The Statutory Powers and Procedures of Administrative Tribunals in British Columbia

A Background Paper

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for

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Preface

This background paper is one of several to be released as part of the Administrative Justice Project. The Project, initiated by the Attorney General, is a broad legal and policy review of the system of administrative justice in British Columbia. Its objectives are to ensure that:

- administrative agencies meet the needs of the people they serve;
- their administrative processes are open and transparent;
- their mandates are modern and relevant;
- government fulfills its obligations by providing the legislative and policy framework administrative agencies require to carry out their independent mandates effectively.

The Terms of Reference for the background papers are to ensure that:

- legislation is based, to the greatest extent possible, on a principled, consistent and clear articulation of the role and powers of administrative agencies;
- administrative agencies possess the procedural authority to respond flexibly, effectively and efficiently to resolve disputes by adjudicative or other means;
- compelling rationales exist for more than one "layer" of administrative appeal or review;
- courts and parties have clearer direction regarding the legislature's intention concerning matters such as the standard of review where a decision is challenged on judicial review or appeals.

The intent of this and the other background papers is to facilitate informed discussion about steps government can take to assist the work of administrative agencies. The papers provide a focus for this discussion and, it is hoped, will result in dialogue and debate within the administrative justice community. Comment will be taken into account by the Administrative Justice Project when it drafts a White Paper for release in early 2002. There will be a further opportunity for public input after the White Paper is released, before government decides on what steps it will take.

If the reader is interested, written comments may be forwarded to the author at the following address prior to April 15, 2002.

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EXECUTIVE SUMMARY

The administrative tribunal is a distinctive institution of our legal system. Neither court nor government department, the administrative tribunal is a servant of the Legislature itself – a creature of statute whose fundamental purpose is to take various actions or decisions, usually at arm's length from government and with less formality than courts, and always with utmost fidelity to the policy of the statute.

Just as public policy is diverse, so are the purposes and functions of administrative tribunals. Amid this diversity, the rule of law is a tie that binds all administrative tribunals. The rule of law requires that whatever powers an administrative tribunal might wish to exercise, it has only such powers as are expressly conferred or necessarily implicit in the governing legislation. The rule of law also includes the principle that, unless excluded by legislation, an administrative tribunal must accord procedural fairness to a citizen specifically and significantly affected by its decision or action.

The demands of the rule of law imply a corresponding onus on legislators to ensure that legislation fully and adequately describes the powers and procedural obligations of the administrative tribunals they create. The failure to do so completely, consistently, or at all carries serious implications. As expressed at page 13 of this paper:

> *Administrative tribunals should, as public service agencies, be spending as little time as possible resolving questions as to their substantive and procedural authority. Where such powers are inadequately or incompletely expressed, tribunals sometimes choose not to exercise those powers at all. On other occasions, they may resolve ambiguity by opting for more court-like solutions to problems, on the basis that they should play it safe. On yet other occasions, they may spend significant time, at hearings and in Court, addressing jurisdictional arguments. They may, in the end, spend time and money seeking to resolve issues that might have been avoided had the legislator anticipated the issues and provided appropriate guidance.*

The purpose of this discussion paper is to emphasize the important link between an administrative tribunal's powers and procedural obligations, and its ability to deliver its public service mandate in a fair, efficient and effective manner. As will be seen from the discussion that follows, the subject of statutory powers and procedures has received a great deal of attention and study both in Canada and elsewhere. Those studies universally reject the creation of a single, comprehensive code of tribunal powers and procedures, but they do propose a number of alternatives designed at once to enhance sound strategic thinking in tribunal legislation and ensure a proper balance between procedural fairness and effective, principled administration.

As the present discussion proceeds, readers are encouraged to consider the following questions:

- Why are the powers and procedures of administrative tribunals so important to the delivery of the public service functions they exercise?
- Are the current disparities that exist among the powers and procedures of administrative tribunals necessary and justified in light of their diverse mandates and public policy functions?
- What law reform processes have other jurisdictions used to review this issue, and what have been the results of those reviews?
- What are the principal options available to British Columbia legislators? In particular, should British Columbia create a Council on Tribunals and/or adopt statutory powers and procedures legislation? Should the individual powers and procedures of administrative tribunals be made by government, a Rules Committee or tribunals themselves?

It has been customary for law reform papers addressing this subject to advance specific recommendations for public comment. This paper takes a different approach, by taking a step back. Rather than proposing a specific course of action, this paper seeks to encourage discussion and debate by assisting readers to consider available law reform options for themselves, and to make their own recommendations to government. Following the receipt of public comment on this paper, the government intends to prepare a White Paper, which will propose specific recommendations.

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"[A] gram of prophylaxis is worth a kilogram of prerogative writs."

Prof. Harry Arthurs[1]

1 OVERVIEW: ADMINISTRATIVE TRIBUNALS

The body of law that we call administrative law is concerned with the principles governing persons and bodies exercising "governmental" or "public" power in relation to the citizen. This power is exercised primarily pursuant to legislation, the work product of the democratic process.[2]

Over the past five decades, administrative law has assumed much greater prominence in the law of Canada. Its increased prominence is the by-product of the expanding role that government itself has played in western society following the Second World War. The following passage from a Supreme Court of Canada judgment nicely emphasizes the ubiquitousness of regulation in modern society:

> *It is difficult to think of an aspect of our lives that is not regulated for our benefit and for the protection of society as a whole. From cradle to grave, we are protected by regulations; they apply to the doctors attending our entry to the world and to the morticians present at our departure. Every day, from waking to sleeping, we profit from regulatory measures which we often take for granted. On rising, we use various forms of energy whose safe distribution and use are governed by regulation. The trains, buses and other vehicles that get us to work are regulated for our safety. The food we eat and beverages we drink are subject to regulation for the protection of our health.*[3]

Regulation, and the use of public power it entails, has many faces. Public power is exercised by courts of law. It is exercised by ministers of the Crown and by officials within their ministries. It is exercised by local governments. It is exercised by self-regulatory bodies.

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1 H.W. Arthurs, "Recognizing Administrative Law" (1979), *Proceedings of the Administrative Law Conference* (University of British Columbia), p. 3.

2 I say "primarily" concerned, because the vast majority of administrative law cases concern persons exercising a statutory power. While this is a useful definition for purposes of this paper, it should be noted that the province of administrative law extends beyond persons exercising statutory powers, to officials such as ministers exercising common law "public" functions, and even private bodies acting without legislative underpinning but regarded as making a "public" decision: see *R. v. Panel on Take-overs and Mergers*, [1987] 1 Q.B. 815 (C.A.). For an extremely useful discussion of the outer boundaries of administrative law, see Groberman, "Administrative Law and Non-Statutory Bodies", *Administrative Law (1998*), Continuing Legal Education, ch. 6.1.

3 *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154 at para. 136, per Cory J.

While the province of administrative law extends to all these bodies, this paper's attention focuses specifically on the group of entities that are neither ministers of the Crown nor courts; neither local governments nor Crown ministry officials. They are entities that are variously described as "independent administrative agencies", "administrative boards" and "administrative tribunals". The Administrative Justice Project refers to them as "administrative justice agencies", and describes them as follows:

> *Administrative justice agencies provide specialized forums for decision making and dispute resolution that are separate from day-to-day operations of government ministries. Like the courts, administrative agencies are expected to be impartial and fair. As an alternative to the courts, they are also expected to be more accessible, less costly and more able to reach a decision in a timely and effective manner.*[4]

Administrative tribunals have been defined as "distinctive institutions of the welfare state" that typically share four characteristics:

- They enjoy a measure of independence from the government department with overall responsibility for the policy area in which they operate. This means, at the very least, that the minister cannot direct their decision-making, and in turn is not politically accountable for their decisions under traditional principles of responsible government.
- They are specialized: they are associated with one or more specific public programs, usually within a single statute.
- They are meant to be effective and typically operate at the "sharp end" of the administrative process: that is, at the point where the program is applied to the individual.
- Their functions typically include making decisions that are sufficiently serious and specific in relation to the citizen as to attract the common law duty of procedural fairness.[5]

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4 Administrative Justice Project, *Terms of Reference*, July 27, 2001. The "administrative tribunals" of particular concern in this paper are those tribunals that are part of the government's administrative justice project review, which are primarily "independent administrative tribunals": Terms of Reference, Schedules 1 and 2. This said, it is recognized that many of the matters discussed in this paper may have application to reform prospects for other legislative delegates, including Crown decision-makers and self-governing professions. While this paper may provide a helpful framework for the reforming the law regarding the standard of review in those areas, each of them raise unique policy considerations that may, for some, speak in favour of a different answer to the law reform questions posed in this paper.

5 See generally, Evans, Janisch, Mullan and Risk, *Administrative Law* (4th ed, 1995), pp. 12-20.

The public policy areas served by administrative tribunals are nearly as broad as those of government itself. As the Supreme Court of Canada has recognized: "In Canada, boards are a way of life. Boards and the functions they fulfill are legion."[6]

For the great breadth of modern administrative law, its roots run just as deep. Administrative law is the inevitable by-product of the Rule of Law, and two transcendent ideals it encompasses: (1) that those exercising public authority must act, and must be allowed to act, within the scope of their grant of authority; and (2) that where public power is directed toward the citizen, decision-makers must generally act in a fashion that is procedurally fair. These ideals are not judicial inventions. They are not matters only for lawyers. They represent a fundamental societal ethic. This is why the articulation, realization and reconciliation of these ideals have spawned significant debate outside the courtroom.[7] They are the very stuff of public policy.

Administrative tribunals are creatures of statute. This fact, and the public policy tensions inherent in finding the proper balance between procedural justice and effective administration, necessarily implies a prominent role, if not a responsibility, for legislators. The fundamental questions posed by this paper are whether policy-makers have consistently given sufficient attention to these questions in creating and enabling British Columbia's administrative tribunals and, if not, what legislative options are available to ensure that administrative tribunals effectively achieve their very important public purposes.

Despite the importance of such questions to the effective functioning of administrative tribunals, it has been observed that a "general interest in reforming the law of administrative [powers] and

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6 *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities),* [1992] 1 S.C.R. 623 at para. 17.

7 For a useful summary of the competing tensions in this area, see Chief Justice McLachlin's Paper: "The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law" (1999), 12 C.J.A.L.P. 171. See also the author's Discussion Paper for this Project concerning the "Standard of Review on Judicial Review and Appeal". The ongoing debate about how "the Rule of Law" should be defined and articulated might cause some readers to wonder whether it really is a notion worthy of being called a "fundamental societal ethic". To this legitimate question, one might respond first with the insight of Lord Reid, whose comments about the notion of "natural justice" apply equally well to the Rule of Law: "In modern times opinions have sometimes been expressed to the effect that natural justice is so vague as to be practically meaningless. But I would regard these as tainted by the perennial fallacy that because something cannot be cut and dried or nicely weighed or measured therefore it does not exist": *Ridge v. Baldwin*, [1963] 2 All E.R. 66, Lord Reid at p. 71. In addition, it may be suggested that the Rule of Law is probably subject to such intense discussion precisely because its "primary colours" are fundamental and well-established; the debate is usually around the importance of each colour, what kind of picture to paint, and how to paint it.

procedures has captured legislative attention relatively infrequently".[8] By sponsoring the preparation of this background paper, the Attorney General of British Columbia has provided the opportunity for a meaningful and principled law reform discussion on the subject of statutory powers and procedures in British Columbia.

2 FOUR REALITIES THAT INFORM THIS PAPER

The matters under discussion in this paper have been canvassed from numerous perspectives in numerous common law jurisdictions. Those reviews, and reactions they have elicited, are canvassed in Part 3 of this paper. However, before turning to a comparative review, it will be useful to expand on the points just made by way of overview, and to outline four key realities that underscore this discussion paper.

Tribunals serve diverse public policy functions

The first reality that underscores this paper is that the label "administrative tribunal" can serve to mask the diversity of public mandates and functions assigned to these delegates of the Legislature.[9] This diversity can be illustrated by examining the mandates of four administrative tribunals that are with the scope of the Administrative Justice Project:

> Review Panels: *Mental Health Act*, R.S.B.C. 1996, c. 288
>
> 25(1) A patient detained [in a mental health facility] is entitled, at the request of a patient or a person on the patient's behalf, to a hearing by a review panel…
>
> (2) The purpose of a hearing under this section is to determine whether the detention of the patient should continue because section 22(3)(a)(ii) and (c) continues to describe the condition of the patient.[10]
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> Building Code Appeal Board: *Local Government Act,* R.S.B.C. 1996, c. 323
>
> 693(6) If a dispute arises on the interpretation or application of the [building codes established by the minister] referred to in section 692, a party to the dispute may refer the question to the appeal board for determination.

8 Bryden and Gunn, The Canadian Law of Administrative Procedure (2000), unpublished, ch. 3, p. 4.

9 This point was repeatedly emphasized by tribunals themselves at the September 28, 2001 consultation workshop.

10 Collectively, subs. 22(3)(a)(ii) and 22(3)(c) require review panels to determine whether a person has a mental disorder, requires treatment in or through a designated facility to protect themselves or others, and will not go voluntarily.

> (7) The appeal board must determine any question of interpretation or application of the codes referred to in section 692.[11]

Farm Practices Board: *Farm Practices Protection (Right to Farm) Act*, R.S.B.C. 1996 c, 131

> 3(1) If a person is aggrieved by any odour, noise, dust or other disturbance resulting from a farm operation conducted as part of a farm business, the person may apply in writing to the board for a determination as to whether the odour, noise, dust or other disturbance results from a normal farm practice.[12]

Labour Relations Board: *Labour Relations Code*, R.S.B.C. 1996, c. 244

> 133(1) If, on application or complaint by any interested person, under section 14, this section or another provision of the Code or regulations, or on its own motion, the board is satisfied that any person has contravened this Code, a collective agreement or the regulations, it may, in its discretion, do one or more of the following:
>
> (a) order a person to do any thing for the purpose of complying with this Code, a collective agreement or the regulations, or to refrain from doing any act, thing or omission in contravention of this Code, a collective agreement or the regulations…..[13]

The diversity reflected in these mandates reflects the diversity of public policy itself. The involuntary committal of certain mentally-ill persons, the creation and enforcement of building codes, the balancing of agricultural and urban interests and sound labour relations policy are all key areas of legislative concern. Each involves different public policy solutions, because each involves different communities, different interests and different statutory purposes. The decision to create an administrative tribunal within a particular statutory scheme is a statement that the Legislature intends the tribunal, first and foremost, to carry out the policy of the statute.[14]

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11 A typical dispute before this Board might arise where a local government inspector has refused a party a building permit: see for example: *Nancy Greene's Cahilty Lodge Ltd. v. Thompson Nicola (Regional District)*, [1996] B.C.J. No. 547 (S.C.).

12 "Normal farm practice" is defined in s. 1 of the Act to mean "a practice that is conducted by a farm business in a fashion consistent with (a) proper and accepted customs and standards as established by similar farm businesses under similar circumstances, and (b) any standards prescribed by the Lieutenant-Governor-in-Council." After hearing a complaint, a panel may either dismiss the complaint, or order the farmer to cease or modify the practice: s. 6.

13 Section 133(1)(a) is quoted only to provide a flavour of the LRB's subject matter jurisdiction. That jurisdiction is of course much more extensive: see for example the whole of s. 133, together with other provisions such as ss. 13, 17, 23 and 99.

14 This is probably the best explanation of the Court's statement in *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)* 2001 SCC 52

Because statutory subjects, purposes and solutions may vary widely, it should come as no surprise that administrative tribunals, viewed as a whole, do not (and cannot) operate in a "cookie cutter" fashion.

