CHAPTER SIX

Guidelines for Administrative Procedure

As stated in the Foreword, the present mandate of the Law Reform Commission in the administrative law area is to study "the broader problems associated with procedures before administrative tribunals". But along with studying broader problems it is important not to lose sight of issues respecting, and values associated with, the choice and implementation of administrative procedures themselves. Procedures should be concerned with fairness, effectiveness, efficiency, principled decision-making, authoritativeness, comprehensibility and openness.

Although administrative law, in its broadest sense, includes the total juridical context within which administrative authorities operate, administrative procedure falls under the branch of administrative law which covers the body of rules governing the administrative process. As mentioned in Chapter Two, the administrative process comprises activities undertaken by administrative authorities leading to decisions or other normative acts of public administration from which direct effects on legal interests of persons are derived.

Administrative procedure concerns the manner in which the authorities carry out their functions at various stages of the administrative process, from its initiation to the time when

administrative decisions or other official acts acquire definitive status.[152]

It is difficult to generalize about existing procedures in the Canadian federal administrative process. They vary extensively from agency to agency and do not receive much attention under many enabling Acts or regulations. There is no code of rules or central body of guidelines, nor even an Administrative Procedure Act with skeletal rules to be incorporated by reference to specific types of functions, powers or procedures imposed on particular agencies by their enabling legislation.

The principles of natural justice and, more recently, the broader duty to act fairly have been developed through case law by the courts.[153] They have applied a presumption as to interpretation of legislative intent concerning statutory authorities that, barring express declaration to that effect, Parliament does not intend that administrative proceedings should be left to an authority's arbitrary or capricious designs.

There is at present no permanent corps of specialists who might offer advice as to which rules of procedure would be most appropriate for various agencies. The wide and inexplicable variation in statutory provisions concerning the powers and procedures of agencies carrying out similar functions has already been noted in Chapter Three to support the contention that more systematic planning and coordination is needed at the earliest stages of the legislative process.

A particular enabling Act will, it is true, sometimes spell out certain procedural requirements for an agency. It is not unusual to find stipulations for notice and hearing, as well as general directions respecting what an agency can consider as evidence. More detailed procedures are sometimes set out in regulations made by the Governor in Council, the responsible Minister or even the agency itself.

It seems fair to say, however, that most agencies have considerable discretion to determine the procedures they employ. Some have highly detailed rules; others have rules

which are sparse and general in nature. In some cases there are no formal rules of procedure at all, although the agency will probably have well-understood informal practices and may create new ones on the spot to deal with problems as they emerge. In other cases a single legislative authority will be exercised under differing procedures, especially where, as in the case of umpires under the *Unemployment Insurance Act*,[154] different judges are designated to act as tribunals without being bound by specified uniform rules.

Agencies often shape their procedures with an eye to the body of judge-made law. The Anti-dumping Tribunal and the Immigration Appeal Board have both changed certain procedures in response to decisions by the courts.[155] If it is believed that there has been undesirable judicial interference with the administrative process of a particular agency, corrective legislation can be enacted.

In terms of sources of principles of administrative procedure according to which administrative authorities really act, internal rules developed through policy statements, guidelines, circulars, administrative manuals, directives and so forth, are, of course, of great importance. Unfortunately, many such rules are not presently brought to the attention of the public and exist as "secret law", rightly condemned by Kenneth Culp Davis.[156] Administrative practices may also be of significance in developing models of procedure. However, these differ from time to time and place to place, and often lack the articulation which one associates even with the "law" internal to an administrative authority.

A. Administrative Hearings — Degree of Participation Required

Claims for a fair and open administrative process almost invariably focus on the importance of hearings. Hearings provide for a direct exchange between an administrative authority

and interested persons. Courts have held that certain decisions can be taken only after notice and a hearing, and a number of standard tests have emerged to assess the adequacy of these.

With respect to notice, we recommend that:

6.1 *parties to any proceedings should be given reasonable notice of a hearing by the administrative authority responsible, and informed of the nature of the proceedings, the time and place of hearing, and the issues to be raised.*

Broad problems concerning notice and consultation have already been treated in Chapter Five in the context of public participation and rule-making.

