ALBERTA LAW REFORM INSTITUTE

EDMONTON, ALBERTA

Powers and Procedures of Administrative Tribunals

Consultation Memorandum No. 13

September 2008

Deadline for Comments: December 31, 2008

INVITATION TO COMMENT

This Consultation Memorandum by the Alberta Law Reform Institute [ALRI] raises a number of issues regarding the powers and procedures of administrative tribunals.

The purpose of issuing a Consultation Memorandum is to allow interested persons the opportunity to consider these issues and make their views known to ALRI. Any comments sent to us will be considered when the ALRI Board makes final recommendations.

Deadline for comments on the issues raised in this Memorandum is December 31, 2008.

You can reach us with your comments by fax, mail or e-mail to:

Alberta Law Reform Institute
402 Law Centre
University of Alberta
Edmonton AB T6G 2H5

Phone: (780) 492-5291
Fax: (780) 492-1790
E-mail: *reform@alri.ualberta.ca*
Website: http://www.law.ualberta.ca./alri/

Law reform is a public process. ALRI assumes that comments on this Consultation Memorandum are not confidential. ALRI may quote from or refer to your comments in whole or in part and may attribute them to you, although we usually discuss comments generally and without attribution. If you would like your comments to be treated confidentially, you may request confidentiality in your response or may submit comments anonymously.

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ABOUT THE ALBERTA LAW REFORM INSTITUTE

The Alberta Law Reform Institute was established on January 1, 1968, by the Government of Alberta, the University of Alberta and the Law Society of Alberta for the purposes, among others, of conducting legal research and recommending reforms in the law. Funding of ALRI's operations is provided by the Government of Alberta, the University of Alberta, and the Alberta Law Foundation.

The members of ALRI's Board are The Honourable Justice N.C. Wittmann, ACJ (Chairman); C.G. Amrhein; N.D. Bankes; A. de Villars, Q.C.; The Honourable Judge N.A. Flatters; W.H. Hurlburt, Q.C.; H.J.L. Irwin, Q.C.; P.J.M. Lown, Q.C. (Director); The Honourable Justice A.D. Macleod; J.S. Peacock, Q.C.; The Honourable Justice B.L. Rawlins; W.N. Renke; N.D. Steed, Q.C.; and D.R. Stollery, Q.C.

ALRI's legal staff consists of P.J.M. Lown, Q.C. (Director); S. Petersson (Research Manager); D.W. Hathaway; C. Hunter Loewen; J.D. Larkam; M.E. Lavelle (on leave); A.L. Lis; and G. Tremblay-McCaig. W.H. Hurlburt, Q.C. is an ALRI consultant.

ALRI has offices at the University of Alberta and the University of Calgary. ALRI's mailing address and contact information is:

402 Law Centre

University of Alberta
Edmonton Alberta T6G 2H5
Phone: (780) 492-5291

Fax: (780) 492-1790
E-mail: *reform@alri.ualberta.ca*

This and other ALRI reports are available to view or download at the ALRI website: <http://www.law.ualberta.ca/alri>.

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Anne de Villars, Q.C., de Villars Jones (Chair)
Giuseppa Bentivegna, Alberta Energy & Utilities Board
David Phillip Jones, Q.C., de Villars Jones
Martin Kay, Q.C., Bennett Jones LLP
Alastair Lucas, Q.C., University of Calgary, Faculty of Law
William Shores, Q.C., Shores Belzil Jardine

The research and writing for this consultation memorandum were carried out with skill and dedication by Maria Lavelle, lead counsel on the project until August 2007. Geneviève Tremblay-McCaig joined the project as lead counsel in October 2007 and ably carried the project through final revisions of the Model Code to publication. Leah Lis, co-counsel on the project, and Sandra Petersson, ALRI research manager, provided administrative and editorial support. Shannon Brochu, Lori Kennedy, Jessica Bortnick, and Ryan Krushelnitsky were research assistants on the project. Jenny Koziar designed the formatting for the Model Code and prepared the consultation memorandum for publication.

EXECUTIVE SUMMARY

In recent years, administrative tribunals have had an important role to play in interpreting and applying the law through their adjudicative functions. For a large proportion of the population they are also a primary contact with the adjudicative role of government. For those administrative tribunals that make decisions affecting the rights and interests of individuals and businesses, there is no single coherent, accessible and logically consistent set of powers and procedures to govern these bodies. While the *Administrative Procedures and Jurisdiction Act* does provide a set of rules to guide tribunals in their decision-making function, its provisions do not reflect developments in the common law requirements of procedural fairness and tribunal practices. Further, it only applies to a limited number of tribunals.

This Consultation Memorandum proposes a Model Code of powers and procedures for administrative tribunals that exercise an adjudicative function. The Model Code is consistent with the requirements of procedural fairness and efficiency. It updates, reorganizes and streamlines the provisions contained in Alberta Law Reform Institute, *Powers and Procedures for Administrative Tribunals in Alberta*, Final Report No. 79 (1999).

The Model Code draws from recent reform proposals in other jurisdictions, notably British Columbia and Saskatchewan. It was developed following consultations with a committee of administrative law experts reflecting diverse backgrounds and experiences.

Part I of the Consultation Memorandum reviews the need for a more coherent set of powers and procedures for administrative tribunals as well as reforms proposed in other jurisdictions.

Part II sets out the recommended provisions of the Model Code. These include general provisions and those that apply specifically to the pre-hearing, hearing, decision-making and reason-giving stages of proceedings.

Part III raises issues for discussion with respect to the Model Code.

ABBREVIATIONS

AUC Act	*Alberta Utilities Commission Act*, S.A. 2007, c. A-37.2.
AJO	Administrative Justice Office, Ministry of the Attorney General, British Columbia.
APA	*Administrative Procedures Act*, R.S.A. 1980, c. A-2.
APJA	*Administrative Procedures and Jurisdiction Act*, R.S.A. 2000, c. A-3.
BC Act	*Administrative Tribunals Act*, S.B.C. 2004, c. 45.
EPEA	*Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12.
ERCB Rules	*Energy Resources Conservation Board Rules of Practice*, Alta. Reg. 196/2007.
LRC	*Labour Relations Code*, R.S.A. 2000, c. L-1.
NRCB Rules	*Rules of Practice of the Natural Resources Conservation Board*, Alta. Reg. 77/2005.
Report No. 79	Alberta Law Reform Institute, *Powers and Procedures for Administrative Tribunals in Alberta*, Final Report No. 79 (1999).
Saskatchewan Model Code	The Law Reform Commission of Saskatchewan, *A Model Code of Procedure for Administrative Tribunals*, Consultation Paper (2003).

PART I — INTRODUCTION

[1] Administrative tribunals in Alberta comprise more than 100 boards, commissions and review panels that make decisions affecting the rights and interests of residents and businesses. These tribunals include the Environmental Appeals Board, the Workers' Compensation Board, the Transportation and Safety Board, the Securities Commission, the Energy and Utilities Board, and the Labour Relations Board to name only a few. Administrative tribunals perform a number of different functions. This Model Code, however, is concerned only with those tribunals that perform an adjudicative function, that is those which conduct hearings, receive evidence, and resolve disputes among parties.[1]

[2] While administrative tribunals have had an important role to play in interpreting and applying the law through their adjudicative functions, there is no single coherent, accessible and logically consistent set of powers and procedures that governs these bodies. Many of the larger tribunals in Alberta have well-developed procedural powers and generally render decisions that are consistent with the requirements of procedural fairness and efficiency. There is a concern, however, that some of their procedures have developed in an *ad hoc* way and differ unnecessarily from the rules of other tribunals that perform the same or similar functions. Smaller tribunals in Alberta tend to have less-developed procedural powers, and would also benefit from more consistent and transparent procedures.

[3] This paper proposes a Model Code – a coherent set of powers and procedures consistent with the requirements of procedural fairness and efficiency – for administrative tribunals in Alberta. It updates, reorganizes and streamlines the provisions contained in Alberta Law Reform Institute, *Powers and Procedures for Administrative Tribunals in Alberta*, Final Report No. 79 (1999) [Report No. 79].

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[1] The Model Code is not intended to apply to commissions of inquiry or other bodies governed by the procedures contained in the *Public Inquiries Act,* R.S.A. 2000, c. P-39.

1. The Need for a More Coherent Set of Powers and Procedures Persists

[4] The problems first identified in Report No. 79 concerning the lack of consistency in the rules of administrative tribunals in Alberta persist today.

[5] The *Administrative Procedures Act* [APA] provided a set of rules to guide tribunals as to how to conduct their decision-making functions.[2] Report No. 79 identified a number of problems with the APA. The first was that the statute was outdated. The APA was enacted in 1966 and remained basically unchanged since then. Its provisions did not reflect developments in the common law requirements of fairness and in tribunal practices.

[6] Second, the APA, had very limited coverage, applying to only those tribunals listed in the schedule 1 and to a number of tribunals whose enabling legislation incorporated the Act. As Report No. 79 identified, this limited coverage has a number of drawbacks:

- Many tribunals have procedures, or some procedures, in their enabling legislation. 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.
- 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.

The APA has subsequently been repealed and replaced with the *Administrative Procedures and Jurisdiction Act* [APJA].[3] However, the provisions in Part 1 of the APJA are identical to those of the APA. Accordingly, the shortcomings of the old Act are replicated in the new Act.

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[2] *Administrative Procedures Act*, R.S.A. 1980, c. A-2.

[3] *Administrative Procedures and Jurisdiction Act*, R.S.A. 2000, c. A-3.

[7] To address these shortcomings, Report No. 79 included a set of provisions of administrative powers and procedures intended to be implemented as 'opt-in' legislation. Since its publication, however, there has been no adoption of the provisions and no opt-in legislation has been passed.

[8] In preliminary discussions with some senior tribunals, it was discussed that the provisions in Report No. 79 were not implemented for two main reasons. First, the more senior administrative tribunals already had in place comparable powers and procedures. Second, the more junior tribunals lacked the incentives and the resources to review and change their procedures voluntarily. However, those consulted considered that there was still a need for a set of consistent procedures, particularly for the more junior tribunals.

[9] Although Report No. 79 has not been implemented, there are good reasons to again propose a model code. First, as noted above, the problems identified in Report No. 79 persist today. Second, the model code approach has been adopted or proposed in a number of other jurisdictions (see discussion below). Third, some senior tribunals in Alberta have encouraged ALRI to revise Report No. 79 to develop provisions that are more user-friendly and less resource-intensive. Fourth, a user-friendly, accessible model code is consistent with the Alberta government's stated goal of developing a justice system that is efficient, effective and responsive to the needs of Albertans.

2. Advances in Other Jurisdictions

a. Advances up to 2000

[10] There has been no shortage of efforts to develop greater consistency in administrative tribunal powers and procedures. Report No. 79 traced the history of administrative law reform in Canada, the US and the UK, prior to 2000. Alberta and Ontario were the first two common law jurisdictions in Canada to have a statute governing tribunal powers and procedures. As noted, Alberta enacted the APA in 1966 with little subsequent amendment. In comparison, Ontario's *Statutory Powers and Procedures Act*, first enacted in 1971, has undergone numerous amendments.[4] The Ontario Act applies very broadly, as some of its provisions are intended to apply not only to adjudicative decision-makers, but also to statutory decision-makers such as

[4] *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22.

licence issuers. Both the Alberta and Ontario statutes have been criticized for being only a partial codification of procedural rules, for applying to only a limited number of tribunals, and for not being cast in the form of a code that is accessible to non-professional tribunal members.[5]

[11] In 1991, the Uniform Law Conference of Canada issued a *Model Administrative Procedures Code* prepared by Yves Ouellette.[6] While the Code was an improvement over the Alberta and Ontario legislation, in that it was in the form of a code and more adequately incorporated the rules of natural justice, its provisions were criticized for being too general, vague, or "skeletal."[7]

[12] In the US, the National Conference of Commissioners on Uniform State Laws first adopted a *Model State Administrative Procedure Act* in 1946.[8] A revised version was adopted in 1961, again in 1981 and is currently under reconsideration.[9] Many states have adopted the Model Act, some with few changes and others with substantial changes.

[13] Subsequent proposals from the UK, the Canadian federal government and ALRI reflected a trend towards more detailed provisions on which tribunals were to base their procedures, departing from the model procedures as required.[10]

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[5] The Law Reform Commission of Saskatchewan, *A Model Code of Procedure for Administrative Tribunals*, Consultation Paper (2003) at 6 [Saskatchewan Model Code].

[6] Uniform Law Conference of Canada, *A Model Administrative Procedure Code* (1991).

[7] See Saskatchewan Model Code at 6-7.

[8] National Conference of Commissioners on Uniform State Laws, *Model State Administrative Procedure Act* (1946).

[9] The National Conference of Commissioners on Uniform State Laws, online: <http://www.nccusl.org/Update/>.

[10] See Saskatchewan Model Code at 6-7.

[14] In 1991, the English Council on Tribunals issued a report entitled *Model Rules of Procedure for Tribunals*.[11] This report included very detailed rules for tribunals that conduct hearings. It also set out the steps to be taken by applicants, respondents and first instance tribunals whose decisions were under appeal. It was intended to be a compilation of procedures, rather than a code, from which departments and tribunals could select and adopt what they needed.

[15] In 1996, the Canadian federal government released a report entitled *Proposal for a Federal Administrative Hearings Act*.[12] It proposed a comprehensive set of procedural provisions to be adopted as opt-in legislation. This proposal has not been implemented, and was suspended due to a lack of resources. ALRI's Report No. 79 drew extensively on the federal proposal both in developing its set of provisions and in its recommendation for implementation as opt-in legislation.

b. Advances since 2000

[16] Since the release of Report No. 79 in December 1999 there have been further efforts to reform administrative law. These recent developments reflect three basic trends, sometimes in combination:[13]

- unification of tribunals into "super tribunals";
- consolidation of governmental responsibilities for tribunals into one ministry, typically a justice ministry; and
- improvement of the quality of first level statutory decision-makers, in an effort to reduce the need for tribunal review.

c. Canada

[17] In Canada, British Columbia commenced a comprehensive review of its administrative tribunal system in July 2001. This review culminated in the passage of

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[11] Council on Tribunals, "Model Rules of Procedure for Tribunals", Cm 1434 (1991) (Chairman: C. Clothier).

[12] *Proposal for a Federal Administrative Hearings Act*, Department of Justice, 1996 reprinted in Robert W. Macaulay & James L.H. Sprague, *Practice and Procedure Before Administrative Tribunals*, looseleaf, (Toronto: Thomson Carswell, 2004) vol. 4 at para. 38.2.

[13] British Columbia, Ministry of Attorney General, *Update on 2004 Reforms*, (Victoria: Administrative Justice Office, 2003) at 59, online: <http://www.gov.bc.ca/ajo/down/ajo_aug25_03.pdf>.

the *Administrative Tribunals Act* in 2004.[14] The BC Act is comprised of two parts: (i) appointment provisions and (ii) general reform provisions providing tribunals with a menu of powers from which to choose. The BC Act is not "stand alone" legislation; its provisions are intended to be selectively applied to individual tribunals, in accordance with each tribunal's particular mandate and needs, by consequential amendment to the affected tribunal's enabling statute.[15] To support and continue this comprehensive review, British Columbia created the Administrative Justice Office [AJO] as part of the Ministry of the Attorney General. The AJO acts as a resource on tribunal-related issues. For example, it is involved extensively in assisting tribunals to implement the BC Act, analysing the impact of legal developments in administrative law and monitoring administrative reform initiatives in other jurisdictions.

[18] Reforms in Quebec began prior to December 1999 when new administrative justice legislation was passed, and culminated more recently in the creation of a new super-tribunal – the Tribunal Administratif du Quebec, "TAQ".[16] The legislation includes basic principles of procedure which are designed to be complemented by detailed rules promulgated by each individual tribunal and tailored to that tribunal's needs. The TAQ amalgamates five existing administrative tribunals,[17] and assumes certain powers that formerly fell under the jurisdiction of the Court of Québec and exercises certain new powers distributed amongst its various divisions. In addition, Quebec created the Council of Administrative Justice, with a broad mandate to sustain public confidence in administrative justice.

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[14] *Administrative Tribunals Act*, S.B.C. 2004, c. 45 [BC Act].

[15] Ronald Ellis is critical of the British Columbia reform efforts for continuing the traditional administrative tribunal system structure in which line-ministries, whose decisions a tribunal is to review, are also assigned as that tribunal's host ministry. He is critical of the systemic conflict of interest inherent in this structure and calls for a super "provincial tribunal" to be created in its place. (See "A Radical Remedy for Canada's Rights Tribunals" *The Lawyers Weekly* 21:32 (4 January 2002) 6; "Disturbing Omissions in B.C. White Paper - II" *The Lawyers Weekly* 22:35 (24 January 2003) 8).