The reality that the label "administrative tribunal" must not act as a substitute for critical thought regarding tribunal structure and operations has led Professor Ison to issue this caution regarding the generic study of administrative tribunals and administrative justice:

> *The term "administrative justice" has a pervasive homogenizing influence. Tribunals and other government agencies were created in the first place to achieve diverse goals through diverse structures and procedures. They were intended to differ from courts, and from each other. But "administrative justice" seems to inspire a demand for some common thread, some common bond, some common structure or process, or some common overview…*
>
> *I believe that the public interest is better served if "administrative justice" is perceived,* not *as a subject on its own, and* not *as a rationale for some controlling overlordship, but as a body of thought that can be drawn upon in the* design *of a particular system, such as income tax, social security, the regulation of road transport, or occupational health. It is in the* design *of such systems that notions of "administrative justice" can be used constructively, with a minimum risk of collateral damage. The damage that I fear is likely to come when notions of "administrative justice" are forced onto a system by people who have no overall responsibility for the design of that system, and who have made no study of the subject area.*[15]

The passages just quoted wisely recognize that tribunal reform should not be divorced from a deeper understanding of a particular tribunal's function within the enabling statute's factual and policy underpinnings.

It may, however, go too far to imply from this that administrative tribunals represent a wilderness of single instances, or that it would undermine public policy to explore, in a systemic way, the benefits of clarity and consistency in tribunal powers and procedures. While reformers and their critics have, for example, differed regarding matters such as how strongly process values should be emphasized across the wide spectrum of administrative tribunals, neither group has advocated arriving at final conclusions without considering the implications of reform proposals

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at para. 24: "[Administrative tribunals] are, in fact, created precisely for the purpose of implementing government policy".

15 Ison, "Administrative Justice: Is it Such a Good Idea?", ch. 1 in Harris and Partington (eds) *Administrative Justice in the 21st Century* (1999) at pp. 26 and 33.

for each potentially affected tribunal.[16] The question of how far traditional process values should be emphasized in one or more administrative tribunals is ultimately a value judgment which the legislator is entitled to resolve for itself, and respecting which notions such as "cost-benefit analysis" do not necessarily provide a ready substitute[17].

Tribunals share common interests

All of which leads to the second reality underlying this paper: that despite the necessary diversity between administrative tribunals in British Columbia, there are common points of interest that justify the meaningful and systemic study of agency powers and procedures with a view to potential law reform.

One common point of interest between administrative tribunals is the question whether the *degree* of diversity attending their powers and procedures even reflects sound strategic planning and careful institutional design. Reference is made for example to the observation made by Sir Oliver Franks in the English context in 1957:

> *Perhaps the most striking feature of tribunals is their variety, not only of function, but also of procedures and constitution. It is no doubt right that bodies established to adjudicate on particular classes of case should be specially designed to fulfill their particular functions and should therefore vary widely in character. But the wide variations in procedure and constitution which now exist are much more the result of ad hoc decisions, political circumstance and historical accident than of the general application of clear and consistent principles.*[18]

Descending from theory to the concrete realities of individual statutes in modern British Columbia, one may question whether the imperative of "tribunal diversity" necessarily explains why, for example:

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16 It should be noted that even the oft-criticized McRuer Report (*Royal Commission of Inquiry Into Civil Rights* (1968) engaged in a comprehensive, statute by statute analysis of whether and to what extent its recommended "Statutory Powers Procedure Act" should apply.

17 Schwartz, "Cost-Benefit Analysis in Administrative Law: Does it Make Priceless Procedural Rights Worthless"" (1985), Admin L. Rev. 1 at pp. 13-14: "[Cost-Benefit Analysis] has about it a delusive aura of scientific objectivity that may be justified in the field of economics in which it began…. As a public-law tool, however, it is as subjective as the Benthamite 'felicific calculus' which was its primitive progenitor… What appears to be objective is really Benthamism in modern dress – and with a subjective vengeance".

18 Report of the Committee on Administrative Tribunals and Enquiries (July 1957), at para. 128.

- some tribunals that regularly hear evidence have the discretion to compel witnesses to attend before them, while others do not;[19]
- some have flexible quorum requirements, while others do not;[20]
- some tribunals have rule-making powers, while others do not;[21]
- the role of the tribunal Chair is addressed in some statutes, but not in others;[22] and
- some tribunals have specific authority to encourage and direct various forms of consensual dispute resolution, while the language of other statutes is silent on the question.[23]

This is not to suggest that all administrative tribunals labour under deficient legislation. As recognized below, two administrative tribunals in British Columbia have indicated that they see no need for any significant reform of their statutory powers and procedures. However, it is probably reasonable to conclude that important "powers" and "procedures" issues often not fully and comprehensively considered in the development of legislation. As recently as March 2001, Sir

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19 Take for example administrative tribunals dealing with individual liberty and which operate in an inquisitorial fashion. The British Columbia Review Board (*Criminal Code*, s. 672.5) and the Health Care and Care Facility Review Board (*Health Care (Consent) and Care Facility (Admission) Act*, R.S.B.C. 1996 c, 181, s. 29(9)) have express jurisdiction to compel testimony, while *Mental Health Act* Review Panels do not have this express power.

20 While the Forest Appeals Commission is entitled to organize itself into panels of one or more members (*Forest Practices Code Act*, R.S.B.C. 1996, c. 159, s. 195(1)), the Community Care Facility Appeal Board is not: *Community Care Facility Act*, R.S.B.C. 1996, c. 60, s. 15(6).

21 The Medical and Health Care Services Appeal Board, which hears appeals from Medical Services Commission decisions regarding medicare entitlement, is expressly empowered to "make rules governing practice and procedure for all appeals before the Board": *Medicare Protection Act*, R.S.B.C. 1996, c. 486, s. 44(1). This authority has not been conferred on other "health" related appeal boards, or indeed on many other appeal boards.

22 The very important question of the Chair's role is simply not addressed in most legislation: see Macaulay, *Practice and Procedure Before Administrative Tribunals* (1996), p. 38-149; in British Columbia, the matter appears to be addressed only on an *ad hoc* basis: see for example, BC Benefits (Appeals) Regulation, BC Reg. 271/96 (as amended), s. 16(1): "The chair of the board is its chief executive officer and is responsible for supervising and directing the staff of the board".

23 The *Farm Practices Protection (Right to Farm) Act* (s. 4) expressly contemplates the Board actively encouraging consensual dispute resolution. However, the legislation of other party-party tribunals, such as the Commercial Appeals Commission, is silent on the question, which potentially raises procedural fairness issues depending upon how proactive the tribunal wishes to be in encouraging consensual dispute resolution.

Andrew Leggatt, in an English law reform report, recognized that procedural reform of formal dispute resolution processes gives rise to a "common set of issues" and that "leaving procedural reform of tribunals scattered across a series of departments is impeding modernization" in England.[24] Administrative tribunals seeking to diligently carry out the public policy expressed in the statute may find that the failure to address these issues comprehensively has serious and adverse consequences indeed.

The serious consequences that can result from omission and inconsistency in legislation flow from the second common thread that binds administrative tribunals – namely, the Rule of Law. All administrative tribunals are statutory delegates. They exist within the legal reality that any excess of jurisdiction – for example, by sitting without a proper quorum – renders their decisions vulnerable on judicial review in the provincial superior courts. Such tribunals are, by and large, subject to the duty of fairness at common law.[25] While commentators may debate the desirability and scope of the courts' judicial review function[26], it is an undeniable reality that the Rule of Law, as defined by the courts, has significant implications for administrative justice reform.

Administrative tribunals should, as public service agencies, be spending as little time as possible resolving questions as to their substantive and procedural authority. Where such powers are inadequately or incompletely expressed, tribunals sometimes choose not to exercise those powers at all. On other occasions, they may resolve ambiguity by opting for more court-like solutions to problems, on the basis that they should play it safe. On yet other occasions, they may spend significant time, at hearings and in court, addressing jurisdictional arguments. They may, in the end, spend time and money seeking to resolve issues that might have been avoided had the legislator anticipated the issues and provided appropriate guidance.

Legislative supremacy

Legislative supremacy is the third key reality that informs this paper. Administrative tribunals are, by definition, creatures of statute. It thus stands to reason that legislators themselves have the

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24 "Tribunals for Users: One System, One Service", *Report of the Review of Tribunals by Sir Andrew Leggatt*, March, 2001, para. 2.27.

25 See for example, *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623 at para. 21: "All administrative bodies, no matter what their function, owe a duty of fairness to the regulated parties whose interest they must determine".

26 See generally, the Project discussion paper regarding the *Standard of Review on Judicial Review and Appeal* (December, 2001).

primary role and responsibility of defining the key powers and procedures applicable to the administrative tribunals of their creation.

The role played by courts

One of the most important features of administrative law has been the willingness of courts to step in and "supply the omission of the legislature" with respect to statutory powers and procedures[27]. It is long been the case, for example, that courts have intervened - where legislation is silent or ambiguous - to define the procedural obligations that tribunals must follow in order to ensure that the exercise of statutory power is "fair".[28] On occasion, courts have been prepared to go even further and imply particular *powers* that are not expressly stated in enabling legislation.[29] These instances of judicial creativity have arisen out of both practical necessity and a deeply embedded judicial ethic that procedural safeguards represent a critically important check on the potential abuse of statutory power.

Having assumed this role, the courts have always readily recognized that judicial policy choices are subject to the legislator's ultimate right to make the key "powers" and "procedures" decisions for administrative tribunals. It is still the case in Canada that, with a few exceptions involving tribunals dealing with personal liberty[30], legislative supremacy is alive and well with respect to the powers and procedures of administrative tribunals.[31] The legislation of other jurisdictions, the work of the numerous law reform projects in this area and the reactions they have all engendered tend to suggest that these are not just issues for Courts. Significant public policy issues lie at the heart of any discussion of statutory powers and procedures.

Legislative choices regarding statutory powers

One group of issues for legislators focuses on the core *powers* that administrative tribunals should have, either individually or in common, in order to operate effectively. For example, should administrative tribunals that find facts typically have the power to summon witnesses and punish for contempt? Should they have the power to dismiss claims or appeals summarily? Should tribunals engaged in party-party disputes typically have powers relating to "consensual dispute resolution" written into their enabling statutes? Should tribunals have the power to order

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27 *Cooper v. Wandsworth Board of Works* (1863), 14 C.B. (N.S.) 180 (C.P).

28 *Ibid*.

29 See *Ewachniuk v. Law Society (British Columbia*) (1999), 46 B.C.L.R. (3d) 203 (C.A.).

30 See *Blencoe v. British Columbia (Human Rights Commission),* [2000] 2 S.C.R. 307.

31 See also *Ocean Port Hotel*, *supra*, note 13.

discovery, or grant costs to the successful party? Should appellate tribunals have the power to stay the decision appealed from pending appeal? Should tribunals have a choice regarding panel size? Should the role of the chair be more carefully defined? Each of these questions requires a public policy choice to be made regarding the appropriate degree of legal authority to be exercised by the tribunal vis-à-vis those subject to the tribunal's mandate.

In an ideal world, those responsible for legislation would give these questions considered thought in respect of each administrative tribunal, and would treat like cases alike. The failure to do so may unduly fetter an administrative tribunal. It may give rise to undesirable uncertainty, litigation and inconsistency between similar tribunals. It may even lead a court to refuse to recognize a particular statutory power on the basis that it was expressly conferred on other administrative tribunals.

In *Vancouver (City) v. British Columbia (Assessment Appeal Board)*[32], the issue was whether the Assessment Appeal Board could hear evidence *in camera*. In answering the question "no", the Court made specific reference to a number of other statutes in which the legislature had seen fit to grant such power explicitly. As noted by the Court at para. 64:

> *In many statutes where the legislature has seen fit to permit certain boards to hold proceedings in camera, it has expressly conferred the power in the enabling Act: see, for example, the Commodity Contract Act, R.S.B.C. 1979, c. 56, s. 4(8); the Employee Investment Act, S.B.C. 1989, c. 24, s. 34.1(4); and the Securities Act, S.B.C. 1985, c. 83, s. 127(5). It has not done so in the case of the Assessment Act. Given the absence of express provision for in camera hearings in the Assessment Act, and the public nature of the assessment process, I find it impossible to say that by necessary implication the Board must have the jurisdiction to conduct a portion of its hearings in camera.*

The above decision demonstrates that in defining the power of a particular administrative tribunal, courts are prepared to give significant weight to how the legislator has defined the powers of other administrative tribunals. This judicial approach is based on a presumption of legislative consistency and coherency. Yet it makes plain that any significant failure to think about statutory powers in a careful and principled way across the system of administrative justice risks unnecessary cost, confusion and litigation for the administrative justice system.

In seeking to think about statutory powers in a principled way, it is very important not to confuse discussions about encouraging greater uniformity in the design and expression of tribunal powers with the view that all tribunals ought to have all the same powers, or ought to exercise them in the same way. As is reflected in the work of the numerous law reform bodies that have considered this issue, the focus here is on creating a principled set of *enabling* provisions that can be fitted to

each administrative tribunal on a case by case basis, intended to confer upon the tribunal the flexibility to exercise its powers in ways that work best for the tribunal.[33] The discussion here is not about imposing "one size fits all" for tribunals serving diverse functions. It is about developing and determining the relevant menu of powers that similarly situated tribunals should have so that they can in turn carry out their mandates with the required good judgment and proper regard to the regulatory and practical context in which they operate.

As noted above, it would be wrong to leave the impression that every provincial administrative tribunal in British Columbia labours under legislation that is deficient in respect of statutory powers. In the discussions leading up to the preparation of this paper, representatives of two provincial administrative tribunals have in fact stated that they do not see any serious difficulties or omissions in their enabling legislation in this respect.[34] In this context, one of the purposes of this paper is to seek comment regarding whether or to what extent these views represent the reality for other administrative tribunals. However, based on the consultation to date with other provincial administrative tribunals, a comparison of their enabling legislation with that of the two boards in question, and a review of the experience in other jurisdictions, it is likely incorrect to conclude that the views of those two boards represents the experience for all, or even most, provincial administrative tribunals. Reform of tribunal legislation to take better account of the realities in which the tribunal operates does not appear to have been a consistently high priority on legislative agendas across government. A number of the alternatives for reform of statutory powers have been developed in recognition of this very reality.

Legislative choices regarding statutory procedures

A second group of questions, which have been more controversial, revolve around what if any statutory procedural obligations ought to be imposed on a particular administrative tribunal before it makes a decision.

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32 [1996] B.C.J. No. 1062 (C.A.).

33 As noted above (pp. 9-10), it would seem, for example, to make little sense for one statute to explicitly authorize members to complete ongoing work beyond the expiry of their terms while exposing others to the common law outcome on this point. Similarly, there does not appear to be any compelling reason why some tribunals that hear witnesses have the power to compel evidence while others do not.

34 The two tribunals in question are the British Columbia Securities Commission and the Property Assessment Appeal Board. The legislative history of the *Securities Act* discloses that that statute has received ongoing legislative attention over the years. For its part, the Property Assessment Appeal Board's powers underwent significant

At common law, two fundamental rationales underlie procedural rights. First, there is the functional value of "hearing both sides" in helping decision-makers to make better decisions. Second, there is the moral justification for granting procedural rights to persons adversely affected by state action, as reflected in the following statement of the Supreme Court of Canada:

> *I find it necessary to affirm that the denial of a right to a fair hearing must always render a decision invalid, whether or not it may appear to a reviewing court that the hearing would likely have resulted in a different decision. The right to a fair hearing must be regarded as an independent, unqualified right which finds its essential justification in the sense of procedural justice which any person affected by an administrative decision is entitled to have. It is not for a court to deny that right and sense of justice on the basis of speculation as to what the result might have been had there been a hearing.*[35]

Today in Canada, most tribunal decisions having the potential for any significant impact on the individual give rise to a basic duty of fairness at common law. The real battle in most disputes today concerns the content of that duty, which the Supreme Court of Canada has held to be "eminently variable".[36] In determining the minimum content of procedural fairness, courts take into account factors such as the purpose of the statute, the closeness of the decision to a traditional judicial decision, the impact on the individual, legitimate expectations, the choices made by the agency itself and its institutional constraints.[37] The outcome of this analysis necessarily reduces to a value judgment about the importance, in any particular context, of process requirements when balanced against competing considerations such as tribunal efficiency and effectiveness.

