reasonably necessary to disclose fully and fairly all matters relevant to the issues in the proceeding, provided that the tribunal does not prevent a participant from presenting its case.

J. Disclosure

PROVISION 32.1

A tribunal may, at the request of participants, at its discretion, order

- the filing or exchange of documents
- the filing or exchange of witness statements, and of experts' reports and qualifications
- the filing or exchange of medical examinations
- the provision of particulars.

J.1 Evidence Ordered by Tribunal

PROVISION 32.2

A tribunal may, on its own motion, order

- the production of documents
- the appearance and 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.

Where a tribunal orders the attendance of witnesses or the production of documents under this provision, the rules under Provision 27.2 apply.

Explanatory Notes

Adoption of Provision 32.2 should be sought only by tribunals that need the type of information that may be so ordered to enable them to properly fulfill their function. (Indeed the power to order such information, where required, is likely to have been included in the enabling statute, either expressly, or by

incorporating the powers of, for example, a Commissioner under the *Public Inquiries Act*[100].)

In Macaulay and Sprague, *Practice and Procedure Before Administrative Tribunals,*[101] the authors suggest that tribunals can claim "an inherent right to call their own expert witnesses to ensure a complete and satisfactory record of their proceedings, especially where the matter impacts upon the public interest."[102]

Privacy
Privacy concerns under Provisions 27.1, 32.1 and 32.2 can be addressed by Provision 23.3, which allows restrictions to be placed on the publication and disclosure of evidence.

Privilege
Orders for disclosure should not be made in relation to evidence that is privileged under the law of evidence, or that is inadmissible under statute or under the *Charter of Rights.* See the discussion in the Explanatory Notes under Provision 26 (at page 108) regarding exclusion of privileged evidence and related material.

Enforcement of tribunal orders under Provisions 32.1 and 32.2 is dealt with under Provisions 14 and 49.

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[100] R.S.A. 1980, c. P-29. Sections 3 and 4 deal with the summoning of witnesses and the production of documents, and the enforcement thereof.

[101] *Supra*, note 13.

[102] See Chapter 17 "Witnesses", 17.9.

K. Taking Judicial/Official Notice

PROVISION 33.1

A tribunal may, in making a decision in any proceeding

- take notice of facts or materials that may be judicially noticed
- take notice of any technical facts, information or opinions within its scientific or specialized knowledge.

PROVISION 33.2

Where a tribunal proposes to take notice of matters under the second sub-clause of Provision 33.1, it shall give notice of its intention, and the facts, information or opinions in question, to the parties (and other participants, depending on the terms of their participation) and give them an opportunity to make representations.

Explanatory Notes

"Judicial notice" (admission as evidence without proof) may be taken of facts that are

(a) so notorious as not to be the subject of dispute among reasonable persons, or

(b) capable of immediate and accurate demonstration by resorting to readily accessible sources of indisputable accuracy.

(Sopinka, Lederman and Bryant, *The Law of Evidence in Canada*,[103] citing, among other cases, *R. v. Potts* (1982), 36 O.R. (2d) 195, at 201 (C.A.).)

"Official notice" may be taken of matters within the specialized knowledge of the panel members. The requirement for notice to participants applies only to the second sub-clause. It is necessary in order to allow such evidence to be tested for accuracy and applicability. With respect to matters within the knowledge of the tribunal that are evident to the participants, a notice and comment provision would be overly cumbersome.

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[103] Butterworths, 1992, at 976 *et seq*.

For a case on the subject of the appropriate use of the tribunal's expertise, see *Huerto v. College of Physicians & Surgeons (Sask.)* (1995), 26 Admin. L.R. (2d) 169. The court held that the members of a medical discipline committee could use their own medical knowledge to assess the evidence. However, having received expert evidence from cardiologists as to the standard of care expected of a cardiologist, they could not use their own medical knowledge to "impress on the evidence their private views of the standard demanded of a cardiologist" (at 177). See also *Todorov v. Canada (Minister of Employment and Immigration)* [1993] F.C.J. No. 216, (Q.L.), (1993), 160 N.R. 158 (F.C.A.). An appeal of a tribunal's decision was allowed in consequence of its failure to notify a participant that notice of a fact was to be taken (in spite of a statutory requirement to give notice). These cases are cited in the discussion on the subject of official notice in *Macaulay*[104] at 12.33.

[104] *Supra*, note 13.

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

PROVISION 34.1

The rights to representation are as follow:

- a party has the right to self-representation, or to be represented by counsel
- representation of non-party participants is at the discretion of the tribunal
- a witness has the right to be advised by counsel.

Explanatory Notes

For an extensive discussion of the right to representation by counsel under the common law, see *Macaulay*[105] at 12.27 "Right to Legal Counsel and Other Representation".

The discussion in *Macaulay* also deals with the right to representation by non-lawyer agents. Subject to any statutory provisions, the latter has been held to be a matter within the general authority of a tribunal over its own procedure. The authors set out the factors a tribunal might consider in deciding whether to allow non-lawyer representation. They also raise the question of when an agent's participation might amount to an unauthorized practice of law contrary to provincial statutory prohibitions.

The rights of representation and advice do not impose a duty on the tribunal to provide counsel.

[105] *Supra*, note 13.

2. Participation Rights

PROVISION 34.2

The rights of participation respecting the substance of the matter before the tribunal are as follow:

- parties shall 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 non-party participants are at the discretion of the tribunal.

Explanatory Notes

Purpose of the provision

This first sub-clause embodies a fundamental tenet of administrative law. It is included in the Model Code to provide inexperienced tribunals with a basis in principle for understanding their duty to parties in proceedings before them in terms of

- the information that they must provide to parties, and
- the opportunities they must give for parties to present evidence and argument, and to respond to other representations and to cross-examine.[106]

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[106] Note that the existing Alberta *Administrative Procedures Act*, R.S.A. 1980, C. A-2, contains the following provisions with respect to participation rights:

> s. 4 Before an authority, in the exercise of a statutory power, refuses the application of or makes a decision or order adversely affecting the rights of a party, the authority
> (a) shall give the party a reasonable opportunity of furnishing relevant evidence to the authority,
> (b) shall inform the party of the facts in its possession or the allegations made to it contrary to the interests of the party in sufficient detail
> (i) to permit him to understand the facts or allegations, and
> (ii) to afford him a reasonable opportunity to furnish relevant evidence to contradict or explain the facts or allegations,
> and
> (c) shall give the party an adequate opportunity of making representations by way of argument to the authority.

(continued...)

The principle stated in Provision 34.2 does not give the participants full control over the presentation of their case (though in some cases this may be appropriate). Rather, the extent to which participants may call and examine or cross-examine witnesses, and present evidence and argument, will vary depending on the nature and complexity of the matter before the tribunal.

The principle is adaptable to the full range of administrative proceedings, and there are a great many cases that elaborate how it applies in particular circumstances. These cases are too numerous to try to include or summarize them in this annotation.[107]

However, the cases on two particular sub-topics of the general principle are highlighted, as follow. First, with respect to the right of participants to know the case they are to meet, there is a separate provision as to information that comes to a hearing panel's attention during permissible consultation by the panel with certain categories of persons (see Provision 34.3 below). Second, with respect to the rights of participants to respond to the case they are to meet, the question of whether there is a requirement to allow cross-examination is addressed immediately below.[108]

Whether the principle creates a requirement to allow cross-examination
Where a tribunal allows presentation of evidence to be by way of witnesses, it should also allow cross-examination, and rebuttal by way of witnesses. However, cross-examination is not a right at common law. It must be permitted only to the extent that it is required to afford a party "a fair

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[106] (...continued)
Section 6 of the Act provides that the entitlement to make representations is not to be taken as an entitlement to make oral representations so long as the party is given an opportunity to make representations adequately in writing. Neither does it afford a right to be represented by counsel.

[107] An Alberta Court of Queen's Bench decision that aptly illustrates application of the "case to meet" principle is *Robert Brothers Farming v. Alberta (Minister of Agriculture, Food And Rural Development)* (1995), 24 Admin. L.R. (2d) 252.

[108] The rights of presentation have already been addressed to some degree in the provisions above that deal with the form of hearings (that is, written, electronic, or oral). As well, Provision 43.1 deals with another aspect of the 'case to meet' principle–the rule that decisions may not be based on facts or legal issues that have not been disclosed to the parties.

opportunity to correct or controvert any relevant statement brought forward to his prejudice".

See *Re Jackson and Ontario Labour Relations Board*, [1955] O.R. 83, per McRuer C.J.H.C.; *County of Strathcona v. Maclab Enterprises* [1971] 3 W.W.R. 461 (Alta. C.A.); *Murray v. MD Rockyview (DAB)* (1980) 21 A.R. 512, at 527-29 (Alta. C.A.); *Re OEX Electromagnetic Inc v. BC (Securities Commission)* (1990) 43 Admin. L.R. 274) (B.C. C.A.).[109]

In *Murray v. MD Rockyview (DAB)* (*supra*), the court added that the obligation so stated "will generally arise where the evidence is in relation to a vital issue which will have a direct bearing on the Board's decision and more particularly so, where the person giving the evidence purports to be knowledgeable in the area." (at 528).