[16] *An Act Respecting Administrative Justice*, R.S.Q., c. J-3.

[17] The TAQ is an amalgamation of the Commission des affaires sociales, the Commission d'examen des troubles mentaux, the Bureau de révision en immigration, the Bureau de révision de l'évaluation foncière and the Tribunal d'appel en matière de protection du territoire agricole.

[19] In contrast, the Saskatchewan Law Reform Commission recently proposed more modest reforms in the form of a model code. In 2003, it released a consultation paper entitled *A Model Code of Procedure for Administrative Tribunals* and it subsequently published its model code as a set of best practices for administrative tribunals to follow. The proposals are similar to those previously raised by the federal government and ALRI.

d. United Kingdom

[20] The UK continues the trend of broad administrative justice reform initiatives. In 2003, the Council on Tribunals released *A Guide to Drafting Tribunal Rules* as a successor to the *Model Rules of Procedure for Tribunals*.[18] Like its predecessor, the new guide contains a very detailed series of procedures that are to be applied as appropriate by tribunals. The focus of the new guide is on the person who has to draft procedural rules for newly formed tribunals or to up-date the old rules of existing tribunals. The UK government has also announced a program for improvements to the whole "end to end" process for administrative justice. These plans include the creation of a unified tribunal system.[19]

e. New Zealand

[21] In March 2004, the New Zealand Law Commission released *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals*, a report which recommended the creation of a unified tribunal framework.[20] In response, the New Zealand government agreed that a "more coherent structure" should apply to the administration of tribunals and committed to developing a set of guidelines for their administration

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[18] U.K., Council on Tribunals, *A Guide to Drafting Tribunal Rules*, (Report) (London: Her Majesty's Stationery Office, 2003).

[19] For further information, see: U.K. Office of Public Service Reform, "Transforming Public Services: Complaints, Redress and Tribunals" (July 2004), online: Department for Constitutional Affairs <http://www.dca.gov.uk/pubs/adminjust/transformfull.pdf>.

[20] New Zealand Law Reform Commission, *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals*, Report No. 85 (2004), online: <http:/www.lawcom.govt.nz/ProjectReport.aspx?ProjectID=89>.

and operation by December 2005.[21] The government proposed that a unified tribunal structure should follow, rather than precede, the application of common guidelines to the various existing tribunals. In January 2008, the New Zealand Law Commission released *Tribunals in New Zealand* which reviews the current problems in New Zealand's system of tribunals.[22] The New Zealand Report first proposes a working definition of administrative tribunal, and then explores various themes, such as accessibility, membership and expertise, independence, procedure, powers, appeals, speed and efficiency, including alternative dispute resolution mechanisms, as well as issues for discussion, tribunal reform in other jurisdictions and options for reform.

f. Australia

[22] Australia has also proposed a super-tribunal model. However, the Australian government's plans to merge the majority of specialist tribunals with its centralized appeal body in order to create a new "super-tribunal", the Administrative Review Tribunal, were defeated in the Senate. Since that time, the focus has shifted to making moderate reforms to existing tribunals.[23]

[23] Versions of the Australian government's planned super-tribunal, however, have been successfully adopted in a number of states and territories in Australia. In Victoria, the Victorian Civil and Administrative Appeal Tribunal, an integrated state tribunal, is well-accepted. In addition, the State of Western Australia established the State Administrative Tribunal in 2005 as an independent body that makes and reviews a range of administrative decisions.[24]

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[21] New Zealand, "Government Response to Law Commission Report on Delivering Justice for All", August 2004, 47th Parliament (September 2004), online: Ministry of Justice <http://www.justice.govt.nz/pubs/reports/2004/delivering-justice-for-all/index.html>.

[22] New Zealand Law Commission, *Tribunals in New Zealand*, Issues Paper No. 6 (2008), online: <http://www.lawcom.govt.nz/UploadFiles/Publications/Publication_131_385_IP6_Tribunals_in_NZ.pdf>.

[23] Robin Creyke, "'Better Decisions' and Federal Tribunals in Australia" (2004) 84 Reform 10 at 13.

[24] See also Michael Barker & Ralph Simmonds, "Delivering Administrative Justice in WA - The Emergence of the State Administrative Tribunal" (2004) 84 Reform 23. The State Administrative Tribunal was established by the *State Administrative Tribunal Act 2004* (W.A.).

3. The Model Code Approach

[24] As the preceding section demonstrates, administrative law reform encompasses a broad range of possible initiatives. Common to most of these initiatives is the development of more coherent set of procedural rules that can be tailored to meet an individual tribunal's needs. As noted by the Saskatchewan Law Reform Commission, a model code responds to problems that are "perceived to lie at the core of deficiencies in administrative adjudication."[25] The focus of this paper is on developing such a set of procedural rules through the development of a model code for Alberta.

[25] The Model Code proposed here starts from the assumption that administrative tribunals will remain an important means of adjudication in Alberta. The use of administrative tribunals for a particular function is not questioned. Rather, the focus of the Model Code is on developing the powers and procedures necessary to provide a fair, just, efficient and effective tribunal process.

[26] Similarly, the Model Code does not address other substantive issues such as the standard of review to be used by a court when reviewing a decision of a statutory delegate; the circumstances under which appeals should be provided from decisions of statutory delegates and the nature of those appeals; the problem of multiple forums for dealing with a particular administrative matter; issues relating to the scope and availability of judicial review; and the process used for appointing members of statutory tribunals. The ALRI Board determined that the focus of the Model Code should be on the procedural powers of administrative tribunals. While these other areas may be in need of reform, such issues fall outside the scope of the project as currently defined.

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[25] See Saskatchewan Model Code at 5.

PART II — MODEL CODE

THE MODEL CODE IS IN FIVE PARTS:

1. General considerations;
2. Powers and procedures which apply across all stages of tribunal proceedings;
3. Pre-hearing powers and procedures;
4. Hearing powers and procedures; and
5. Decision and reasons.

Underlying principles

The Model Code reflects the four underlying principles that were identified in Report No. 79.

First, administrative tribunals are to be distinguished from courts. They deal with limited subject areas and the degree of formality in their proceedings varies. Accordingly, there is a need for flexibility and the Model Code provides tribunals a high degree of control over their own processes. Further, their mandate often requires that they take into account the public interest in making decisions. To accomplish this, tribunals must have access to additional information without necessarily relying on the parties or other participants to bring this information forward. The Model Code accommodates this in a number of provisions that provide the tribunal with information on which to base their decisions, as well as recognizing that tribunal members may also rely on their own expertise.

Second, it goes without saying that tribunals are bound by the principles of fairness and natural justice, and where applicable, the *Charter of Rights and Freedoms* [Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11]. The key elements of natural justice are captured in the Model Code provisions.

Third, it is imperative that tribunals are efficient. The Model Code contains numerous provisions that aim to streamline tribunal proceedings. For example, the Model Code provisions dispense with unnecessary hearings, provide for pre-hearing conferences and encourage alternative dispute resolution.

Fourth, tribunals must have the tools that allow them to conduct their proceedings effectively. As mentioned in the discussion above, many tribunals have few written rules or none at all. Further, tribunals may not all be aware of the duty of procedural fairness under the common law. The Model Code assists tribunals in that it provides a centralized repository of these rules of procedure and clarifies what procedural fairness requires.

Explanatory notes

The Model Code provisions are often accompanied by an explanatory note. The explanatory note, where included, is intended to assist the reader in understanding the purpose of the provision, and may elaborate on the meaning of a particular term, or set out some considerations that a tribunal may want to bear in mind in applying a provision. It is intended that the explanatory notes would be included with the Model Code in its final form. For example, were the Model Code to be implemented through legislation, the explanatory notes would be included to assist the reader although they would not have any legal effect. Were the Model Code to be published as an annotated document, the explanatory notes would be part of the annotation.

1. GENERAL

1.1 PURPOSE

The purpose of this Model Code is to provide a fair and just process for parties and other participants, as well as to increase the efficiency and effectiveness of administrative tribunal proceedings.

1.2 DEFINITIONS

"Enabling enactment" means the enactment that creates a tribunal and provides it with the power to act.

"Tribunal" means a body or person that is assigned the authority by an Act of the Legislature to decide questions or disputes among parties, but does not include a court or a government department.

1.3 REPRESENTATION BY LAWYER OR AGENT

(1) A party or other participant may conduct his or her own case or may be represented by a lawyer.

(2) Where the enabling enactment provides or a tribunal exercises its discretion, a party or other participant may be represented by an agent.

EXPLANATORY NOTE – REPRESENTATION BY LAWYER OR AGENT

Any party or other participant appearing before a tribunal may be represented by lawyer. There is no absolute right to a lawyer. However, the courts have found a right to a lawyer where there are formal and somewhat complex proceedings, or where the consequences of the proceedings to the individual are significant. Conversely, there has been found to be no right to a lawyer in the context of situations where the authorities must act with urgency and there is no time to retain and instruct a lawyer. Where the issues are not complex and the individual is capable of presenting his or her case, then the right to a lawyer has been dispensed with. [See for example, Robert W. Macaulay & James L.H. Sprague, *Practice and Procedure Before Administrative Tribunals*, looseleaf, (Toronto: Thomson Carswell, 2004) vol. 2 at para. 12.27(a).] This provision does not impose a duty on the tribunal to provide a lawyer.

In the absence of a statutory direction, the ability of an individual to be represented by an agent, a person who is not legally qualified, is matter of procedure and falls within the tribunal's general authority over its own procedure.

2. POWERS AND PROCEDURES

EXPLANATORY NOTE – GENERAL

This part sets out the power of tribunals to control their own process. These general provisions are intended to apply to all stages of tribunal proceedings. Tribunals are encouraged to tailor or build on the procedures contained in the Model Code to suit their own particular context.

2.1 POWER TO CONTROL ITS OWN PROCESS AND MAKE RULES OF GENERAL APPLICATION TO GOVERN ITS OWN PROCESS

(1) A tribunal may control its own process and may adopt rules of procedure of general application to govern its proceedings, subject to procedural fairness and the requirements of the enabling enactment.

(2) A tribunal's procedures must be documented and made available for public inspection.

EXPLANATORY NOTE – POWER TO CONTROL ITS OWN PROCESS AND MAKE RULES

The purpose of this provision is to codify the common law power of a tribunal to control its own process. [See for example*, Kane v. University of British Columbia*, [1980] 1 S.C.R. 1105; *Innisfil (Township) v. Vespra (Township),* [1981] 2 S.C.R. 145; *Knight v. Indian Head School Division No. 19,* [1990] 1 S.C.R. 653; and *Baker v. Canada (Minister of Citizenship and Immigration),* [1999] 2 S.C.R. 817.] The power of a tribunal to determine its own procedural rules is subject to fairness and the requirements of its enactment.

Rules of procedure of general application

Examples of the types of power that are subsumed under this broad heading include:

(a) setting hearing times and venues;
(b) ordering that separate proceedings be heard immediately one after the other;
(c) ordering that proceedings be stayed until after determination of other procedures;
(d) making interim procedural orders;
(e) granting adjournments;

(f) ordering the exchange of documents among parties or other participants, the filing or exchange of witness statements, or experts' reports and qualifications, the exchange of medical examinations, and the provision of particulars;
(g) specifying the manner, that is, whether oral or written, sworn or otherwise in which a party or other participant may make representations on procedural questions, etc.; and,
(h) excluding repetitious or marginally-relevant evidence.

All tribunals are encouraged to establish their own procedures for conduct of a hearing consistent with the minimum requirements set out in the Model Code. Some larger tribunals with more formal proceedings will already have developed comparable procedural provisions which, however, should be checked for consistency against the Model Code. The Model Code provisions are also intended to provide guidance to those tribunals who have not already developed hearing procedures, and who may lack the legal or professional expertise to develop their own.

Documented and made available for public inspection
To ensure greater transparency and accessibility it is important that a tribunal's procedures be documented and made available to the public. Documenting the procedures ensures there is no disagreement as to which rules and procedures apply at a given point in time. The requirement that they be made available for public inspection can be met in a variety of ways depending on the resources and user base of the particular tribunal. Suggestions include: participation guidelines, brochures, web-pages, and videos. Tribunals are also encouraged to have any policy statements or practice directives documented and made available to the public.

2.2 THE POWER TO TAILOR MODEL CODE PROCEDURES OR TO VARY PROCEDURES OF GENERAL APPLICATION

(1) A tribunal may adopt rules of procedure of general application in addition to or in substitution for those contained in the Model Code, subject to the requirements of procedural fairness and the enabling enactment.

(2) Notwithstanding that it has adopted procedures of general application, a tribunal may adopt particular procedures or vary existing procedures for a given circumstance, subject to the requirements of procedural fairness and the enabling enactment.

2.3 STANDING

Parties

(1) A tribunal must grant standing in proceedings before it to the following:

(a) persons who have standing under the enabling enactment;

(b) persons whose rights or obligations will be directly varied or affected by the tribunal's determination of the matter before it.

Other Participants

(2) (a) A tribunal may, at its discretion, grant standing to participate in proceedings before it to the following:

(i) persons who are otherwise affected by the tribunal's determination of the matter;

(ii) persons who represent the public interest;

(iii) persons who can contribute a novel argument or perspective.

(b) A tribunal may specify the extent of these other participants' participation rights.

EXPLANATORY NOTE – STANDING

The purpose of these provisions is to set out clear and consistent rules with respect to the parties and other participants in tribunal proceedings.

Parties

In the context of proceedings before an administrative tribunal, the question of who has standing is resolved primarily through the language of the enabling enactment, rather than through the application of common law tests. That is, the enabling enactment will usually specify who is to be a party in proceedings. In addition, the rules of procedural fairness require that those persons who are directly affected by a tribunal's decision have an automatic right to participate in the proceedings, unless the enabling enactment provides otherwise. [See for example, *Telecommunications Workers Union v. Canada (Radio-television and Telecommunications Commission)*, [1995] 2 S.C.R. 781.] These parties are entitled to the full range of participatory rights.

Other participants
Other participants are generally persons who are not directly affected by a tribunal's decision, but who still have a sufficient interest or some expertise or view which a tribunal feels is beneficial to the proceedings. [See for example, Robert W. Macaulay & James L.H. Sprague, *Practice and Procedure Before Administrative Tribunals*, looseleaf, (Toronto: Thomson Carswell, 2004) vol. 2 at para. 12.4.] A tribunal's authority to grant "other participant" status may be expressly given by statute or flow implicitly from the tribunal's authority to control its own procedure. Only clearly expressed language in the enabling enactment can take away this authority. [*American Airlines Inc. v. Canada (Competition Tribunal)*, [1989] 1 S.C.R. 236.]

The extent that other participants may participate in proceedings is left to the discretion of the tribunal. A tribunal may limit the participation of other participants in a number of ways. For example, the tribunal may limit other participants with respect to:

- the cross examination of witnesses;
- the right to lead evidence;
- one or more of the issues raised in the application;
- written submissions; and,
- time limited oral submissions.

In some cases, persons who represent the public interest may be applying to participate in an application brought by another, and may be granted standing either at the discretion of the tribunal as other participants or, where they meet the requirement for "directly affected", be granted standing as full parties. [In *Friends of the Island Inc. v. Canada (Minister of Public Works)* (1993), 102 D.L.R. (4th) 696 (F.C.T.D.), at 735-737, the court held that persons representing the public interest met the "directly affected" requirement in an enactment that allowed applications for judicial review of the decision at issue in the case.]

2.4 SERVICE OF NOTICE OR OTHER DOCUMENTS

(1) Where a tribunal is required to provide a notice or any document to a party or other participant in an application, it may do so by sending a copy to the party or other participant by any of the following means:

(a) personal service

(b) recorded mail;

(c) electronic transmission, including an e-mail and telephone transmission of a facsimile, with the party's or other participant's consent;

(d) any other method specified in the tribunal's enactment or rules.

(2) If the tribunal is of the opinion that because there are so many other participants in an application, or for another reason it is impractical to give notice of a hearing by any one of the above means, the tribunal may give notice of by public advertisement or otherwise as the tribunal directs.