The common law method has the advantage of providing finely calibrated answers to specific fairness issues in individual disputes.

It has been argued, however, that there are four disadvantages to relying solely on the common law to resolve key procedural rights. First, there is the cost and uncertainty of having to go to court to get an answer that could have been addressed in the statute. The McRuer Report put the matter this way in 1968:

> *…the development of procedural requirements of limitations applicable to tribunals with a wide variety of powers and a wide variation in their constitution,*

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legislative revision in 1998 and addresses many of the points raised in this paper: S.B.C. 1998, c. 22.

35 *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643 at para. 25.

36 *Knight v. Indian Head School District (No. 23),* [1990] 1 S.C.R. 653 at p. 682.

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

> *cannot be satisfactorily left to the courts. In any case it is quite unrealistic to expect laymen to be presumed to know when and under what circumstances and to what extent the rules of natural justice apply to the statutory powers they exercise. It is also quite unrealistic to expect the courts to evolve suitable rules for individual tribunals. It is therefore essential that means be found to develop rules appropriate to the varying purposes and characteristics to which they are respectively applicable.*[38]

Second, some jurisdictions have regarded it as very important for both administrative tribunal members and the public to legislate an explicit, visible set of minimum procedural rights that must be accorded to persons affected by a tribunal's decisions. On this approach, the common law is a pale substitute for legislative recognition of basic procedural protections. Thus, as early 1946, a number of American jurisdictions adopted an approach reflected today in Alberta, Ontario and Quebec, and to a lesser extent in numerous individual tribunal statutes across Canada:

> *Every student of administrative law recognizes that many of the procedural details involved in administrative action must necessarily vary more or less from state to state and even from agency to agency within the same state. Each state and each agency must work out these details for itself according to the necessities of the situation. However, there are certain basic principles of common sense, justice and fairness that can and should prevail universally. The proposed act incorporates these principles, with only enough elaboration of detail to support the essential major features.*[39]

Third, some commentators have also questioned the outcomes when the balance between process and efficiency is left solely to courts. David Mullan has observed that "[t]raditional judicial values have been in the habit of intruding too frequently."[40] A former chair of an Ontario administrative tribunal has expressed the concern more colourfully:

> *Lawyers are confronted in tribunals with a quasi-court whose policy origins they are not trained to understand. They are on a never-ending crusade to twist the tribunal into something they know and understand better – the court. They seek more structure, more process, and greater formality. And in this, they are ably assisted by the judiciary…*
>
> *This has left the tribunal's public, the consumers, somewhat bewildered. They understood tribunals to be an alternate form of dispute resolution to the courts, less formal, less cumbersome, more expeditious. Instead, they find themselves carried along on a wave of procedural wrangling which, as their lawyers explain, must necessarily take weeks rather than the days they had expected. Instead of*

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38 Royal Commission of Inquiry on Civil Rights (1968), p. 147.

39 An excellent review of history and development of "administrative procedures" legislation in the United States up to 1968 is found in the Report of the Ontario Royal Commission Inquiry into Civil Rights (1968) ["the *McRuer Report*"] at pp. 148-181.

40 Mullan, "Common and Divergent Elements of Practices of the Various Tribunals: An Overview of Present and Possible Future Developments" (1992), Law Society of Upper Canada Special Lectures 461 at p. 476.

> *learning quickly what the outcome was after these weeks of complex evidence and argument, they find themselves waiting months to get a voluminous decision any law review would be proud to print. Yet the public is only interested in the last page where they can see if they won.*[41]

Fourth, to the extent that legislated procedures – particularly minimum procedures – are seen as ensuring more uniform, fair and consistent treatment across the spectrum of administrative tribunals, they are seen by some as being a positive development. Those who support minimum procedures legislation do not regard such legislation as imposing a procedural straightjacket; they do, however, see it as enshrining basic standards of decent treatment for all persons affected by tribunal decisions, subject to the exceptions written into the law. They also see such legislation, importantly, as forcing tribunals to think more carefully and critically about their processes, and about making those processes transparent to the public, rather than simply relying on past practice and the assertion that "this is how we do things around here".

Those who oppose legislating procedures have, on the other hand, expressed fear that legislating procedures – particularly minimum procedures – will lead to one of two possible outcomes. They will either be seen as adding nothing to the common law, or they will be seen as adding something to the common law. If they are seen as adding nothing to the common law beyond a symbolic statement of values, opponents question their practical utility. If, on the other hand, they are seen as adding something to the common law, the question arises as to precisely what they are adding, and whether they should be adding it.

While legislation is clearly capable of restricting common law procedural fairness obligations[42], opponents of minimum procedures legislation observe that such legislation is not usually intended to have that effect. In this context, some argue that any limitation on tribunal flexibility is a retrograde step, that legislating minimum procedures will serve only to further formalize and judicialize administrative tribunal practice, and that all this will in fact do little to limit further uncertainty and litigation concerning the content of procedural entitlements. Others argue that in a system of administrative justice, some degree of uniformity in the practice of administrative tribunals based on a set of basic procedural values is a reform to be welcomed. Yet others argue that a process for ensuring legislative attention to these questions is appropriate, but that the objective of

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41 Abella, "Canadian Administrative Tribunals: Towards Judicialization or Dejudicialization?" (1989), 2 C.J.A.L.P. 1 at pp. 6, 7.

42 *Ocean Port Hotel*, *supra*, note 13 at para. 22.

achieving standard practice and uniformity across administrative tribunals is less important than ensuring legislative attention to appropriate balance between process and efficiency for each individual tribunal.

The mechanics of reform

A third group of questions relates to the mechanics of reform, if reform is regarded as appropriate. As the discussion below will make clear, there are a number of possible approaches to law reform in this area:

- Statutory powers and procedure legislation establishing a uniform, detailed and exhaustive "code" applying to administrative tribunals within the ambit of the statute.
- Statutory powers and procedure legislation establishing a *minimum* code applying to administrative tribunals within the ambit of the statute.
- Statutory powers and procedure legislation that is detailed legislation, but that vests in tribunals themselves the ability to "opt in" to those provisions that apply to them.
- Revision of tribunal powers and procedures on a statute-by-statute basis, with legislative drafters making the choice of particular powers and procedure for each tribunal from a non-statutory checklist of "Model Rules".
- Rule-making by the tribunal itself.

As will be seen shortly, the subject of statutory powers and procedures has been the subject of study and/or legislation, both in England and in a number of Canadian jurisdictions. Before turning to those reviews, however, it will be appropriate to refer to a fourth and final reality that underlies this paper.

Powers and procedures reform is closely tied to government policy regarding appointments and training

The fourth key reality that underlies this paper is that, as significant as the subject matter of statutory powers and procedures may be to ensure the effective operation of administrative tribunals, even the most enlightened legislative reform initiative will be at risk if it is not accompanied by high quality appointments and training.

This paper is not the vehicle for a detailed discussion of the process for tribunal appointments and training in British Columbia. That subject has, quite rightly, been deemed sufficiently important to warrant its own paper as part of the Administrative Justice Project. Brief mention of

the subject in this discussion paper is however necessary given its inextricable link with the effective exercise of statutory powers and procedures. The following quotations suffice to make the point:

> *The notion of commitment to the delivery of administrative justice also raises the controversial issue of one of the most obvious gaps in the three Acts: the absence of any provisions about independence and the appointment and performance of members of tribunals:* Mullan, Administrative Law (2001), Part 3, ch.11E, p. 1 (Q.L.)
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> *Excellence … breeds respect, credibility, legitimacy and curial deference. No amount of structural "reform" to the powers and process of an administrative tribunal can come close to conferring the benefits provided by a tribunal consisting of first rate decision-makers. As is the case with most other institutions in society, the calibre of the people doing the job is the single most important factor to its success: Falzon, "Case Comment: Ocean Port Hotel v. British Columbia (Liquor Appeal Board)",* Administrative Law – 1999 Update, Continuing Legal Education, p. 16.
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> *There may perhaps be a tendency among lawmakers to believe that once a law is in place, the problem is solved. The lawmakers then move on to the next challenge. Those of us left to work with the new statute know that it is a daily challenge to breathe life into the law, to meet the lawmakers' aspirations in the day-to-day decision making of tribunal members. And it is there, in the mind and heart of the individual tribunal member, not on the floor of the legislature, that administrative justice reform will be won or lost:* Steele, "God from a Machine: New Proposals for Administrative Justice Reform" (1998), 10 C.J.A.L.P. 241 at p. 247.
>
> *The age of learning on the job, and seat-of-the-pants conduct of hearings, is gone:* Leggatt*: "Tribunals for Users: One System, One Service", Report of the Review of Tribunals,* March, 2001, p. 7.40.[43]

Statutory powers and procedures are a means to an end; they do not decide cases. They represent a "legislative tool kit" intended to assist administrative decision-makers to carry out their statutory mandates in an effective, fair, creative and efficient manner. In good hands, effective tools can produce outstanding work. In untrained hands, such tools may be positively dangerous.

3 LAW REFORM IN CANADA AND ENGLAND

No meaningful discussion of potential law reform in relation to statutory powers and procedures can take place without some understanding of the very extensive thinking that has informed this

[43] There are numerous other statements to this effect, going back at least to the Franks Report (1957), para. 44.

subject in the various jurisdictions of Canada and elsewhere. While the constraints of this paper do not allow for a detailed review of each legislative proposal, a meaningful overview of major proposals and related legislation is necessary to assist readers in identifying the major issues, debates and alternatives. As will become apparent, there has been an immense amount of writing and thinking about this subject that can be drawn upon by British Columbia legislators.

In order to keep this paper to a manageable length, the comparative review has been limited to England and Canada (provincial and federal). The review is organized according to jurisdiction. Order has been determined based on the chronology of the first major report or enactment addressing the subject of statutory powers and procedures following the Second World War. Once discussion of a particular jurisdiction has commenced, subsequent developments in that jurisdiction are traced to the present day. This approach has been taken to assist in a coherent review of the law in each jurisdiction, and to provide a useful basis for comparing proposals and criticisms that have been made from time to time in other jurisdictions.

England

Report of the Committee on Administrative Tribunals and Enquiries (1957) – The Franks Report

In 1955, Sir Oliver Franks was appointed by the Lord High Chancellor to consider and make recommendations on the constitution and working of tribunals in Great Britain. The Franks Report was the first such review in England following the Second World War[44], which period had seen a significant increase in the numbers and the importance of tribunals "other than ordinary courts of law".[45] As noted at paragraph 5 of the report:

> *Since the war the British electorate has chosen Governments which accepted general responsibilities for the provision of extended social services and for the broad management of the economy. It has consequently become desirable to consider afresh the procedures by which the rights of individual citizens can be harmonized with wider public interests.*[46]

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44 The 1932 report of *The Committee on Ministers' Powers*, more commonly referred to as the "Donoughmore Report" is referred to in the Franks Report. That report, which followed the publication of Lord Hewart's famous book *The New Despotism*, is discussed in the *Franks Report*.

45 Franks Report, p. iii and para. 5.

46 The Franks Committee appears to have been no exception to the proposition that Commissions of Inquiry are not struck in political vacuums, or for mere academic interest. The "Critchel Down imbroglio" occurred in 1956, and involved a poorly handled expropriation which affected a high profile person's would be succession rights to the expropriated land. The fallout from the affair included the resignation of a minister and

The Franks Committee reported that most of the evidence it received focused on tribunal procedure. Noting that there was general agreement "on the broad essentials" which include "notice of the right to apply to a tribunal, notice of the case which the applicant has to meet, a reasoned decision by the tribunal and notice of any further right of appeal", the Franks Committee arrived at three key conclusions with regard to statutory procedure:

1. Procedure is "of the greatest importance" and should be clearly laid down in a statute or statutory instrument.

2. It would not be appropriate do so by way of either a single code or a small series of codes:

   > *We agree that procedure is of the greatest importance and that it should be clearly laid down in a statute or statutory instrument. Because of the great variety of the purposes for which tribunals are established, however, we do not think it would be appropriate to rely upon a single code or a small number of codes. We think that there is a case for greater procedural differentiation and prefer that the detailed procedure for each type of tribunal should be designed to meet its particular circumstances.*[47]

3. The appropriate body to create the rules applicable to each tribunal would be a body called the "Council on Tribunals", whose fundamental purpose would be to advise government and keep the constitution and workings of tribunals "under continuous review".[48]

The Franks Committee endorsed the view that informality is a very important feature of most administrative tribunals. At the same time, it expressed this caution: "…the attempt which has been made to secure informality in the general run of tribunals has in some instances been at the expense of an orderly procedure. Informality without rules of procedure may be positively inimical to right adjudication, since the proceedings may assume an unordered character which makes it difficult, if not impossible, for the tribunal properly to sift the facts and weigh the evidence."[49]

Because of its view that recommending specific rules was the proper function of a "Council on Tribunals", the Franks Committee did not do so. It did, however, outline a number of key points to be followed in the "rules" work of such a council. For purposes of this paper, these points are worthy of summary as a basis for comparison with later reform proposals, and indeed, with present tribunal statutes in British Columbia:

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the appointment of the Franks Committee: see generally, Sprague, "Thirty Years after the Franks Committee Report – Alberta's Report Card" (1989), 5 Admin. L.J. 66 at p. 67.

47 Report of the Committee on Administrative Tribunals and Enquiries (1957) at para. 63.

48 *Ibid*, paras. 62, 63, 127-134.

49 *Ibid*, para. 64.

- Citizens must be advised of their right to apply to a tribunal.
- Citizens must know in good time the case they will have to meet, which requires no more or less than a document setting out the main points of the opposing case.
- Tribunal hearings should have a set order of events that the tribunal itself can vary where variance is in the interests of justice.
- Tribunal hearings should generally be held in public, except where compelling reasons dictate otherwise.
- Witnesses should generally enjoy the same immunity from suit in tribunal proceedings as they do in the courts.
- Government departments should not be entitled to legal counsel unless the citizen employs a lawyer, but the citizen should only be deprived of counsel "in the most exceptional circumstances".
- While in practice tribunals should not find it necessary to administer oaths and issue subpoenas, they should have this power to exercise where required.
- In disputes between the citizen and government, the citizen should never have to pay costs, but government should generally be required to pay reasonable expenses of successful applicants; in "party-party" disputes, costs should be awarded only with respect to frivolous applications.
- After the hearing, reasons should be given and leading decisions published.[50]

The Tribunals and Inquiries Act, 1958[51]

The recommendations of the Franks Report were, in general, accepted, including its major recommendation that a "Council on Tribunals" be created. The Council – which consists of a mix of membership but which has "leaned heavily" on its legal members[52] – has remained a feature of English administrative law ever since.[53] Franks had advised that one of the Council's main functions should be "to suggest how the general principles of construction, organization and procedure enunciated in this report should be applied in detail to the various tribunals."[54]

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50 *Ibid*, paras. 67-102.

51 Tribunals and Inquiries Act (1958), 6 & 7 Eliz. II, c. 66.

52 de Smith, *Judicial Review of Administrative Action* (1995), p. 59.

53 See now *Tribunals and Inquiries Act, 1992*.

54 Report of the Committee on Administrative Tribunals and Enquiries (1957) at para. 133.

The *Tribunals and Inquiries Act*, passed one year after the Franks Report, created the Council on Tribunals. Section 8(1) of the Act provided that "No power of a Minister … to make, approve, confirm or concur in procedural rules for any such tribunal as is specified in the First Schedule of this *Act* shall be exercisable except after consultation with this Council".