With respect to hearings, it is always relevant to question the extent to which a person is entitled to participate. The degree of control left to participants in the introduction and interpretation of information to be taken into account in a particular case can be of critical importance in its effect on any final decision, and in the impression left on participants or observers as to whether proceedings have been conducted in a proper manner.

Among the particular questions often raised regarding the degree to which an agency should allow participation by applicants or other interested persons in the hearing process are the following: Is there to be a hearing with interested persons present, or merely a consideration by the agency of written submissions? If there is to be a hearing with some party participation, is it to be public or *in camera*? Is representation of a participant by counsel or other agent to be allowed? Does a participant have a right not only to be heard, but to call evidence, produce documents and make representations? Should a participant be given the further opportunity to cross-examine and perhaps re-examine witnesses? Responses to these questions depend on such factors as the purpose of the particular hearing, the interests at stake, and the benefits accrued through the use of particular procedures as against the costs incurred in terms of such diverse values as efficiency and fairness.

B. Treatment of Evidence

Collateral questions can arise about the degree of control agency decision-makers should exert over the treatment of evidence in administrative proceedings. How much importance should the record of a hearing assume in the totality of a given administrative proceeding? In many types of hearings, it might be appropriate as well as convenient for agency panels to take official notice of many facts, not put on the record.

In other proceedings, an agency might need to take into account evidence which, if made public, would either undermine the operations of the agency or irreparably and unfairly damage the interests of some participant or third party. Evidence obtained from inspectors' reports would be of great utility to the Canada Labour Relations Board in carrying out its functions, but public release of such information would undermine the union certification process.[157] Evidence regarding commercial or industrial operations of importers or Canadian manufacturers is of great importance to the Anti-dumping Tribunal, but unless such evidence can be kept confidential, business competitors of the firms providing it might gain an unfair competitive advantage from its release.[158] The National Parole Board might wish to depend on information from counsellors, prison employees, fellow prisoners, spouses or other relations or acquaintances of prisoners up for parole, but a release of such information to the potential parolee or the public might have very detrimental results.[159] The balancing of interests between disclosure of information and confidentiality in administrative proceedings is considered further in the study paper on *Access to Information*.[160]

It should also be realized that from the agency's point of view the contribution made by even key participants in a hearing can be quite minor in certain types of proceedings. For example, the participation of a prisoner at an initial parole hearing before the National Parole Board might serve simply as a check on a miscarriage of justice in the odd case where the Board received misinformation in documents or in

personal assessments.[161] For most types of administrative proceedings, definitive solutions have not been agreed upon concerning the degree of participant involvement in the process, or the degree of control by a decision-maker over the information it considers.

C. The Purposes Hearings Serve

Our administrative law jurisprudence with respect to notice and hearing has primarily developed in relation to adjudication, and to a great extent these requirements have been viewed from the perspective of fairness. But as already noted in Chapter Five, the concepts of notice and hearing must be viewed from a wider perspective. They are important to broad policy-making functions as well, where there may be less concern about fairness than about offering sufficient scope to allow someone to participate effectively in the information gathering and policy-making functions an agency is attempting to perform.

There are two main purposes for a hearing which hold true of agency activities ranging all the way from general policy-making to adjudicating individual cases. First, a hearing allows interested people to make representations in an attempt to persuade the agency to render a favourable decision. Second, it helps members of the agency to appreciate and judge the case being made, taking into account all the facts and arguments of the persons who appear along with legal standards and policy imperatives.

D. When Should Hearings Be Held?

Whether one approaches notice and hearing from the standpoint of fairness or from a more functional standpoint, there are serious problems to be considered. When should an

agency decide to hold a hearing? Should it be a full hearing or be subject to restrictions? What restrictions are appropriate?

Generally the courts have determined that the closer administrative proceedings come to deciding questions involving initial restraints on liberty, confiscation of property rights, or the imposition of other significant sanctions, the stricter should be the procedural guarantees of fairness. We are in accord with this position, and recommend that:

> 6.2 *hearings with the full panoply of traditional legal procedural safeguards, including the right of parties to call and examine witnesses and present their arguments and submissions, the conducting of cross-examination of witnesses, and the making of decisions based on the hearings record, should be used by agencies when dealing with issues of this kind.*

The use of procedural safeguards should not be denied through resorting to potentially shallow conceptual dichotomies such as "administrative/judicial", "recommendation/final decision", or "privilege/right", which obfuscate the fact that basic interests are at stake.