EXPLANATORY NOTE – SERVICE OF NOTICE OR OTHER DOCUMENTS

The notices of application, pre-hearing and hearing are prerequisites to the *audi alteram partem* rule. As such, formal notices should be given to any person entitled to a "right to be heard" by the tribunal, according to the requirements of procedural fairness. Therefore, "parties" should normally be served personally. In contrast, "other participants" could be given notice of hearing public by public advertisement or otherwise directed, when a tribunal is of opinion that it is impractical to give notice by any other means. Indeed, a tribunal required to provide a notice or any document to a party or other participant may do so by sending a copy of the notice or document by various means, including electronic means. The *Electronic Transactions Act*, S.A. 2001, c. E-5.5 provides that a public body has the power to create, collect, receive, use, store, transfer, disclose, distribute, publish or otherwise deal with information and records in an electronic form, unless expressly prohibited by law. Electronic means include telephone transmission of a facsimile, but it is not limited to it.

2.5 WITHDRAWAL

(1) If an applicant wishes to withdraw an application before the hearing is held, the applicant must file with the tribunal a written notice of withdrawal of application and serve a copy of the notice on the other parties and participants.

(2) The tribunal may, with or without a hearing, grant or refuse an application to withdraw an application on any terms that it considers appropriate.

EXPLANATORY NOTE – WITHDRAWAL

The purpose of this provision is to provide for the withdrawal of an application.

The decision whether to grant an application for withdrawal and the terms that it considers appropriate are at the discretion of the tribunal. A tribunal may refuse to permit withdrawal of an application in two circumstances:

(i) where the issue of costs remains outstanding and the tribunal has the power to do so; and

(ii) where the tribunal must protect the public interest.

As a practical matter, a tribunal cannot force the applicant to continue proceedings or to participate. However, if the public interest requires it, the tribunal can proceed to make a determination based on matters already raised, on further evidence and on submissions provided by other parties and participants, or it may itself order further investigation or the production of further evidence, if it has the power to do so.

2.6 SUMMARY DISMISSAL

Without holding a hearing on the merits, a tribunal may, on its own motion or on the motion of a party, hear and determine the following:

(a) whether the tribunal lacks jurisdiction or the application contains some other fundamental defect;

(b) whether to proceed is an abuse of process;

(c) whether the material filed in support of the application fails to support the basis of the application;

and may dismiss all or part of an application.

EXPLANATORY NOTE – SUMMARY DISMISSAL

The purpose of this provision is to preserve scarce resources. In the absence of statutory authority, a tribunal cannot reject an application without giving the applicant an opportunity to be heard. Tribunals can, however, separate jurisdictional questions from issues of merit and hold a hearing confined to jurisdictional issues.

Fundamental defects

Examples of fundamental defects include:

- the matter is submitted beyond the statutory time limit, or beyond an extended time limit;
- 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 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; and,
- 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.

Abuse of process

Examples of abuse of process include:

- supporting reasons are frivolous or vexatious;
- proceedings were initiated or continued primarily with the intent to cause distress or harm to others;
- proceedings were initiated or continued only for the purpose of delay; and,
- proceedings were an unjustified attempt to have a matter redetermined that has already been resolved in earlier proceedings.

2.7 CONSENT ORDERS

(1) A tribunal may make a determination or a disposition, or grant an order or provision, on the consent of all the parties and other participants, provided the order is consistent with the enabling enactment.

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

EXPLANATORY NOTE – CONSENT ORDERS

The purpose of this provision is to enable a tribunal to simplify proceedings by issuing a consent order.

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, on consent, a tribunal permits a party or other participant in one application before it to represent other parties or participants in other pending applications.

Consistent with its enactment

The phrase "consistent with the enabling enactment" is added in recognition that a tribunal's mandate may require it to take into account matters which the parties or other participants will not raise or advocate. For example, it may consider agency or government policy, the spirit or purpose of the enabling enactment, 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 parties and other participants, and to obtain information in addition to that which the parties and other participants have put forward.

2.8 INVESTIGATIVE POWERS

(1) A tribunal may direct staff or any person to carry out an enquiry or investigation, or otherwise gather information relating to a matter.

(2) The tribunal must make available the information gathered, and provide an opportunity to respond to the following:

(a) parties;

(b) other participants, subject to provision 2.3(2)(b).

2.9 RECORD OF PROCEEDINGS

(1) A tribunal must compile a record of any proceedings in which it issues a final decision.

(2) In addition to any material required by enactment, the record must include the following:

(a) the document by which the proceedings were commenced;

(b) all notices and acknowledgements;

(c) any written orders, directions or decisions made during the course of the proceedings;

(d) documentary evidence, transcript, if any, of oral evidence, any video or recording made by the agency;

(e) written or recorded submissions or arguments; and,

(f) the decision or order of the tribunal and the reasons for the decision.

Explanatory Note – Record of Proceedings

The purpose of this provision is to ensure the transparency of tribunal proceedings and to ensure a record is available for appeal or judicial review, where applicable.

This provision would apply to a pre-hearing conference portion of a proceeding as well. It would also apply to proceedings where a tribunal makes a decision to refuse to accept an application, to refuse to continue where proceedings have begun or to make a decision based on the consent of the parties and other participants.

Subsection (e) requiring inclusion of written or recorded submissions goes beyond the common law. Many tribunals already voluntarily include written or recorded submissions as part of the record. Further, in the administrative tribunal context, submissions often include not only arguments, but also the factual evidence that is being relied upon.

3. PRE-HEARING POWERS AND PROCEDURES

EXPLANATORY NOTE – GENERAL

Pre-hearing powers and procedures concern all the matters a tribunal has to consider before holding a hearing. In some cases pre-hearing procedures will simply mean acknowledging receipt of the application and giving notice to other interested persons as may be required. In other cases, they may also include deciding whether a hearing is required, whether consolidation of related application is appropriate, whether a pre-hearing conference is desirable, and whether investigation is required.

Pre-hearing powers and procedures can contribute to the efficiency and effectiveness of tribunal proceedings by clarifying the issues and the procedures, by determining whether or not a hearing is required, and by informing parties of available alternatives such as alternative dispute resolution. They can also contribute to the fairness and justness of the process, for example, by ensuring that parties and where applicable other participants are given notice of the proceedings, by determining who has standing, and by determining the procedures to apply to a particular case.

3.1 TRIBUNAL MAY REQUEST FURTHER INFORMATION

Where a tribunal receives an application, it may request further necessary information including information concerning any errors or omissions in the application.

3.2 NOTICE OF APPLICATION

(1) Where a tribunal receives an application that will give rise to further proceedings before it, the tribunal must give notice of the application to the following within a reasonable time of receipt of the application:

(a) the applicant;

(b) all persons named in the application;

(c) all persons who have had standing in earlier proceedings with respect to the subject of the application;

(d) all persons whom the tribunal knows or reasonably believes are entitled by the enabling enactment to standing with respect to the subject of the proceedings;

(e) all other persons whom the tribunal knows or reasonably believes are directly affected by the proceedings.

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

EXPLANATORY NOTE – NOTICE OF APPLICATION

The purpose of this provision is to ensure, so far as possible, that the persons who are entitled or may be permitted to be involved in any consequent adjudicative administrative hearing are given notice that an application has been received.

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 does not apply to applications that are not accepted by the tribunal. For example, this may result because the tribunal has no jurisdiction or because it decides that the application is an abuse of process.

Directly affected

The rules of natural justice require that any person who is "directly affected" by administrative proceedings be given an opportunity to participate.

It is important to note that the notice of application and notice of hearing may be combined in appropriate circumstances.

3.3 NOTICE OF PRE-HEARING CONFERENCE

(1) A tribunal must give notice of a pre-hearing conference to the following:

(a) parties;

(b) other participants;

(c) persons who have applied for standing, and whose standing has not been determined.

(2) The timing of the notice must be such as is required by the enabling enactment, or where there is not express requirement, it must be reasonable notice.

(3) The notice of a pre-hearing conference must contain the following:

(a) a statement of the date, time and place of the pre-hearing conference;

(b) a summary of the issues to be addressed at the pre-hearing conference;

(c) any other information required to be included by the enabling enactment.

EXPLANATORY NOTE – NOTICE OF PRE-HEARING CONFERENCE

The purpose of the notice provisions is to ensure that persons who are entitled to be involved in a pre-hearing conference or a hearing, or whose involvement may be permitted by a tribunal, are given notice and thus given an opportunity to participate. The provisions also ensure that persons will be given sufficient information to know whether they wish to be involved. For example, the notice of a pre-hearing conference could clarify what specific issues will be addressed. Usually, pre-hearing conferences address procedural matters, rather than substantive matters.

In most cases the enabling enactment will govern the time in which a hearing is to be held. In all other cases, a hearing must be held in a reasonable time. Best practice would be for a tribunal to issue practice directives concerning the ususal timelines to complete various stages of an application.

3.4 PRE-HEARING CONFERENCES

(1) A tribunal may, on its own initiative or at the request of a party,hold a pre-hearing conference with the parties and any other participants for one or more of the following purposes:

(a) to identify the issues in question and the position of the parties, and any other participants including, where applicable, matters relating to costs;

(b) to recommend the procedures to be adopted with respect to the hearing;

(c) to explore the possibilities for settlement or for referring the matter to alternative dispute resolution;

(d) if an oral hearing, video conference or teleconference is to be held, to set the date, time and place for the hearing and to fix the time to be allotted to the following persons to present evidence and arguments;

(i) parties

(ii) other participants, subject to provision 2.3(2)(b)

(e) to decide any other matter that may aid in the simplification or the fair and most expeditious disposition of the proceedings.

(2) A tribunal member who participated in a pre-hearing conference at which the parties attempted to settle issues may only participate in a subsequent hearing if

(a) the subsequent hearing is confined to issues that were not raised in the settlement discussion; and

(b) all parties provide their express written and informed consent to the member's participation in the subsequent hearing.

EXPLANATORY NOTE – PRE-HEARING CONFERENCES

Pre-hearing conferences are effective case management tools. They can be used to identify and simplify the issues to be considered and set the timetables for a hearing. They also can be used to assess the potential for and to make referrals for settlement or for decision by alternative dispute resolution mechanisms.

To retain flexibility and accommodate limitations in tribunal staffing, a tribunal member who presided at a pre-hearing conference is not prohibited from participating in a subsequent hearing. However, to avoid the apprehension of bias, a tribunal member who participated at a pre-hearing conference at which the parties attempted to settle issues is not to preside at the hearing unless the parties give their consent. [See for example, *L.N. v. S.M.*, 2007 ABCA 258.]

(See also Provision 4.5 concerning opening pre-conference proceedings to the public.)

3.5 ALTERNATIVE DISPUTE RESOLUTION

(1) Subject to the enabling enactment, a tribunal may engage in alternative dispute resolution proceedings [ADR]. A resolution reached by the parties through ADR can, at the discretion of the tribunal, become an order of the tribunal, consistent with the enabling enactment.

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

(a) parties in the ADR are not competent nor compellable to testify about the ADR in any subsequent proceedings of a tribunal or a court;

(b) the notes and work product of parties made in the course of an ADR must not be admitted as evidence in a tribunal or court;

(c) documents submitted or communications made in the course of an ADR must not be disclosed to any other person without the permission of the person who submitted them; and,

(d) such documents or records or any record of such communication must not be filed in any tribunal or court by a party other than the person who submitted them.

(3) A tribunal member who participated in an ADR may only participate in a subsequent hearing if

(a) the subsequent hearing is confined to issues that were not raised in the ADR; and

(b) all parties provide their express written and informed consent to the member's participation in the subsequent hearing.

EXPLANATORY NOTE – ALTERNATIVE DISPUTE RESOLUTION

The purpose of this provision is to provide for the possibility of resolving a dispute through ADR. Alternative dispute resolution includes mediation, conciliation, negotiation or any other means of facilitating the resolution of issues in dispute. The availability of ADR mechanisms is desirable to increase the efficiency of the tribunal. ADR also potentially affords parties the advantage of a resolution to which they have agreed.

Where the provisions of the Model Code regarding ADR conflict with the provisions of the enabling enactment, the provisions of the enabling enactment are paramount. A statutory requirement to hold a hearing, however, could likely still be met so long as the tribunal required that any proposed resolution be brought back for its approval or incorporation into a tribunal order. In addition, some ADR-type proceedings such as designating a negotiator or mediator from outside the agency require authorization.

The decision whether to engage in ADR should be that of the tribunal, taking into account the views of the parties. Resort to ADR may be had at any point in the tribunal's process, including after the hearing has commenced. To decide whether ADR is appropriate for a given case or class of cases, a tribunal should consider whether:

- the parties are willing to take part in the ADR;
- the ADR would expedite the resolution of the matter before it; a definitive or authoritative resolution of the matter is required for precedential value and that an ADR 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 that an ADR would not likely serve to elucidate or develop such policy;
- the matter materially affects persons or organizations that are not parties to the proceedings;
- a full public record of the proceedings is important and that an ADR cannot provide such a record; and,
- the tribunal must maintain continuing jurisdiction over the matter, with authority to alter the disposition of the matter in light of changed circumstances, and that an ADR would interfere with the meeting of that requirement by the tribunal.

Tribunals should develop their own procedural rules for the conduct of an ADR. These rules could, and in some cases should, include the following provisions:

- designate a qualified person to preside in the ADR [in developing its own procedural rules for ADR, a tribunal should also consider whether to have qualified tribunal members or staff conduct the ADR or whether to look to persons outside the tribunal];
- identify what records of the ADR should be kept and what information should be provided to a tribunal where its approval is sought;
- indicate whether enactment requires that any proposed resolution be brought back to the tribunal for its approval/incorporation into a tribunal order;
- provide that a tribunal cannot unilaterally amend the proposed resolution without the parties' further involvement and a provision for recalling the ADR for amendments to the resolution;
- providing for termination of the ADR by the tribunal; and,
- where a tribunal has the power to award costs, outlining the effect of cooperation in the ADR or otherwise on the awarding of costs.

Tribunals considering the consensual resolution of disputes need to do more than simply add mediation or other process to their procedural flow chart. As has been noted:

> Tribunals should consider policies that support settlement at every stage of the case. This means supporting dispute resolution - not only as a final objective, but at every level and stage in the process - in a consensual fashion. This may mean, for example, training regulatory staff to use a collaborative approach to solving problems in their day-to-day work environment; training all tribunal staff who interact with parties to work in a collaborative fashion; or using case management tools to identify, early in the process, cases appropriate for non-adjudicative resolution. [British Columbia, Ministry of Attorney General, *Model Statutory Powers Provisions for Administrative Tribunals*, (Victoria; Administrative Justice Office, 2003) at 17.]

4. HEARING POWERS AND PROCEDURES

EXPLANATORY NOTE – GENERAL

This Part deals with the default rules that are to govern the hearing itself. The aim of these Model Code provisions is: (i) to ensure that the conduct of proceedings reflects procedural fairness, and (ii) to ensure that it does so in the most administratively efficient manner.

This Part includes provisions concerning participation rights, whether hearings should be private or public, the type of the hearing, evidence, witnesses and disclosure.

In most cases the enabling enactment will govern the time in which a hearing is to be held. In all other cases, a hearing must be held in a reasonable time. Best practices would be for a tribunal to issue practice directives concerning the usual timelines to complete various stages of an application.

4.1 NOTICE OF HEARING

(1) A tribunal gives notice of a hearing to the following:

(a) parties;

(b) other participants;

(c) persons who have applied for standing, and whose standing has not been determined.

(2) The timing of the notice must be such as is required by the enabling enactment, or where there is no express requirement, it must be reasonable notice.

(3) The notice of hearing must contain the following:

(a) a statement of the date, time and place of the hearing;

(b) any information required to be included by the enabling enactment;

(c) information about how to contact the tribunal and about the tribunal's procedural rules;

(d) 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 NOTE – NOTICE OF HEARING

The notice of hearing should be given to everyone who has standing in adjudicative proceedings, and would have to be given again during the course of a hearing when additional persons might be directly affected by the decision.

4.2 CONSOLIDATED HEARINGS

(1) Where two or more proceedings 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 party, order that the proceedings, or any part of them:

(a) be consolidated;

(b) be heard together;

(c) be heard one after another; or

(d) be stayed until the determination of one of them.

(2) Before giving any direction under this rule, the tribunal must give notice to the parties and other participants and consider any representations made in consequence of the notice.

EXPLANATORY NOTE – CONSOLIDATED HEARINGS

The purpose of this rule is to avoid duplication of proceedings on the same or similar matter by consolidating or hearing them together. Expediency, however, must not be permitted to override fairness.

Consolidation involves the possibility that the tribunal's findings and final determinations or orders will be applied to all the parties in the consolidated proceedings. A particular remedy may be granted in favour of all applicants, or against all respondents.