To effectively carry out the Council's functions, Council members became acquainted with the various tribunals by sitting in on their hearings. It appears that by 1964, most of the active tribunals under its supervision had statutory rules of procedure.[55] Government departments normally consult the Council with respect to proposed tribunal legislation. The Council makes general recommendations regarding appointments and writes annual and special reports on administrative law questions.

The Council has published Model Rules of Procedure for tribunals for departmental guidance. Writing in 1989, Grant Sprague stated that *"If one considers that the Council is essentially a weaponless body, one must conclude that they are doing very well for having lasted 30 years and having been as successful as they have been in reforming the procedures of tribunals and influencing both government and Parliament".*[56] Writing in 1995, the authors of de Smith have stated that the Council "has helped to give concrete expression to the Franks principles of fairness, openness and impartiality".[57]

Why did the English act upon Franks' recommendations and create the Council on Tribunals? Part of the answer undoubtedly lay in the Council's lack of expense (only the chair is paid, other members perform the work *gratis*). Grant Sprague, however, has suggested that other factors were also at play:

> *…perhaps there was also a more altruistic element: providing the best form of government for the people. Undoubtedly, there is a strong tradition in the Anglo-Saxon mind for fairness and straight-shooting.*[58]

Model Rules of Procedure: Council on Tribunals (1991)[59]

The Council published its most recent Model Rules in February, 2000. The Model Rules, as their name implies, are neither a comprehensive code, nor an enactment. They are a compilation of

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55 see generally the discussion of the Council in the *McRuer Report*, at pp. 202-205.

56 Sprague, *supra*, p. 70.

57 de Smith, Judicial Review of Administrative Action (1995), p. 58.

58 Sprague, *supra*, p. 70.

59 The Council on Tribunals' Model Rules were most recently updated on February 16, 2000.

model procedural rules "for the use of Departments and tribunals which are engaged in drafting or amending rules for tribunals." As noted in the Introduction to the Model Rules:

> *It must be emphasized that this compilation is not a code. It is a store from which Departments and tribunals may select and adopt what they need. In making their selection from the various provisions, Departments and tribunals should give careful consideration as to what is necessary or useful for the purpose of the particular tribunal. They should not just adopt a rule because it happens to be included in this compilation, and they should not feel inhibited about modifying or adapting a model rule if the model does not fit the particular needs or circumstances of the tribunal.*[60]

The Model Rules are predicated on the notion that it is highly desirable when drafting legislation to give early and detailed consideration to the powers and procedures of the tribunal. A general power in the enabling statute to make rules for "the practice and procedure" of the tribunal is unlikely to suffice for the needs of a modern tribunal. The commentary to the rules states that while the model rules are extensive, their essential aims are simple:

- So far as concerns the appellant/applicant (and as regards third and fifth points below, the respondent), the aim should be to provide:
  - For his awareness of what his rights are and how the proceedings will develop;
  - A simple means of invoking the tribunal;
  - A full opportunity to put his own case and to know his opponent's case;
  - The removal of ignorance and fears of the procedures of the tribunal;
  - A right to receive reasons for decisions.
- So far as concerns the tribunal, the aim should be:
  - To provide sufficient power to establish the facts;
  - To be able to adapt the procedure to the needs of a particular case;
  - To be able to bring on and decide the case with expedition and efficiency;
  - To be able to correct mistakes.

The Council's *Illustrative Basic Rules* are available at:

www.council-on-tribunals.gov.uk/specialreports/modelrules.htm.

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60 *Ibid*, Introduction, item 2.

Report of the Review of Tribunals by Sir Andrew Leggatt (2001) (The Leggatt Report)[61]

The Leggatt Report represents the first comprehensive review of English administrative tribunals since the Franks Report. While the discussion that follows concentrates on Leggatt's comments regarding tribunal powers and procedures, it is important to note that the Leggatt Report is about very much more than powers and procedures.

The Leggatt Report is influenced by Australian administrative law reform[62], and is predicated on the view that administrative tribunals should be more independent from government departments. Leggatt calls for what he describes as "radical changes"[63] to the English tribunal system, particularly that part of the system engaged in hearing appeals from ministry decisions where, at present, many appellants feel like "every appeal is an away game".[64] The key elements of Leggatt's proposed changes are the creation of a nationwide, "one stop" tribunal registry run out of a single ministry (the Lord Chancellor's office), a radical reorganization of tribunals involved in disputes between citizen and state, and the exclusion of judicial review in favour of specialized administrative appeal courts.[65]

Leggatt also makes a number of suggestions regarding tribunal powers and procedures that are germane to the present discussion. These discussions are significant because they extend beyond the words on the pages of statute books, and into the trenches of tribunal practice:

- Tribunals exist to serve the user: Tribunal procedures must be structured in such fashion as to enable users, where possible, to present cases themselves.[66] For the tribunal this implies a need to give users, in advance, procedural advice, information about jurisdictional issues and remedies, information about pre-hearing, hearing and decision

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61 Tribunals for Users: One System, One Service", *Report of the Review of Tribunals by Sir Andrew Leggatt,* March, 2001.

62 Discussion of administrative law reform initiatives or legislation in Canada is conspicuously absent.

63 *Ibid*, para. 3.3.

64 Ibid, Overview, para. 3.

65 *Ibid*, see generally chapters 3, 5, 6.

66 As noted in the Report, para. 4.3: "The effective communication of information about how to start a case, prepare it for submission to the tribunal and present it at a hearing is not an optional extra of good service to users. It is fundamental to the reason why tribunals exist separately from the ordinary courts. With very few exceptions the aim should be that tribunals' distinctive procedures and approach should enable users to prepare and present their cases themselves…. [U]sers were increasingly turning to lawyers or others for help. Overall, that is a serious failure in the system, which should be corrected urgently".

timetables, and information about the availability of consensual dispute resolution options.

- The Council on Tribunals should assume a more prominent role: Departments should be required by law to consult with the Council during the preparation of draft legislation, and the Council's comments should be appended to any bills put before Parliament. Further, the Council should monitor the development of new tribunals, ensure that tribunals are user-friendly, monitor the training of tribunal members, and publish any findings that arise from visits to tribunals.[67]

- Active case management: To ensure efficient and effective hearings, tribunals must be empowered to establish rules, and impose sanctions for failure to follow them – such sanctions to include the power to refuse adjournments, to disallow late documents, to award costs where delays prejudice other parties and to summarily dismiss appeals. Such rules should be contained in tribunal rules or practice directions. Tribunals must also make more use of electronic hearings and pre-hearing procedures, and utilize registry staff in pre-hearing case management.[68]

- Flexible hearing procedure: As part of active case management, tribunals should assess the merits of written or oral procedures for the particular case, including whether to ask each party for their preference.[69]

- Alternate dispute resolution: ADR has been widely welcomed in civil justice reform, and "it is likely that increased use of ADR may be possible in at least some areas of tribunal work". Tribunals themselves represent in an important sense an alternative to the courts,

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67 *Ibid*, paras. 7.46-7.55. See in particular, para. 7.47: "The Council possesses a great deal of knowledge about the operation of tribunals today. It has made some efforts to promote policies and standards. Its Model Rules of Procedure are a major achievement. Its work on independence of tribunals and on standards of accommodation and of training deserve notice. Its has also drawn attention to the importance of competence in tribunal chairmen and members. But it has not published its visit reports, nor exposed the defects they identified. It has failed to gain visibility for its criticisms, for example in its Annual Reports, whether or not the failure has been due to departmental opposition. Visitors who have given evidence to the Council have not found the experience as challenging as they should have. In focusing on the need for detailed comment on specific issues, it has given insufficient emphasis on strategic thinking about administrative justice generally or about tribunals in particular."

68 *Ibid*, paras. 8.2 – 8.12.

69 *Ibid*, para. 8.15.

but ADR processes focused on assisted settlement, particularly in the case of party-party tribunals, are important tools.[70]

- Communication with departments, and tribunal consistency: Rather than continue with tribunal decisions that have impact on only a "one off" basis, mechanisms should exist for direct communication between tribunals and departments to ensure that the latter learn the lessons of adverse decisions:

  > *[T]ribunals are well placed to pick up systemic problems in decision-making within the department, from decision letters which are confusing, through administrative systems which muddle or miss key facts, to a flawed decision-making process which leads to misconception of the law.*[71]

To this end, tribunals themselves should take steps to make consistent decisions.

Leggatt does not provide specific legislative proposals to achieve the six ends listed. His operating assumption is that tribunals operating in accordance with the flexible powers contained in the Council's Model Rules would be capable of carrying them out.[72] The six items summarized above from Leggatt emphasize the important of marrying tribunal powers and procedures with creative and effective tribunal practice.

Alberta

The Clement Report (1965)

In 1965 – eight years after the Franks Report – the Province of Alberta established a committee, headed by Carleton Clement, to examine the powers of statutory tribunals. The government's perspective in establishing the committee is evident in the committee's terms of reference, which directed a study of "the degree to which these Boards infringe upon the rights and liberties of the subject".[73]

From these terms of reference, it is fair to surmise that the "Clement Committee" was tasked, at least in significant measure, with discovering a way in which to provide a "bridle for Leviathan".[74] This having been the premise, it is not surprising that Clement opted against the Franks approach

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70 Ibid, paras. 8.17 – 8.23.

71 Ibid, para. 9.11.

72 *Ibid*, Part III, recommendation 199.

73 Sprague, "Thirty Years after the Franks Committee Report – Alberta's Report Card" (1989), 5 Admin. L.J. 66 at p. 76.

74 Harvey, "The Rule of Law in Historical Perspective" (1961), 59 Mich.L.Rev. 487 at 491.

of recommending individualized procedures monitored by a Council on Tribunals. Instead, Clement opted for a solution Franks had rejected: the establishment of a minimum set of rules which would apply to all tribunals within its ambit.[75]

This had been the approach taken in the United States as early as 1946, when the federal *Administrative Procedure Act* was passed. Similar legislative initiatives followed in a number of American states, many of which adopted a "Model Statute" developed for state purposes, which statute was prefaced with this explanation, quoted above and repeated here for convenient reference:

> *Every student of administrative law recognizes that many of the procedural details involved in administrative action must necessarily vary more or less from state to state and even from agency to agency within the same state. Each state and each agency must work out these details for itself according to the necessities of the situation. However, there are certain basic principles of common sense, justice and fairness that can and should prevail universally. The proposed act incorporates these principles, with only enough elaboration of detail to support the essential major features.*[76]

Administrative Procedures Act (1966)[77]

The Clement Committee's 1965 report led to the enactment in 1966 of the Alberta *Administrative Procedures Act*.[78] The key features of Alberta's *Administrative Procedures Act*, which remains in effect today, are these:

- The Act's provisions apply only to the tribunals, and to the extent, designated by the Lieutenant-Governor-in-Council. Presently, there are approximately ten such designations.[79] The Act also states that it "does not relieve the authority from complying with any procedure to be followed by it under any other Act."
- The Act is very brief. The required minimum procedures are listed at a high level of generality:

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75 See generally Sprague, *supra*, note 40 at pp. 76-77.

76 An excellent review of history and development of "administrative procedures" legislation in the United States up to 1968 is found in the Report of the Ontario Royal Commission Inquiry into Civil Rights (1968) ["the *McRuer Report*"] at pp. 148-181.

77 R.S.A. 1980, c. A-2.

78 Administrative Procedures Act, S.A. 1966, c. 1.

79 Mullan, *Administrative Law* (2001), Part Three, ch. 11C, p. 1 (Q.L.).

- Notice: Before a statutory power is exercised, the authority shall give all parties "adequate notice" of the application, and its information "in sufficient detail" to permit them to understand the facts.
- Participation: "reasonable opportunity" to furnish evidence and "adequate opportunity" to make argument.
- Right to contradict facts, and cross examine where necessary for fairness.
- Right to make representations does not require oral representations or legal counsel.
- Oath not required, nor is tribunal required to adhere to rules of evidence in court.
- Reasons for decision required.

Consistent with its purpose (and its title), the Alberta *Administrative Procedures Act* is concerned only with the *duties* owed by statutory bodies to the citizen. Unlike the later Leggatt Report – or even the earlier Franks Report – it does not address the issue of the statutory *powers* tribunals require in order effectively discharge their functions.

Alberta Law Reform Institute Report (1999)

In December 1999, the Alberta Law Reform Institute published a report entitled "Powers and Procedures for Administrative Tribunals in Alberta". It begins with this assessment of the existing law in Alberta:

> *The existing legislation that governs the procedures of adjudicative tribunals in Alberta – the Alberta Administrative Procedures Act – is seriously deficient. This act has not kept up to date with developments in the law respecting fairness and fundamental justice, nor with new methods and processes that can help make tribunals more efficient in terms of the use of their resources, and better-equipped to run their hearings efficiently… Our purpose is to provide procedural rules that take into account case law developments relative to the requirements of natural justice, and new procedures to enhance efficiency and effectiveness, and to make them more widely available.*[80]

It was open to the Institute to recommend repeal of the 1966 Act, thus leaving powers and procedures issues to individual statutes and the common law. The Institute's intent, however was "to ensure that the procedural rules of tribunals are consistent and visible for the benefit of users. We have located the procedures in a single comprehensive Code. To the extent that they are

[80] Alberta Law Reform Institute, *Powers and Procedures for Administrative Tribunals in Alberta* (December, 1999), Report No. 79.

adopted, they will make procedures highly visible and readily accessible to those who appear before tribunals."[81]

The Institute recognized that a single comprehensive code could not apply to all tribunals. It adopted a unique implementation method:

> *Our solution to the implementation question was to recommend legislation … in the form of an "opt in" statute – the* Administrative Powers and Procedures Act*. Under this proposal, every tribunal will compare its existing procedures to our Code, and will choose those powers and procedures from the Code that that it needs to help make its decisions fairly and enable it to be as effective and efficient as possible…. Under our proposal a tribunal that needs a particular power for the conduct of its business may apply to adopt the related Code provision, and if this application is approved, by ministerial order, the tribunal may thereafter exercise the power. The advantage of using this mechanism is both avoidance of the need for legislative amendment, and consistent and visible rules.*[82]

While the content of the Institute's Model Code is very similar to the Model Rules in England, the English "Rules" are merely a non-statutory compilation to assist host departments in drafting legislation for tribunals. The Institute's proposal is for the passage of legislation – called the *Administrative Powers and Procedures Act* – which would enable tribunals themselves to "opt in" to Model Code provisions in whole or in part, as suits the needs of the tribunal. Tribunals would be required to undertake such a review to determine whether and to what extent "opt in" is appropriate. Tribunal "opt in" requests would become legally effective upon approval by the Minister of Justice. As explained by the Institute:

> *The approval process that we recommend is especially significant with respect to the additional powers in the proposed legislation that cannot be implied as essential to the performance of the tribunal's mandate. Some of these powers can enable tribunals to effect participants' rights significantly. Examples are the power to reconsider a decision, or to extend a statutory time period. We think it is important that before a tribunal can appropriate such powers, there be a check on whether the powers are suitable and necessary…. It is primarily for powers like these that we recommend the ministerial approval process. However, for the sake of simplicity and uniformity, we recommend a common process….*[83]

The majority of the Institute's 190-page report represents a very useful, annotated discussion of the content of the proposed Model Code. For present purposes, it will suffice to observe that the Institute has engaged in what appears to be an even more exhaustive collection of the key

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81 Ibid, p. 9.