Public hearings are presently employed by a number of agencies we have studied. The National Energy Board, the Canadian Transport Commission and the Canadian Radio-television and Telecommunications Commission, in particular, have extensive experience with hearings, although it would be wrong to convey the impression that agencies do, or could, use public hearings as a standard way of dealing with the many decisions they must make in the run of a year. The Air Transport Committee of the C.T.C., for example, averaged only nine public hearings per year from 1967 through 1974,[162] despite the fact that it deals with hundreds of licence applications annually. The vast number of files this agency is required to process has made it selective about those handled through public hearings.

For those functions in connection with which agencies are not obliged by statute to conduct hearings, hearings should be held selectively. Many decisions have to be taken quickly, and

hearing procedures could destroy the efficacy sought to be gained by reposing discretionary decision-making powers in administrative officials. As well, most agencies find that they are expected to perform more and more functions on proportionately decreasing budgets. They are subjected to complaints about delay, not only from businesses which are dependent on agency decisions, but from a general public demanding services directly affected by an agency. Indiscriminate proliferation of hearings could result in delay becoming the by-word of the administrative process in Canada. Agencies should proceed by negotiation where appropriate, and even rely in some cases on panels of decision-makers including representatives of competing interests. Only in a minority of cases can they resort to hearings for deciding matters.

Hearings are only one mode of increasing an agency's information base. Agencies must often rely on inspection and investigation to secure information. Numerous agencies need to engage in research and analysis. Agencies should engage experts like economists and other social scientists to inform them of the economic and social dimensions of problems, and employ staff to carry out fact-finding and analytical functions. Sometimes they should adopt market research and other effective techniques developed and used in the private sector.

E. Shaping Procedure: Minimizing Costs of Participation

Even in the minority of cases in which a public hearing is held, a dilemma is presented. On the one hand, we recognize the value of open decision-making, accessible to people and groups having legitimate interests. We see value in increased participation, not only from the standpoint of fairness and the integrity of the process, but in terms of better decisions. And yet we have serious doubts about the capacity of the process to handle the increased load. At the very least, then, it is

necessary to consider the extent to which agencies should actively solicit participation in their hearing processes, and the extent to which the hearing process may be modified to accommodate a broader range of participation.

In Chapter Five we stated that agencies should be encouraged to ensure that a comprehensive range of interests and values are taken into account before decisions having a significant policy content are taken. One of the consequences of taking this approach to administering an economic or social activity will be an increase in the "delay factor". How can a concerted "interest representation" approach be taken, where vast numbers of people might be interested in an issue, while at the same time getting on with the job in an efficient manner?

To the extent that hearings are opened up to broad participation, there may be a diminution of the quality of participation by those who obtain access. An agency which has traditionally made decisions after a formal hearing, with the trappings of a judicial trial, may find that it simply cannot handle increased participation in that way. If there are twenty intervenors on a rate application, each representing different interests, it may be totally impractical to entertain cross-examination as an element of the procedure. Some may regard this as a serious price to pay. As a technique, cross-examination has proved extremely useful for shaping issues, for exposing inconsistencies and vagueness, and generally for getting at the truth of a situation. But at the very least it may be necessary in many administrative hearings to curtail severely rights such as cross-examination with respect to certain classes of participants. It may be less unfair, for example, to deprive an intervenor of this right than a licence applicant, although this kind of judgment is never easily made. Of course, other techniques than cross-examination can be used effectively to allow for confrontation of different interest positions. For example, the CRTC in broadcast licensing proceedings has given interested persons the opportunity to make presentations and counterpresentations with an added opportunity for rebuttals, without allowing for cross-examination.

Perhaps it is necessary to start thinking in terms of trade-offs. Do we want more participation, but at a reduced level? More participation, but longer delays? Stabilized costs but less participation? Do we subsidize increased participation, but pass on the costs through regulated companies to their consumers or by taxation to a more general public? These are significant and difficult questions. The need to make such choices may be postponed, however, to the extent that we can identify rational adjustments to compensate for increasing requirements of participation.