Consolidation differs from the situation where two separate proceedings are *heard together* by the same panel, at the same time. When proceedings are heard together, the tribunal's findings and resulting remedies remain separate and particular to the parties to the original separate applications.

4.3 ROLE OF PARTIES AND OTHER PARTICIPANTS

A tribunal must give a fair opportunity to present a case and to know and respond to the case to be met, including any representations of other parties and participants that are relevant to an issue in that case to the following:

(a) parties;

(b) other participants, subject to provision 2.3(2)(b).

EXPLANATORY NOTE – ROLE OF PARTIES AND OTHER PARTICIPANTS

The obligation to provide parties and other participants with a fair opportunity to present a case and to know and respond to the case they are to meet is a fundamental principle of administrative law. The extent to which parties and other participants may call and examine or cross-examine witnesses, and present evidence and argument, will vary depending on the terms of their participation [provision 2.3.(2)(b)], as well as the nature and complexity of the matter before the tribunal.

4.4 QUORUM

(1) Unless the enabling enactment provides otherwise, a quorum of members of the tribunal may hold any hearing the tribunal is authorized to hear.

(2) When one or more tribunal members cannot complete the hearing, the remaining participating members may complete the hearing provided that a quorum remains.

4.5 ACCESS TO PROCEEDINGS – PUBLIC/PRIVATE

(1) Unless the enabling enactment provides otherwise, a hearing is open to the public.

(2) The public must have access to all documents and electronic data filed or generated by the parties, other participants, and the tribunal.

(3) Despite subsections (1) and (2), the tribunal may consider it necessary and appropriate to prevent the disclosure of intimate personal, financial, commercial matters or other matters when the need to protect the confidentiality of those matters outweighs the desirability of an open hearing. In such circumstances the tribunal may exercise its discretion to make any of the following orders, provided those orders are consistent with the enabling enactment:

(a) that all or part of the hearing be held in private;

(b) that persons be excluded;

(c) that persons be admitted on terms and conditions;

(d) that restrictions be placed on the disclosure and publication of evidence;

(e) that restrictions be placed on inspections of the tribunal's record;

(f) any other appropriate order.

(4) Nothing in subsection (3) may be interpreted as limiting a party's or other participant's right to be informed and to participate in the proceedings.

EXPLANATORY NOTE – ACCESS TO PROCEEDINGS – PUBLIC/PRIVATE

This provision is concerned with the question of whether hearings are to be held in public or in private. It applies to pre-hearing conferences, hearings and re-hearings. It provides that administrative justice proceedings are, with some exceptions, to be open to the public, since they generally deal with matters of public interest.

Therefore, a tribunal should only use its discretion to order a closed or private hearing or a publication ban when such an order is necessary to prevent a real and substantial risk to the fairness of the tribunal (including disclosure of personal or privileged information), because no other alternative measures are reasonably available to prevent the risk, and the salutary effects of the publication ban outweigh the deleterious impact the ban has on the freedom of expression and the freedom of the press guaranteed by the Charter. [See for example, *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, at para. 74.]

4.6 TYPE OF HEARING

(1) Unless the enabling enactment provides otherwise, a tribunal may hold a hearing in any form considered by the tribunal to be appropriate for the parties, other participants, and circumstances, including in-person, written, video or teleconference.

(2) The type of hearing must not interfere with the ability of the parties and other participants to participate effectively.

EXPLANATORY NOTE – TYPE OF HEARING

The parties and other participants must have a chance to efficiently present their submissions. The duty to be fair does not necessarily mean that an in-person or oral hearing is required for all proceedings. The more important the rights or interests affected by the decision, the more likely the courts will find that fairness requires an oral hearing. [See for example, *Singh v. Canada (Minister of Employment and Immigration)*, [1985] 1 S.C.R. 177.] In other words, the flexible nature of the duty of fairness recognizes that meaningful participation can occur in different ways in different situations. The type of the hearing must not interfere with the ability of the parties and other participants to participate effectively.

The discretion to choose the type of hearing (or combination) is a matter for the tribunal. Determining which type of hearing should be held, to comply with the duty to act fairly binding administrative tribunals, is highly fact or context-sensitive. In exercising its discretion as to the form of a hearing, a tribunal should consider and balance the following factors:

- the convenience to the parties, other participants and the tribunal;
- the prejudice to the parties and the other participants; and,
- the nature of the issues to be considered.

4.7 OPPORTUNITY TO SUBMIT ARGUMENTS

A tribunal must give a reasonable opportunity to the following persons to submit arguments:

(a) parties;

(b) other participants, subject to provision 2.3(2)(b).

4.8 EVIDENCE

(1) A tribunal may receive and accept evidence that it considers relevant and appropriate.

(2) A tribunal is not bound by the formal rules of evidence.

(3) Despite subsection (1), nothing is admissible before a tribunal that would be subject to privilege.

(4) Nothing in subsection (1) overrides the provisions of any enactment expressly limiting the admissibility of evidence.

EXPLANATORY NOTE – EVIDENCE

The freedom of administrative tribunals from the technical rules that determine admissibility in courts is a principle of common law. [See for example, *T.A. Miller v. Minister of Housing and Local Government*, [1962] 2 All E.R. 633. See also *Canadian National Railway v. Bell Telephone Co. of Canada,* [1939] S.C.R. 308.] 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 would not be admissible as evidence in a court as long as in doing so they adhere to the principles of natural justice. This approach permits tribunals to proceed informally, while at the same time ensuring a just hearing for all parties and other participants.

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

Irrelevant or repetitious evidence can be excluded. However, the discretion to exclude marginally relevant material is to be exercised with due caution to avoid unfairness.

4.9 WITNESSES

(1) Parties may do the following:

(a) call and examine witnesses;

(b) cross-examine witnesses called by other parties and participants where reasonably required for a full and fair disclosure of all matters relevant to the issues in the proceedings.

(2) Subject to provision 2.3(2)(b), other participants may do the following:

(a) call and examine witnesses;

(b) cross-examine witnesses called by other parties and participants where reasonably required for a full and fair disclosure of all matters relevant to the issues in the proceedings.

(3) The tribunal may ask any question of witnesses which the tribunal considers necessary for clarification provided that it does so fairly, without preventing a party or other participant from presenting his or her submissions.

(4) Any fact that is to be proved by the oral or written evidence of a witness may be proved on oath or affirmation or solemn declaration.

EXPLANATORY NOTE – WITNESSES

The purpose of this provision is to set out the basic rules regarding witnesses. Parties and other participants, in the latter case depending on the terms of their participation [provision 2.3(2)(b)], may call and examine witnesses. Tribunals retain the ability to exclude repetitious or irrelevant witnesses. There is no right to cross-examine witnesses, however, a tribunal may permit it to the extent that it is required to afford a participant a party or other participant a fair opportunity to correct or controvert any relevant statement brought forward to his or her prejudice.

The power to compel the attendance of witnesses is not appropriate for all tribunals and is a matter best left to the enactment of individual tribunals.

4.10 EFFECT OF NON-PARTICIPATION

Where a party who has been given notice of the proceedings fails to appear or to participate, the tribunal may proceed and may render a decision in the party's absence.

4.11 FAILURE TO COMPLY WITH TRIBUNAL ORDERS

Where a party fails to comply with a tribunal order, the tribunal may take any measure it considers appropriate, consistent with the enabling enactment, including:

(a) proceeding in the absence of party;

(b) refusing to admit evidence not previously disclosed;

(c) issuing a cost order, where authorized;

(d) adjourning a hearing;

(e) dismissing or allowing an application.

4.12 MAINTAINING ORDER AT THE HEARING

At an oral hearing, a tribunal may make orders or give directions that it considers necessary for the maintenance of order at the hearing.

5. DECISION AND REASONS

EXPLANATORY NOTE – GENERAL

The manner in which a decision is reached and how it is communicated with the parties, other participants and the public must be consistent with the requirements of procedural fairness. The purposes of this Part are to set out the requirements of procedural fairness with respect to decisions and reasons and to reduce any doubts that a tribunal may have as to its powers.

The Model Code provisions address the following:

- A final decision must not take into account facts or legal issues whose substance was not disclosed and to which parties and other participants did not have an opportunity to make representations.
- A final decision is to be made in writing and include reasons. A copy of the decision is to be provided to the parties and made available to the other participants and the public.
- Final decisions are to be made within a reasonable time.
- A decision of a majority of tribunal members participating in the proceedings is a decision of the tribunal.
- A tribunal can correct clerical or typographical errors in its final decision.
- In certain circumstances, a tribunal has the power to review or rehear a decision.

5.1 FACTORS FOR DECISION MAKING

In reaching a decision, a tribunal must not take into account any facts or legal issues whose substance was not disclosed and to which an opportunity to make representations was not given to the following:

(a) parties;

(b) other participants, subject to provision 2.3(2)(b).

5.2 TIMELY DECISION

The tribunal must issue a decision within the time required by an enactment, if any, or within a reasonable time.

EXPLANATORY NOTE – TIMELY DECISION

Where a tribunal does not issue a decision within the time required by an enactment, if any, or within a reasonable time, the parties would be able to seek mandamus to compel the tribunal to make a decision.

5.3 DECISION AND REASONS IN WRITING

(1) Unless the enabling enactment provides otherwise, where a matter is to be heard by more than one member, it must be decided by the majority of the tribunal members participating in the proceedings.

(2) A tribunal must make its final decision in writing and set out the findings of fact on which it based its decision, and reasons for the decision.

(3) Any member of the panel disagreeing in whole or in part with the majority must provide his or her dissenting opinion in writing and set out the findings of fact on which the dissent is based, and the reasons for the dissent.

EXPLANATORY NOTE – DECISION AND REASONS IN WRITING

Natural justice and procedural fairness rules require providing written reasons for a decision in certain circumstances, although the form and extent of those reasons may vary for each tribunal depending on the complexity of issues dealt.

A matter should be decided by the majority, meaning that where the majority of a panel is not in favour of a proposition, then the proponent simply loses.

Dissenting members of a panel should have the same obligation as the majority to provide a written decision and set out the finding of facts on which they based their dissent, and the reasons for the dissent with respect to all or part of the decision of the tribunal. The matter of dissents should be dealt with on a tribunal-wide basis, and not on an individual panel basis (panel-by-panel).

5.4 DATE OF DECISION

A decision takes effect on the date specified by the tribunal, or if none, then when the written decision is provided to the parties.

5.5 AVAILABILITY OF THE DECISION

(1) A tribunal must provide a copy of its decision to the parties, and explanation of the appeal procedures and time lines, where applicable.

(2) A tribunal must make available a copy of its decision to the other participants.

(3) Except as otherwise provided by enactment or this code, a tribunal's written decision must be available for public inspection.

EXPLANATORY NOTE – AVAILABILITY OF THE DECISION

This provision sets out the default rule that administrative tribunals are required to provide the parties with a copy of the final decision or order, including the reasons for that decision and its factual basis, and make it available to the other participants. In addition, subject to contrary provisions in an enactment, tribunal decisions must be available to the public.

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

5.6 CORRECTING AN ERROR

A tribunal may, within a reasonable time, amend its final decision for any of the following reasons:

(a) to correct a clerical or typographical error or error of calculation;

(b) to rectify an accidental slip or omission;

(c) to clarify an ambiguity.

EXPLANATORY NOTE – CORRECTING AN ERROR

A tribunal may generally correct a typographical or clerical error or error of calculation in its decision.

Clerical error

"Clerical error" has been defined by the courts as "an error in a document which can only be explained by considering it to be a slip or a mistake of the party preparing or copying it." [See for example, *Re Ovens* (1979), 26 O.R. (2d) 468 (C.A.) at 472.] It has also been described as "a simple slip in drafting." [See for example, *Jonquière (Ville) v. Munger*, [1964] S.C.R. 45 at 48. See also *Chester v. Canada (National Parole Board)* (1989), 37 Admin. L.R. 27 at 37-38 (B.C.C.A.).]

Accidental slip or omission

"Accidental slip or omission" has been found where an arbitrator made a finding but inadvertently left it out of his report. [See for example, *Debret v. Debret* (1997), 10 Sask. L.R. 366 (Sask. S.C.).]

Clarify an ambiguity

An "ambiguity" is a type of omission that requires 'clarification'. It can be contrasted with the situation where words are added to an award to expand or amend it. [See *Regina Police Association Inc. v. Board of Police Commissioners of Regina* (1998), 164 Sask. R. 282 (Q.B.), and *Regina v. Andrews, Ex parte Nurses' Association, St. Joseph's General Hospital (Peterborough),* [1970] 1 O.R. 247 (S.C.).]

PART III — ISSUES FOR DISCUSSION

This part of the consultation memorandum raises issues for discussion with respect to the Model Code. The discussion compares the Model Code provision with the approach taken by British Columbia in the BC Act and that recommended by the Saskatchewan Law Reform Commission in the Saskatchewan Model Code. It also compares the Model Code provisions with current legislation governing administrative tribunals in Alberta and explains how the Model Code differs from that contained in Report No. 79. A list of the issues for discussion is set out on the following pages.

LIST OF ISSUES

1. GENERAL

a. Representation by Lawyer or Agent [Provision 1.3]

[27] A preliminary review of enactments in Alberta reveals no consistent approach to the issue of representation. Some enactments are silent as to whether or not a party or other participant may be represented by a lawyer. Some, like the APJA[1] and the *Human Rights Citizenship and Multiculturalism Act*,[2] provide only for representation by lawyer. Other legislative provisions provide for representation by lawyer or an agent.[3]

ISSUE No. 1
Should the Model Code provisions provide for representation by an agent?

[28] The recommended provision consolidates previous provisions Nos. 34.1 and 34.2 from Report No. 79. It adopts the recommendation in Report No. 79 that provision for representation by an agent be left to the control of an individual tribunal over its own process.

[29] The Saskatchewan Model Code provides that a party has the right to self-representation or to be represented by counsel or other advocate.[4] The BC Act also provides that a party to an application may be represented by counsel or an agent.[5]

Position of the Committee

[30] The Committee was of the view that the Model Code should not automatically provide for representation by an agent. At the same time, however, the Committee did not want to discourage representation by agents. The Committee determined that representation by an agent was a matter that should be left to the enactment of the

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[1] See APJA, s. 6(b).

[2] R.S.A. 2000, c. H-14, s. 30(1).

[3] See for example, *Workers' Compensation Regulation*, Alta. Reg. 325/2002, s. 11(3).

[4] See Saskatchewan Model Code, Recommendation for Discussion, 2.4.

[5] See BC Act, s. 32.

individual tribunal or to a tribunal's discretion. Subject to any enactment, representation by an agent is a matter within the general authority of a tribunal over its own procedure.

2. POWERS AND PROCEDURES

a. Power to Control its Own Process and Make Rules of General Application to Cover its Own Process [Provision 2.1]

[1] At common law, a tribunal has the power to control its own process. Only a few enactments currently include the express power to make procedural rules of general application. For example, s. 13.1(3) of the *Worker's Compensation Act*, provides that the "Appeals Commission may make rules governing the practice and procedure applicable to proceedings before it."[6]

[2] Inclusion of provision 2.1 is intended to remove any doubt concerning the authority of a tribunal to control its own process and to encourage tribunals to make rules of general application. It is included in the general section as the power to control its own process pertains to any stage of proceedings (pre-hearing, hearing, decision and review). A similar provision is included in virtually all administrative law reform efforts to date.[7]

[3] Provision 2.1 combines provisions Nos. 19.1, 47 and 53 from Report No. 79. It does not include provision 19.3 regarding waiver of procedural rights. First, the case law is not entirely clear on this point.[8] Second, no comparable provision was included

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[6] R.S.A 2000, c. W-15.

[7] See for example, Saskatchewan Model Code, Recommendation for Discussion 2.1 and BC Act, s. 11.

[8] See Robert W. Macaulay & James L.H. Sprague, *Practice and Procedure Before Administrative Tribunals*, looseleaf, (Toronto: Thomson Carswell, 2004), vol. 2 at para 12.22(a). There is some authority to the effect that at common law there cannot be a waiver of a serious breach of natural justice, based on the theory that such a breach goes to jurisdictions. 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 inquiry" (citing *S.E.I.U, Local No. 333 v. Nipawin District Staff Nurses Association,* [1975] 1 S.C.R. 382). 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. Therefore, procedural rights may be waived even though they would otherwise constitute breaches of natural justice.

by other jurisdictions as part of administrative law reforms. Accordingly, in the interests of simplifying the Model Code, it was not included.

ISSUE No. 2
Should the Model Code expressly encourage tribunals to tailor or to elaborate on the Model Code procedures?