82 Powers and Procedures for Administrative Tribunals in Alberta (December, 1999), p. 11.

83 *Ibid*, p. 30.

subjects of tribunal powers and procedures than does the English Model Code. The proposed menu of powers and procedures addresses:

- Pre-Hearing Powers and Procedures: acknowledgements and notifications, dismissal without hearing, consent orders, and pre-hearing conferences, including proactive use of staff and members;[84]
- Alternate Dispute Resolution: authority to engage in ADR practices, to issue tribunal orders giving effect to consensual agreements, to engage in ADR at any point in the proceedings, to protect confidentiality of statements made and materials used in ADR proceedings;[85]
- Hearing Powers and Procedures: authority to adopt general rules of procedure, to grant standing, issue notice of hearing, set hearing panels, close hearings in exceptional cases, proceed in writing or in person, to grant adjournments, not to be fettered by rules of evidence except where this would cause significant unfairness, and to compel witness and documents. This section also makes clear that the panel chair is responsible for the conduct of the hearing, codifies the rule about wider consultation in *Consolidated-Bathurst*, and authorizes members to complete ongoing work after expiry of a term;[86]
- Decision and Reasons: addresses interim decisions, time limits for decisions, written reasons, publication of reasons, majority decision, reconsideration and correction of errors;[87]
- Miscellaneous Powers: subjects include contempt, costs, extending time, *ex parte* decisions, tribunal publication of rules of procedure, process for addressing bias allegations.

It is not apparent whether administrative law reform is on the agenda of the Alberta government at the moment. Whatever its fate in that jurisdiction, the Institute's report is an impressive achievement, and represents an important contribution to any discussion of statutory powers and procedures in British Columbia.

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84 *Ibid*, pp. 39-57.

85 *Ibid*, pp. 57-62.

86 *Ibid*, pp. 82-130.

87 *Ibid*, pp. 131-158.

Ontario

Royal Commission Inquiry Into Civil Rights (McRuer Report) (1968)[88]

The Ontario Government established the Royal Commission of Inquiry into Civil Rights in 1964. The "McRuer Report", as it became known, was issued in February 1968 - two years after passage of the Alberta *Administrative Procedures Act*. The inspiration for Carleton Clement's 1965 terms of reference in Alberta may be found in the Ontario government's terms of reference to Chief Justice McRuer only a year earlier:

> 1. *To examine, study and inquire into the laws of Ontario including the statutes and regulations passed thereunder affecting the personal freedoms, rights and liberties of Canadian citizens and others resident in Ontario….*
>
> 2. *[T]o recommend such changes in the law, procedures and processes as in the opinion of the commission are necessary and desirable to safeguard the fundamental and basic rights, liberties and freedoms of the individual from infringements by the State or any other body.*

The McRuer Report is an ambitious, multi-volume administrative law *tour de force*. Whatever one's position on the policy questions discussed in the report, the depth and breadth of McRuer's research represented a major achievement. Like the Leggatt Report, the McRuer Report is about more than administrative powers and procedures. The report canvasses matters ranging from constitutional theory, to the structure and organization of tribunals, to the principles governing appeals and judicial review, to subordinate legislation. McRuer even reviewed and made recommendations regarding the civil court system in Ontario.

Chapter 14 of the report[89] addresses "procedural safeguards" for the exercise of statutory powers in Ontario. The philosophy that underscores this part of the report is reflected in an American quotation adopted by the commission:

> *The essence of justice is largely procedural. Time and again thoughtful judges have emphasized this truth. Mr. Justice Douglas: "It is not without significance that most of the provisions of the Bill of Rights are procedural. It is procedure that spells much of the difference between rule by law and rule by whim or caprice. Steadfast adherence to strict procedural safeguards is our main assurance that there will be equal justice under the law." Mr. Justice Jackson: "Procedural fairness and regularity are of the indispensable essence of liberty".*

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88 Royal Commission Inquiry into Civil Rights, February 7, 1968, Hon. J.C. McRuer, Chair.

89 *Ibid*, pp. 206-223.

> *Mr. Justice Frankfurter: "The history of liberty has largely been the history of procedural safeguards".*[90]

The McRuer Report saw this, however, as only the beginning of the analysis. Recognizing that one could not focus exclusively on procedure, McRuer noted that "the main problem in establishing a just procedure for the exercise of a statutory power is the reconciliation of procedural justice with effective governance." The need for such reconciliation having been recognized, however, McRuer observed that "[t]he conflict between the two demands is often less real than it is made to appear".[91] To achieve a proper balance, McRuer identified the following five options:

> *1. To leave the development of the law relating to procedure to the courts*
>
> *This option was rejected, on the basis that while "judicial decisions may tend to decrease uncertainties and reconcile procedural justice and effective government to a certain extent, that development will not be systematic and it will inevitably be a slow process attended by much uncertainty during the process…"*[92]
>
> *2. To enact detailed rules in each statute conferring a power*
>
> *While this option had the advantage of certainty, this option was not seen as practical as it "would occupy the time of the Legislature with a minutiae of detail that could better be worked out in consultation with those administering the statute. In addition, detailed procedural rules enacted in a statute are inflexible."*[93]
>
> *3. To enact general legislation establishing uniform detailed rules applying to all powers*
>
> *The report also rejected this approach: "Experience in all jurisdictions shows that the diversity in the character, nature and purpose of statutory powers is such that a uniform statute cannot be drawn so as to cover in detail the procedure to be followed in the exercise of all powers which would be consistent with effective governmental action."*[94]
>
> *4. To give in each statute conferring a power authority to make procedural rules for the exercise of the power*
>
> *The committee approved of this option, stating that "Regulations … conferring specific powers for which fair procedure is required, would remove much uncertainty and tend to reconcile justice with governmental efficiency. Both of*

90 *Ibid*, pp. 206-07.

91 *Ibid*, p. 207.

92 *Ibid*, p. 209.

93 *Ibid*, pp. 209-210.

94 *Ibid*, p. 210.

> *these factors could be weighed specifically in the preparation of the rules applicable to each power. In addition, reasonable flexibility would be maintained. This is the course that has been adopted, in part, in the United Kingdom."*[95]
>
> *5. To enact general legislation establishing uniform minimum rules of procedure for the exercise of powers*
>
> *The committee also approved of this notion, stating that "Minimum rules would establish generally recognized fundamental procedural requirements applying to the exercise of any statutory power where a fair procedure is required. The minimum standards would be supplemented for each tribunal or class of tribunals by detailed rules made by regulation. Adoption of this course would eliminate many uncertainties as to the application and content of minimum requirements in a just procedure. This is the course that has been followed in the United States."*[96]

In the end, McRuer selected a combination of options 4 and 5, which he regarded as being "an adaptation of the best of the systems of the United States and the United Kingdom":

> *Minimum and basic procedural safeguards enacted by legislation have distinct value. They are in the nature of a procedural Bill of Rights, controlling draftsmen and guiding administrators and the courts. The time has come when the Legislature should declare in clear terms those minimum safeguards to which every citizen is entitled in the administrative processes of government. We therefore recommend the enactment of a Statutory Powers Procedure Act with provision for a Statutory Powers Rules Committee…."*[97]
>
> *The Statutory Powers Procedure Act which we recommend should establish:*
>
> > *(a) Minimum rules of procedure applicable to all tribunals, whether judicial or administrative, with certain defined exceptions;*
> >
> > *(b) A Statutory Powers Rules Committee composed as hereinafter indicated with power to make appropriate detailed rules for each tribunal, having regard to the nature and purpose of the powers exercised by it.*
>
> *The provisions of the Act should apply to all tribunals, bodies or persons exercising judicial or administrative powers where fair procedure is required, unless excluded by express language or necessary implication….*
>
> *Much advantage is to be gained from setting out specific rules for the guidance of those exercising statutory powers, even though many of them are a mere codification of the common law. Not only will they know the procedure they must follow, but those who have matters before tribunals will know the controlling procedure.*[98]

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95 *Ibid*.

96 *Ibid*, pp. 210-11.

97 Royal Commission Inquiry on Civil Rights (1968), p. 211.

98 *Ibid*, pp. 212-13.

Because the Rules Committee would address the specifics, the proposed Act would address only the "minimum" procedural requirements, such as notice of hearing, notice of the case to be met, right to counsel subject to exceptions[99], right to lead evidence and cross-examine, and reasons. Unlike the Alberta statute, it would also address key "powers" issues, such as subpoenas, adjournments, oaths, admissibility of evidence, and official notice.[100]

Professor Willis' "irritated dissent"

In 1968, law professor John Willis published an article entitled "The McRuer Report: Lawyers' Values and Civil Servants' Values".[101] Professor Willis began with the caveat that he was undertaking his review in a "mood of irritated dissent", which irritation flowed from the "slant" he perceived both in the Terms of Reference and in the report itself:

> *We are told a great deal about the dreadful things that, as the law now stands, civil servants might do to the citizen but are given no actual instances of them having actually done so. We can see why the citizen, and still more his lawyer looking for loopholes, will like the recommendations, but the civil service point of view is never adequately stated. Second, I dislike its direction – which is: you backsliders must do your level best to cram your awkward selves into the eighteenth-century constitution you have inherited from your forefathers….*[102]

Interestingly, Professor Willis did not comment on statutory powers reform. However, with respect to statutory procedures, he wrote:

> *I agree with the Commission when it says that 'the basic problem is the reconciliation of procedural justice with effective government.' I disagree with it when it goes on to say that 'the conflict between these two demands is often less real than is made to appear'….Under the present common law rules of 'natural justice', uncertain as they are in their application and in their content, we have inherited from a series of English cases an approach to administrative procedure so relaxed that all a deciding authority really has to do is give the citizen 'a fair shake'. If you set up mandatory statutory codes of minimum procedure, however devised, you will inevitably reintroduce into 'non-court' deciding authorities the*

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99 On the issue of right to counsel, the Commission's approach is very different from that of the Franks Committee: "We do not accept the argument that the presence of counsel at a hearing necessarily creates additional expense and undue formality. In fact, in many cases it may be quite otherwise. To deny a right to counsel is to discriminate against the illiterate or inarticulate person. Every person is entitled to expert assistance in the presentation of his case before a tribunal which is empowered to make a decision affecting his rights. Unless the tribunal is in the nature of a court, we see no reason why the expression "counsel" should be confined to members of the legal profession" (p. 215).

100 Ibid, pp. 213-19.

101 Willis, "The McRuer Report: Lawyers' Values and Civil Service Values" (1968), 18 U.T.L.J. 351.

102 *Ibid*, pp. 351, 352.

> *'court' atmosphere that they were created to avoid…. Nor does the Commission produce any evidence to show that anyone has, in the world of 'what actually happens', suffered injustice by reason of their absence….*
>
> *[This said], if we are going to get … mandatory statutory codes, this method of devising them is a good one. Each deciding authority … should therefore concentrate on finding out in what respects its present procedure does not square with the McRuer minima and to what extent it must, in order to do its job effectively, refuse to change it.*[103]

Ontario *Statutory Powers Procedure Act* [104]

Ontario's *Statutory Powers Procedure Act* (*SPPA*) took effect in 1973. Unlike its Alberta counterpart, the *SPPA* addresses tribunal powers as well as procedures. Also in contrast to the Alberta statute, the *SPPA* applies generally to any person exercising powers delegated by statute and required by law to hold a hearing[105], rather than applying to particular tribunals scheduled to the *Act*. In Ontario, the *SPPA* is the general rule; the exceptions must be set out in the enabling statutes of particular tribunals.

The original Ontario *SPPA* followed the McRuer Report's recommendations. It outlined the minimum *procedural* obligations of agencies – what it referred to as the "Minimum Rules for Proceedings of Certain Tribunals" (rights of parties to notice, to counsel, to call witnesses, to cross-examine) – as well as key powers tribunals needed to function, such as rights to issue summonses, close hearings, admit evidence and control its proceedings.[106] The *SPPA* contained a "supremacy" clause making its provisions applicable unless the enabling statute provided to the contrary.[107] And it created a "Statutory Powers Procedure Rules Committee", whose function was to "maintain under continuous review the practice and procedure in proceedings to which Part I applies". Importantly, no tribunal rules could be approved "except after consultation with the Committee".

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103 Ibid, p. 358.

104 R.S.O. 1990, c. S22, as amended by S.O. 1994, c. 27 and S.O. 1997, c. 23.

105 For historical reasons resulting from the state of the law at the time the *SPPA* was passed, the Act's application to bodies required by law to hold a "hearing" is limited to those where a hearing is required by statute, or where the common law would otherwise identify the proceeding as "quasi-judicial": Mullan, *Administrative Law* (2001), c. 11B.

106 The original Act's key provisions are outlined in Evans, Janisch, Mullan and Risk, *Administrative Law* (1st ed., 1984) at pp. 119-122.

107 In this regard, the other key component of the *SPPA* reform was the passage of the *Civil Rights Statute Law Amendment Act, 1971*, S.O. 1971, c. 50, which amended numerous other statutes in order to "custom fit" the *SPPA* to a whole host of decision-makers: see generally Mullan, Administrative Law (2001), ch 11B, p. 2.

Another major contrast with Alberta is that, unlike the Alberta statute, the Ontario *SPPA* has undergone major reform. The first reform exercise took place in 1995, in the wake of calls for change from Robert Macaulay[108], the Attorney General for Ontario and the Society of Ontario Adjudicators and Regulators.[109] The reforms were based on the belief that the original *SPPA* tended to "over-judicialize" agency processes, and that the previous focus on "procedures" needed to be balanced with additional "powers" to enable agencies to operate more effectively. A good example of this concern was David Mullan's comment about the Ontario *SPPA* in 1992:

> *What it fails to do, however, is to make any provision for pre-hearing procedures of any kind – discovery, pre-hearing conferences, agreed statements of fact – all of those devices that have come to play such a significant role in the regular trial process and which are of such potential value as well in the administrative process.*[110]

Consistent with these concerns, the 1995 amendments addressed the following:

- flexibility of tribunal chair to establish panel size;
- authorization for a panel member to continue and complete hearing despite expiry of term;
- power to issue interim orders;
- power to hold written and electronic hearings;
- power to require pre-hearing conferences;
- power to order parties to disclose documents;
- power to combine hearings, use previously admitted evidence, hear evidence from panels of witnesses.

The 1995 amendments made one other very important change. They abolished the Rules Committee which, as Mullan pointed out, "was for many years virtually a dead letter"[111]. Under

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108 Macaulay, *Review of Ontario's Regulatory Agencies* (1989), Government of Ontario, see esp. ch. 9.

109 Porter, Posluns & Harris, *Grey Areas*, "Proposed Amendments to SPPA" (April, 1994), QL, p. 1.

110 Mullan, "Common and Divergent Elements of Practices of the Various Tribunals: An Overview of Present and Possible Future Developments" (1992), Law Society of Upper Canada Special Lectures 461 at pp. 463-64.

111 *Ibid*, p. 464.

the 1995 amendments, administrative tribunals would create their own rules of practice and procedure:

> 25.1(1) A tribunal may make rules governing the practice and procedure before it.
>
> (2) The rules may be of general or particular application.
>
> (3) The rules shall be consistent with this Act and with the other Acts to which they relate.

As an incentive to tribunals to create rules under s. 25.1, many of the most significant 1995 "powers" were drafted in such fashion that they would not apply unless the tribunal developed rules under s. 25.1.[112] For its part, the Society of Ontario Adjudicators and Regulators responded by creating a draft template to assist tribunals seeking to develop their own rules.[113]

A third set of amendments, passed in 1999 and proclaimed in 2000, arose in the wake of the Ontario Government's 1998 report on Regulatory and Adjudicative Agencies (the Guzzo Report).[114] Consistent with the reform process undertaken in 1995, the Guzzo Report focused less on traditional process values than on providing tribunals with tools to balance fairness and efficiency for themselves: "Some changes are also needed to the *SPPA* to give all agencies the full range of powers needed to resolve problems as quickly as possible".[115] Like the later Leggatt Report, Guzzo emphasized independence, as well as the daily trench work of administrative tribunals: matters such as case management and the use of information technology.

