



**Powers & Procedures for
Administrative Agencies:
MODEL CODE**

Consultation Memorandum No. 6
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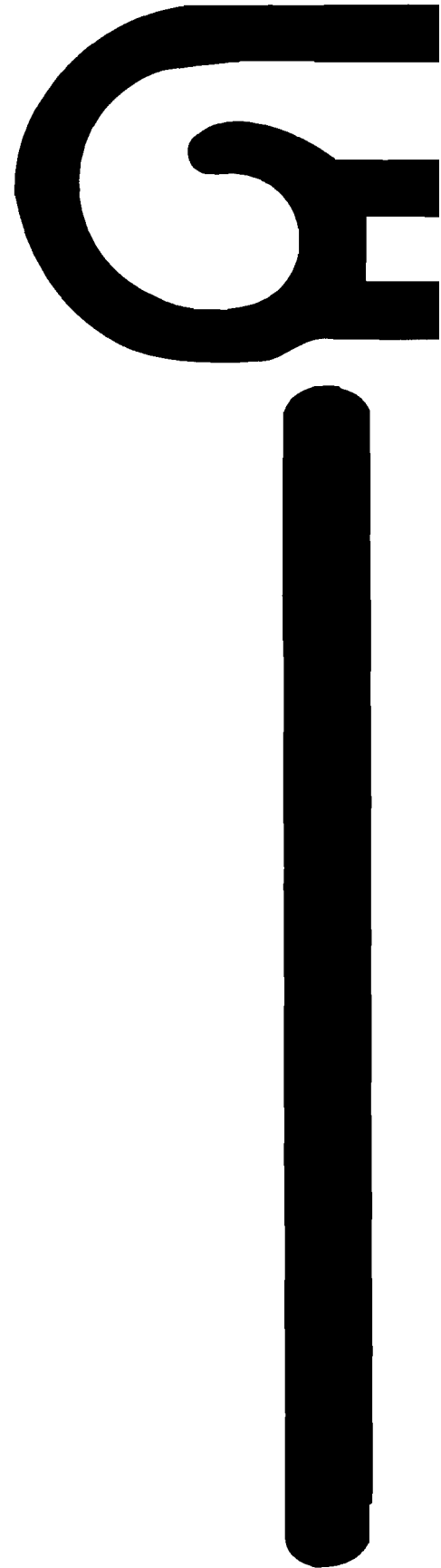


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ADMINISTRATIVE LAW REFORM INITIATIVES IN OTHER JURISDICTIONS

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

Ontario

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

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

Federal Jurisdiction

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

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

United States

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

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

United Kingdom

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

Uniform Law Conference of Canada

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

OUR PROCESS FOR DEVELOPING THE PROPOSED MODEL CODE

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

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

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

1. We created a Project Committee, which consisted of the following persons:
 - Andrew Sims, Q.C., former Chair, Labour Relations Board
 - Raylene Palichuk, Neuman Thompson, Chair, Canadian Bar Association Arbitration Section, National Chair; former Chair,
 - Frans Slatter, McCuaig Desrochers, former Member, Securities Commission
 - Dr. Bill Tilleman, Chair, Environmental Appeal Board.
2. We created a Table of Contents for the Model Code (see the attachment below).
3. Under each major heading and sub-heading, we compiled the relevant provisions, where such existed, from each of the following sources:
 - Macaulay, *Practice and Procedure Before Administrative Tribunals*
 - Society of Ontario Adjudicators and Regulators - Proposals for amendment to SPPA, 1993
 - *Ontario Statutory Powers and Procedures Act*, as amended to 1997
 - Society of Ontario Adjudicators and Regulators - Proposals for amendment to SPPA, 1997
 - Government of Ontario Task Force Consultation Document, "Excellence in Administrative Justice".
 - Federal Department of Justice, *Proposal for a Federal Administrative Hearings Act, 1996*
 - *United States Model State Administrative Procedure Act 1981*
 - California Law Revision Commission proposal for *Administrative Adjudication by State Agencies*
 - English Council of Tribunals, *Model Rules of Procedure for Tribunals*

- Ouellette, Uniform Law Conference of Canada, *Model Administrative Procedure Code*.
4. Relying on the material in the sources, we prepared a set of choices and related questions for each sub-heading. The answer to these questions would allow us to design a tentative provision under each sub-heading.
 5. For each major heading, we held one or two meetings of our Project Committee. The Committee reviewed the set of choices and related questions under each sub-heading, and developed a tentative provision.
 6. The Project Committee's recommendations were taken to a meeting of our full Institute Board of Directors. Again, there were one or two meetings for each major heading. The Board reviewed each of the tentative provisions developed by the Project Committee, and approved or revised it.
 7. We compiled the provisions as approved by the Board into a Model Code.

THE FINAL PRODUCT AND ITS IMPLEMENTATION

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

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

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

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

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