3. Consultation by the hearing panel / provision of information that arises

PROVISION 34.3

Where panel members consult with one another, with other adjudicative members of the tribunal, with staff of the tribunal, or with any other person having technical or special knowledge, at any stage in the proceedings, and new facts or new legal issues arise that are likely to affect the reasons or order, the panel shall apprise the parties (and other participants, depending on the terms of their participation) of the nature of this new information and give them an opportunity to make representations.

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[109] Note that the existing Alberta *Administrative Procedures Act*, R.S.A. 1980, c. A-2, contains a requirement with respect to cross-examination, as follows:

> s. 5 When an authority has informed a party of facts or allegations and that party
>
> (a) is entitled under section 4 to contradict or explain them, but
>
> (b) will not have a fair opportunity of doing so without cross-examination of the person making the statements that constitute the facts or allegations,
>
> the authority shall afford the party an opportunity of cross-examination in the presence of the authority or of a person authorized to hear or take evidence for the authority.

Explanatory Notes

Purpose of the provision
This provision embodies a principle laid down in recent case law on the subject of consultation by panel members. The substance of the provision is an elaboration of the "case to meet" principle for a particular kind of circumstance (consultation), and is captured by it. The provision is included for the guidance of those tribunals for which such consultation procedures are appropriate.

Propriety of adopting the provision
The provision contemplates consultation of the type described. However, such consultation may not be appropriate for every tribunal. Whether the provision is appropriate depends on the structure of the tribunal. It also depends on whether the reasons for consultation–the benefits of the acquired experience of all the members, and consistency in decision making, outweigh the potential disadvantages–the hampering of judicial independence, and interference with the parties' opportunity to respond to all arguments. Tribunals should carefully balance these factors in structuring any consultation process, and in adopting this provision for their rules.

Key decision
Consolidated-Bathurst Packaging v. International Woodworkers of America [1990] 1 S.C.R. 282, 42 Admin. L.R. 180, (S.C.C.) contains the requirement that participants be apprised of new information.

Meeting the requirements: conflict with solicitor-client privilege
Where information is supplied to the tribunal by tribunal counsel (for example a legal opinion), there may be some concern that provision of this information to participants pursuant to the obligation stated above may conflict with solicitor-client privilege. However, such an opinion is unlikely to fall within the principle or the rule for solicitor-client privilege. See *Melanson v. New Brunswick (Workers' Compensation Board)* (1995), 25 Admin. L.R. (2d) 219 (N.B. C.A.) at 228, where the court said that a legal opinion given to the WCB with respect to the interpretation of legislation germane to a claim

before one of the Board's tribunals was not privileged. The court pointed out that the WCB is not a party adverse in interest to claimants, and that the claim was not given in contemplation of litigation. In the court's view the opinion was for the benefit of employers and employees as well as for the use of the Board, and could not be withheld.

Conflict may be avoided in any case by supplying the substance of that part of the opinion that must be disclosed according to Provision 34.3 (that is, the legal issue, abstracted from the opinion), rather than the opinion itself.

Other principles related to consultation by the hearing panel
The *Consolidated-Bathurst* decision also contains an extensive discussion by the Supreme Court of Canada on the type of consultation by panel members that is allowed. Consultation with other members of the tribunal who are not on the panel, on legal and policy issues, is permitted, under certain conditions.

One condition is that the decision must be made, and be seen to be made, by those who conducted the hearing. A tribunal's arrangements for consultation may not operate or appear to operate as a constraint on the panel members' ability to make their own independent decisions. (In the *Consolidated-Bathurst* case, a procedure under which no consensus was reached or vote taken, attendance was voluntary, no minutes were kept, and the decision was left entirely to the hearing panel, was held to be permissible). See in contrast *Tremblay v. Quebec (Commission des affaires sociales)* [1992] 1 S.C.R. 952 (S.C.C.), where consultation machinery that involved compulsory consultation, held in order to arrive at a consensus together with persons who were non-panel members, was held to violate the rules of natural justice.

See also *Glengarry Memorial Hospital* v. *Ontario (Pay Equity Hearings Tribunal)* (1993), 110 D.L.R. (4th) 260 (Ont. Div. Ct.); *James* v. *Canada (Minister of Employment & Immigration*) (1991) 45 F.T.R. 139, at 142 (T.D.). Both cases involved permissible consultation.

A second condition is that the panel cannot discuss facts or evidence in the case that it has heard, but in relation to which it has not yet made factual determinations. Questions of fact must be distinguished from policy

questions, on which consultation is permitted. In the *Consolidated-Bathurst* decision, Gonthier J.:

> The determination and assessment of facts are delicate tasks which turn on the credibility of the witnesses and an overall evaluation of the relevancy of all the information presented as evidence. As a general rule, these tasks cannot be properly performed by persons who have not heard all the evidence and the rules of natural justice do not allow such persons to vote on the result. Their participation in discussions dealing with such factual issues is less problematic when there is no participation in the final decision. However, I am of the view that generally such discussions constitute a breach of the rules of natural justice because they allow persons other than the parties to make representations on factual issues when they have not heard the evidence.

See also *Ellis-Don Ltd.* v. *Ontario (Labour Relations Board)* (1998) 38 O.R. (3d) 737 (C.A.), aff'g [1995] O.J. No. 3924 (Q.L.), (1995) O.A.C. 45 (Ont. Gen. Div.) (application for leave to appeal to Supreme Court of Canada granted Jan. 21, 1999). This case involved a post-hearing meeting at which the full Labour Relations Board (including non-panel members) discussed whether particular actions of the union constituted abandonment of its bargaining rights. The court rejected the argument that this was a discussion of fact contrary to the ruling in the *Consolidated-Bathurst* decision, rather than a permissible discussion of a policy issue.

Further, new evidence may not be presented to panel members in the absence of the parties (or other participants, depending on the terms of their participation).

The court in *Consolidated-Bathurst* cited *Kane v. Board of Governors of the University of British Columbia*, [1980] 1 S.C.R. 1105, at 1113-14 in support of this principle. See also *Ellis-Don Ltd.* v. *Ontario (Labour Relations Board)*, cited at page 125.

Proving that the panel did not comply with the requirements

Principles such as those just discussed raise the question of how a participant is to know whether the principles were followed in the proceeding, and whether on review, the decision-maker or staff can be compelled to testify about the deliberative process.

This question is a developing area of law, and is addressed in *Macaulay*[110] in two sections: in Chapter 22 "Tribunal Decisions" at 22.3.1(v)(i); and in Chapter 28 "Rehearings, Petitions, Appeals and Reviews" at 28.19(e). There is a common law testimonial immunity which provides that a discovery of decision makers that will reveal their mental processes will not be compelled, unless the person seeking compulsion can show a *prima facie* case of impropriety in the decision-making process. (See *Agnew v. Ontario Association of Architects* (1988), 30 Admin. L.R. 285 (Ont. Div. Ct.).) In *Tremblay v. Quebec (Commission des affaires sociales)* [1992] 1 S.C.R. 952, at 965-66, Justice Gonthier said:

> The institutionalization of the decisions of administrative tribunals creates a tension between on one hand the traditional concept of deliberative secrecy and on the other the fundamental right of a party to know that the decision was made in accordance with the rules of natural justice. ...
> Accordingly it seems to me that by the very nature of the control exercised over their decisions administrative tribunals cannot rely on deliberative secrecy to the same extent as judicial tribunals. Of course, secrecy remains the rule, but it may nonetheless be lifted when the litigant can present valid reasons for believing that the process followed did not comply with the rules of natural justice.

Justice Gonthier accordingly dismissed the objections of the tribunal to questions put to its secretary with respect to the tribunal's process for dealing with draft decisions. (Note that in doing so the Justice distinguished between questions as to the tribunal's formal process (on which questions were to be allowed according to the decision), and "matters of substance or the decision makers' thinking on such matters" (at 964).)

See also *Ellis-Don Ltd. v. Ontario (Labour Relations Board)* (1994), 110 D.L.R. (4th) 731, 24 Admin. L.R. (2d) 122 (Ont. Div. Ct.) and *Glengarry Memorial Hospital v. Ontario (Pay Equity Hearings Tribunal)* (1993), 110 D.L.R. (4th) 260 (Ont. Div. Ct.); *Welland County General Hospital v. Ontario (Pay Equity Hearings Tribunal)* (1993) 10 Admin. L.R. (2d) 232; *Apotex Inc. v. Alberta* [1996] 7 W.W.R. 207 (Alta. Q.B.). These cases deal with the compulsion of administrative decision makers to testify about alleged improprieties in the decision-making process. See on the same topic Mullan, David J., "Policing the Consolidated-Bathurst Limits - Of Whistleblowers and Other Assorted Characters", (1993), 10 Admin. L.R. (2d) 241.

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[110] *Supra*, note 13.

Some of the cases discussed deal with statutory immunities to compulsion in the enabling statutes.

4. Procedure on default

PROVISION 34.4

Where a party or participant who has been notified of a proceeding fails to appear or to participate, the tribunal may proceed and may render a decision in their absence.

M. Keeping Record, Transcript

PROVISION 35.1
A tribunal shall compile a record of any proceeding in which it issues a final decision.

Explanatory Notes

The record should contain the following:

- the document by which the proceeding was commenced
- the notices issued to participants or potential participants of receipt of the application
- the notices of the pre-hearing conference and the hearing
- any pre-hearing orders
- any interim orders
- any other written decisions made in the course of the proceedings
- any documentary evidence
- any statement of agreed facts
- any video or audio recording made by the tribunal
- any transcript of oral evidence
- a statement of any matters officially noticed
- the decision and reasons.