Consistent with Guzzo's advice, the most recent amendments[116] were enacted with a view to providing tribunals with even greater flexibility. The highlights included:

- a direction to the courts to "liberally construe" the Act and any rule made by a tribunal;
- provisions allowing tribunals to dismiss proceedings without a hearing;
- provisions authorizing use of ADR, including mandatory ADR, and authorizing tribunal members to participate in such processes;

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112 See for example, s. 4.5(3), 5.1, 5.2, 5.3.

113 Porter, Posluns & Harris, *Grey Areas*, "SOAR Develops Suggested Rules of Procedure for Tribunals" (July, 1995), QL, p. 1. For a copy of the most recent version of SOAR's Sample Rules, see its Website at www.soar.on.ca/soar-rules_prac.htm.

114 "Everyday Justice", Report of the Agency Reform Commission on Ontario's Regulatory and Adjudicative Agencies (April, 1998).

115 *Ibid*, p. 11.

116 S.O., 1999, c. 12.

- a provision stating that "A tribunal shall establish guidelines for setting out the usual time frame for completing proceedings that come before the tribunal and for completing the procedural steps within those proceedings."

David Mullan has expressed regret at the abolition of the original Rules Committee, believing that an external review body would act as a useful check "in ensuring that tribunal or agency self-interest does not impede the development of procedures that are responsive to constituency needs and the even-handed dispensing of administrative justice." Mullan has also suggested that the rule making power has not resulted in a diverse set of rules – rather, "most are adopting the standard set of rules that is doing the rounds".[117]

British Columbia Law Reform Commission Report (1974)

In November, 1974, the Law Reform Commission of British Columbia produced a report entitled *Civil Rights – Procedure Before Administrative Agencies.* This report appears to be the only official and public study of the subject of statutory procedures in the history of this province.[118]

By the time the BC Law Reform Commission embarked upon its review, the subject of statutory procedures had of course recently been addressed both in Alberta and Ontario by way of commission reports and law reform.[119]

Like the other study groups, the BC Law Reform Commission examined the common law, as well as reform exercises that had taken place elsewhere. It reviewed existing statutory procedural requirements in British Columbia. The Commission's conclusion about the state of the statute books, and the situation of the public seeking to appear before administrative agencies, bore a familiar ring to the conclusions reached, both before and since, by its counterparts elsewhere:

> *The statutory procedural requirements in British Columbia are generally inconsistent and incomplete, and their presence often compounds the difficulties involved in determining whether the common law natural justice principles apply.*

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117 Mullan, *Administrative Law* (2001), c. 11E, p. 2 (Q.L.). Whether this lack of diversity is necessarily a bad thing is of course another question. It may well reflect that, for tribunals exercising similar functions, SOAR's Model Rules are in fact practical and workable.

118 Law Reform Commission of British Columbia, Report on Civil Rights – Part 3 – Procedure Before Statutory Agencies (1974).

119 According to the commission's Report, a similar exercise had been undertaken in New Zealand even more recently (1973) but that commission rejected the idea of a "comprehensive code of procedure for all agencies": p. 9.

> *Agencies are left without guidelines as to what procedures they must use, and affected individuals are uncertain of their procedural rights and duties...*[120]
>
> *[T]he standards imposed by statute vary from agency to agency without justification according to any immediately apparent set of consistent principles.*[121]

For the Commission, however, the solution was more elusive. While its research staff recommended a "minimum procedures" statute, the Commission did not feel able to endorse such a proposal.[122] In the end – in a step quite exceptional for law reform bodies – the Law Reform Commission declined to make a recommendation. Instead, it stated that: "The Commission has in the end been able to recommend only that the matter be placed in the hands of a specially constituted body of inquiry"[123], which the Commission suggested be constituted under the *Inquiry Act*.[124]

The Commission's hesitation flowed primarily from its philosophical position that the rules of "procedural fairness" – which it appeared to define as requiring very formal procedures[125] – should not, absent a case-by-case review, presumptively be entitled to greater consideration than any other government purpose.[126] The Commission felt that it was inappropriate to recommend a code of fairness before undertaking an agency-by-agency review of the effect of any such code. It cited a number of examples – dealing with contagious diseases, the fire marshal, food inspection, welfare, investigation and rulemaking – where it felt the full requirements of procedural fairness would be too onerous.[127] Further, and reflecting the influence of John Willis[128], it felt that it had neither the composition nor the resources to undertake the required work:

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120 *Ibid*, p. 21.

121 *Ibid*, p. 36.

122 *Ibid*, p. 7.

123 *Ibid*, p. 55.

124 *Ibid*, p. 44.

125 *Ibid*, pp. 46-54. One hastens to recognize that, at the time the commission wrote its report, procedural fairness was often equated with "natural justice" and the full panoply of process associated therewith. Whether the commission's report would have reflected similar angst after *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311, and in view of the more flexible understandings of procedure which followed, is of course an open question.

126 *Ibid*, p. 42.

127 *Ibid*, pp. 39-42. It should be noted that the *McRuer Report*, at p. 207, specifically refers to a number of very similar examples to show why procedural protections cannot be universal, and would on occasion even "frustrate immediate necessary governmental action and destroy the protection given the public by the statute". For McRuer, however, these were much more the exception than the rule.

> *What is required is an ability to weigh legal principle against the broader purposes which agencies serve, and the final and administrative cost which compliance with all or some of the rules of procedural fairness would involve for an agency. It does not seem appropriate to us that a Commission composed exclusively of lawyers should embark upon a task which demands a wider area of competence than lawyers may be thought to have.*[129]

The Commission's recommendation for an inquiry was never acted upon. This was the option suggested by the British Columbia Law Reform Commission in 1974.

The BC Law Reform Commission's unusual step of recommending that the issue be deferred to a separately constituted inquiry was thus based on what it perceived as the flaw in deciding about a "code of fairness" before studying the implications of any such code, and its concern that the body making the recommendation should not be confined to lawyers. The advantages of the Law Reform Commission's approach are of course those the commission itself listed: detailed study of each agency before a final decision is made, and input from a wider constituency.

Reflecting on the Law Reform Commission's study 27 years later, a number of additional points may perhaps be in order.

First, as its title makes clear, the BC Law Reform Commission's report was focused on the question of "Procedure Before Statutory Agencies". Its report does not address reform of statutory powers. There is no indication in the commission's report that it would, for example, oppose statutory powers reform of the sort undertaken in Ontario in 1995 and 2000, and recommended in other recent law reform reports.

Second, it may be fair to observe that whatever difficulties may attend the study and debate of statutory procedures, its resolution probably does not demand an *Inquiry Act* process. Given the numerous reports produced on this subject since 1974 in different jurisdictions, public inquiries have not been needed to review the circumstances of individual administrative tribunals and reach the informed public policy conclusions about whether legislative reform is needed.

Third, it is important to note that the Commission's report was predicated on the belief that procedures legislation necessarily implies that "court-like" procedures will be imposed on tribunals, for which such procedures are ill-fitted. While this point reflects the Commission's concerns about "uniform minimum procedures" legislation, it is not an argument against

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128 The commission was clearly well aware of Willis' criticisms of McRuer: see BCLRC Report, p. 36, footnote 1.

129 *Ibid*, p. 43.

legislative reform itself. The Franks Report did not, for example, adopt a minimum code, but still provided a legislative solution intended to achieve principled diversity among tribunals. The Alberta Law Reform Institute's proposal would enact general legislation, but tribunals would "opt in" to the provisions required for their particular needs. And while the Ontario and Quebec statutes do outline the basics of fair procedure, they are sufficiently general that, while providing visibility to a clear set of principles, they are, for most affected tribunals, consistent with the developed common law.

A point may also be made respecting the BC Law Reform Commission's concern about "lawyers' values" and the inspiration it undoubtedly drew from Professor Willis in that regard. Arguments based on "lawyers' values" undoubtedly hold a certain rhetorical appeal. The reality, however, is that lawyers are people, they hold very diverse views and they do not usually support "formalism" as that term was used in the 1960s and 1970s. Lawyers play an important role both as participants and decision-makers in the administrative law system. The English experience has shown that, in practice, the lay members of the Council on Tribunals have "leaned heavily" on their lawyer members.[130] None of this is to downplay the importance of ensuring input and participation from all persons interested in rules, as is often recommended for rule-making exercises.[131] It does suggest, however, that there are means other than a public inquiry by which to achieve broader input by persons interested in and affected by a law reform discussion.

Canada: Federal Jurisdiction

There is no federal legislation regarding statutory powers and procedures. As is the case in seven provinces, the powers and procedures of federal administrative agencies are defined by their enabling legislation, regulations, any procedural guidelines and the common law. This is not to say, however, that statutory reform has not been proposed.

Law Reform Commission of Canada (1980)

In its 1980 working paper, *Independent Administrative Agencies*, the Law Reform Commission of Canada commented that "[t]he wide and inexplicable variation in statutory provisions concerning the powers and procedures of agencies carrying out similar functions … support[s] the contention that more systematic planning is needed at the earliest stages of the legislative process".[132] The

130 de Smith, Judicial Review of Administrative Action (5th ed, 1995), p. 59.

131 See Janisch, The Choice of Decisionmaking Method: Adjudication, Policies and Rulemaking" (1992), LSUC Special Lectures, p. 259.

132 Law Reform Commission of Canada (1980), Working Paper 25, *Independent Administrative Agencies*, p. 120.

Law Reform Commission's other concern was that, even where the agency has an established practice, that practice exists as "secret law" which is contrary to the public interest.[133] All this led the commission to conclude as follows:

> *Our research on the Canadian federal administrative process leads to the conclusion that there are a sufficient number of problems relating to administrative procedure – in terms of inadequacies and anomalies – to justify that we recommend:*
>
> > *General legislation should be enacted incorporating minimum administrative procedure safeguards or providing means for the development of common procedural guidelines.*[134]

The Law Reform Commission of Canada's 1980 Working Paper led to similar recommendations contained in its 1985 Report entitled *Independent Administrative Agencies.* No action was taken based on the Law Reform Commission's recommendation.

Federal Department of Justice (1995)

In 1995, the Department of Justice issued a discussion paper proposing a federal *Administrative Hearings Powers and Procedures Act*. It was proposed that accompanying such an enactment would be a detailed *Hearing Guide* that would act as a non-binding manual providing practical advice for hearings. Following its initial release in April, 1995, the federal discussion paper underwent two revisions, the most recent of which was published in September 1996.[135] The discussion paper's Introduction poses the question "What Prompted this Proposal?" The answer is stated as follows:

> *There is currently no common procedural structure for federal administrative decision making. Procedural directions in statute, where they are found at all, are vague. Agencies are required to develop procedures in an ad hoc manner. The consequences of this approach are:*
>
> > *i) uncertainty, both within agencies and outside, as to the extent of procedural rights;*
> >
> > *ii) increased difficulty in accessing administrative justice;*

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133 *Ibid*, p. 121.

134 *Ibid*, p. 141.

135 See www.canada.justice.gc.ca/Consultations/Proposal. See also Macaulay, *Practice and Procedure Before Administrative Tribunals*, ch. 38. Macaulay notes that "I understand that while the Department has not formally decided to abandon the project, the proposal has been suspended owing to a lack of resources (which, of course, may come to the same thing)."

> *iii) duplication of effort in the drafting, development and amendment of procedure;*
>
> *iv) delay in the implementation of new programs;*
>
> *v) direct and indirect costs resulting from that duplication, as well as from training costs;*
>
> *vi) judicial challenges; and*
>
> *vii) a failure to utilize the abilities of individuals who are not formally trained in procedures.*

While the Department of Justice proposal would extend both to oral and written hearings, its principal focus is on oral hearings (the decision-makers to whom it would apply are identified in a draft schedule). In substance, this proposal covers many of the same matters canvassed in other modern law reform reports. Its main headings are as follows:

- access to proceedings by parties, and the public
- notice of information
- alternative procedures
- assignments of Hearings, pre-hearing matters
- the hearing; evidence
- power to issue guidelines
- decisions and reasons
- powers: early dismissals, extensions of time, ex parte proceedings, maintaining order, subpoenas, compelling evidence, views, enforcement, member liability

At the time of its original release, the discussion paper garnered significant attention. Writing in 1996, Robert Reid strongly supported the idea:

> *If the [federal] proposal is rejected, it will not be because it is not courageous, innovative or imaginative.*
>
> *The authors confront the fundamental fallacies of Administrative Law: the assumption that anyone can perform the task of hearing and deciding properly without training; that exact procedures, like those of courts, stand in the way of decision-making; and that administrative hearings are somehow simpler than trials. Apologists for Administrative Law dwell on the protraction and expense of court procedures… The cure is to dump the procedure-obsessed courts with their tedious rule books, and the lawyer's mind-set which produced them, and hand over the decision-making process to sensible folk who know the area they*

> *are asked to regulate and will go direct to the heart of the matter without getting tangled in procedure.*
>
> *This is, and was, a vain dream. Yes, the courts had severe shortcomings…. But in their zeal to turn their backs on the courts the reformers went too far… Unfortunately for the dream, the good men they appointed revealed a distinct preference for the arbitrary.*[136]

Robert Macaulay also provided extensive comment on the paper. His primary concerns were as follows: (i) failure to clearly define the role of tribunal chair; (ii) the proposal's failure to recognize the federal government's duty to train tribunal appointments; (iii) excessive focus on oral hearings; and (iv) failure to require agencies to promulgate procedural rules.[137]

To date, the federal government has not acted upon this proposal. Macaulay's text states "I understand that while the Department has not formally decided to abandon the project, the proposal has been suspended owing to a lack of resources (which, of course, may come to the same thing)."[138]

Quebec

In 1988, the Working Group on Administrative Tribunals submitted its report on Administrative Justice. The report, which recommended sweeping reform of Quebec's administrative law system, is more commonly referred to as the "Ouellette Report".[139]

After what one writer referred to as a "long gestation period"[140], the Quebec National Assembly acted upon the Ouellette Report in 1998 by enacting the *Administrative Justice Act*.[141] The Act's

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136 *Reid's Administrative Law Letter*, Vol. 5, No. 3 (Feb. 1996), pp. 49-50.

137 Macaulay, Practice and Procedure Before Administrative Tribunals, p. 38-148.1 – 38-161.

138 Ibid, ch. 38-2.

139 The author was unable to obtain a copy in English of the *Ouellette Report* (*Rapport du Group de travail sure les tribunaux administratifs* (Quebec, Ministry of Justice, 1987). However, that Report is summarized and discussed in Macdonald, "Reflections on the Report of the Quebec Working Group on Administrative Tribunals" (1988), C.J.A.L.P. 337. The discussion started in the *Ouellette Report* continued in the *Garant Report (Rapport du Groupe de travail sur certain questions relatives a la reforme de la justice administrative* (Quebec, Ministry of Justice, 1994).

140 Mullan, Administrative Law (2001), ch. 11D, p. 1.

141 R.S.Q., c. J-3.

major reform - the creation, mandate and management of a new and general "appeal tribunal" consisting of 4 divisions - is beyond the scope of this discussion.[142]

However, the *Administrative Justice Act* also speaks to statutory powers and procedures. Consistent with Ouellette's recommendation, the Act eschews codification in favour of a generic statute setting out basic principles of procedure. These principles, set out in Title I of the Act, are designed to be complemented by detailed rules promulgated by each individual tribunal and tailored to the tribunal's specific needs.[143]

While it addresses most of the same "powers" as the Ontario *SPPA*, the Quebec Act's "procedural" emphasis is unique for decision-makers other than the super-tribunal. The procedural emphasis is on giving parties clear information on relevant issues, access to documentation, opportunity for parties to add to the record before the decision-maker and reasons. Beyond this, the Quebec statute's focus is on the principles that should govern tribunals dispensing administrative justice. These principles refer to adherence to legal norms, the use of simple, flexible and informal rules, respect for affected constituencies including ethnic groups, and good faith in the exercise of power. The Act even outlines standards of conduct for tribunal members.