[4] As the Saskatchewan Law Reform Commission concluded, the adoption of a Model Code is generally the first step toward establishing an adequate set of procedural rules. The next step is for tribunals to be encouraged to tailor and elaborate on the Model Code.[9] In order to encourage tribunals to take this next step, the Saskatchewan Model Code expressly recommends inclusion of the following provision: "A tribunal may adopt rules of procedure of general application in addition to or in substitution for the rules contained in this code, subject to statute and the rules of natural justice."[10] The BC Act includes the general power to make rules respecting power and procedures, but does not contain a provision comparable to the preceding one contained in the Saskatchewan Model Code.

Position of the Committee

[5] The Model Code provisions are intended to set out the minimum requirements for the conduct of a procedurally fair hearing. Recognizing that different tribunals will require more or less formalized procedures, the Committee determined that there should be an express provision to encourage tribunals to tailor or to elaborate on the Model Code procedures. This is reflected in provision 2.2 below.

ISSUE No. 3
Should the Model Code contain a more exhaustive or detailed list of procedural powers?

[6] In developing the BC Act, British Columbia's Administrative Justice Office identified the difficulty in differentiating those powers that are considered to be more procedural than substantive in nature. (Procedural powers do not require statutory

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[9] See Saskatchewan Model Code at 16.

[10] See Saskatchewan Model Code, Recommendation for Discussion, 2.1(2).

authority, whereas substantive powers do). To address this issue they recommended that the rule-making power of a tribunal be codified in the enactment and that the statute set out the types of matters that fall within the scope of that procedural power. Consistent with this recommendation, section 11(2) of the BC Act contains a list of procedural powers from (a) - (w) that fall within the power of a tribunal to control its own process. In contrast, the Saskatchewan Model Code does not include any list of procedural powers. The Model Code, rather than including an exhaustive list in the provision itself, provides a list of some of the procedural powers in the explanatory note.

Position of the Committee

[7] The Committee was unanimous that the list of procedural powers should remain in the explanatory note. The Committee noted, however, that this is an issue that may have to be reviewed if the Model Code is implemented through legislation.

b. The Power to Tailor Model Code Procedures or to Vary Procedures of General Application [Provision 2.2]

[8] The adoption of the Model Code is only the first step towards establishing an adequate set of procedural rules. Provision 2.2(1) responds to Issue No. 1, in expressly encouraging tribunals to tailor or to elaborate on the Model Code procedures.

[9] Provision 2.2(2) provides a tribunal with the flexibility to adopt particular procedures or vary its existing procedures in a particular circumstance. The Committee felt it was important that this issue be dealt with separately from the power of a tribunal to control its own process. The provision reflects the first part of provision 19.2 from Report No. 79, it does not, however, reflect the requirement found in the second part of provision 19.2 that before varying an existing procedure for a given circumstance, the tribunal provide the parties with the opportunity to make representations, as it is not clear that procedural fairness demands this in all cases.

c. Standing [Provision 2.3]

Parties

[10] At common law, persons who are directly affected by proceedings have a right to participate as “parties”. The enactments of most tribunals will specify who is to have standing before a tribunal. In some cases, legislative provisions specifically identify

and define who has standing.[11] In others, the legislative provisions are more open-ended. For example, the APJA provides standing for "a person whose rights will be varied or affected by the exercise of a statutory power or by an act or thing done pursuant to that power." The courts and tribunals have often had to resolve whether a person's interest falls within the language of such an open-ended provision.[12]

[11] Moreover, the language used in the open-ended provisions varies. Provisions in various enactments grant standing to "a person aggrieved", "a person who is dissatisfied", "a person who has a direct interest and is dissatisfied", "person affected", "person directly affected", and "interested persons". The rationale for the different wording is not always clear from the context of the legislation. In light of these inconsistencies, it is recommended that the various wording of the open-ended provisions be reviewed in order to determine whether or not there is a principled reason for departing from more uniform phrasing such as "person directly affected".

[12] The recommended provision replaces provisions Nos. 20.1-20.4 in Report No. 79 which were quite complex. Unlike the provisions in Report No. 79, the recommended provision does not include the added requirement of "directly involved" for party status as this additional criteria is not supported by case law.

ISSUE No. 4
Should the Model Code include a standardized provision for standing?

[13] Recent administrative law reform proposals contain no consistent approach with respect to standing. British Columbia's AJO concluded that standard provisions for standing were not possible because of the "sheer range and diversity of issues that are

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[11] For example, the *Residential Tenancies Act*, S.A. 2004, c. R-17.1, s. 54.2, identifies "landlords" and "tenants" as having access to the dispute resolution service.

[12] See for example, *Friends of the Athabasca Environmental Association v. Alberta (Public Health Advisory and Appeal Board)*, [1996] 181 A.R. 81 (C.A.); *Court v. Alberta (Environmental Appeal Board)* (2003), 333 A.R. 308 (Q.B.).

adjudicated by administrative tribunals."[13] The AJO found that enactments for "private" disputes tended to identify clearly who would have standing and that disputes under these provisions did not arise. For those tribunals with a potentially broader constituency or potentially affecting diverse interests, they recommended that, where possible, the specific categories of persons that would have standing be identified in the tribunal's enactment. Where this is not possible, they recommended that the tribunal be given the discretion to determine whether a person is directly affected, and thus, a party. They recommended the following provision be incorporated into the enactment of each such tribunal:

> Who may bring an appeal
>
> 42(1) An [application/appeal] may be brought by a person directly affected by the decision of _____.
>
> (2) For the purpose of subsection (1), a "person directly affected" means:
>
> (a) a person who has sustained an injury to an interest that the statutory provision is designed to protect; and
>
> (b) a person who has sustained an injury to an interest that is distinguishable from that sustained by other members of the public
>
> and includes the following persons:
>
> (c) [enumerate]
>
> but excludes the following persons:
>
> (d) [enumerate].

The BC Act does, however, include a provision enabling tribunals with the discretion to allow "interveners" in an application.[14]

[14] Other model codes, such as the one proposed by the Saskatchewan Law Reform Commission, include standard provisions for standing for both "parties" and "interveners."[15]

Position of the Committee

[15] While most enactments contain provisions concerning standing, the standard provision was thought to be useful to make it clear that persons "directly affected" are

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[13] British Columbia, Ministry of Attorney General, *Model Statutory Power Provisions for Administrative Tribunals*, (Victoria: Administrative Justice Office, 2003) at 59.

[14] See BC Act, s. 33.

[15] See Saskatchewan Model Code, Recommendation for Discussion 1.2.

entitled to standing. Further, it also makes it clear that tribunals have discretion to add "other participants" and to set out the conditions for their participation.

d. Service of Notice or Other Documents [Provision 2.4]

[16] Report No. 79 chose not to include rules respecting service of notice (or other documents), as such rules which were thought to be too detailed for inclusion in the Model Code. Tribunals were instead encouraged to adopt their own rules for service and to make them publicly available.

ISSUE No. 5
Should the Model Code include a rule concerning service of notice or other documents?

[17] The BC Act and many other administrative law reform proposals contain provisions with respect to service.

Position of the Committee

[18] The Committee was of the view that the Model Code should contain a separate provision regarding service of notice or other documents.

e. Withdrawal [Provision 2.5]

[19] Some enactments provide for the withdrawal of an application. These provisions typically leave it up to the tribunal to determine whether or not to accept a withdrawal application.[16]

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[16] See for example, s. 2 of the *Surface Rights Act Rules of Procedure and Practice*, Alta. Reg. 196/2007:

> 2(1) An operator who wishes to withdraw an application for a right of entry order filed with the Board must, in writing, request the Board to cancel the application.
>
> (2) The operator's request under subsection (1) must contain evidence satisfactory to the Board that each of the respondents described in the application has no claim for damages, costs or expenses in connection with the application.

Or s. 21 of the *Energy Resources Conservation Board Rules of Practice*, Alta. Reg. 252/2007 [ERCB Rules]:

> 20(1) If an applicant wishes to withdraw an application before a hearing is held, the applicant shall file a notice of withdrawal of application in writing and serve a copy of the notice on the other parties.
>
> (2)The Board may, with or without a hearing, grant an application to withdraw an application on any terms that it considers appropriate.

(continued...)

[20] The recommended provision replaces provisions Nos. 6 and 6.1 from Report No. 79. It closely follows s. 21 of the ERCB Rules. Provision 6 from Report No. 79 focussed only on the question of when a tribunal could refuse a request for withdrawal. The recommended provision deals more broadly with the procedure for withdrawal of an application.

ISSUE No. 6
Should tribunals have the discretion to refuse or to accept an application for withdrawal?

[21] Not all model codes include a discretionary provision for withdrawal. Section 17 of the BC Act provides that if an applicant withdraws, the tribunal must order that the application or the part of it be dismissed. In contrast, the Saskatchewan Model Code did not include a provision concerning withdrawal.

Position of the Committee

[22] Tribunals should have the discretion to refuse or to accept an application for withdrawal.

ISSUE No. 7
Should the withdrawal provision include an express provision regarding incorporating settlement of an action into the order of a tribunal?

[23] Section 17 of the BC Act combines withdrawal and settlement of an application. It provides for the approval of a settlement by the tribunal. It also provides that reasons must be provided where a tribunal declines to make an order that includes the terms of settlement. The supporting materials do not provide any background information as to why this approach was taken.

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[16] (...continued)

(3) If an applicant does not take any steps with respect to an application within the time specified in these Rules or by the Board, the Board may declare the application to be withdrawn, unless the applicant shows cause why the application should not be withdrawn.

(4) If an intervener wishes to withdraw a submission before a hearing is held, the intervener shall file a notice of withdrawal in writing and serve a copy of the notice on the other parties.

Position of the Committee

[24] The Committee was unanimous that this type of provision was better left to the discussion regarding alternative dispute resolution. (See provision 3.5.)

f. Summary Dismissal [Provision 2.6]

[25] Not all enactments in Alberta contain provisions regarding summary dismissal. Where they do, the provisions vary. For example, both the *Rules of Practice of the Natural Resources Conservation Board*, Alta. Reg. 77/2005 [NRCB Rules] and the ERCB Rules provide that where an applicant does not provide additional information as requested, the tribunal can dismiss the application. Some provide more detailed provisions. See for example, s. 95(5) of the *Environmental Protection and Enhancement Act*:[17]

> The Board
>
> (a) may dismiss a notice of appeal if
>
> (i) it considers the notice of appeal to be frivolous or vexatious or without merit,
>
> (ii) in the case of a notice of appeal submitted under section 91(1)(a)(i) or (ii), (g)(ii) or (m) of this Act or section 115(1)(a)(i) or (ii), (b)(i) or (ii), (c)(i) or (ii), (e) or (r) of the *Water Act*, the Board is of the opinion that the person submitting the notice of appeal is not directly affected by the decision or designation,
>
> (iii) for any other reason the Board considers that the notice of appeal is not properly before it,
>
> (iv) the person who submitted the notice of appeal fails to comply with a written notice under section 92, or
>
> (v) the person who submitted the notice of appeal fails to provide security in accordance with an order under section 97(3)(b), ...

[26] The recommended provision modifies and consolidates provisions Nos. 2.1-4 from Report No. 79. It simplifies the previous provisions by reducing some of the repetition.

ISSUE No. 8
Should the Model Code contain more detailed provisions as to the circumstances under which a tribunal can dismiss summarily an application or appeal?

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[17] R.S.A. 2000, c. E-12 [EPEA].

[27] The recommended provision makes reference to broad categories where a tribunal can summarily dismiss an application. Other legislation, such as the BC Act, contains more detailed provisions:

> 31(1) At any time after an application is filed, the tribunal may dismiss all or part of it if the tribunal determines that any of the following apply:
>
> (a) the application is not within the jurisdiction of the tribunal;
>
> (b) the application was not filed within the applicable time limit;
>
> (c) the application is frivolous, vexatious or trivial or gives rise to an abuse of process;
>
> (d) the application was made in bad faith or filed for an improper purpose or motive;
>
> (e) the applicant failed to diligently pursue the application or failed to comply with an order of the tribunal;
>
> (f) there is no reasonable prospect the application will succeed;
>
> (g) the substance of the application has been appropriately dealt with in another proceeding.
>
> (2) Before dismissing all or part of an application under subsection (1), the tribunal must give the applicant an opportunity to make written submissions or otherwise be heard.
>
> (3) If the tribunal dismisses all or part of an application under subsection (1), the tribunal must inform the parties and any interveners of its decision in writing and give reasons for that decision.

Position of the Committee

[28] The Committee did not think that the Model Code should contain more detailed provisions as to the circumstances under which a tribunal can summarily dismiss an application. The Committee was of the view that it was better to include the broader term "abuse of process" which would include "frivolous and vexatious" applications. Abuse of process was broader and the inclusion of more detailed provisions risked missing some circumstance where summary dismissal would be appropriate. Further, there could be argument as to what was included under each of the detailed headings. The inclusion of more terms to be debated was not desirable.

ISSUE No. 9
Should the Model Code include an express procedural provision which allows for a hearing confined to jurisdictional issues or other fundamental defects prior to a hearing of the application on its merits?

[29] Without providing much of an explanation, the Saskatchewan Model Code concludes that special procedural rules are not needed to address dismissal powers in circumstances such as abuse of process, discontinuance or decision on consent of the parties and other participants or re-routing to alternative dispute resolution.[18] It does, however, identify the need for special procedural rules providing for a hearing confined to jurisdictional issues.[19] Saskatchewan found that tribunals who did not have the statutory authority for summary dismissal were dismissing applications on the grounds of a lack of jurisdiction without convening a hearing. It was critical of the approach in Report No. 79, which, in its view, provided only for the opportunity to be heard and did not expressly provide for a hearing confined to jurisdictional issues. Saskatchewan recommended instead to expressly allow the tribunal to separate jurisdictional issues from issues of merit and to direct that a hearing confined to jurisdictional questions be held before requiring submission on the merits of the application. In fact, in ALRI's Consultation Memorandum to Report No. 79, provision 2.1, made clear that refusal to accept or early dismissal could occur where there was a fundamental defect "without holding a hearing into the merits." The wording of the recommended provision has been revised to make this point clearer.

Position of the Committee

[30] The Committee was of the view that this was adequately addressed in the recommended provision.

g. Consent Orders [Provision 2.7]

[31] Few enactments in Alberta expressly refer to consent orders.[20] Nevertheless, a provision concerning consent orders is included in the Model Code as it can contribute to the efficiency and effectiveness of tribunals. Where a matter can be disposed of based on the consent of all the parties and other participants, tribunal resources can be freed up for other matters where issues remain in dispute.

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[18] See Saskatchewan Model Code, Recommendation for Discussion 1.5.

[19] See Saskatchewan Model Code, Recommendation for Discussion 1.4.

[20] See for example, the *Electric Utilities Act*, S.A. 2003, c. E-5.1, s. 65(3).

[32] The recommended provision essentially replicates provisions Nos. 5 and 5.1 from Report No. 79. The recommended provision also reflects part of the language from s. 16 of the BC Act.[21] The reference to "consistent with the enactment" is drawn from the BC Act and replaces the more cumbersome third clause of provision 5, which referred to the "general purpose and spirit of the statute under which the matter arose" and the "public interest." These matters are referred to in the explanatory note, but do not appear to be needed in the code provision itself. There is no comparable provision in the Saskatchewan Model Code.

h. Investigative Powers [Provision 2.8]

[33] In Alberta, many tribunals already have express provisions in their enactments that enable them to carry out investigations.[22]

ISSUE No. 10
Should an investigative power be included as part of the Model Code?

[34] The recommended provision essentially replicates provision 15 from Report No. 79. Report No. 79 included this provision to provide greater clarity to those tribunals whose mandate implied an informal investigative power, but who did not have such a power in their enactment.

[35] Saskatchewan also included a provision providing for informal investigations.[23] No such provision was included in the BC Act.

[36] Note that the Model Code does not include the coercive investigative power outlined in provision 16 of Report No. 79. That provision was an extra-code provision and for the reasons identified in Report No. 79 it does not form part of the Model

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[21] Section 16 of the BC Act provides:

> (1) On the request of the parties to an application, the tribunal may make a consent order if it is satisfied that the order is consistent with its enabling Act.
> (2) If the tribunal declines to make a consent order under subsection (1), it must provide the parties with reasons for doing so.

[22] See for example, the *Energy Resources Conservation Act*, R.S.A. 2000, c. E-10, s. 29.

[23] See Saskatchewan Model Code, Recommendation for Discussion 1.5(3)

Code. Demand for this type of coercive investigative power would be small and would require a balancing of factors, such as an individual's privacy interest, the public interest and possible safeguards; that balancing is best conducted on an individual tribunal basis.