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

This provision applies to the pre-hearing conference portion of a proceeding. It is also meant to apply to proceedings under Provisions 2 to 5 (or a tribunal's equivalent rules) where a tribunal makes a decision to refuse to accept an application, or refuses to continue where proceedings have begun, or makes a decision on the basis of consent of the participants.

PROVISION 35.2

A tribunal may record and transcribe the hearing.

Where a request is made by a participant, a tribunal shall record, and provide a transcript of, a hearing. A tribunal may require that a participant making such a request pay or prepay the cost of transcription.

Explanatory Notes

Although it has been held that neither the common law nor the *Charter of Rights* require a transcript of proceedings (see *Kandiah v. Canada (Minister of Employment and Immigration* (1992), 6 Admin. L.R. (2d) 42 (F.C.A.)), there may be circumstances in which the absence of a transcript may amount to a breach of natural justice because the court in a judicial review application is not on this account able to rule on the reasonableness of a tribunal's conclusions. See *Fariuji v. Canada (Minister of Employment and Immigration* (1994), 30 Admin. L.R. (2d) 153 (F.C.T.D.), in which a matter was returned to the tribunal for a new hearing before a different panel because the absence of a transcript made it impossible to rule on the reasonableness of the conclusions. However, if the record allows a proper disposition of the appeal or review, the absence of a transcript is not in itself a violation of natural justice. See *C.U.P.E., Local 301 v. Montreal (City)* [1997] 1 S.C.R. 793, in which the absence of a transcript was held not to violate natural justice, as affidavit evidence presented in conjunction with the application for review provided an adequate record for determining if there had been an evidential basis for the tribunal's finding of fact.

Tribunals should not resist recordings on the basis that this can change the informal tone of a hearing. A tape recording is a simple and unobtrusive device, and an accurate record of a proceeding is highly desirable.[111]

[111] For cases dealing with defective recordings, see *Okeynan v. Prince Albert Penitentiary* (1988), 20 F.T.R. 270 (T.D.), in which the absence of a complete transcript of a detention hearing (resulting from technical problems in recording) added to the review court's difficulty in satisfying itself that the applicant had had a fair hearing; *Desjardins v. Canada (National Parole Board)* (1989), 29 F.T.R. 38 (T.D.), in which despite gaps in a recording, the transcript showed a good ventilation of the issues and did not deprive the applicant of a ground of review.

PART 3. DECISION AND REASONS

Overview:

This part deals with the matters that pertain to the result of the decision making process–the decision and reasons. All of the following are considered:

A. *Interim decisions*
B. The requirement for a *written version of the decision*
C. *Reasons for decision* (reasons should be required for all final decisions)
D. The requirement that *notice of decision* be given to the participants
E. *Public availability* of the decision
F. *Mandatory time lines* for decisions, and what is to be done where a decision is not rendered within a reasonable time
G. *Decision by the majority*, and how the decision is to be reached where the panel is divided
H. *Factors for decision-making/ staff involvement:* the requirement that tribunal 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 a submission, and the limitations where staff is involved in the drafting of the decision
I. *Reconsideration* of the decision
J. The *correction of errors*.

A. Interim Orders

PROVISION 36.1

A tribunal may

- make interim orders and decisions
- impose conditions on the grant of an interim order
- vary the interim order by the final order
- make the final order retrospective to the date of the interim order.

Explanatory Notes

The provisions regarding variation of the interim order by the final order, and retrospectivity, arise from an issue that arose before the Federal Court of Appeal and the Supreme Court of Canada over interim orders for telephone rate increases. In *Bell Canada v. Canadian Radio-Television and Telecommunications Commission* [1989] 1 S.C.R. 1722, 38 Admin. L.R. 1, the dispute was whether the power to issue interim decisions under the *National Transportation Act*[112] included the power to retrospectively adjust for revenue excesses collected pursuant to a rate that had been set on an interim basis. Overturning the Federal Court, the Supreme Court of Canada held that the CRTC's powers to make interim orders impliedly included the power to vary these by a subsequent decision, making the latter retrospective.

PROVISION 36.2

Reasons for an interim decision or order need not be given.

Note: This is an exception to the general duty to give reasons in Provision 38.1.

[112] R.S.C. 1985, c. N-20.

Explanatory Notes

Though reasons may often be appropriate, this should not be a requirement for all cases. Often interim orders are meant to preserve the status quo, or protect the public interest, until the matter is heard. Such judgements are largely discretionary. The giving of reasons might also create a perception that a matter is being pre-judged.

However, where they are appropriate, reasons should be given.

B. Decision in Writing

PROVISION 37

A decision of a tribunal shall be given in writing.

Where a tribunal makes an oral decision, it shall be followed by a decision in writing.

The transcript of an oral decision satisfies the requirement that a decision be given in writing.

Where an oral decision is given, it shall take effect on the date specified by the tribunal, or if none, then when the written decision is issued.

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. At the request of a participant, the tribunal shall provide a permanent or paper record.

Explanatory Notes

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

PROVISION 38.1
A tribunal shall give reasons for its final decision.

Explanatory Notes

Purpose of the provision
This provision creates a requirement that tribunals provide reasons for decision. This provision should be adopted by all tribunals. There is an argument that reasons are sometimes routine or trite, and a formal requirement can involve expense or delay without significantly advancing participants' rights. However, the form and extent of reasons can reflect the complexity of the issue. In simpler cases reasons may be given orally (and a transcript provided). This can address the problem of delay.

Reasons to give reasons
The existing Alberta *Administrative Procedures Act s. 7* contains a right to reasons.[113] Courts interpreting section 7 have expressed the following purposes for the right to reasons:

- written reasons are more likely to have been properly thought out and thus make for a better decision;
- tribunals benefit from having their decisions exposed to public scrutiny;
- written reasons reinforce public confidence in administrative bodies;
- they allow the parties to assess whether there are grounds to appeal and to know the case to be met if there is an appeal; and
- they allow the reviewing or appellate tribunal to know the basis of the decision.

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[113] The act provides as follows:
7. When an authority exercises a statutory power so as to adversely affect the rights of a party, the authority shall furnish to each party a written statement of its decision setting out
(a) the findings of fact on which it based its decision, and
(b) the reasons for the decision.

Apart from these practical considerations, a fundamental point is that people should be given reasons for the decisions that affect them, as a matter of fairness.

Common law position

When considering whether to adopt this provision, tribunals should have regard to recent decisions in which the absence of reasons has been held to be a breach of the rules of natural justice.

These decisions were recently reviewed by the Supreme Court of Canada in *Baker v. Canada (Minister of Citizenship and Immigration)* [1999] S.C.J. No. 39. The Court concluded that

> ... it is now appropriate to recognize that, in certain circumstances, the duty of procedural fairness will require the provision of a written explanation for a decision. The strong arguments demonstrating the advantages of written reasons suggest that, in cases such as this where the decision has important significance for the individual, when there is a statutory right of appeal, or in other circumstances, some form of reasons should be required.[114]

See also *Future Inns Canada Inc. v, Nova Scotia (Labour Relations Board)* (1997), 160 N.S.R. (2d) and 473 A.P.R. 241 (C.A.), in which after a thorough review of the authorities, the court sent matters to be reheard by a different panel, on the basis that it was not possible to see what the tribunal had done in relation to a number of factual and legal issues that had been raised, and the decision was accordingly "reached in a patently unreasonable manner and contrary to the rules of natural justice" (at 258); *Brochu v. Bank of Montreal* (1997) 45 Admin. L.R. (2d) 312 (F.C.T.D.), in which the court said that an implied duty to give reasons is more likely to be found where there is a right of appeal or where the availability of judicial review depends on the ability to demonstrate that the decision contained either a jurisdictional error or an error in law. The court held that in the circumstances (where the tribunal had before it highly prejudicial but irrelevant allegations, and a recommendation from its investigator), the refusal to give reasons raised an inference that the decision may have been influenced by

[114] The court regarded reasons as necessary in the case before it (an application, on the basis of humanitarian and compassionate grounds, for exemption from a requirement that application for permanent residence be made from outside Canada), but held that the requirement had been satisfied by the provision of the notes of the junior immigration officer.

extraneous considerations. The court remitted the matter to the tribunal to provide reasons.

Application to administrative approvals made without a hearing

This rule is not meant to apply to routine administrative approvals, made without a hearing at the first instance

Content

Because the form and extent of reasons required will vary greatly from one type of decision to another, the Model Code does not contain a provision specifying the content of reasons. However, there is a substantial body of case law with respect to what reasons must contain. This developed largely in relation to the statutory duty to give reasons.[115] The main points of these cases may be summarized as follows:

- to meet the duty, the reasons must be proper, adequate and intelligible
- the reasons must deal with the substantial points that have been raised, and must allow the reader to know what matters the decision maker did or did not take into account; they must show, whether expressly or by necessary implication, that the tribunal considered the factors which it was required by statute to take into account
- the reasons must enable the person concerned to assess whether there are grounds of appeal.
- the duty is not fulfilled where the tribunal merely recites the fact that evidence and arguments led by the parties had been considered, nor by the bald assertion that "my reasons are that I think so".
- in deciding whether the duty is met, the court should consider the whole context in which the impugned decision was made, including matters such as statutory directives, planning instruments, the written record, and in some cases, the arguments adduced
- in view of the fact that tribunals are often meant to provide quick and inexpensive resolutions for disputes, a tribunal may be entitled to use its

[115] For summaries of the cases see Gauk, C, "The Annotated Alberta Administrative Procedures Act - Section 7: The Duty to Give Reasons, in *Administrative Agency Practice*, Vol. 1, No. *2, May, 1995 , at 49*.

own expertise in filling in gaps in the evidence, and may not have to spell out in minute detail all the factors and computations leading to the award; however, for an appeal court to defer to a tribunal's expertise in coming to a conclusion, the reasons must show how the expertise was applied to the facts.
- reasons and facts need not be stated separately
- reasons given by a tribunal's solicitor rather than by the tribunal itself do not satisfy a statutory duty to provide reasons.