On a general level, an effective response to the question of how to conduct hearings might be to build flexibility into the process, to allow different hearing procedures for different functions. It is important to determine which functions are best handled judicially, and which in some other way. If judicialization is largely incompatible with increased participation, then perhaps the need for it can be reduced by reassessing what procedures might be best for different functions, and then making appropriate adjustments.

The Canadian Radio-television and Telecommunications Commission, for example, has been able to accommodate a high degree of participation by placing less emphasis on formality.[163] To facilitate its work the Commission considers licensing and rate applications separately from matters of general policy or proposed regulations. The Commission frequently invites people to attend to present their views at its hearings, and on occasion has financed their costs of travel and accommodation. Its hearings are informal, and questioning is carried on only by Commissioners and Commission counsel. The Commission's procedures have, however, from time to time, been criticized because of its unwillingness to allow lawyers to play as prominent a part in its hearings as they do before other agencies.

At the same time the CRTC has been forced more than other agencies to make decisions about which intervenors will be heard. This places a difficult burden on an agency. The opportunity to intervene in regulatory hearings should be refused only where other techniques fail to make proceedings

manageable. Often less stringent approaches can be taken to minimize the risk that valuable time will be taken up by irrelevancies and repetition. One approach requires those who seek to participate to file a written submission, or at least an abstract of the matters to be raised before an agency. This forces potential participants to organize and focus their presentations and allows an agency to determine which presentations are similar and which conflict with one another. It provides an agency with the opportunity to resolve misconceptions and minor issues by providing for an exchange of written arguments. An agency can also hold preliminary conferences to encourage intervenors to consolidate proceedings so that a minimum of repetition occurs in the actual hearings. It may be able to persuade the potential intervenor that no useful purpose would be served by intervening separately.

Another technique to limit the time consumed by those who do decide to intervene is to reduce evidence to written form and pre-circulate it among the parties. This is almost a standard practice within major regulatory agencies now. Yet another is to encourage parties to meet at preliminary conferences, as has been done by the Railway Transport Committee of the Canadian Transport Commission, to secure agreement on uncontested facts and to isolate issues to be explored at a hearing.[164] These are but a few of many different approaches that can be taken to better accommodate participation at hearings.

The nature of the issues involved, and the work constraints of an agency, may demand something other than a conventional oral hearing. The Canadian Transport Commission, for example, has moved more and more towards what has been described as a "file hearing", although the various committees of the Commission have adopted variables of this core procedural idea.[165] In reviewing administrative action, courts have consistently made the point that administrative proceedings are not trials. Agencies do not necessarily deny natural justice or exceed their jurisdiction because they employ speedier and less formal approaches than courts. Much more reliance can be placed on written material. The important question is whether an agency acted fairly in the circumstances.

"File hearings" are capable of combining fairness with efficiency. Basically, the procedure involves the accumulation and exchange of written submissions in accordance with guidelines prepared and distributed by the agency, guidelines requiring specific information about the application and the proposal to be entertained by the Committee. The procedure allows for the efficient marshalling of information so that the application can be put through various stages of agency scrutiny. The files are processed by staff, and relevant information and issues raised by applications and interventions are set out for those who have to make the decisions. File hearings do, however, give considerable opportunity to agency staff to influence the outcome of an application, since decisions are often not directly based on the material in the file, but on a staff report.

The "file hearing" is, of course only one of several procedures an agency might find useful to deal with issues. The National Energy Board, which holds full and formal hearings for many of its adjudications, has also used a procedure referred to as an "expedited hearing" for processing some of its work. Essentially this does away with a hearing but allows interested persons to file written submissions. For other matters it has held a "limited hearing", which is a formal hearing limited to certain narrow issues, often to break up a large unmanageable issue into an orderly sequence of limited ones. Experience has led that agency to experiment with a number of different modes for carrying out its responsibility to hold hearings.