Position of the Committee

[37] The Committee was of the view that such a provision is useful and should be included in the Model Code. In addition, the Committee expanded the language in the draft provision to provide that the "record", rather than simply "the results" of the investigation be provided to the parties and other participants. In the interests of transparency and disclosure all the materials generated in the course of the investigation, enquiry or information gathering should be made available to parties and other participants.

i. Record of Proceedings [Provision 2.9]

[38] Most enactments in Alberta do not provide for a record of the hearing. Of those that do, the requirement to have a record is often implicit as appeal provisions make reference to the transfer of the record to the appeal court. Section 29(10) of the *Alberta Utilities Commission Act*, S.A. 2007, c. A-37.2 [AUC Act] is illustrative:

> Within 30 days from the day that the leave to appeal is obtained, the Board must forward to the Registrar of the Court of Appeal the transcript and record of the hearing, its findings and reasons for the order or direction.

[39] The recommended provision replicates provision 35.1 from Report No. 79, however, it adds some of the detail contained in the explanatory note to the provision itself. The AJO recommended that such a provision be included in the BC Act,[24] although ultimately, the British Columbia Act does not include such a provision. The Saskatchewan Model Code also recommends that a similar provision concerning the record be included.[25]

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[24] See British Columbia, Ministry of Attorney General, *Model Statutory Powers Provisions for Administrative Tribunals*, (Victoria: Administrative Justice Office, 2003) at 59.

[25] See Saskatchewan Model Code, Recommendation for Discussion 2.7.

3. PRE-HEARING POWERS AND PROCEDURES

a. Notice of Application [Provision 3.2]

ISSUE No. 11
Is a notice of application necessary if the matter is proceeding to a hearing? Would a notice of hearing be sufficient? Would a notice of application be more appropriate when a matter is not proceeding to a hearing?

[40] The rules of natural justice require notification to enable a person directly affected to be involved in the proceedings. It is not clear that this requires notice of the receipt of the application *per se.* Notice of a hearing may be sufficient to enable a person directly affected to participate in the proceedings.

[41] In Alberta, not all enactments require that an acknowledgement of receipt of an application be provided.[26] Where the enactment does provide for a notice of application, it is often only required where an application does not lead to further proceedings. For example, the ERCB Rules[27] and the NRCB Rules[28] require the Board to issue a notice of application only if it is considering deciding an application without a hearing. Otherwise, the Board will send out a notice of hearing.[29]

[42] The recommended provision essentially replicates provisions Nos. 1.1-1.3 in Report No. 79. The BC Act does not include a provision regarding notice of

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[26] For example, s. 40(1) of the *Mental Health Act*, R.S.A. 2000, c. M-13, provides that a review panel, upon receipt of an application, must provide at least 7 days notice of a hearing. It does not provide for a separate acknowledgement of receipt of an application.

[27] See ERCB Rules, s. 22.

[28] See NRCB Rules, s. 8.

[29] See ERCB Rules, s. 23 and NRCB Rules, s. 9

application. The Saskatchewan Model Code, however, does include provisions providing for acknowledgement and notice of application.[30]

[43] In addition, the terminology used in the enactments in Alberta is inconsistent. Some enactments refer to the application submitted by an applicant as the "notice of application",[31] whereas in other statutes, "notice of application" refers to the notice of the hearing sent out by the tribunal.[32] It is recommended that the terminology in the enactments be reviewed to ensure "notice of application" is used consistently.

Position of the Committee

[44] Whether a notice of application is required depends on the context - the nature of the tribunal and the issues raised. For example, a notice of application would be useful where the issues are particularly contentious and/or the identity of all potential parties and other participants is not known. For this reason, the Committee left in the provision regarding notice of application, but made it permissive rather than mandatory in all circumstances.

ISSUE No. 12
Should provision 3.2 expressly provide that more detailed information be included with the notice of application?

[45] The Saskatchewan Law Reform Commission was critical that the provisions in Report No. 79 concerning acknowledgement of an application did not specify any detail regarding the types of communications that are to be included with the acknowledgement, i.e. notification of any errors, request for additional information and information concerning the availability of alternative dispute resolution. This information is, however, reflected in the explanatory note to provision 1.1 from Report No. 79.

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[30] See Saskatchewan Model Code, Recommendations for Discussion 1.1 and 1.2, respectively.

[31] See for example, *Mental Health Act Forms and Review Panels Regulation*, Alta. Reg. 136/2004, s. 12(3).

[32] See for example, *Residential Tenancies Act*, S.A. 2004, c. R-17.1, s. 51.

Position of the Committee

[46] The Committee determined that it would not be appropriate to request additional information with the notice of application. The notice of application goes to a range of parties and other participants, whereas the request for additional information would primarily concern the persons who have initiated the application. Rather than including additional information in the notice of application, the Committee favoured the addition of a new provision preceding the notice of application that would specify that a tribunal may request additional information (see new provision 3.1).

b. Pre-hearing Conferences [Provision 3.4]

[47] Currently in Alberta, only a limited number of statutes refer to pre-hearing conferences or meetings.[33] The addition of provision 3.4 encourages more tribunals to adopt this useful case management tool.

[48] The recommended provision simplifies and consolidates provisions Nos. 14.1-14.3 from Report No. 79. The previous provisions were quite detailed and distinguished between issues to be considered by a person who was not a member of the adjudicative branch and those that were required to be decided by a member of the adjudicative branch. This level of detail was too much for the Model Code. The recommended provision is based on s. 32 of the ERCB Rules. Under the recommended provision a pre-hearing conference may be initiated by either a party or by the tribunal. The tribunal retains the discretion to hold pre-hearing conferences.

ISSUE No. 13
What level of detail should be included in the Model Code provision providing for pre-hearing conferences?

[49] The recommended provision strikes a middle ground between the detail provided by the provision in Report No. 79 and the approach adopted by British Columbia and recommended by Saskatchewan. In the latter approach, the statute or model code refers to a tribunal's ability to hold a pre-hearing conference but does not provide any detail. For example, section 11(2)(a) of the BC Act provides:

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[33] See, for example, ERCB Rules, ss. 32-33; NRCB Rules, s. 17; *Tribunal Process and Procedure Regulation,* Alta. Reg. 170/2003, ss. 6-7.

> Without limiting subsection (1), the tribunal may make rules as follows:
>
> (a) respecting the holding of pre-hearing conferences, including confidential pre-hearing conferences, and requiring the parties and any interveners to attend a pre-hearing conference.

The Saskatchewan Model Code simply provides: "A tribunal may direct, on consent of the parties, that a pre-hearing conference be held."[34]

Position of the Committee

[50] The Committee agreed that it is the tribunal, not the parties and other participants, that should take control of the pre-hearing conference. The Committee agreed that the level of detail contained in the recommended provision concerning pre-hearing conferences was appropriate.

c. Alternative Dispute Resolution [Provision 3.5]

[51] In Alberta, few enactments concerning administrative tribunals provide a general power for consensual dispute resolution process.[35] Some provide for conciliation, mediation or arbitration in certain situations. Including alternative dispute resolution processes in the Model Code is intended to encourage tribunals to engage in such processes.

[52] It is universally accepted in Canada that all admissions in the course of negotiation are protected by privilege based on public policy.[36]

ISSUE No. 14
What level of detail is required in the Model Code provision concerning alternative dispute resolution?

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[34] See Saskatchewan Model Code, Recommendation for Discussion 1.5 (1).

[35] Only six statutes in Alberta provide generally for alternative dispute resolution. For example, s. 18 of the NRCB Rules provides: "The Board may direct that the applicant and interveners participate in alternative methods of dispute resolution before a hearing or other proceeding."

[36] *Middlekamp v. Fraser Valley Real Estate Board* (1992), 96 D.L.R. (4th) 227 (B.C.C.A.), cited in John Sopinka, Sidney N. Lederman & Alan W. Bryant, *The Law of Evidence in Canada* 2nd ed., Supplement (Markham: LexisNexis Canada Inc., 2004) at para. 14.204.1. Wigmore outlines four different theories why admissions in the course of negotiations toward settlement are protected by privilege, John Henry Wigmore, *Evidence in Trials at Common Law*, ed. by James H. Chadbourn (Toronto: Little, Brown and Company, 1972) vol. 4 at para. 1061.

[53] The recommended provision is a consolidation of previous provisions Nos. 9.1-9.3 from Report No. 79 and aims to provide tribunals with a basic outline for establishing alternative dispute resolution procedures. In contrast, the Saskatchewan Model Code and the BC Act chose not to include anything regarding alternative dispute resolution except brief provisions referring to the ability of tribunals to use it.[37]

Position of the Committee

[54] The Committee was of the view that the level of detail in the recommended provision is appropriate.

4. HEARING POWERS AND PROCEDURES

a. Notice of Hearing [Provision 4.1]

[55] Natural justice requires that administrative tribunals provide parties and other participants, in the latter case depending on the terms of their participation, with reasonable notice of the proceedings. There is, however, considerable variation in the notice of hearing provisions contained in the enactments of tribunals in Alberta. In fact, many of the enactments do not contain any provisions providing for notice of a hearing. Of those that do, some, like the NRCB Rules, require that notice of a hearing be published not less than a prescribed number of days before the date of the hearing.[38] Others, like the ERCB Rules require at least 10 days notice of an oral or electronic hearing and describe in detail the contents of the Notice of Hearing, but do not specify how notice is to be provided and to whom.[39]

[56] The recommended provision essentially replicates Provisions Nos. 21.1-21.5 in Report No. 79.

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[37] See Saskatchewan Model Code, Recommendation for Discussion, 1.5(2) and BC Act, s. 11(2)(b).

[38] See NRCB Rules, s. 9.

[39] See ERCB Rules, s. 23.

[57] The BC Act provides for notice of a hearing by publication.[40] The Saskatchewan Model Code also includes a provision concerning the notice of hearing, however, it is less-detailed than provision 4.1.[41]

ISSUE No. 15
Should a provision requiring a hearing to be held within a reasonable time be added to the Model Code?

[58] The Saskatchewan Model Code includes a provision requiring a tribunal to hold a hearing within a reasonable time after receipt of an application.[42] The BC Act does not contain a comparable provision, although it does require a tribunal to issue practice directives concerning the usual time period for completing an application, the procedural steps within an application and within which a final decision and reasons are to be released following a hearing. Report No. 79 did not include any comparable provision.

Position of the Committee

[59] The Committee agreed that it would be preferable to make reference to holding a hearing within a reasonable time in the explanatory notes to the Model Code. Also the notes should make mention that it is best practice for tribunals to issue practice directives concerning the usual timelines to complete various stages of an application.

b. Consolidated Hearings [Provision 4.2]

[60] Surprisingly, a preliminary review of Alberta legislation did not reveal any that refer to the ability of an administrative tribunal to consolidate or hear proceedings together. It appears to be important, therefore, that this issue be included in the Model Code.

[61] The recommended provision simplifies provisions Nos. 11 and 12 in Report No. 79. It is modelled on s. 37 of the BC Act, which reads:

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[40] See BC Act, s. 21.

[41] As discussed previously, Saskatchewan recommended more detail be included with the notice of application and correspondingly less detail with the notice of hearing.

[42] See Saskatchewan Model Code, Recommendation for Discussion 1.3(1).

(1) If 2 or more applications before the tribunal involve the same or similar questions, the tribunal may

(a) combine the applications or any part of them,

(b) hear the applications at the same time,

(c) hear the applications one immediately after the other, or

(d) stay one or more of the applications until after the determination of another one of them.

(2) The tribunal may make additional orders respecting the procedure to be followed with respect to applications under this section.

ISSUE No. 16
Should a provision providing for joint hearings by more than one tribunal be included in the Model Code?

[62] The recommended provision does not provide for a joint hearing by more than one tribunal. Only a few Alberta tribunals, such as the Securities Commission, hold joint hearings with their counterparts from other provinces. A provision concerning joint hearings was not included in the BC Act, the UK provisions or the Canadian Federal Proposal. Provision 13 in Report No. 79 is one of the few places where such a provision is proposed. Macaulay asserts that the time and money saved by having a party appear before a joint panel of two agencies is substantial.[43] The Saskatchewan Model Code also recommends that a joint hearing be authorized on the consent of the parties, but does not provide any further details.[44]

Position of the Committee

[63] While the Committee observed that there were situations where joint hearings are held by tribunals in Alberta this was in specialized circumstances and not appropriate for inclusion in the Model Code.

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[43] See Robert W. Macaulay & James L.H. Sprague, *Practice and Procedure Before Administrative Tribunals*, looseleaf, (Toronto: Thomson Carswell, 2004), vol. 4 at para. 35.7(g).

[44] See Saskatchewan Model Code, Recommendation for Discussion, 1.5(5).

c. Incapacity, Expiration of Term or Termination of Tribunal Members

[64] The *Interpretation Act* contains detailed provisions regarding the expiry and termination of an appointment respectively.[45] The subsections are reproduced below for ease of reference:

> 20(7) Unless otherwise expressed in an enactment, if
>
> (a) a person who is appointed by or under the authority of an enactment to an office is engaged in an investigation, a hearing, a review, an appeal or a similar undertaking or in carrying out some other duty or function provided for under an enactment, and
>
> (b) that appointment expires or otherwise ends before that person concludes the investigation, hearing, review, appeal or undertaking or the carrying out of the duty or function,
>
> that person, unless otherwise directed by the person who has the authority to make the appointment referred to in clause (a) or the Minister responsible for the enactment under which the appointment was made, remains empowered to conclude that investigation, hearing, review, appeal or undertaking or the carrying out of that duty or function, including the making of any recommendation, report, determination or other conclusion that forms a part of that investigation, hearing, review, appeal, undertaking, duty or function.
>
> (8) Notwithstanding subsections (6) and (7), in the case of an appointment referred to in subsection (4) that is terminated, revoked or rescinded, the person whose appointment is terminated, revoked or rescinded is not, at any time after the termination, revocation or rescission becomes effective, eligible to exercise any power, duty or function under subsection (6) or (7) unless expressly permitted to do so by the person who terminated, revoked or rescinded the appointment or by the Minister responsible for the enactment under which the termination, revocation or rescission was effected.

[65] The Committee considered the *Interpretation Act* provisions to be fairly complex. It recommended that a more simplified provision regarding incapacity, expiration of term and termination be developed, and proposed the following draft:

> (1) Where a member's term expires, that member may continue to hear any matter which that member began to hear before the term expired and the member should be paid on the same basis as before for work done after the term expires.

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[45] R.S.A. 2000, c. I-8, ss. 20(7) and (8).

> (2) Where the appointment of a member is terminated, revoked or rescinded that member may not continue to hear any matter, unless expressly permitted to do so by the person who has the authority to appoint members of the tribunal.
>
> (3) Where a member of a single-member panel dies, is incapacitated, or otherwise unavailable, the matter must be re-heard by a different single-member panel.
>
> (4) Where a member of a multi-member panel or tribunal dies, is incapacitated, or otherwise unavailable, the hearing may be completed by the remaining members either where there is quorum without the member, or where the participants (and other participants depending on the terms of their participation) consent. Otherwise, the matter must be re-heared by a newly-constituted panel.

Consequently, this issue is not addressed in the Model Code. The Committee considered that the re-hearing in subsections (c) and (d) may be a full hearing, but may also be more perfunctory – that is a review of notes and materials.

[66] However, the Committee recognised that a provision dealing with matters affecting the appointment of tribunal members would require statutory authority. As such, the provision could not be included in the Model Code unless it too had statutory authority.

d. Hearing Panels

[67] Hearing panels enable tribunals to use their resources more effectively and efficiently. The members of a tribunal may sit as the tribunal, or as a hearing panel of the tribunal. Two or more hearing panels may sit simultaneously or at different times.

ISSUE No. 17
Should tribunals be allowed to sit in panels?

[68] A number of Alberta enactments provide for the creation of hearing panels, however, the language and comprehensiveness of these provisions vary. For example, s. 90 of EPEA provides:

> (3) The Board may convene a panel of Board members to conduct a hearing of an appeal and appoint a person to chair the panel.

> (4) Where a panel is convened, the panel has all the powers of the Board and is subject to all the same duties the Board is subject to, and a reference in this Act to the Board is to be read as a reference to the panel.