Tribunals should set out their own guidelines for content, having regard to the common law requirements described above.

PROVISION 38.2
Where a panel member dissents, the dissenting reasons shall be included with the majority reasons, at the election of the panel member. The tribunal shall provide dissenting reasons at the request of the parties (or other participants, depending on the terms of their participation).

Explanatory Notes

When deciding whether to adopt this provision, a tribunal might consider that there may be a higher motivation to achieve consensus where dissents are not issued. Consensual decisions may give rise to greater certainty and stability. This may be desirable for some contexts. There is also danger, however, that the inability of a dissenting member to make their views known will enable the majority to disregard a legitimate viewpoint of a minority.

PROVISION 38.3
The duty to give reasons cannot be waived by the participants.

Explanatory Notes

When deciding whether to adopt Provision 38.3, a tribunal might consider that it would make a tribunal's processes visible for all cases, and would make decisions that have precedential value available.

For cases of consent orders, the tribunal should state that the participants consented, and the reasons, if any, for its concurrence.

D. Notice of Decision/Provision to Participants

PROVISION 39

A tribunal shall give notice to the participants of its decision and reasons.

E. Availability of Decision to Public

PROVISION 40

The decision of a tribunal shall be available to the public on request.

Where the conditions for privacy under Provision 23.1 have been met, the relevant private information shall be deleted from the reasons.

There are some tribunals for which this rule should not be selected because of the private nature of their proceedings. Examples are tribunals under the *Dependent Adults Act*,[116] and the *Child Welfare Act*.[117]

[116] R.S.A. 1980, c. D-32.

[117] S.A. 1984, c. C-8.1.

F. Timely Decisions

PROVISION 41.1
Unless the tribunal otherwise orders at the close of the hearing, a decision of the tribunal shall be issued within [90 days] [a time specified by the tribunal].

Explanatory Notes

Purpose
This provision creates a requirement that tribunals set their own time lines for issuing decisions. The time line chosen by a tribunal should suit its particular decision-making function.

Examples
Examples of statutory time lines for decisions are found in the following statutes:

- *Agricultural Pests Act*,[118] s. 14(6): an appeal under this section (from a notice issued by an inspector under s. 12) is to be heard and determined within 5 days of receipt of notice of the appeal
- *Environmental Protection and Enhancement Act*,[119] s. 90(1): a written decision is to be issued within 30 days after the completion of the hearing of an appeal from decisions under specified sections of the Act
- *Expropriation Act*,[120] ss 16, 18: objections to expropriations are to be heard by an inquiry officer, and a report to the approving authority made by the officer, within 30 days of the officer's appointment; the approving authority is to consider the report and approve or disapprove the expropriation, and give written reasons for its decision, within 30 days of receiving the report (and see s. 18(3))

[118] S.A. 1984, c. A-8.1.

[119] S.A. 1992, c. E-13.3.

[120] R.S.A. 1980, c. E-16.

- *Irrigation Act*,[121] s. 181.5: an appeal tribunal under this section is to hear the appeal and make its decision within 60 days of receipt of an application
- *Labour Relations Code*,[122] s. 100(1): a compulsory arbitration board under this section must make its award within 20 days of the date on which it is established
- *Marketing of Agricultural Products Act*,[123] s. 40: an appeal of an order or decision of a board or commission under the *Act* is to be heard and decided within 90 days of the notice of appeal[124]
- *Mental Health Act*,[125] s. 41.1: a decision respecting the review of an admission or renewal certificate under s. 33, 38, or 39 is to be made within 24 hours of hearing the application
- *Municipal Government Act*:[126] the *Act* contains various time lines for decisions, ranging from 15 days through 30 days for the hearing of particular types of appeals, to 150 days for the review of assessments and of decisions of assessment review boards (s. 500).

Role of tribunal chair

The adherence to decision time lines by panel members is an administrative matter which should be the responsibility of the tribunal chair, and the chair should, as part of his or her mandate to manage the tribunal, take action against a panel member who fails to render a decision.

Where this fails, resort might be had to Provision 22, which deals with the circumstance in which a member is incapacitated. This provision allows that in such circumstances a matter may be reheard or a decision made on the basis of a method agreed by the parties/participants.

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[121] R.S.A. 1980, c. I-11.

[122] S.A. 1988, c. L-1.2.

[123] S.A. 1987, c. M-5.1.

[124] The time limit does not run during a period of adjournment (s. 40 (g)).

[125] S.A. 1988, c. M-13.1.

[126] S.A. 1994, c. M-26.1.

Mandamus

Mandamus is also available as a remedy for participants where a decision is not rendered within a reasonable time.

G. Decision by Majority

PROVISION 42

Where a hearing is held before a multi-member panel the decision shall be made 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 tribunal chair on the basis of the record or otherwise as the parties (or other participants, 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.

Explanatory Notes

The circumstance in the second sub-clause can be avoided by ensuring that panels do not have an even number of members. This would be particularly important for smaller tribunals, where the chair of the tribunals sits on every hearing and the suggested procedure is impracticable.

H. Factors for Decision Making

PROVISION 43.1

In reaching a decision a tribunal may not take into account any facts or legal issues (other than matters which may be judicially noticed) whose substance was not disclosed to the parties (and other participants, depending on the terms of their participation) and in relation to which they have not had an opportunity to make representations.

Explanatory Notes

Purpose

Like Provision 34.3 (which involves consultation by panel members with particular categories of persons), this provision is based on the principle that parties are to be apprised of the case they are to meet, and given an opportunity to respond, before a decision is made. The substance of the provision–that other facts or legal issues may not be taken into account in the decision–is a correlative of the "case to meet" principle set out in Provision 34.2.[127] Because a tribunal that does not afford the opportunities set out in Provision 34.2 may have its final decision challenged, Provision 43.1 is not strictly necessary to protect participant rights. However, it is included as a reminder to tribunals at the decision-making stage of the hearing process.[128]

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[127] Provision 34.2 requires that parties (or participants depending on the terms of their participation) shall 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.

[128] Provisions 34.2 and 43.1, taken together, achieve much the same purpose as section 4 of the existing Alberta *Administrative Procedures Act*. Section 4 provides:

> Before an authority, in the exercise of a statutory power, refuses the application of or makes a decision or order adversely affecting the rights of a party, the authority
>
> (a) shall give the party a reasonable opportunity of furnishing relevant evidence to the authority,
>
> (b) shall inform the party of the facts in its possession or the allegations made to it contrary to the interests of the party in sufficient detail
>
> (continued...)

Proving adherence to the requirements

The considerations discussed under Provision 34.2 and 34.3[129] with regard to proving that a tribunal did not adhere to the requirements set out in those Provisions, apply to Provision 43.1. See page 125.

[128] (...continued)

(i) to permit him to understand the facts or allegations, and
(ii) to afford him a reasonable opportunity to furnish relevant evidence to contradict or explain the facts or allegations,

and

(c) shall give the party an adequate opportunity of making representations by way of argument to the authority.

[129] These provisions deal with providing information to participants, and more specifically, information arising from consultation by the hearing panel.

H.1 Staff Involvement in Decision Writing

PROVISION 43.2

Where a hearing panel consults with staff, or staff is involved in decision writing, the following limitations apply:

- the involvement in the proceeding of the staff member who is consulted may not be such as to compromise, or appear to compromise, the independence of that staff member from the participants
- where staff is involved in drafting or reviewing the draft of the decision, they may make no changes to the findings of fact or conclusion of law of the panel, and the decision must be reviewed by the presiding panel members.

Explanatory Notes

Purpose

This provision is added for the guidance of tribunals whose staff may be consulted or involved in the writing of the decision.

Common law

A tribunal is entitled to the assistance of counsel in the preparation of reasons for decision; however, the reasons must be those of the tribunal. Counsel's assistance may not be such as to impair the fairness or integrity of the decision-making process. The propriety of particular procedures in a given case depends on a host of factors such as the nature of the proceedings, the issues raised, the composition, structure and workload of the tribunal, whether participants are represented by legal counsel or panel members are legally qualified, and the enabling legislation.

See *Khan v. College of Physicians and Surgeons (Ontario)* (1992), 11 Admin. L.R. (2d) 147 (C.A); *Weerasinghe v. Canada (Minister of Employment and Immigration)* (1993) 17 Admin. L.R. (2d) 214 (F.C.A.). See also the extensive discussion of this topic in *Macaulay*[130] at 22.4.1.

[130] *Supra*, note13.

A tribunal policy that members submit draft reasons for review by legal counsel does not in itself constitute an unlawful constraint.