There are many types of cases where a court-like hearing is not warranted, but some kind of hearing is required for the sake of fairness or accuracy. To cover these situations, we recommend that:

> 6.3 *minimum procedural safeguards should be adopted requiring that appropriate notice of hearings be given, written comment from interested persons be solicited and considered, and the supplementary use be made of written interrogatories, oral comment and cross-examination in certain cases or on specific issues, at the discretion of*

the agency. This kind of hearing would include rule-making proceedings.

Procedural safeguards should not, however, be imposed where they are not wanted. We recommend accordingly that:

6.4 *in cases where individual life or liberty is not at stake, parties should be allowed to waive procedural rights so that safeguards otherwise required would not be applicable and case resolution might be expedited.*

There is also a need to structure informal agency action. We recommend that:

6.5 *agencies should develop official policies concerning the conditions under which informal advice can be given by staff, and procedures under which such advice can be easily referred to a higher level for review.*

The powers given to agency members relating to administrative proceedings can assume great importance. In the absence of statutory provisions, agencies could not compel persons to attend hearings, to take an oath, to give evidence or to produce documents, nor punish persons guilty of non-compliance with those demands. This is a subject about which little has been written in Canada, and it warrants further study. As was mentioned in Chapter Three, a Commission study paper is being prepared on *Statutory Powers of Independent Agencies*.

F. The Use and Allocation of Powers Relating to Procedure

1. *Keeping Control over Proceedings*

Regardless of the type of hearing held, the agency should, of course, manage its proceedings effectively. The obligation of an agency official conducting a hearing is like that of a

judge in the sense that the proceedings should at all times be governed with an eye to both efficacy and fairness. The major problem here is not that agencies exercise arbitrary powers with respect to the conduct of a hearing, but that they too frequently exercise too little control. In such circumstances, hearings can drag on with rambling, irrelevant or repetitive evidence being led, with the agency panel listening politely while time and money are being wasted. Firm chairmanship can expedite most proceedings without curtailing anyone's rights in any significant way. We recommend that:

> 6.6 *each agency should establish procedures whereby it may keep control over its proceedings and the timetable followed therein, and provision should be made for appropriate sanctions against parties who fail to comply with procedural rules.*

2. *Delegation of Power to Hold Hearings*

It seems likely that in order to cope with any increasing volume in public hearings, more agencies will have to delegate the power to conduct hearings to panels of members, single members, or staff hearing officers. Several agency statutes already provide for this.[166] The entire membership of an agency or even a designated committee will not be able to participate fully in every decision an agency is required to make. The very thought of such a development might raise the hackles of advocates who are firmly convinced that there should be an identity between the person who hears and the person who decides. Although traditional case law incorporates at most a rebuttable presumption against subdelegation, this hoary principle is riddled by statutory exception.

Time may be a crucial factor. Fifty-five days were taken up in 1974, for example, in a single Bell Canada hearing before the Telecommunications Committee of the Canadian Transport Commission.[167] To tie up a decision-making body for such a period may be impractical, even where an agency can be divided into modal committees, as with the CTC. Both that agency and the National Energy Board have begun to expedite hearings by assigning them to single members or panels.

Geography is also important, especially in a country with a vast territory and relatively small population like Canada. The deployment of individual permanent members on the road to conduct initial hearings, as used to be the case with Immigration Appeal Board hearings,[168] makes a great deal of sense here. Also the inclusion on a panel of members located in the region where a hearing is to be held, as is recommended in the study paper on the Canadian Radio-television and Telecommunications Commission,[169] appears to be a sensible technique.

Some agencies have permitted senior staff members to act as hearing officers, transferring to them the responsibility to preside at hearings and to report on the evidence and issues to the agency or the appropriate committee. This practice has long been followed in the United States, especially by large federal agencies which could not otherwise conduct the volume of hearings expected of them. Authority for adopting this practice exists in the *National Transportation Act*,[170] and has already been used, for example, by the Telecommunications Committee of the CTC.[171] Not only does it relieve busy Commissioners from considerable pressure, it facilitates the maintenance of an agency presence in various areas of Canada. We recommend that:

> 6.7 *the practice of delegating formal authority to individual agency members or hearings officers to hold hearings and make findings or recommendations for final decisions by an agency should be adopted, when appropriate, in proceedings where problems of time or geographic dispersion of cases are too burdensome for the agency sitting as a collegial body.*

Delegating this kind of authority should be done carefully, however, because in some cases there is a price to be paid. Where authority is given to a single member the interest of the agency is diluted, and experience shows that those who deal with a matter will usually carry the agency to its formal decision. While it is only natural that reliance should be placed on the member most deeply involved, that person's decision ought not to be merely rubber-stamped by the remaining members.