[69] In contrast, a far more comprehensive provision can be found in the *Securities Act*.[46] Section 23 provides:

> (1) The Chair may designate 2 or more members of the Commission to sit as a panel of the Commission and may direct the panel to conduct any hearing, review, inquiry or other proceeding that the Commission itself could conduct under this Act or the regulations or any other enactments.
>
> (2) Two members constitute a quorum at a sitting of a panel of the Commission.
>
> (3) A decision or other action made or taken at a sitting of a panel of the Commission at which a quorum is present is the decision or action of the Commission and binds all members of the Commission.
>
> (4) A panel of the Commission has, with respect to its duties, the same jurisdiction as that of the Commission and may exercise and perform all the powers of the Commission under this or any other Act with respect to a hearing, review, inquiry or other proceeding that it is directed to conduct and for that purpose any reference in this or any other Act to the Commission is deemed to be a reference to a panel of the Commission.
>
> (5) The Chair may designate a member of a panel of the Commission to preside at any sitting of the panel at which the Chair is not present.
>
> (6) A panel of the Commission shall conduct its sittings separately from those of another panel of the Commission being conducted at the same time.
>
> (7) Where a hearing, inquiry or other proceeding is conducted by a panel of the Commission and one or more members of the panel do not for any reason attend on any day or part of a day, the remaining members present may, if they constitute a quorum of the panel, continue with the hearing, inquiry or proceeding.

[70] Section 26 of the BC Act provides for the organization of the tribunal into panels, establishes that a decision of the majority of the panel is a decision of the tribunal, and addresses the situation where a panel member is unable to complete his or her duties. Subsection (6) of the BC Act also provides that a decision of the

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[46] R.S.A. 2000, c. S-4.

majority of panel members is a decision of the tribunal and in the case of a tie, the decision of the chair of the panel governs. Subsections (7) and (8) address the circumstances where a member of a panel is unable to continue for any reason. Where a member of a multi-member panel is unable to continue, the remaining panel members may continue to hear and determine the matter. Where a member of a single-member panel is unable to continue, the chair of the tribunal, with the consent of all parties to the application, may organize a new panel to continue to hear and determine the matter on terms agreed by the parties. Interestingly, it does not address quorum issues. Finally, subsection (9) provides that the chair or the chair's delegate may hear and decide any interim or preliminary matter. The British Columbia provision is described as being:

> ...sufficiently flexible to enable a tribunal to organize itself in the most efficient and effective way, it also ensures there is no room for debate about such questions as the powers of individual panels, the effect of the expiration of a member's appointment and the effect of panel decisions.[47]

[71] The Saskatchewan Model Code chose not to include a provision regarding hearing panels, concluding that there was no need to do so: "The tribunals that may find a panel system useful are usually those authorized to do so by statute, and are also those that require least guidance from a model code."[48]

Position of the Committee

[72] The Committee agreed that hearing panels can increase the efficiency and effectiveness of tribunals. As hearing panels require statutory authority, however, they are not currently included in the Model Code. A provision concerning hearing panels should be added if the Model Code is implemented as legislation. The Committee proposes the following draft:

> (1) Subject to any enactment to the contrary, the [tribunal] [tribunal chair] may do the following:
>
> (a) designate hearing panels comprised of one or more tribunal members to preside over a hearing or otherwise to decide any

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[47] British Columbia, Ministry of Attorney General, *Providing Administrative Tribunals with Essential Powers and Procedures: Report and Recommendations*, (Victoria: Administrative Justice Project, July 2002), online: <http://www.gov.bc.ca/ajo/down/providing_administrative_tribunals_with_essential_powers_and_procedures.pdf> at 21.

[48] See Saskatchewan Model Code at 19.

matter before the tribunal (unless the enactment sets out a minimum number of panel members); or

(b) where the enactment sets out the minimum number of panel members, designate a panel smaller than the minimum with the consent of the participants (and other participants depending on the terms of their participation);

(2) If the panel comprises more than one member, the tribunal chair must designate one of those members to act as chair of the panel.

(3) Where a panel is convened,

(a) the panel has all the powers of the tribunal and is subject to the same duties as the tribunal, and

(b) a decision of the panel is a decision of the tribunal.

e. Quorum [Provision 4.4]

[73] The enactments of some tribunals include provisions with respect to quorum, but these largely mirror the provisions in the *Interpretation Act*. Section 17 of *Interpretation Act* sets out the basic rules with respect to quorum:[49]

17(2) If an enactment establishes or continues a board,

(a) at least ½ of the number of members provided for under the enactment constitutes a quorum at a meeting of the board;

(b) an act or thing done by a majority of the members of the board present at a meeting, if the members present constitute a quorum, is deemed to have been done by the board;

(c) a vacancy in the membership of the board does not invalidate the constitution of the board or impair the right of the members of the board to act, if the number of members is not less than a quorum.

(3) In subsection (2), "board" means a board, commission or other body, whether incorporated or not, consisting of 3 or more members.

[74] There are no general provisions concerning quorum in Report No. 79, but former provision 22.2 does set out particular rules with respect to hearing panels and quorum.

[75] The Saskatchewan Law Reform Commission concluded that "[t]here is no need to repeat or supplement [the *Interpretation Act*] rules in the model code, but it would

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[49] See *Interpretation Act*, R.S.A. 2000, c. I-8, s. 17.

be useful to draw attention to them by reference."[50] The BC Act does not contain any provisions regarding quorum. The Committee found it was useful to include a provision on quorum in the Model Code. It determined that it was unnecessary to make express reference to the *Interpretation Act* in the recommended provision as the Act would apply to a tribunal unless its enactment expressly provided otherwise.

f. Access to Proceedings – Public/Private [Provision 4.5]

[76] The starting point is that hearings are generally be open to the public, subject to public interest exceptions to this rule. Much of the legislation in Alberta contains broad provisions requiring a public hearing, with limited exceptions. See for example the ERCB Rules which provide:

> 43(1) Subject to subsections (2) and (3), all oral hearings and electronic hearings are open to the public.
>
> (2) If the Board considers it necessary to prevent the disclosure of intimate personal, financial or commercial matters or other matters because, in the circumstances, the need to protect the confidentiality of those matters outweighs the desirability of an open hearing, the Board shall conduct all or part of the hearing in private.
>
> (3) If all or any part of an oral hearing or electronic hearing is to be held in private, no party may attend the hearing unless the party files an undertaking stating that the party will hold in confidence any evidence heard in private.

[77] On the other hand, given the nature of the issues considered, some tribunals have broad powers in their enactments to hold private hearings and permit exclusions and restrictions on disclosure.[51]

[78] Still, other legislation is silent with respect to whether the hearing is to be public or not.

[79] The recommended provision is a slightly simplified version of provisions Nos. 23.1 and 23.3 in Report No. 79. It also builds on the wording of s. 43(2) of the ERCB

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[50] See Saskatchewan Model Code, at 19.

[51] See for example, *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25; *Dependant Adults Act*, R.S.A. 2000, c. D-11; and *Child, Youth and Family Enhancement Act*, R.S.A. 2000, c. C-12.

Rules which expresses some of the concepts more clearly. Provision 23.2 in Report No. 79 concerning principles of openness in a written or electronic hearing was not included as this level of detail does not seem to be necessary for the Model Code.

[80] While other model codes have generally included a provision concerning the openness of a hearing the level of detail has varied. By way of comparison, s. 41 of the BC Act is less detailed than the recommended provision in terms of the types of situations that might warrant an *in camera* hearing.

> (1) An oral hearing must be open to the public.
>
> (2) Despite subsection (1), the tribunal may direct that all or part of the information be received to the exclusion of the public if the tribunal is of the opinion that
>
> (a) the desirability of avoiding disclosure in the interests of any person or party affected or in the public interest outweighs the desirability of adhering to the principle that hearings be open to the public, or
>
> (b) it is not practicable to hold the hearing in a manner that is open to the public.
>
> (3) The tribunal must make a document submitted in a hearing accessible to the public unless the tribunal is of the opinion that subsection (2) (a) or section 42 applies to that document.

[81] The proposal in the Saskatchewan Model Code is even less detailed, simply providing that:

> Unless otherwise provided by statute, hearings shall be open to the public and advertised in a reasonable manner.[52]

g. Type of Hearing [Provision 4.6]

[82] Interestingly in Alberta, in addition to oral hearings, more enactments provide for the possibility of an electronic hearing than provide for written hearings. The ERCB Rules is one of the few pieces of legislation to provide for all three types of hearings – oral, written and electronic.

[83] The recommended provision departs somewhat from provision 24 in Report No. 79 as the Committee felt that the reference to electronic hearings was unclear. Did this

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[52] See Saskatchewan Model Code, Recommendation for Discussion 2.3(1).

refer to hearings based solely on submissions made electronically, to video conferences or both? The recommended provision maintains that a tribunal has the discretion to choose the type of hearing for specific proceedings. Having the flexibility to hold oral, written, video, teleconferences, or other types of hearings allows tribunals the flexibility to take advantage of existing technology and handle increasing caseloads more efficiently and effectively. The explanatory note sets out factors that the tribunal is to consider to ensure that its hearing selection powers are exercised fairly.

[84] Section 36 of the BC Act simply provides that "...the tribunal may hold any combination of written, electronic, and oral hearings."[53]

[85] The Saskatchewan Model Code expressly disagrees with the approach in Report No. 79 which permits electronic or written hearings even where all the parties do not consent. It suggests the following:

> A tribunal may, on the consent of the parties and the interveners, hold written, electronic, oral or mixed hearings, but in such cases, access of the parties and interveners to all submissions, replies and evidence during the course of the hearing must be ensured, and if the tribunal is required to hold a public hearing, public access to such materials must be made available prior to release of the tribunal's written decision and reasons.[54]

With respect, the Saskatchewan approach appears overly-cautious and possibly reflects a discomfort with written or electronic hearings.

h. Evidence [Provision 4.8]

[86] Where enactments do make reference to the rules of evidence, they usually simply negate the application of the formal rules of evidence. Section 9 of the APJA is typical:

> Nothing in this Part
>
> ....
>
> (b) requires any authority to adhere to the rules of evidence applicable to courts of civil or criminal jurisdiction.

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[53] See BC Act.

[54] See Saskatchewan Model Code, Recommendation for Discussion 2.3(3).

See also s. 20 of the AUC Act, which reads:

> The Commission is not bound in the conduct of its hearings by the rules of law concerning evidence that are applicable to judicial proceedings.

And for example s. 14(5) of the *Labour Relations Code* which reads:

> The Board
>
> (a) may accept any oral or written evidence that it, in its discretion, considers proper, whether admissible in a court of law or not, and
>
> (b) is not bound by the law of evidence applicable to judicial proceedings.[55]

[87] The recommended provision builds on provision 26 in Report No. 79. Provision 26 provides that "[a] tribunal is not bound by the formal rules of evidence unless deviation from these rules would cause significant unfairness." Subsections (1),(3), and (4) were reflected in the explanatory note to provision 26, but are added to the recommended provision for greater clarity.

[88] The Saskatchewan Model Code was critical of the approach of provision 26 from Report No. 79:[56]

> This formula implies that the tribunal should be aware of the exclusionary rules, and determine applicability on a case by case basis. In our opinion, this is inappropriate. The fundamental requirement imposed by the courts is fairness to the parties. It may be that in some cases, second hand information of dubious value (technically hearsay) should not be admitted by a tribunal, but this is a consequence of the unfairness of allowing the evidence to become part of the tribunal's deliberations, not because it breaches a formal rule of evidence.

[89] The Committee did not agree with Saskatchewan's criticism. It is reasonable to expect tribunals to have knowledge of what the formal rules of evidence require. Tribunals, however, are not bound by the formal rules of evidence.

[90] Provisions Nos. 33.1-33.2 in Report No. 79 made reference to both judicial notice and official notice. Neither the Saskatchewan Model Code nor the BC Act include such a provision. The Law Reform Commission of Saskatchewan observed

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[55] R.S.A. 2000, c. L-1, s. 14(5) [LRC].

[56] See Saskatchewan Model Code at 21.

that such provisions would fall within the general rule regarding evidence and their inclusion in the model code was unnecessary.[57] The Committee was of the view that judicial notice and official notice were both relatively narrow concepts. It was of the view, that their inclusion in the Model Code was unnecessary and their development should be left to the common law.

i. Witnesses [Provision 4.9]

[91] In Alberta, some tribunals routinely hear from witnesses, their rules provide for witness panels and the payment of conduct money. For example, s. 39 of the ERCB Rules provides:

> (1) The Board may, on its own initiative or at the request of a party, issue a notice requiring a person to attend an oral hearing or electronic hearing as a witness and to produce the documents and material set out in the notice.
>
> (2) The provisions of the *Alberta Rules of Court* (AR 390/68) relating to the payment of conduct money and witness fees apply to oral and electronic hearings.
>
> (3) Despite subsection (2), the Board may increase the amount payable to an expert witness or in special circumstances where a witness attends an oral hearing or an electronic hearing as a result of a notice to attend.

In contrast, other tribunals rely solely on submissions from the parties and other participants without calling other witnesses.

[92] The recommended provision consolidates and simplifies provisions Nos. 27.1, 28.1 and 32.2. It does not include Provision 27.2 which dealt with the ability to *subpoena* witnesses (see discussion below).

[93] The Saskatchewan Law Reform Commission indicated that it did not agree with the proposal in Report No. 79 that "cross-examination should automatically be a right when evidence is received from a witness."[58] Instead, Saskatchewan posited that

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[57] See Saskatchewan Model Code at 23.

[58] See Saskatchewan Model Code at 24.

"[w]hile cross-examination and reply might be allowed, or even clearly required in the interests of fairness, in some cases, we do not believe it is always necessary."[59]

[94] With all due respect to the Saskatchewan Law Reform Commission, it appears that there really is no disagreement between the two positions. Report No. 79 provides that there is no right to cross-examination at common law and that "[i]t must be permitted only to the extent that it is required to afford a party 'a fair opportunity to correct or controvert any relevant statement brought forward to his prejudice.'"[60] Perhaps, the difficulty is that the comment in Report No. 79 is made in the explanatory note rather than in the rule itself. To avoid the potential for misunderstanding, the recommended provision makes express reference to the cross-examination of witnesses.

ISSUE No. 18
Should tribunals have the power to order and compel witnesses?

[95] Where witnesses are routinely called by tribunals, some but not all of the enactments provide that a tribunal may make an order to compel a witness to attend proceedings and apply to a court to have that order enforced. Section 14(2)-(4) of the LRC is illustrative:

> (2) Subject to subsection (3), the Board may, by order, summon and enforce the attendance of witnesses and compel them to give oral or written evidence on oath and to produce the documents and things the Board considers requisite to the full investigation and consideration of matters within its jurisdiction in the same manner as a court of record may in civil cases.
>
> (3) If any person fails to comply with a Board order made under subsection (2), or conducts himself or herself in a manner that may be in contempt of the Board or its proceedings, the Board may apply to the Court for an order directing compliance with the Board's order, or restraining any conduct found by the Court to be in contempt of the Board or its proceedings.

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[59] See Saskatchewan Model Code at 24.

[60] Report No. 79 at 121-122.

> (4) On an application under subsection (3), the Court may grant any order that, in the opinion of the Court, is necessary to enable the Board to carry out its duties.

Others, like the AUC Act, vest the commission itself with the powers of the Court of Queen's Bench to compel a witness to attend.[61]

[96] This raises the question whether the power to compel the attendance of witnesses is appropriate for administrative tribunals. Report No. 79 indicates this is appropriate for some tribunals and includes this power in provisions Nos. 27.2 and 32.2 of the Model Code. A similar approach was taken by s. 34 of the BC Act. Saskatchewan determined that this was not something that was appropriate for the model code, rather as an exceptional power it should be left to the enactment of individual tribunals.[62]

Position of the Committee

[97] The Committee was of the view that this power would require statutory authority and would not be appropriate for all tribunals. Where such a power is necessary, it should be included in the enactment for a particular tribunal. It is important to note that it is better to draft specific provisions for individual tribunals rather than incorporating by reference provisions from other statutes, such as s. 5 of the *Public Inquiries Act,* which may not be appropriate in all circumstances.[63]

ISSUE No. 19
Should a provision be included in the Model Code requiring evidence to be given on oath or solemn declaration?

[98] Finally, a related issue is whether a witness's testimony must be given under oath or affirmation. Provision 28.1 in Report No. 79 adopted the position that oath or affirmation was necessary. While it acknowledged that some tribunals may be hesitant to adopt the procedure as it would interfere with the informal nature of their proceedings, it noted that tribunals who do not require sworn testimony may have no

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[61] See AUC Act, s. 19.

[62] See Saskatchewan Model Code at 23.

[63] R.S.A. 2000, c. P-39, s. 5.

effective way to respond if a false statement is made. That is, a sanction is available for persons who make false statements under oath but not for unsworn evidence.