See *Bovbel v. Canada (Minister of Employment and Immigration)* (1994), 18 Admin. L.R. (2d) 169 (F.C.A.); *Weerasinghe v. Canada (Minister of Employment and Immigration*) (*supra*).

But note that in *Khan v. College of Physicians and Surgeons (Ontario)* (*supra*), in the context of a discussion about counsel involvement in the drafting of reasons, the court cited *Tremblay v. Quebec (Commission des affaires sociales)* [1992] 1 S.C.R. 952, as authority for the proposition that the appearance of independence may be lost where consultation with others not charged with deciding the case is compulsory. A mandatory review policy may not be permissible.

The persons consulted by the decision maker must be independent of the parties.

See *Hutterian Brethren Church v. Starland (Municipal District No. 47)* (1994) 14 Admin. L.R. (2d) 186 (Alta. C.A.); *Mitchell v. Institute of Chartered Accountants (Manitoba)*, (1994) 22 Admin. L.R. (2d) 182 (Man. Q.B.)*; Khan v. College of Physicians and Surgeons (Ontario)* (*supra*), at 180.

The involvement of a prosecutor in the drafting of a decision is likely to give rise to a reasonable apprehension of bias.

See *Sawyer v. Ontario (Racing Commission*) (1979), 24 O.R. (2d) 673 at 676 (Ont. C.A.)*; Re Bernstein and College of Physicians and Surgeons of Ontario* (1977), 15 O.R. (2d) 447 (Div. Ct.).

Proof of adherence

Other parts of this document contain a discussion of the question of proof of adherence to the rules governing provision of information to participants, and appropriate consultation by the panel with others.[131]

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[131] See the Explanatory Notes under Provisions 34.2 and 34.3, at page 125. With regard specifically to proving whether staff involvement in decision writing was appropriate, see *Snider v. Manitoba Association of Registered Nurses* (March 2, 1999), Doc. CI97-01-03614 (Man. Q.B.). The court said that a participant in a proceeding before the tribunal (a professional disciplinary body) has a right, upon receipt of a decision, to request particulars of counsel's involvement or participation if he or she has any concerns whatever, and if the particulars are refused by the tribunal or counsel, the court could compel delivery thereof.

I. Reconsideration

PROVISION 44.1

A tribunal may, on its own motion or on the motion of a participant, review or rehear an order or decision, and confirm, vary, rescind or suspend it

- where there has been fraud, or false or misleading evidence was unknowingly accepted
- where there has been a procedural defect or lack of due process that could not have been raised at the hearing
- where the tribunal failed to dispose of a matter raised in the proceeding.

An application by a participant for a review on the second and third grounds must be brought within a reasonable time after the defect is discovered.

Where a tribunal contemplates that it may review or rehear a matter, it shall give notice to parties in the original proceeding (and other participants, depending on the terms of their participation), and an opportunity to make representations on the question of whether the matter should be reviewed or reheard.

A review or rehearing under this provision does not automatically operate as a stay of the original order or decision.

Explanatory Notes

Purpose

Reconsiderations under circumstances such as the provisions describe can allow a tribunal to cure injustices without resorting to court process. The powers in Provision 44.1 exist under the common law. Tribunals can add the powers to their procedural rules for the sake of clarity.

Fraud

With respect to decisions involving fraud or misleading evidence, there is a line of decisions that court judgments secured by fraud can be invalidated. Though there is no parallel line of authority with respect to tribunal decisions, the principle that a decision grounded in fraud should not be allowed to stand should apply.

In *Macaulay*[132] the authors put forward several reasons why a tribunal should be able to reconsider decisions grounded in fraud (without a requirement for a court order to do so):

- such decisions are nullities
- agencies can take steps to prevent or avoid abuse of process, and
- the principle of *functus officio*, based on the desirability of finality of decisions, does not apply to decisions procured by fraud.

Procedural defects

With respect to the power under the second sub-clause, see *Nurani v. Alberta (Environmental Appeal Board)* (1998), 1 Admin. L.R. (3d) 248 (Alta. Q.B.). The tribunal in this case had express statutory authority to rehear any matter. However, the court went on to review the authorities and to declare that a tribunal may hold a rehearing to remedy a breach of natural justice even in the absence of a statutory power to rehear (in this case, in order to give a notice of hearing to persons who should have been notified).

The court cited the following cases in support of this conclusion: *Grillas v. Canada (Minister of Manpower & Immigration)*, [1972] S.C.R. 577 (S.C.C.); *Chandler v. Alberta Association of Architects* [1989] 2 S.C.R. 848, 40 Admin. L.R. 128 (S.C.C.); *Ke v. Canada (Minister of Citizenship & Immigration)* (1995) 31 Imm. L.R. (2d) 309 (F.C.T.D.); *Posluns v. Toronto Stock Exchange*, [1968] S.C.R. 330 (S.C.C.).

Failure to dispose of a matter fairly raised

The power in the third sub-clause was affirmed in the following cases:

Chandler v. Alberta Association of Architects (*supra*); *Severud v. Canada (Employment and Immigration Commission*) [1991] 2 F.C. 318 (F.C.A.); *Assn des*

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[132] *Supra*, note 13, at 27A.4(d)(i). See generally Chapter 27A "Authority of an Agency to Rehear or Reconsider Decisions".

Officieres de direction du Service de police de Quebec (Ville) c. Quebec (Commission de police) (1994), 119 D.L.R. (4th) 484 (Que. C.A.). (In the last of these cases, though a majority of the Court held that the commission was not *functus officio*, the commission was not permitted to continue because comments of the panel had given rise to an appearance of bias in the commission.)[133]

In contrast, the powers in Provision 44.2 below do require legislative authority.[134]

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[133] In the *Chandler* decision the court said that if the case involves a denial of natural justice that vitiates the whole proceeding, the tribunal must start afresh. If, in contrast, it has conducted a valid hearing but fails to properly dispose of a matter, it is entitled to reopen the matter and make a proper disposition (though on continuation, either party should be allowed to supplement the evidence and make further representations with regard to disposition). See (1990), 40 Admin. L.R. 128, at 143-44.

[134] Legislative authority need not be express. In some cases it may be implied from the enabling statute as a whole, or from the nature of the decision-making power (for example, a continuing and equitable power that may require a decision to be adjusted over time to ensure equity or justice). See the discussion in *Macaulay* (*supra*, note 13) at 27A.4(a).

PROVISION 44.2

A tribunal may, on its own motion or on the motion of a participant, review or rehear an order or decision, and confirm, vary, rescind or suspend it

- [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 the tribunal has made an error of fact or law]
- [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 tribunal].

An application by a participant for a review under the first and second sub-clauses must be brought within a reasonable time after the defect is discovered.

Where a tribunal contemplates that it may review or rehear a matter, it shall give notice to parties in the original proceeding (and other participants, depending on the terms of their participation), and an opportunity to make representations on the question of whether the matter should be reviewed or reheard.

A review or rehearing under this provision does not automatically operate as a stay of the original order or decision.

Explanatory Notes

Purposes of reconsideration / considerations for inclusion of provision

The first two sub-clauses under Provision 44.1 allow a tribunal to reconsider where it is persuaded or is open to being persuaded to change its decision.

The first allows reconsideration where some new evidence is available that was formerly unavailable. This is not a ground for judicial review, so unless an appeal on this basis is available by the terms of the statute, reconsideration is the only means for rectifying any resulting injustice.

The second sub-clause allows a tribunal to review or rehear where it is disposed to consider whether it failed to properly evaluate some fact or point of law. Judicial review is available to the parties for errors of law, and an appeal may be available under the enabling legislation from both factual and legal determinations. The advantage of allowing reconsideration (rather than creating a right of appeal or leaving the matter to judicial review) is that it allows the tribunal to correct itself when so disposed, and thereby forestall a more costly, lengthy, and potentially more inconvenient review or rehearing by the courts. A tribunal considering whether to seek such a provision for its rules should consider time limits, and the interrelation between these and the time limits for appeals and judicial review on the same grounds. It may wish to specify that an application for reconsideration must be brought within the periods for bringing an appeal or judicial review application.

In deciding whether to seek the power to reconsider under these circumstances, a tribunal must balance the advantages of reconsideration (rectifying matters that might not otherwise be rectified, and possibly avoiding delay and expense) against the desirability of the finality of decisions and the ability of participants to rely on them.

Whether a tribunal requires the power to reconsider under the third sub-clause of Provision 44.2 depends on the nature of its function. Some tribunals make decisions whose effects continue and may require adjustment for changing circumstances, but whose enabling statutes do not provide another mechanism for making the necessary adjustment. While many such bodies have a reconsideration power,[135] there may be others that do not.

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[135] Examples of tribunals that have a reconsideration power are: the Environmental Appeal Board, the Alberta Motor Transport Board, the Labour Relations Board, the Land Access Panel and Appeal Tribunal under the *Metis Settlements Act, S.A., 1990, c. M-14.3*, the Energy Resources Conservation Board, the Natural Resources Conservation Board, the Public Utilities Board, the Surface Rights Board, the Workers' Compensation Board, the Municipal Government Board, Human Rights Panels under the *Human Rights, Citizenship and Multiculturalism Act*, R.S.A. 1980, c. H-11.7, the Alberta Impartial Jurisdictional Disputes Board, the Appeal Tribunal under the *Racing Corporation Act*, S.A. 1996, c. R-1.5, various tribunals that make tax assessments, and various professional disciplinary bodies. In most cases the reconsideration power is unfettered, but in some cases there are restrictions such as a requirement for new evidence, or a time limit.