Finally, the Act creates the Quebec Administrative Review Council, whose functions appear to blend those of the English Council on Tribunals and the Canadian Judicial Council.[144] The rationale for the Council was stated as follows:

> *A body is needed which can deal with complaints as they are, instead of leaving them to build up into a volume of discontent which, every twenty-five years or so, discharges itself in a special but temporary inquest by a committee which merely reports once and then dissolves.*[145]

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142 A more detailed discussion of the Administrative Tribunal of Quebec may be found in Bryden and Gunn, *supra* note 8, at pp. 16-23.

143 *Ibid*, p. 345. The Quebec *Administrative Justice Act* is somewhat more prescriptive in the case of "decisions made in the exercise of an adjudicative function". Even here, however, the Act is concerned primarily with ensuring a full set of powers at the tribunal's disposal, rather than with micro-managing procedure: see ch. VI, ss. 99-158.

144 The Quebec Council may give advice to tribunals regarding procedural rules, but it may also establish a code of ethics, inquire into whether a tribunal member should be removed and receive and examine complaints against members: see ss. 165-198.

145 Quoted in Macdonald, *supra*, note 137, at p. 346.

New Brunswick (1991)

In December 1991, the Law Reform Branch of the New Brunswick Department of Justice issued a discussion paper proposing an "Administrative Procedures Act" for New Brunswick.[146] The paper emphasizes New Brunswick's "vague" and "deficient" legislation on the subject of tribunal powers and procedures, and concludes:

> *In our view, clearly defined procedural safeguards and powers need to be provided. There is no obvious reason for the statutory differences that currently exist, and we suspect that these differences result in reduced efficiency, fairness and comprehensibility in the decision-making process. We suggest that the enactment of an Administrative Procedures Act would provide the necessary means for remedying this situation.*

The New Brunswick proposal is very much a mirror of the McRuer approach: (a) to pass a statute to enact minimum powers and procedures, and (b) to ensure that tribunals themselves have more detailed rules that govern their particular practice, with a "coordinating body" responsible to ensure the promulgation of individual rules. The report suggests that, whether the body is a Council on Tribunals, an informal body established by tribunals, or the Ombudsman, that outside body (rather than the tribunal or government) should have final decision-making responsibility for tribunal rules.

The author is not aware of any legislative action to date in New Brunswick as a result of the Department of Justice proposal.

Nova Scotia (1997)

In January, 1997, the Nova Scotia Law Reform Commission added its voice to the call for standard powers and procedures legislation.[147] A key recommendation of the commission's comprehensive report is that government enact an *Administrative Justice Act* which would (a) set a floor of minimum procedural requirements and powers for administrative agencies but allow adjustments by the agency or the legislature; and (b) require tribunals to develop procedures and rules consistent with the minimum procedures in the Act.[148]

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146 "Proposals for an Administrative Procedures Act: A Discussion Paper", Law Reform Branch, Office of the Attorney General, December, 1991.

147 Nova Scotia Law Reform Commission, Agencies, Boards and Commissions: The Administrative Justice System in Nova Scotia (January, 1997).

148 *Ibid*, Introduction, p. 2.

Consistent with the views expressed in other studies of the matter, the commission emphasized that such a statute should not require decision-makers to follow court-like procedures. It further recognized that even with such an enactment, there "will always be a level of unpredictability". However, after reviewing various approaches, the commission opted for a model based very much on the present Ontario model:

> *After reviewing all of these approaches, the Commission has developed a draft* Administrative Justice Act *…. The Act requires that administrative tribunals develop procedures and rules consistent with the minimum procedures in the Act which must be communicated to the people involved in the hearing. This will ensure that administrative tribunals develop rules that address these issues and it will also help ensure that people are informed about the process which they will encounter. It will still allow each agency the flexibility to make the process as formal or informal as deemed appropriate, subject to natural justice requirements.*[149]

To date, no legislative action has been taken in Nova Scotia based on its Law Reform Commission's report.

4 SUMMARY OF KEY POINTS

Before turning to a discussion of the options for British Columbia, it will be useful to summarize a number of key points arising from the preceding examination of legislation and law reform proposals in Canada and England.

Lack of consistent strategic planning

- Each law reform group that has studied this subject has concluded that the relevant policy-makers of its jurisdiction did not engage in consistent strategic planning regarding tribunal powers and procedures to ensure that the tribunals they created could carry out their mandates effectively and fairly.
- The wide variation in tribunal powers and procedures has not been regarded as evidence of the sort of principled diversity that is often spoken about and encouraged among administrative tribunals. It has instead been regarded as diversity of a more inexplicable variety. This "inexplicable" diversity has been seen as giving rise to these undesirable consequences:
    - ♦ Members of the public who are required to interact with tribunals, often do not know what procedure will be followed by the tribunal or by a particular tribunal panel: The

149 *Ibid*, Recommendations for Reform, p. 8 of 25.

citizen's uncertainty about tribunal procedure can be the product of two factors. First, the tribunal itself may not have given appropriate strategic thought to the question of process. This can result in *ad hoc* procedure, which in turn increases risks of excessive formalism on one hand, and the denial of the basic procedural rights on the other. Alternatively, tribunal procedure may indeed be well established, but may exist as "secret law" that is not communicated to users. In either case, the lack of certainty can create, for the user, undue complication, expense, disadvantage and even an appearance of arbitrariness.

- Tribunals are often not given the powers they need to function effectively and creatively*:* Where those involved in legislative design do not turn their minds to all alternatives for tribunal design, or rely on inappropriate precedents, there is a serious risk that important tribunal powers designed to enhance efficiency and effectiveness will be omitted, or poorly drafted, and that the tribunal's functioning will be impaired.

- Uncertainty can lead to litigation: Ambiguity about powers and procedures tends to encourage litigation about "jurisdiction" and "rights". This gives rise to expense, distracts the tribunal from its immediate purpose, and results in judicial definitions of the proper balance between rights and effective administration that may or may not reflect the legislative will.

Statutory procedures

- The law reform exercises of the 1950s and 1960s tended to emphasize the need for statutory *procedural* rights designed to protect the citizen from the potential abuse of administrative power. Legislation was regarded as providing protection not provided by the common law of the day, as well as a strong measure of visibility and certainty for the public and tribunals alike.

- Some critics have objected to legislating procedural rights – particularly in the form of "codes of procedure" – on the basis that legislating procedure tends to produce excessive formality and a court-like atmosphere. Proponents of such legislation argue just the opposite: that legislation can be drafted in a fashion that avoids excessive formality while ensuring the necessary structure which accords with basic principles of justice and fairness. This debate has, from time to time, given rise to what the BC Law Reform

Commission described as "an almost ideological conflict involving the relative merits of procedural justice and effective government…."[150]

- From a practical perspective, none of the early reform efforts – and none since – has favoured a single, uniform and comprehensive code of procedures applicable to all tribunals. The real debate has been about whether, as has been accepted in Alberta, Ontario and Quebec, enough tribunals have enough in common to justify legislating certain minimum principles, or whether, as in England, legislative reform should take place solely on a tribunal by tribunal basis.
- A number of methods have been proposed for achieving procedural rules that are properly tailored to the individual needs of tribunals. Some recommend that the rules be made by the tribunals themselves. Others add the gloss of requiring ministerial approval for tribunal rules. Yet others strongly endorse the use of a body that is neither government nor tribunal, to make (or at least to approve) the rules.[151]

Statutory powers

- While earlier law reform exercises tended to focus on "procedures" and "rights", law reform thinking over the past 10 years has devoted much more attention to the need for flexibility and effectiveness in the exercise of statutory powers.
- Over the past decade, an enormous amount of innovative writing and thinking has been done to help identify and articulate statutory powers in a fashion designed to assist tribunals in carrying out their mandates more effectively, efficiently, creatively and with greater jurisdictional clarity. The majority of this work is directed to the "trenches" of daily tribunal operations.
- The extensive work done elsewhere makes it unnecessary to engage in a detailed discussion in this paper of every possible statutory power that might apply to the administrative tribunals that are part of the Administrative Justice Project. The Ontario *SPPA* and the English Council on Tribunals' *Illustrative Basic Rules*, both of which can be

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150 Law Reform Commission of British Columbia, *Report on Civil Rights, Procedure Before Statutory Agencies* (1974), p. 36.

151 Mullan, "Common and Divergent Elements of Practices of the Various Tribunals: An Overview of Present and Possible Future Developments" (1992), Law Society of Upper Canada Special Lectures 461 at pp. 479-80.

easily accessed on the World Wide Web[152], provide useful sources of the most current thinking on this subject. To go further in this paper would run contrary to the theme expressed in all thirteen reports discussed in this paper: detailed design work can only be done on a tribunal by tribunal basis.

- Most recent thinking has identified the following content areas as being relevant to both "appellate tribunals" and "party-party" tribunals. The first four bullets address critical case management and tribunal management powers that are often omitted or inadequately addressed in individual statutes:

  - Pre-Hearing Powers and Procedures: acknowledgements and notifications, dismissal without hearing, consent orders, and pre-hearing conferences, including proactive use of staff and members. This includes giving users as much advice and support as possible to help them understand the tribunal and its procedures.

  - Consensual dispute resolution: authority to engage in ADR practices, to issue tribunal orders giving effect to consensual agreements, to engage in ADR at any point in the proceedings, to protect confidentiality of statements and materials in ADR proceedings.

  - Hearing Powers: authority to adopt general rules of procedure, to grant standing, issue notice of hearing, to set hearing panels, to close hearings in exceptional cases, to proceed in writing or in person, to grant adjournments, not to be fettered by rules of evidence except where this would cause significant unfairness, and to compel witness and documents. Panel chair is responsible for the conduct of the hearing, the rules about wider consultation as set out in *Consolidated-Bathurst* are codified and members are authorized to complete ongoing work after expiry of a term.

  - Miscellaneous Powers: subjects include contempt, costs, extending time, stating a case to the court, *ex parte* decisions, tribunal publication of rules of procedure, process for addressing bias allegations, status of the chair as chief executive officer for the tribunal.

  - Decision and Reasons: interim decisions, time limits for decisions, written reasons, publication of reasons, majority decision, reconsideration and correction of errors.

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152 The Council on Tribunal's Model Rules are available at: www.Council-on-tribunals.gov.uk/specialreports/modelrules.htm; the Ontario *SPPA* is available at http://192.75.156.68/DBLaws/Statutes/English/90s22_e.htm.

- Except perhaps on the appointments question[153], there has been very little controversy attending the question whether tribunal design ought to take these considerations into account. The real debate – which is addressed in the "Options" discussion – has centred on *how* this might best be achieved.

5 OPTIONS

The preceding discussion gives rise to a number of options regarding whether or how law reform with respect to statutory powers and procedures would enable administrative tribunals to serve the public more effectively. As will be apparent from the discussion that follows, some options have a number of elements.

Rather than identify every possible combination of elements that might be regarded as an "option", this paper has sought to identify five primary alternatives. Individuals commenting on the paper are of course invited to specify their preferred mix of elements, and provide any other comment that will ensure different perspectives and interests are properly advanced in this discussion.

Consistent with the purpose of this paper, the author has striven to avoid recommending any particular option. This said, it is recognized that – strive as one might to avoid it – the author's own views may, from time to time, creep into the manner in which alternatives are described or discussed. The author can only provide the reader with the assurance that he has done his best to ensure that the discussion is broad, reasonable and helpful.

Option 1: Status quo

The first option is to preserve the status quo, whereby tribunal powers and procedures are defined according to a mix of legislation and common law, with any needed reform being taken up by government and tribunals directly. Five arguments may be made in favour of this approach:

- From a "procedures" standpoint, the status quo prevents the imposition of undue uniformity on administrative tribunals. The modern common law regarding procedural fairness is sufficiently broad and flexible that it is unnecessary to legislate additional procedures – particularly not uniform minimum procedures – for administrative tribunals. If tribunals wish to issue procedural guidelines, the common law already provides them

[153] *Ibid*, at p. 465.

with the authority to do so, provided they meet common law "fairness" standards and do not fetter their discretion.[154]

- As argued by Willis, legislating procedures will tend to formalize tribunal proceedings.
- To the extent that there are any deficiencies in a tribunal's enabling legislation regarding powers and procedures, gaps in that legislation can be taken up directly between tribunals and host ministries. With the benefit of the checklists of powers and procedures drawn from the excellent law reform work done elsewhere, tribunals and their host ministries can make a commitment to sit down and identify what legislative changes are needed on a case by case basis.
- The focus on statutory powers and procedures may divert necessary attention away from issues relating to the appointment, remuneration, support, training and independence of tribunal members, all of which are, in the end, much more important to the day-to-day operations of tribunals than "powers" and "procedures".
- A number of jurisdictions have not acted upon recommendations favouring more systemic reform. This may reasonably imply that a number of other governments have concluded either that there is no real problem that warrants legislative attention, or that the problems of tribunals encountering serious difficulties can adequately be addressed on a case by case basis.

The arguments against the above approach may be summarized as follows:

- Legislators should not abdicate to courts the responsibility to address the core aspects of the balance between procedural justice and effective government. Nor should they underestimate the benefits provided to users and tribunals by a visible and consistent statement of legislative principles relevant to procedural justice. While the common law does authorize tribunals to provide procedural guidance, the practical fact is that many do not do so, or do not do so in a fashion that reflects either transparency or an awareness of procedural creativity and efficiency.
- It is not accurate to equate legislation with formalism. Fairness is not formalism. In addition, the very purpose of legislation may be to restrict common law rules of procedural fairness that are considered inappropriately formal. Legislation may be drafted precisely in order to enable flexible procedures that afford a person an

[154] Brown and Evans, Judicial Review of Administrative Action in Canada (2001), pp. 9-94 – 9-95.

opportunity to be heard while still encouraging informal and efficient methods of dispute resolution and hearing procedure.

- It may be unrealistic to suggest that host ministries will promptly or adequately respond to tribunal requests for legislative change to their statutory powers. In the absence of larger and ongoing political commitment to address this subject, *ad hoc* calls for reform by individual tribunals are likely to receive low priority on busy legislative agendas. Moreover, requiring tribunals to approach government on bended knee for *ad hoc* changes places tribunals in an awkward position, particularly when the discussion includes issues that will have arises from cases where the host ministry was a party and has taken a position on the question before the tribunal, or in court. Moreover, this option does not address how statutory powers and procedures are developed for proposed new administrative tribunals .
- The importance of appointments is not an argument against reform of statutory powers and procedures. Whatever reforms government ultimately makes regarding appointments, appointees should have the best legislative tools with which to work.
- It is true that, in some jurisdictions, there has been a lack of legislative response to proposals for legislative action. While this may be evidence that there is no real problem in those jurisdictions, it may be more accurate to conclude that there is a problem, but that there has been no political commitment to address it.

Option 2: Reform tribunals on a case-by-case basis but create a specialized advisory body at arm's length from both tribunals and government to assist in the exercise

The Franks Report embraced the notion of legislative reform to tribunal powers and procedures, but rejected the idea of a minimum statutory procedural code, which had been adopted federally in the United States in 1946. The Franks Report stated that "[we] prefer that the detailed procedure for each type of tribunal should be designed to meet its particular circumstances." For Franks – and for the English ever since – the solution was to establish a specialized body at arm's length from both tribunals and government in order to assist in the exercise. Franks described it as a "Council on Tribunals", and Parliament gave it legal life in 1958. Along with its other roles regarding the appointments process and reporting on the functioning of the tribunal system, the Council would play a key role supporting the executive in the drafting of regulations, and supporting tribunals in the creation of individual rules of practice.