[99] There is no consensus in the enactments in Alberta. For example, section 9 of the APJA provides that evidence or allegations of fact made to an authority under the Act are not required to be made under oath. In contrast, s. 40 of the ERCB Rules provides that "unless the Board otherwise directs, a witness at an oral hearing or electronic hearing must be examined orally on oath or affirmation."

[100] The consultation document to Report No. 79 indicates that this provision was "contentious" and that some of the Board and Project Committee members felt strongly that it should be discretionary. Saskatchewan agreed with those who found provision 28.1 contentious. It felt that requiring oath or affirmation would interfere too much with the informal nature of administrative proceedings and identified a practical concern that not all tribunals would have commissioner of oaths.[64]

Position of the Committee

[101] The Committee concluded that a tribunal should not require evidence to be given on oath, affirmation or solemn declaration. This would add a degree of formality that would not be appropriate for all tribunals. Further, application of a mandatory provision would be complex. Where a tribunal wishes, and is authorized to administer oaths, it may require that evidence be given under oath.

j. Effect of Non-participation [Provision 4.10]

[102] This provision replicates provision 34.4 from Report No. 79. It deals exclusively with non-participation. Neither the BC Act nor the Saskatchewan Model Code included a comparable provision. The Committee was of the view that non-participation raised issues distinct from that of failure to generally comply with tribunal orders and should be included as a separate Model Code provision.

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[64] See Saskatchewan Model Code at 23. This practical concern can be addressed, however, as Ontario's *Statutory Powers and Procedures Act*, R.S.O. 1990, c. S. 22, s. 22 has done by providing that a member of a tribunal has the power to administer oaths and affirmations.

k. Failure to Comply with Tribunal Orders [Provision 4.11]

[103] The recommended provision deals generally with the failure to comply with a tribunal order. Report No. 79 did not include such a provision.

[104] Some enactments include the express power to act where a party fails to comply with a tribunal order or rules of practice and procedure. For example, s. 8 of the ERCB Rules provides:

> (1) If a party fails to comply with these Rules or a direction of the Board, the Board may
>
> (a) make an order that the Board considers appropriate to ensure the fair determination of an issue, or
>
> (b) adjourn the proceeding until it is satisfied that these Rules or the direction of the Board has been complied with.
>
> (2) If a party fails to comply with a time limit specified in these Rules or by the Board for the filing of documentary evidence or other material, the Board may disregard the documentary evidence or material.
>
> (3) No proceeding is invalid by reason of a defect or other irregularity in form.

[105] Similarly, s. 32 of the *Board Administrative Procedures Regulation*, provides:

> (1) If a party fails to comply with this Regulation or a direction of the Board respecting an application, submission or review, the Board may
>
> (a) make an order that the Board considers appropriate to ensure the fair determination of an issue, or
>
> (b) adjourn the proceeding until it is satisfied that this Regulation or the direction of the Board has been complied with.
>
> (2) If a party fails to comply with a time limit specified in this Regulation or by the Board for the filing of documentary evidence or other material, the Board may disregard the documentary evidence or material.
>
> (3) No proceeding is invalid by reason of a defect or other irregularity in form.[65]

[106] The Saskatchewan Model Code does not address this issue. On the other hand, British Columbia felt this was an important power for tribunals and included the following provision in the BC Act:

> If a party fails to comply with an order of the tribunal or with the rules of practice and procedure of the tribunal, including any time limits specified

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[65] Alta. Reg. 268/2001, s. 32.

> for taking any actions, the tribunal, after giving notice to that party, may do one or more the following:
>
> (a) schedule a written, electronic or oral hearing;
>
> (b) continue with the application and make a decision based on the information before it, with or without providing an opportunity for submissions;
>
> (c) dismiss the application.[66]

I. Maintaining Order at the Hearing [Provision 4.12]

[107] Somewhat surprisingly, no enactment for any administrative tribunal in Alberta includes a provision regarding the maintenance of order at a hearing.

[108] The recommended provision is more simplified than that found in provision 58 of Report No. 79. It does not include much of the detail contained in Provision 58, such as the power to call for the assistance of a peace officer, as this would require statutory authority.

[109] The Saskatchewan Model Code does not include a comparable provision. British Columbia included a maintenance of order provision in s. 48 of the BC Act:

> 48(1) At an oral hearing, the tribunal may make orders or give directions that it considers necessary for the maintenance of order at the hearing, and, if any person disobeys or fails to comply with any order or direction, the tribunal may call on the assistance of any peace officer to enforce the order or direction.
>
> (2) A peace officer called on under subsection (1) may take any action that is necessary to enforce the order or direction and may use such force as is reasonably required for that purpose.
>
> (3) Without limiting subsection (1), the tribunal, by order, may
>
> (a) impose restrictions on a person's continued participation in or attendance at a proceeding, and
>
> (b) exclude a person from further participation in or attendance at a proceeding until the tribunal orders otherwise.

The BC Act provision is based on s. 9(2) of Ontario's *Statutory Powers Procedure Act*.[67]

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[66] See BC Act, s. 18.

[67] R.S.O. 1990, c. S. 22, s. 9(2).

5. DECISION AND REASONS

a. Factors for Decision Making [Provision 5.1]

[110] The recommended provision generally replicates provision 43.1 from Report No. 79 and is a corollary to the right to be heard.

[111] The recommended provision clarifies what is required by natural justice in reaching a decision, however, comparable provisions are not found in either the BC Act or the Saskatchewan Model Code.

b. Timely Decision [Provision 5.2]

[112] Most enactments in Alberta provide timelines for decisions. For example, s. 98(1) of the EPEA requires a written decision to be given within 30 days after the completion of a hearing of an appeal. Section 102(1) of the LRC provides that a compulsory arbitration board under this section must make its award within 20 days of the date on which it was established.

[113] Provision 41.1 in Report No. 79 provided that tribunals are to set their own timelines for issuing decisions that are appropriate to their decision-making function. ALRI's Consultation Memorandum elaborated on why this approach was taken:

> We rejected the idea of mandatory timelines in favour of guidelines because there is no practical sanction. The timeliness of decisions is an administrative matter which should be the responsibility of the agency chair, and the chair should, as part of his or her mandate to manage the agency, take action against a panel member who fails to render a decision. Mandamus is also available as a remedy.[68]

[114] The Saskatchewan Model Code was critical of ALRI's position. It agreed that the chair has the responsibility to ensure that a tribunal is operating efficiently, but felt that tribunals must recognize a basic obligation to render decisions in a timely fashion. It recognized timely decision-making as a basic right of parties and other participants,

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[68] Alberta Law Reform Institute, *Powers and Procedures for Administrative Agencies: Model Code*, Consultation Memorandum No. 6 (1999) at 71.

not simply an "administrative matter."[69] It included an express provision requiring a decision to be rendered "in a timely fashion and not later than the time required, if any, by the statute or regulations."[70]

[115] The BC Act is more consistent with the position of Report No. 79. Section 12(1)(b) requires the tribunal to issue practice directives respecting the usual time period within which the tribunal's final decision and reasons are to be released after the hearing is to be completed.

[116] Arguably, implicit in both the position in Report No. 79 and the BC Act is an assumption that the time frames selected by the tribunal will provide for a decision within a reasonable time. To avoid any possible confusion and to underscore the obligation of tribunals to render a decision in a reasonable time, the Model Code recommends an express provision to this effect.

c. Decision by Majority [Provision 5.3(1)]

[117] Somewhat surprisingly, few enactments expressly provide that decisions are to be made by the majority. Some, like the LRC[71] and the *Human Rights, Citizenship and Multiculturalism Act*,[72] contain such provisions. For the remaining tribunals it appears to be implicit. None of the tribunals' enactments require unanimous decisions.

[118] The recommended provision is included in the Model Code to avoid any confusion as to whether decisions require a majority or unanimity. It essentially replicates provision 42 from Report No. 79.

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[69] See Saskatchewan Model Code at 27-28.

[70] See Saskatchewan Model Code, Recommendation for Discussion 3.2.

[71] See LRC, s. 9(7).

[72] See *Human Rights Citizenship and Multiculturalism Act*, R.S.A. 2000, c. H-14, s. 27(5).

[119] The BC Act is silent with respect to this issue. The Saskatchewan Model Code, however, recommends that an express provision be included to aid smaller tribunals who may be uncertain whether a simple majority or unanimity is required.[73]

[120] Some model codes provide that where a panel is equally divided then the parties can agree to have the decision made by the chair, or if they do not agree, to have the matter reheard. The Committee was of the view that this was an unnecessary departure from the concept of a majority decision. Where the majority of a panel is not in favour of a proposition, then the proponent simply loses.

d. Decision and Reasons in Writing [Provision 5.3(2)]

[121] Some enactments in Alberta expressly require that both the decision and the reasons for the decision be made in writing. For example, s. 7 of the APJA provides:

> 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.[74]

Many others enactments require that the decision be in writing, but are silent with respect to whether written reasons are to be included.[75]

[122] The courts in Alberta have adopted the *Baker* line of reasoning with respect to whether written reasons are required.[76] That is, "in certain circumstances, the duty of procedural fairness will require the provision of a written explanation for a decision."[77] This is particularly so in cases where the decision has an important

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[73] See Saskatchewan Model Code at 29.

[74] See APJA, s. 7; see also *Human Rights Citizenship and Multiculturalism Act*, R.S.A. 2000, c. H-14, s. 32(3).

[75] See for example EPEA, s. 98.

[76] *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817.

[77] See *Cook v. Alberta (Minister of Environmental Protection)*, [2001] 293 A.R. 237 (Alta. C.A.).

significance for the individual, or where there is a statutory right of appeal.[78] Concerns that a requirement for written reasons places too great a burden on decision-makers can be "accommodated by ensuring that any reason requirements under the duty of fairness leave sufficient flexibility to decision-makers by accepting various types of written explanations for the decision as sufficient."[79]

[123] Against this backdrop, Report No. 79 concluded that written reasons are to be required in all cases:

> There is an argument that reasons are somewhat 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.[80]

[124] A similar position was adopted by the BC Act[81] and is reflected in the Saskatchewan Model Code, although the latter identified this as an issue that requires further discussion.[82]

[125] The recommended provision adopts the position taken in Report No. 79. It consolidates and simplifies provisions Nos. 37, 38.1, 39 and 40. The wording of the recommended provision reflects the Committee's preference for the language of APJA expressly requiring the factual basis and the reasons for a decision, rather than simply the reasons for the decision. In the administrative law context, the reasons and factual basis for a decision are often inter-twined.

ISSUE No. 20
Should written reasons include the dissent, if any? As a requirement? Only where the tribunal member requests?

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[78] See *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 43.

[79] See *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 40.

[80] See Report No. 79 at 135.

[81] See BC Act, s. 51.

[82] See Saskatchewan Model Code, Recommendation for Discussion 3.1.

[126] Currently, only a few Alberta enactments provide that dissenting reasons are to be provided.[83] The BC Act does not require the provision of dissenting reasons. The Saskatchewan Law Reform Commission concluded that a requirement that dissenting reasons be included was not necessary and instead recommended that dissenting reasons be included only where the dissenting tribunal member so requests.[84]

Position of the Committee

[127] The Committee determined that it would be better not to leave it up to individual panels to decide whether or not to include dissenting reasons. The matter of dissents should be dealt with on a tribunal-wide basis. While some might assert that Saskatchewan's approach better equates with an open and transparent process, the Committee noted that dissent at the tribunal level can be very divisive and may fuel what may already be a very heated emotional matter.

e. Correcting an Error [Provision 5.6]

[128] The recommended provision essentially reproduces provision 45 from Report No. 79. Tribunals may generally correct clerical or typographical errors or errors of calculation. In only a few cases is this power explicitly provided for in a tribunal's enactment. For example, s. 50 of the ERCB Rules provides:

> The Board may correct typographical errors, errors of calculation and similar errors made in any of its orders, decisions or directions.

[129] The recommended provision is included in the Model Code to provide greater certainty regarding the power of tribunals to correct these sorts of errors. Both the BC Act and the Saskatchewan Model Code include comparable provisions.[85]

f. Reconsideration

[130] A provision regarding reconsideration may be included in the enactment of an individual tribunal. Examples of the circumstances where reconsideration could be authorized include: where there has been fraud or false or misleading evidence

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[83] See for example, the *Environmental Appeal Board Regulation*, Alta. Reg. 114/1993, s. 17(3)(c), and the *Legal Profession Act*, R.S.A. 2000, c. L-8, s. 74(2).

[84] See Saskatchewan Model Code, Recommendation for Discussion 3.3(2).

[85] See BC Act, s. 53 and Saskatchewan Model Code, Recommendation for Discussion 3.4, respectively.

knowingly accepted; where the tribunal has failed to dispose of a matter fairly raised; or where a hearing panel decides a matter that raises broader policy concerns.

g. Costs

[131] A provision providing for the award of costs may be appropriate for some, but not all tribunals. Where an enactment authorizes a tribunal to award costs, it should be possible to make such an award at any stage of the proceedings, not only at the conclusion.

h. Appeals to Appeal Bodies Within Agencies

[132] Enactments may also provide for, where appropriate, appeals to an appeal body within an agency where appropriate. Typically, these provisions address matters such as what is to be contained in the notice of appeal; the time limit for appeals; and, whether an appeal operates as a stay or not. Standardized provisions amongst tribunals assist the general public in navigating the appeal procedures of various tribunals.

i. Contempt of Tribunal Orders

[133] For many tribunals, a provision allowing them to obtain orders for contempt to enable them to enforce their orders would be useful. It is generally preferable if such a provision requires application to a court, rather than placing the power to punish for contempt in the tribunal themselves, i.e., by imposing a fine, or placing restrictions on participation. Court involvement is particularly preferable where the liberty of a person is at stake and it also avoids having the tribunal act as both prosecutor and judge.

j. Interim Orders and Decisions

[134] As part of their general power to control their procedures, tribunals may make interim procedural orders. (See explanatory note to recommendation 2.1.) Interim orders or decisions concerning substantive matters, however, require statutory authority. The enactments of some tribunals provide for interim orders and decisions and may include the power to vary them retrospectively.

6. OPTIONS FOR IMPLEMENTATION

[135] The focus of this Consultation Memorandum and the Model Code has been to identify a coherent set of powers and procedures that would enhance the role of administrative tribunals. While implementation of those provisions is a key concern, the Committee and the Board felt it was important to identify the provisions on their merits first. Implementation will be addressed as a later part of this project after consultation on the Model Code provisions is complete. Once the appropriate set of provisions has been identified, it will be an easier matter to determine the appropriate method (or methods) of implementation. That being said, four options for implementation will be briefly outlined.

a. Best Practices

[136] The Model Code could be published by the Alberta Ministry of Justice as an approved guide for administrative procedures. As a non-binding set of best practices it would be used as a tool for training new tribunal members and for revising or updating the procedures of existing administrative tribunals.

b. Opt-In Legislation

[137] Along the lines of Report No. 79, the Model Code could be enacted as opt-in legislation. Its provisions would have the force of law, but administrative tribunals would have to review and elect which provisions to adopt.

c. Opt-Out Legislation

[138] The Model Code could be adopted as opt-out legislation. It would have the force of law and would apply to all administrative tribunals unless they expressly opted-out of a provision. This would ensure that the minimum procedural provisions applied to all tribunals and would provide an incentive for tribunals to review their procedural rules in light of the code.

d. Uniform Application Legislation

[139] A further option would be for the Model Code to be given the force of law and to apply uniformly to all administrative tribunals without the possibility of opting in or opting out.

INVITATION TO COMMENT

This Consultation Memorandum by the Alberta Law Reform Institute [ALRI] raises a number of issues regarding the powers and procedures of administrative tribunals.

The purpose of issuing a Consultation Memorandum is to allow interested persons the opportunity to consider these issues and make their views known to ALRI. Any comments sent to us will be considered when the ALRI Board makes final recommendations.

Deadline for comments on the issues raised in this Memorandum is December 31, 2008.

You can reach us with your comments by fax, mail or e-mail to:

Alberta Law Reform Institute
402 Law Centre
University of Alberta
Edmonton AB T6G 2H5

Phone: (780) 492-5291
Fax: (780) 492-1790
E-mail: *reform@alri.ualberta.ca*
Website: http://www.law.ualberta.ca./alri/

Law reform is a public process. ALRI assumes that comments on this Consultation Memorandum are not confidential. ALRI may quote from or refer to your comments in whole or in part and may attribute them to you, although we usually discuss comments generally and without attribution. If you would like your comments to be treated confidentially, you may request confidentiality in your response or may submit comments anonymously.