Considerations for exercising the power to reconsider

Assuming that a tribunal has a power to review or rehear, considerations for deciding whether to exercise it in a particular case are:

- how much time has elapsed since the original decision
- whether the request was made within a reasonable time after the defect was discovered or the change came about or became known
- whether reconsideration will adversely affect a participant who has relied on the decision
- the interest of participants or the public in the finality of the decision.

Tribunals should be careful not to allow applications for review or rehearing that are made to avoid or circumvent a time limit for appeal or judicial review. Tribunals that adopt this provision should set time limits for reconsideration, suitable to their own circumstances, and that take into account time limits for appeals and judicial review.

Constitution of panel

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 the original panel was biased), and in others by a larger panel (for example, to decide a policy matter).

J. Correction of Errors

PROVISION 45

A tribunal may, on its own motion or on the motion of a participant, within a reasonable time,

- correct a clerical or typographical error or error of calculation
- rectify an accidental slip or omission
- clarify an ambiguity.

Explanatory Notes

The powers in Provision 45 are common law powers.[136]

For cases discussing the meaning of "clerical error", see: *Re Ovens* (1979), 26 O.R. (2d) 468 (Ont. C.A.), in which the court defined the term as "an error in a document which can only be explained by considering it to be a slip or mistake of the party preparing or copying it" (the court refused to characterise a failure to set out a debtor's name in a financial statement creating a security interest as falling within this definition); *Jonquiere (Ville) v. Munger* [1964] S.C.R. 45, in which the court defined 'clerical error' as 'a simple slip in drafting' (this definition did not cover an error in an award that made an agreement retroactive for thirteen months when 12 months was the

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[136] See *Chandler v. Alberta Association of Architects* [1989] 2 S.C.R. 848, 40 Admin. L.R. 128, at 141-42 (S.C.C.), citing *Paper Machinery v. O.J. Ross Engineering Corp.*, [1934] S.C.R. 186. In the latter case the court listed two exceptions to the rule against re-opening a final decision of a court:

1. where there had been a slip in drawing it up, and,
2. where there was an error in expressing the manifest intention of the court.

The Supreme Court in *Chandler* said:

> As a general rule, once ... [an administrative] tribunal has reached a final decision in respect to the matter that is before it in accordance with its enabling statute, that decision cannot be revisited because the tribunal has changed its mind, made an error within jurisdiction or because there has been a change of circumstances. It can only do so if authorized by statute or if there has been a slip or error within the exceptions enunciated in *Paper Machinery v. O.J. Ross Engineering Corp., supra.*

(The Supreme Court went on to list further exceptions to the general rule, including that where the tribunal fails to dispose of a matter fairly raised.)

maximum period allowable). See also *Chester v. Canada (National Parole Board)* (1989), 37 Admin. L.R. 27, at 37-38 (B.C. C.A.), .

Debret v. Debret, [1917] 3 W.W.R. 503 (Sask. S.C.) dealt with the meaning of "accidental slip and omission". The statute (*The Arbitration Act)* allowed correction in an award of "any clerical mistake or error arising from an accidental slip or omission". The facts concerned an omission of a part of an award that had constituted a finding of the arbitrator, but had been inadvertently left out of the report. The court noted that the correction would not require any new determination or judgment, and held that the omission fell within the statutory phrase. The correction was accordingly allowed.

For the meaning of "ambiguity" see *Regina Police Association Inc. v. Board of Police Commissioners of Regina* (1998), 164 Sask. R. 282 (Q.B.). In this case the court contrasted 'clarification' with adding words to an award that expanded and amended it. The same distinction is drawn in *Regina v. Andrews, Ex parte Nurses' Association, St. Joseph's General Hospital (Peterborough)*, [1970] 1 O.R. 247 (Ont. H.C.). The clarification can do no more than explicate the decision-maker's original intention. In this sense an ambiguity is a type of omission.

PART 4. MISCELLANEOUS POWERS

Overview:

This part deals with powers and procedures that do not fall easily within any of the foregoing categories, or strictly within a tribunal's decision-making function.

A. Levels of formality: The first question raised in this part is whether the Model Code should distinguish among classes of cases to which different levels of formality apply, and assign different procedures to each class. This approach is rejected in favour of the availability of a full continuum of formality for all decision making, adaptable by tribunals to meet the needs of a given case.

B. Control over process: This provision affirms the power of tribunals to control their own process.

C., D. Enforcement, Contempt: These provisions address enforcement of tribunal orders, by filing with the court, and by contempt proceedings. The former option (enforcement by the courts in like manner as court orders) is not included in the Model Code, but the latter (enforcement of particular classes of tribunal orders by contempt proceedings) is made available. The latter provision sets out the procedure for the contempt (by application to the court).

F., G. Appeals: These provisions address the question of whether the Code should contain substantive or procedural rules for appeals to the court. The conclusion is that the substantive rules for appeals must be made on a case-by-case basis, and court-related procedural rules belong elsewhere. However, provision is made for supplemental rules for the conduct of appeals to appellate bodies within an agency. These are to be read together with the hearing rules of general application considered earlier.

Provisions *E, J, K and M* deal with powers of tribunals to award costs, extend time, make *ex parte* decisions, and maintain order at a hearing.

H. Visibility: This provision is fundamental to the purpose of the Code. To ensure that the rules adopted by tribunals are accessible to users, the provision requires that these rules be printed and made available for public inspection. Tribunals are also encouraged to index and make available their precedent decisions.

I. Bias: This provision affirms the right of persons in relation to whom tribunal decisions are made to have the decision made by a fair and impartial tribunal, and sets out procedures for dealing with allegations of bias.

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

In contrast to the approach taken in some of the source jurisdictions from which the Model Code's provisions were drawn,[137] the Code does not contain provisions that distinguish among classes of cases to which different levels of formality apply. Under the Code it is not necessary to formally choose a suitable level of proceeding for every case. Rather, the full continuum of formality is available for all proceedings. Under Provision 34.2 it is in the power of the tribunal to limit the presentation of evidence, cross-examination, rebuttal and presentation of arguments, so as to provide a process that meets the "fair opportunity" criterion described therein.

Explanatory Notes

Source materials: categories of proceedings
The Explanatory Notes below outline the various categories of proceedings that are found in some of the source materials noted above, and describe the levels of formality of proceedings that are prescribed for each.

The purpose of setting out the full range of possibilities is to help bring to the attention of tribunals, particularly *ad hoc* or otherwise inexpert bodies, that for appropriate cases, a tribunal may exercise a higher degree of control over the presentation of evidence and argument than might otherwise be thought appropriate. The categories are as follow:

a) full formal hearing: This applies to situations involving disputed issues of fact, with no limitation as to the quantum with respect to a monetary issue, or nature of potential sanction. The procedure affords all participants the opportunity to respond, present evidence and argument, conduct cross-examination, and submit rebuttal evidence (except as restricted by a limited grant of intervention or by a pre-hearing order).The proceedings involve pre-hearing conferences (at the discretion of the presiding officer), interventions, pleadings and briefs, and discovery orders.

[137] See page 16 for the list of source materials.

b) 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)[138] or a specified minor sanction. The presiding officer is required to permit the parties and may permit others to offer oral or written 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, disclosure, pre-hearing conferences, and rebuttal.

c) emergency hearing: This applies in a situation involving an immediate danger to the public health, safety, or welfare that requires immediate tribunal action to prevent or avoid the danger. The tribunal is required, *if practicable*, to give the person to whom the tribunal 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 relief is subject to an adjudicative proceeding. After issuing an order pursuant to this section, the tribunal is to proceed as quickly as possible to complete any proceedings that would be required if the matter did not involve an immediate danger.

d) 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 tribunal'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.

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[138] This amount is found in the American *Model State Administrative Procedures Act*, 1981.

e) 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 tribunal.

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

The approach in the Model Code

The Code rejects the approach of creating distinct categories with attendant procedures, in favour of making available the full continuum of formality for all cases. This 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 a tribunal to vary its procedures for a given case also permits adaptation of procedures to conform to the needs of a particular emergency, possibly in the manner suggested in section (c) above. The inclusion of declaratory orders in the Model Code has already been rejected (though provisions for such decisions might be contained in the enabling legislation of particular tribunals), on the basis that decisions based on agreed facts are part of the routine procedure, and it may be inappropriate to expend tribunal resources on hypothetical facts.

B. Power of a Tribunal to Control Its Process

PROVISION 47
Subject to its enabling statute and regulations, a tribunal may control its own process.

Explanatory Notes

This power is a codification of the common law.

Some of the powers that are subsumed under this general power have been set out in other parts of the Code.[139] Other examples include:

- setting hearing times and venues
- ordering that separate proceedings be heard immediately one after the other
- ordering that proceedings be stayed until after determination of other proceedings
- granting adjournments
- specifying the manner (that is, whether oral or written) in which a participant may make representations on procedural questions such as consolidation or severance, the variation of procedures, etc.
- excluding repetitious or marginally-relevant evidence.

[139] Examples are: to direct written, oral or electronic hearings; to hear separate applications in a common hearing; to hold private hearings; to refuse to hold a hearing in order to prevent abuse of the tribunal's process; to order advance disclosure of evidence and not to hear evidence that is not so disclosed.