In 2001, the Leggatt Report endorsed the Council on Tribunals, but recommended that the Council's role be formally expanded to require formal consultation on draft statutes as well as regulations. Leggatt also recommended that the Council's advice regarding such legislation be publicly disclosed when bills are given first reading in Parliament. Leggatt's recommendations for an increased Council profile undoubtedly stem from the sorts of concerns outlined by the authors of de Smith, *Judicial Review of Administrative Action*:

> *Its effectiveness is impaired by widespread ignorance of its very existence, its absence of legal powers of investigating and execution, its part-time membership, small staff, very limited budget and lack of any political power base…*
>
> *The Council has sought to raise its research profile and publicize research being conducted by academics and others in the area of administrative justice, but it lacks the wide-ranging statutory brief and proactive stance adopted by bodies such as the Administrative Review Council of Australia and of the Administrative Conference of the United States. It also does not have the advantage of knowing that Government is under a duty to take a "hard look" at its proposals.*[155]

A number of points may be made in support of the English model as reformed in accordance with the Leggatt proposal:

- A standing body serves the public much more effectively than any temporary "inquiry" which merely reports once and then dissolves.
- As a standing body, a Council on Tribunals can be assigned other important "systemic" roles, such as those related to appointments, training and the provision of annual reports regarding the quality of public service provided by the administrative tribunal system.
- The English model encourages legislative reform, but takes a more cautious approach minimizing the risks that may attend "uniform" legislation.
- The English model does not remove from government departments the ultimate right to make policy decisions regarding procedural legislation and rules; it is instead intended to act as a helpful, ongoing and arm's length resource to government to help ensure strategic thinking and informed design.
- Importantly, the English Council on Tribunals also acts at arm's length from tribunals, thus ensuring that agency self-interest does not impede the development of even-handed and responsive procedures.

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155 de Smith et al, *Judicial Review of Administrative Action* (5th ed, 1995), p. 60.

- The English Council on Tribunals is credible because its membership is drawn from different constituencies.
- Finally, the strength of the English model is reinforced by the fact that it has lasted for over 30 years and has inspired similar recommendations in other jurisdictions, such as Ontario, Quebec and New Brunswick.

Three different types of arguments may be made against the English model.

- It may be argued that England's rejection of uniform "minimum" powers and procedures legislation is too cautious, often leading to duplication and "reinventing the wheel" in the drafting of tribunal legislation and regulations.
- Government departments or tribunals do not require any "arm's length" body to advise on statutory powers and procedures. If reform is needed, it should either be a matter between government and tribunals, or it should be addressed as in the Ontario *SPPA,* which confers rule-making authority upon tribunals themselves.
- Others may oppose the English model from the other direction – that a Council is necessary, but that the English Council, even with the Leggatt recommendations, would have no "teeth": it contains no means to ensure either that reform will be initiated, or that when it is, government will listen to its advice. While the English Council has had meaningful influence within the political and civil service culture in England, there is no guarantee that a similar body would have the same success in British Columbia.

Option 3: Develop a *Statutory Powers and Procedures Act*. Make decisions about individual tribunal powers and procedures by (a) a specialized "rules committee", (b) tribunals alone, or (c) tribunals, with final approval by a minister or advice by an external body

The third option is to enact a statutory powers and procedure statute. This option has been the almost universal choice of Canadian law reform bodies, which have differed only on the proposed method of implementation.

Some have referred to such legislation as a "code". This may be something of a misnomer, since a "code" (such as the federal *Criminal Code* or a *Personal Property Security Act*) implies comprehensive, detailed and directive legislation. It may be more accurate to describe statutes such as the modern Ontario *SPPA* and the Quebec *Administrative Justice Act* as "minimum procedures and flexible powers" statutes. Even the Alberta Law Reform Institute's suggestion is something less than a "code", given its "opt-in" implementation approach.

Objections to statutes such as the Ontario *SPPA* and the Quebec *Administrative Justice Act* fall into three general categories:

- The first category of arguments is summarized above under Option 1. These arguments, which draw their inspiration primarily from Willis, oppose systematic legislative reform. They assert that the common law provides appropriate procedural protection for the citizen, that minimum procedures legislation inevitably results in undue formality by administrative tribunals and that deficiencies in tribunal powers can be addressed on an *ad hoc* basis, as the need arises.

- A second set of arguments focuses on the complications inherent in enacting uniform legislation that seeks to be sensitive to the diverse needs of administrative tribunals. The concern here has been summarized by David Mullan as follows:

> *…as exemplified by all three Canadian statutes, one way to respond to these concerns is to realize that it will be impossible to draft a statute that can apply to all forms of statutory decision-making. Choices in the range of the statute's application will have to be made either, in the Alberta way, by leaving its application to executive designation, or in the Ontario and Quebec manner, by use of a formula, which brings within the range of the statute principally individualized decision-making of a final character affecting significant interests of citizens. However, as the sheer quantity of legislative exemptions from the Ontario Act may illustrate, even the most careful honing of the Act's application may amount to insufficient fine-tuning.*[156]

- A third set of arguments objects to noticeable omissions from such legislation. As also noted by Mullan:

> *The notion of commitment to the delivery of administrative justice also raises the controversial issue of one of the most obvious gaps in the three Acts: the absence of any provisions about independence and the appointment and performance of members of tribunals.*[157]

The arguments in favour of statutory powers and procedures legislation may be summarized as follows:

- From a "procedures" standpoint, these statutes seek only to ensure that tribunals accord the citizen minimum procedural safeguards, including adequate notice, the ability to be represented, and the right to call evidence, question other witnesses and receive a decision with reasons. Law reform bodies have been virtually unanimous in concluding that (a) one need not formalize tribunal proceedings in order to ensure that basic

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156 Mullan, *Administrative Law* (2001), ch. 11E, p. 1 (Q.L.).

157 Ibid.

principles of common sense, justice and fairness are protected in tribunal proceedings, (b) these principles apply to enough tribunals to justify a procedures statute, and (c) there is merit in legislating such protections rather than relying on the common law since they are visible and encourage principled rule-making by or for tribunals. As noted by Mullan:

> *[S]tatutes such as the SPPA do have the merit of both providing legislative drafters with a checklist and forcing specific attention to be paid to what items on that list should or should not be applicable to a new or revised "statutory power of decision" with an individual rights or interest focus. The penalty for not addressing that question deliberately is, of course, the overriding effect of the SPPA's entitlements.*

- Even with respect to "minimum" procedures, the Ontario and Quebec statutes recognize the need for flexibility. For example, the Ontario *SPPA* recognizes a party's right to call witnesses, present evidence and cross-examine, but confers discretion on the tribunal to determine the mode of hearing (oral, written, electronic) and provides that cross-examination is limited to that which is "reasonably required for a full and fair disclosure of all matters relevant to the issues in the proceeding".[158] The Quebec statute goes even further in its effort to encourage flexibility, as reflected in s. 4 of the *Administrative Justice Act* which might easily be adapted to the tribunals included in this review[159]:

> 4. The Administration shall take appropriate measures to ensure:
>
> (1) that procedures are conducted in accordance with legislative and administrative norms or standards and with other applicable rules of law, according to simple and flexible rules devoid of formalism, with respect, prudence and promptness, in accordance with norms and standards of ethics and discipline governing its agents and with the requirements of good faith;
>
> (2) that the citizen is given the opportunity to provide any information useful for the making of the decision and, where necessary, to complete his file;
>
> (3) that decisions are made with diligence, are communicated to the person concerned in clear and concise terms and contain the information required to enable the person to communicate with the Administration;
>
> (4) that the directives governing agents charged with making a decision are in keeping with the principles and obligations under this chapter and are available for consultation by the citizen.

- Mullan has noted that while some may question "the impact or utility of provisions such as the Quebec statute's statement of administrative standards … such powerful

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158 *SPPA*, s. 10.1(b).

159 The Quebec *Administrative Justice Act*'s definition of "the Administration" would, on its face, appear to capture many tribunals included in Schedule 1 of the AJP Terms of Reference. The *Administrative Justice Act*'s emphasis on procedural flexibility and principle is also reflected in its treatment of "adjudicative" decisions: ss. 9-13.

statements, when backed up by a general political and administrative process commitment to those values, might well be difficult to quantify but overall have an advantageous impact on the functioning of the system of administrative justice."[160]

- The vast majority of law reform thinking over the past 10 years has been dedicated to the question of how to identify and frame statutory powers in a fashion that accords maximum clarity and flexibility to administrative tribunals. Significantly, the literature discloses virtually no objection to the notion of a statute creating a uniform menu of powers from which tribunals or others can select in carrying out their functions. Such powers (a) provide administrative tribunals with opportunities for greater flexibility, active case management and effective dispute resolution; (b) encourage the development of well-considered and transparent tribunal rules and procedures; and (c) limit jurisdictional wrangling both at the tribunal, and in court.

All this raises an interesting point. It is not written in stone that statutory powers and procedures must be legislated together. Since the primary debate regarding "uniform" legislation has revolved around its "procedural rights" component, even a jurisdiction that is cautious about legislating "minimum procedures" may wish to proceed with "statutory powers" legislation. Nor is there anything preventing such a statute from addressing matters such as appointments, independence and training.

For most law reform bodies that have examined this question over the past decade, the question has not been whether such legislation should exist, but rather how it is implemented. Two key implementation questions arise. The first is whether the statute ought to apply on a "tribunal by tribunal" basis, as in Alberta, or whether it ought to apply "definitionally", as is the case in Ontario and Quebec. The result in practice may not be very different, since on either approach, each administrative tribunal will have to be examined to determine the extent to which the model provisions should apply.

The second and more important question is how the fundamental object of the exercise – the establishment of visible and properly tailored *individual* tribunal rules and procedures – will be achieved. None of the law reform reports that have examined this question since the Second

[160] Mullan, *Administrative Law* (2001), ch. 11E, p. 1 (Q.L.).

World War have proposed leaving this to government departments alone. Instead, three approaches have been recommended:

- create a Rules Committee with decision-making power (the McRuer approach, also recommended for New Brunswick);
- confer rule-making authority on the tribunals themselves (the present Ontario and Quebec approaches and the approaches recommended by the Federal Department of Justice and the Nova Scotia Law Reform Commission);
- have tribunals play a primary rule-making role, subject to approval by a minister (Alberta Law Reform Institute approach) or advice by an external body, called an Administrative Justice Council (the Quebec approach).

The policy question inherent in these options is whether tribunals ought to have rule-making autonomy, whether government ought to have the "last word" or whether the rule-making function is better exercised with the involvement of an agency that is independent of both government and tribunals.

David Mullan has, on more than one occasion, promoted the latter model. In 1992 and 2001 respectively, Mullan wrote as follows:

> *The possibilities of the [SPPA] have not been fulfilled largely because of the virtual disappearance of the Statutory Powers Procedure Rules Committee…. [That] Committee should be the cornerstone of any such amendment with the assurance of individualized attention to the particular demands of specific processes that a fully operational body such as that will bring with it…. Properly conceived and implemented, such a process is one in which the nature of the Committee would one of cooperative enterprise with and support of administrative tribunals … not that of unwanted and irritating interloper in matters where the tribunal knows best. Indeed, the very considerable efforts … of tribunal members across the country over the past few years to achieve improved status, continuing education, a sharing of experience, and a high level of professionalism makes it clear that such a body would be welcomed as long overdue.*[161]
>
> *It is, however, unfortunate that, for what were probably budgetary considerations, the 1994 amendments [to the SPPA] finally disbanded the moribund Statutory Powers Procedure Rules Committee. Under the 1971 Act, this Committee ostensibly had responsibility for superintending the procedural rules of all administrative tribunals and agencies across the province, whether subject to the special procedural provisions of the SPPA or not. Such checks are important in ensuring that agency self-interest does not impede the development of procedures that are responsive to constituency needs and the even-handed dispensing of administrative justice…. It is also disappointing that*

[161] Mullan, "Common and Divergent Elements of Practices of the Various Tribunals: An Overview of Present and Possible Future Developments" (1992), Law Society of Upper Canada Special Lectures 461 at pp. 479-80.

> *consideration was not given to mandatory notice and comment rule-making as a possible substitute for the existence of such a superintending role.*[162]

The modern Ontario approach, on the other hand, has been to accept tribunal rule-making autonomy. This model implicitly recognizes that tribunals already enjoy common law autonomy to create procedural guidelines, and that the procedural safeguards both in the *SPPA* and at common law operate as a safeguard to ensure that "agency self-interest" does not dictate outcomes. It recognizes that tribunals are professional organizations that also enjoy the benefits of provincial and national associations. Thus, not only does the Ontario legislation accept agency rule-making autonomy, it encourages such autonomy by providing that certain of the more innovative case-management provisions of the *SPPA* can only be exercised if the tribunal has made individual rules.

The third approach is the one suggested by the Alberta Law Reform Institute. Under the institute's approach, tribunals would be required to make procedural rules, but these rules would have to be approved by a minister such as (in Alberta) the Minister of Justice. For the institute, this approach excludes the need for any external body to be involved, and also balances tribunal input with political responsibility.

The Quebec approach is a hybrid of the latter two approaches: Tribunals have rule-making power, but in exercising those powers they receive "advice" from the Administrative Justice Council.[163]

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

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162 Mullan, *Administrative Law* (2001), ch. 11E, p. 2 (Q.L.).

163 *Administrative Justice Act*, R.S.Q., c. J-3, s. 177(1).

Option 4: Grant rule-making powers to tribunals with no additional legislative reform

The final option considered in this paper is to enact a simple amendment granting rule-making authority to administrative tribunals, without any additional reforms relating to statutory powers and procedures. Provisions of this sort presently exist in some British Columbia enactments. See for example section 44 of *Medicare Protection Act*[164] which establishes the Medical and Health Care Services Appeal Board:

> 44 (1) The board may make rules governing practice and procedure for all appeals before the board
>
> (2) The rules may be different for appeals by beneficiaries and practitioners and in respect of diagnostic facilities.
>
> (3) A copy of the rules must be made available to any person who appeals.

Simple provisions such as these may be said to have certain benefits. First, they allow tribunals to establish firm rules of practice, which rules might otherwise be seen as a "fettering of discretion" at common law. Second, they shift the responsibility for making such rules away from the Lieutenant Governor in Council (where they usually reside) to the agency that knows most about the tribunal's needs: the tribunal itself. Third, authority to make rules related to "practice and procedure" provides wide scope for flexible and creative rules that tribunals can draft to accommodate their individual needs. Finally, if a rule change is required, tribunal rule-making allows it to take place efficiently, and without the delay that often attends requests to a busy Cabinet.

There are a number of potential disadvantages if reform is confined to a simple rule-making power.

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

Moreover, the very point of many of the law reform studies to date has been that the common law ability to establish procedural guidelines has often been exercised incompletely, inappropriately and inconsistently. Part-time boards may not have the same capacity to engage in this exercise

as full-time boards. Furthermore, it is possible that agency self-interest may come into play, particularly with respect to full-time boards. McRuer addressed this latter point by recommending a rules committee. In Quebec, tribunals make the rules, but the rules are monitored by the Administrative Review Council. The present Ontario approach gives tribunals rule-making autonomy, but provides a statutory safeguard which at least requires rules to be made before certain powers are exercised.

6 CONCLUSION

This paper has sought to achieve three main objectives.

The first has been to provide the reader with a meaningful overview of the significant amount of legislative and law reform thinking that has attended the question of statutory powers and procedures. That issue has not been examined in any comprehensive way in this province since the BC Law Reform Commission undertook the challenge 27 years ago.

The second goal has been to reinforce the importance of making decisions about "statutory powers and procedures" as part of any systematic inquiry into the reform of the administrative justice system. In that context, this paper seeks to acquaint the reader with the key issues, tensions and themes that have arisen.

The final and overarching objective has of course been to encourage meaningful discussion about whether, as suggested in the opening quotation to this paper, "a gram of legislative prophylaxis" may be found which not only protects against "a kilogram of prerogative writs", but also allows administrative tribunals to undertake their public service functions in a necessarily diverse but truly principled fashion.

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[164] *Medicare Protection Act*, R.S.B.C. 1996, c. 286.