The need for reconciling the roles of the hearing officer and the agency is particularly acute when staff members are the hearing officers. To what extent should a hearing officer be required to make conclusions and recommendations, and to what extent should an agency rely on such determinations? The more agencies move towards this procedure, the more urgent it may become for agencies to engage in formal policy-making to remove policy questions as much as possible from adjudicative proceedings.

It also seems vital for agencies employing hearing officers to give high priority to establishing a system of internal review. Again, this depends on the extent to which it is felt desirable to allow hearing officers to make decisions binding the agency.

A specialized structure for internal review already exists within the Canadian Transport Commission, which relies on a Review Committee to review initial decisions made by separate committees established to deal with the various transportation modes for which the Commission is responsible. The Review Committee has interpreted its jurisdictional mandate as being quite narrow, and confusion has arisen over the grounds upon which it will overrule another committee.[172] Undoubtedly, there are difficult problems of internal administrative review which will have to be given more attention as an increasing number of agencies find they are unable to make many of their decisions acting as a unified body.

G. The Role of Agency Advisory Staff at Hearings

Other administrative arrangements which bear study relate to the various roles to be played by agency staff before, during and after hearings. The same persons who conduct

research or investigate a matter may be asked to participate in a hearing respecting it.

Any administrative agency with a large workload or broad mandate will invariably rely greatly on the work of its staff. Staff research will provide necessary background information pertaining not only to issues raised in the proceedings but to other issues as well, particularly those relating to the discharge of the agency's public interest mandate. In some cases agency members will not even have read the documentation on file, relying on agency personnel to summarize it. This is particularly true of what we earlier referred to as "file hearings". Staff will frequently participate as well in the sessions which the agency holds to reach a decision in a case.

The efforts of an agency's staff will inevitably have an influence on the agency. Unless a special point is made of testing staff conclusions against these presentations by careful questioning in the course of a hearing, the relative validity of the staff assessment versus that of presentations from other sources may not be established.

Agency staff may, of course, be hesitant to testify at a hearing. Even if staff members are called upon merely to prepare a simple factual statement, or give neutral professional testimony at a hearing, it might be difficult for them to comply effectively if they know that the agency itself is developing policy or is giving advice to the government which could fly in the face of the conclusions the agency members or staff themselves would come to if they were outside professionals.

Another factor is that agencies such as the Canadian Transport Commission have been guarded in their approach to releasing information obtained by staff. While there are instances when its committees have made staff studies available as aids in hearings, and have put staff members on the witness stand to explain aspects of proceedings, the CTC has been selective about what can be revealed. Disclosure of staff studies and mandatory disclosure on the witness stand, it is argued, impairs the candidness of staff communications.[173]

H. Disclosure of Information and Confidentiality

While it must be acknowledged that agencies may have legitimate reasons for resisting wide open access to documents and background information generated by staff, there would seem to be room for a compromise. We recommend that:

> 6.8 *agencies should, in appropriate cases, release and distribute information at their disposal, including research papers prepared by individual staff members which outline issues and disclose relevant information not elsewhere disclosed in documentation available to participants; but agency documents should not attribute to the staff as a whole any official position taken with respect to any issues raised.*

Such attribution might create undesirable tensions within the agency and unduly impair the free exchange of ideas and information at the staff level. However, the release and distribution of this sort of material would tend to canvass the dimensions of a problem by all the participants and to elicit a direct response from them.

Another reason given by agencies for resisting free and open disclosure of staff studies and related files is that they frequently contain confidential information acquired from other governments or from companies. Effective regulation requires information about the affairs and operations of those sought to be regulated and the impact of those operations on various sectors of the public. Obtaining this information may be difficult for an agency, since companies tend to be apprehensive about unfavourable publicity and fear leaks to competitors of information about business practices, and other governments may be chary of such leaks for various policy reasons. For reasons of confidentiality, therefore, there is a clear interest in maintaining some form of control over access.