C. Enforcement of Tribunal Orders by Filing with the Courts

This provision should not be included in the proposed *Administrative Powers and Procedures Act*.

PROVISION 48 [Extra-Code Provision]
A tribunal may file its decisions or orders with the court. A decision or order so filed is enforceable in the same manner as a judgment or order of the court.

Explanatory Notes

Legislation permitting such a procedure may be necessary. However, because of the involvement of the court in this provision, it should not be housed in the proposed *Administrative Powers and Procedures Act*.

Each tribunal should consider whether its enabling legislation should contain such enforcement powers.

D. Contempt of Tribunal Orders

PROVISION 49

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

- refuses to respond to a subpoena to attend, to be sworn, to testify, 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 tribunal's process
- [fails to obey any other order of the tribunal]
- interferes with the orderly accomplishment of the tribunal's mandate.

Explanatory Notes

This provision allows tribunals to obtain orders for contempt to enable them to enforce their orders. It requires application to the court, rather than placing the power to punish for contempt in tribunals themselves (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.

The third sub-clause may be unnecessary if there is provision in a tribunal's enabling statute or rules for filing orders with the court, or some other means for enforcement of orders.

Where an application is brought by a tribunal under Provision 49, the court will determine whether there has been contempt and the appropriate penalty or remedy.

E. Costs

This provision should not be included in the proposed *Administrative Powers and Procedures Act*.

PROVISION 50 [Extra-Code Provision]
A tribunal may award costs [and hearing expenses].

Explanatory Notes

With regard to both costs and hearing expenses, but particularly the latter, there are some types of tribunals for which making such awards would be completely inappropriate. For this reason, and because it is not possible to craft a general costs provision that is suitable to the function of tribunals generally, the costs provision is included in the list of provisions for tribunals to consider for amendment to their enabling legislation on a tribunal-by-tribunal basis.

Where legislation authorizes the tribunal to award costs, it should be possible to make such awards at any stage of the proceedings, not only at the conclusion. (This could be especially important for interveners).

Ontario's *Compendium of Model Rules* was written in contemplation of proposed amendments to the *SPPA* that would allow costs awards in situations of unreasonable, frivolous, or vexatious conduct, or where a party has acted in bad faith. The *Compendium* contains a discussion meant to

assist tribunals in defining circumstances for which they will consider a costs request on the basis of one of the criteria afore noted.[140]

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[140] The discussion includes the following descriptions:

Frivolous behaviour is thoughtless, careless, trivial or of little weight or importance. Frivolous behaviour is usually less aggravating than vexatious behaviour. *Vexatious behaviour* can be similar to frivolous behaviour, or it can be nearly as serious as "bad faith" behaviour. Vexatious behaviour may be behaviour whose primary effect, whether deliberate or not, is harassment or annoyance. Examples of frivolous or vexatious behaviour include:

- Ignoring a notice of hearing,
- Asking for a procedural ruling that will not benefit the requester,
- Making a request that is *de minimus* ("very small or trifling" and so not worthy of relief),
- Failing to comply with a tribunal order,
- Continuing a disruptive behaviour even after being warned by the presiding member.

Bad faith behaviour is the most extreme type of improper conduct, and is prompted by deliberate intent or malice, such as:

- Knowingly leading false evidence,
- Using the tribunal's process for improper ends,
- Seeking relief that is not deserved.

Unreasonable behaviour is more general and probably more common, such as:

- Not co-operating with other parties or with the tribunal process,
- Rude, or disrespectful behaviour,
- Changing position mid-way through the proceeding without notice or explanation to the other parties and the tribunal.

Tribunals can also decide whether to add an explicit requirement that the requester must have "clean hands" when making a costs request. The awareness that the requester may not receive costs if he/she has also conducted him/herself unreasonably, even if another party's conduct had been worse, could serve to further encourage proper conduct from everyone. The tribunal could also still grant a costs award, but reduce the amount actually awarded based on the requester's own conduct.

F. Appeals to the Court

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 a tribunal, or in the *Rules of Court*.

Explanatory Notes

The *Macaulay*[141] manual suggests a substantive provision for the decisions of all tribunals 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*.

The Code does not adopt this approach. Whether an appeal should lie from a particular type of tribunal decision, whether it be an interim decision, a procedural decision 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 a tribunal's enabling legislation.

However, the Code contains provision for appeals to another level of decision maker within the agency where the original decision is made by a staff member or single adjudicative member. (See Provision 52). An appeal is also provided in Provisions 2 and 3 from a decision to dismiss a matter without holding a hearing.

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 tribunals.

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[141] *Supra*, note 13.

G. Appeals to Appeal Bodies Within the Agency

PROVISION 52

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

- the appeal shall be brought within [30 days] [a time set by the tribunal]
- the time for appeal shall run from the date the written decision is provided to the participants
- if leave is required, this shall be requested within the time for bringing the appeal
- the fact that an appeal has been brought does not automatically create a stay of the decision or order from which the appeal is brought
- with respect to both leave to appeal and applications for a stay, the application may be made to either the first-level body or the appellate body, or both
- notice of appeal shall 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 representations from the parties (and other participants, depending on the terms of their participation). the tribunal may request and receive further evidence, if such is necessary to enable a proper determination.

Explanatory Notes

Purpose

This provision sets out procedures for the conduct of appeals from one adjudicative body in an agency to another. It is intended to supplement, for this circumstance, the general Model Code rules with respect to hearings, 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 representations, to hear the appeal on a written rather than oral basis. The foregoing provisions are included because they 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.

Further evidence

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 (e.g. to allegations of absence of evidence, or unfairness in the process) would need to be admitted to make a proper determination.

Stay on appeal

The question of staying the original decision requires the tribunal to balance factors such as prejudice.[142] The tribunal should also ensure that parties do not use the appeal procedure as a tactic for delaying the effect of a decision.

[142] The test for a stay is analogous to that for an injunction in civil proceedings. See *Algonquin Wildlands League v. Ontario (Minister of Natural Resources)* (1996), 93 O.A.C. 228 (Div. Ct.); *Vivace Tavern Inc. v. Metropolitan Licensing Commission* (1996), 96 O.A.C. 246 (Div. Ct.).

H. Visibility, Accessibility of Procedures, Precedents

PROVISION 53

A tribunal's powers and procedures of general application shall be printed and made available for public inspection.

Explanatory Notes

The way in which this requirement is met will vary depending on the resources and user base of the particular tribunal. Some suggestions for making the availability of its processes known are participation guidelines, brochures, and videos. Plain language should also be used, especially for tribunals with less-sophisticated users.

This Provision should be applied not only to rules selected from the Model Code, but to all tribunal rules of general application.

With respect to tribunal decisions, tribunals 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.

Tribunals are also encouraged to have policy statements and guidelines of general application printed and made available to the public.

I. Bias

PROVISION 54

Decisions are to be made by a fair and impartial tribunal.

Where a member assigned to a proceeding has personal knowledge of any information which is relevant to whether there exists a reasonable apprehension of bias, unless that member decides to withdraw from the proceeding, the member shall disclose this information to the parties.

An application requesting a member not to participate in a proceeding on the grounds of a reasonable apprehension of bias shall be made at the earliest reasonable opportunity after the applicant becomes aware of the circumstances giving rise to the allegations.

The parties (and participants, depending on the terms of their participation) shall have a reasonable opportunity to respond, which may include an opportunity to introduce additional evidence or make representations, but may not include cross-examination of any member.

The tribunal may rely upon as evidence any part of a member's disclosed information which is not contradicted by any other evidence.

The member or members assigned to the proceeding may hear and decide any issue regarding reasonable apprehension of bias.

The parties may consent to the continued participation of a member in the proceeding, but the consent of the parties does not preclude an application to remove a member based on undisclosed facts or facts arising after the disclosure.

Explanatory Notes

This provision is taken, with some changes, from the Society of Ontario Adjudicators and Regulators' Proposals for Amendment to the SPPA, 1997.[143]

The sixth clause, under which the matter of bias is to be decided at first instance by the assigned member or members, is an appropriate procedure under the law. See *Flamborough (Town) v. Canada (National Energy Board)* (1984) 55 N.R. 95 (F.C.A.) However, it may be preferable in the case of a multi-member panel for the other member or members to determine the matter, or for the tribunal chair or a different panel to do so. In Jones & de Villars, *Principles of Administrative Law*, the authors suggest that these alternatives should be available.[144] (The SOAR proposal, which makes the first procedure mandatory, has been amended accordingly.)

The provision respecting cross-examination is included because allowing a participant to cross-examine a member potentially creates an adversarial tension between the member and a participant, which may then affect or be seen to affect the member's impartiality.

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[143] Some of the provisions are a response to *Dulmage v. Police Complaints Commissioner* (1995), 30 Admin. L.R. (2d) 203 (Ont. Div. Ct.), a case that involved a division in opinion as to the appropriate procedure for a tribunal to take when an apprehension of bias on the part of a member is perceived or alleged. In the face of the allegation the tribunal retired, and returned with additional information, at least part of which had been provided by the member in question. It disclosed the information, heard argument (including argument by counsel for the police officers that this was an inappropriate way to obtain information) and additional evidence, and then found the allegation to be unsubstantiated. One member of the court found this procedure was proper, but two others thought that it aggravated the apprehension of bias (how this was seen to be so was not explained). Provision 54 responds to this case by providing that the tribunal may deal with the bias issue by relying on uncontradicted information supplied by the member against whom the allegation is made.

[144] 3rd ed., Carswell, 1999, at 389. For a general discussion in this text of the topic of dealing with bias issues before tribunals, see "Waiver, Remedies and Evidence: The "Real" Issues of Bias Law" at 385 *et seq*. The authors disapprove of the practice of relying on a member's disclosed statements without giving the opportunity of testing that evidence (at 394). However, they agree that cross-examination is to be avoided

Where a member of a panel withdraws or is disqualified on the ground of bias, Provision 22.2 would apply with regard to the conduct of the hearing in the absence of an incapacitated member.

J. Extensions of Time

PROVISION 55

When satisfied that unfairness will result unless an extension is granted, a tribunal may extend or abridge time periods found in enabling or other legislation. When extending a time period, a tribunal may impose conditions.

K. Ex Parte Decisions

PROVISION 56

A tribunal may make a decision or order *ex parte* if satisfied that no notice is necessary or that delaying the proceeding until notice has been given might entail serious mischief.

Where a decision or order is made pursuant to this provision, the tribunal shall reconsider the matter at the request of

- any party or person entitled to party status under Provision 20.1 (or the tribunal's equivalent rules)
- any participant or person entitled to participant status under Provision 20.2 (or the tribunal's equivalent rules)

who is affected by the decision or order.

A tribunal may, at its discretion, reconsider a decision or order made under this provision at the request of a person who has been or may be granted participant status under Provision 20.3 (or the tribunal's equivalent rules).

The tribunal shall ensure that notice of a reconsideration is given to

- all parties or persons entitled to party status under Provision 20.1 (or the tribunal's equivalent rules)
- all participants, or persons entitled to participant status under Provision 20.2 (or the tribunal's equivalent rules)

who are affected by the decision or order.

A tribunal may, at its discretion, ensure that notice of a reconsideration under this provision is given to a person who has been or may be granted participant status under Provision 20.3 (or the tribunal's equivalent rules).

The notice under this provision shall be 48 hours notice.

On reconsideration the tribunal may confirm, vary, rescind or suspend the decision or order.

Explanatory Notes

Decisions so made should be minimally intrusive.

The rules for notice of hearing under Provision 21 are meant to apply to notice of a reconsideration under this provision.

L. Interpreters

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

Explanatory Notes

Many of the materials from which the Code provisions were drawn contain provisions respecting interpreters. However, this matter is covered by the requirement that the tribunal 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 the Hearing

PROVISION 58

A tribunal may 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 with the tribunal's orders and directions
- the power to impose conditions on continued participation
- the power to call for the assistance of a peace officer.

N. Service of Documents

Provisions respecting service of documents are too detailed for the Model Code.

Explanatory Notes

For standardized rules in relation to the service of documents, see the *Federal Administrative Hearings Act*.[145] The provisions for service in this document cover the following matters:

- methods of service, including service by methods other than personal service, and service on a corporation or non-incorporated association
- deemed receipt after mailing
- alternative methods of service
- actual notice in lieu of proper notice, and
- when failure to serve does not invalidate proceedings.

Tribunals should develop and adopt their own rules for service of documents and make them publicly available.

[145] This document is reproduced in *Macaulay* (*supra*, note 13) at 38.2 *et seq*.

PART 5. LIST OF POWERS TO BE CONSIDERED FOR INCLUSION IN ENABLING LEGISLATION

PROVISION 7

On the motion of an interested person a tribunal may, at its discretion, issue a decision with respect to how the law (statute, rule, decision or order) applies to unproven or hypothetical facts.

PROVISION 16

A tribunal may [obtain information by way of agency officers who have statutory powers of inspection] [obtain information by issuing warrants for search and seizure] [obtain information by applying to the court for warrants of search and seizure].

PROVISION 48

A tribunal may file its decisions or orders with the court. A decision or order so filed is enforceable in the same manner as a judgment or order of the court.

PROVISION 50

A tribunal may award costs [and hearing expenses].

PART V — DRAFT LEGISLATION

Administrative Powers and Procedures Act

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Alberta, enacts as follows:

Definitions

1. In this Act,

(a) "minister" means the Minister of Justice and Attorney General [minister charged with the administration of this Act],
(b) "order" means an order made by the minister under this Act,
(c) "Model Code" means the Model Code of Powers and Procedures in the Schedule,
(d) "tribunal" means a person or persons, whether or not incorporated, authorized to exercise a statutory power, and includes an authority designated under the Administrative Procedures Act, and
(e) "statutory power" means a power conferred by or under a statute to make a decision deciding or prescribing,

(i) the legal rights, powers, privileges, immunities, duties or liabilities of any person or party, or
(ii) the eligibility of any person or party to receive or retain a benefit or licence, whether the person is legally entitled thereto or not.

Model Code

2. The Model Code is hereby adopted as a model code of powers and procedures which will apply to tribunals as provided by orders made under this Act.

Order applying provisions of Model Code

3. (1) A tribunal has power to apply to the minister under this section.

(2) Upon the application of a tribunal, the minister

(a) may make an order that the Model Code applies to the tribunal in whole or in part, and

(b) may amend an order made under this subsection.

(3) The minister may make regulations prescribing

(a) the form of applications and the supporting information and materials to be provided,

(b) the criteria to be applied in determining what if any provisions of the Model Code are to be made applicable to a tribunal, and

(c) times within which applications are to be brought.

Effect of order

4. (1) Upon the making of an order under section 3,

(a) the tribunal has the powers conferred by the provisions of the Model Code referred to in the order,

(b) the tribunal is subject to the duties imposed by the provisions of the Model Code referred to in the order, and

(c) the procedures prescribed by the provisions of the Model Code referred to in the order are procedures prescribed for the tribunal.

(2) The provisions of the Model Code referred to in the order apply to the exercise of all statutory powers of the tribunal unless the order otherwise provides.

Regulations Act

5. (1) The Regulations Act applies to an order made under this Act.

(2) The minister may

(a) keep and publish a list of orders made under this Act, including the names of the tribunal to which each order applies and a list of the provisions which the order makes applicable to the tribunal, and

(b) publish updated lists from time to time.

Administrative Procedures Act

6. The Administrative Procedures Act

(a) continues to apply to each tribunal to which it applies on the effective date of this Act until the minister makes an order

(i) making applicable to the tribunal provisions of the Model Code which include the subject matter of all of the provisions of the Administrative Procedures Act which at the time of the order are applicable to the tribunal, and

(ii) terminating the designation of the tribunal as an authority under the Administrative Procedures Act, and

(b) is otherwise repealed.

APPENDIX
List of Consultants

A. Department representatives

Note: some departments have been redesignated since the date of our consultation.

Sheila Blair	Health
Audrey Dean	Community Development
Jillian Flett	Environmental Protection
Raffaella Garofalo	Education
Tim Hurlburt	Justice, Civil Law
Bill Nugent	Municipal Affairs
Eleanor Richardson	Energy
Diana Salonen	Labour
Tanya Stewart	Justice, Legal Research
Ian Zaharko	Advanced Education & Career Development
Bernie Rodriguez	Treasury
Brian Bolan	Transportation and Utilities
Sonia Gaal	Personnel Administration
Bard Haddrell	Agriculture, Food & Rural Development
Cameron Henry	Intergovernmental and Aboriginal Affairs
Susan Rankin	Family and Social Services
Joanne Rimmer	Economic Development & Tourism

B. Tribunals

Alberta Apprenticeship and Industry Training Appeal Board
Alberta Citizenship and Human Rights Commission
Alberta Corporate Tax Act Appeal Committee
Alberta Dairy Control Board
Alberta Energy and Utilities Board
Alberta Human Rights and Citizenship Commission
Alberta Insurance Council Appeal Board
Alberta Insurance Council

Alberta Securities Commission
Agricultural Financial Services Corporation
Board of Censors
Child Welfare Appeal Panel
Edmonton and North Dependent Adults Appeal Panel
Edmonton Police Commission
Environmental Appeal Board
Family and Social Services Appeal Panels
Labour Relations Board
Land Compensation Board / Surface Rights Board
Livestock Industry Diversification Act Appeal Board
Metis Settlement Appeal Tribunal
Municipal Government Board
Natural Resources Conservation Board
Office of the Information and Privacy Commissioner
Persons with Developmental Disabilities Provincial Board
Public Health Appeal Board
Public Service Act Classification Appeal Board
Students Finance Board
Umpires, Employment Standards Code
Universities Coordinating Council
Workers Compensation Appeal Tribunal
Workers Compensation Board

C. Local bodies

We consulted a number of municipalities and regional health authorities by e-mail and telephone. We also exchanged correspondence with the Calgary, Edmonton, and Ponoka Mental Health Review Panels.

D. Legal Profession

Law Society of Alberta
Canadian Bar Association, Administrative Law Section

B.R. BURROWS
C.W. DALTON
A. DE VILLARS
A.D. FIELDING
N.A. FLATTERS
W.H. HURLBURT
H.J.L. IRWIN
P.J.M. LOWN
A.D. MACLEOD
S.L. MARTIN
D.R. OWRAM
B.L. RAWLINS
N.C. WITTMANN
R.J. WOOD

CHAIRMAN

DIRECTOR

December 1999