On the other hand, agencies have a mandate to serve the public interest. To refuse disclosure of pertinent information

may not only be unfair to participants having a legitimate interest in the proceedings but may frustrate a proper disposition of an issue. Agencies must therefore reconcile as best they can the competing values of confidentiality and fairness to fulfil their responsibilities. One solution provided under statute for a few agencies, for example the Tariff Board[174] and the Anti-dumping Tribunal,[175] has been to give a limited statutory protection to confidential information relating to the business or affairs of any person, firm or corporation, prohibiting the agency from making it available for use by a competitor. Implicit in this is a discretion to release the information in a non-prejudicial way, indicating that there is no absolute claim of confidentiality which attaches to any class of material.

The study paper on *Access to Information* states that three basic considerations should be taken into account respecting the granting of access to information: the identity of persons requesting information and their interest in it; the relevant function of the agency holding the information; and the kind of information, personal information, or agency management information. The paper notes that the reason or motive for requesting information overlaps with the first three considerations and, if made a subject of interest, should be considered in that context.

I. Reasons for Decision

Whether a decision is highly discretionary or is strictly delimited by its terms of reference, reasons are essential to enable people to understand what the proceeding has been about; and it is important to have the decision put in writing so that there is an official record of it to which interested persons might have access. It is all the more necessary if there is to be any review of a decision. Appealing a decision made without reasons is difficult. And even if a decision is not appealable, to refuse reasons might make the process of

decision-making appear to be neither objective nor fair. To maintain the integrity of the decision-making process, we recommend that:

> 6.9 *agencies should make official decisions in writing. They should also be required to give reasons for their decisions at least when requested. Reasons should be made available, even when no hearings have been held, where decisions are taken directly and adversely affecting persons whose dossiers are the subject of a decision.*

Unfortunately, even when an agency consistently produces reasons for decisions, the product may be of little assistance. According to the study paper on the *Canadian Transport Commission*, the reasons given by the Air Transport Committee of the CTC are seldom adequate;[176] and the study paper on the *Anti-dumping Tribunal* points out that the Tribunal often gives incomplete reasons.[177]

J. Accessibility

An agency's procedures should be designed to make it as accessible as possible. Concepts like notice, hearings, participation, disclosure of information and reasoned decision-making are all related to accessibility. Creating an accessible agency, however, involves more than just extending rights to participate in agency proceedings.

Procedures must be made simple and clear, and steps must be taken to explain to people what the procedures are and what is required of them. The process must be comprehensible. There must be a shift in attitude so that procedures are regarded less as a matter of convenience to an agency and more as a matter of assistance to those who rely on the agency for a benefit or privilege, whether it be a welfare payment or a licence to carry on an occupation.

Many federal agencies appear to devise their procedures on the assumption that those dealing with them will obtain legal assistance. This is understandable and perhaps desirable where the principal constituents are corporations or organized groups. But agencies also deal with people who are not accustomed to retaining lawyers. The National Parole Board has traditionally excluded the right of legal representation. Other agencies, like the Employment and Immigration Commission and the Pension Appeals Board, are so enmeshed in the problems of people that it is vital that every effort be made to assist people in their dealings with these agencies.

In some cases, legal aid services may assist in facilitating access to the administrative process. One special program at the federal level is run by the Bureau of Pension Advocates, which provides legal aid and representation to veterans in cases dealt with by the Canadian Pension Commission or appealed to the Pension Review Board. The Bureau has branch offices in eighteen Canadian cities and maintains lists of experienced local lawyers who may be designated to handle cases.

Consideration should be given to making legal aid available more generally for proceedings before federal administrative authorities, especially in cases heard by social agencies that determine welfare benefits or the status of individuals. We recommend that:

> 6.10 *the federal and provincial attorneys-general should designate appropriate officials to study jointly the possibility of incorporating into legal aid plans and federal-provincial cost sharing formulae, an effective mechanism for legal representation of individuals, where appropriate, before federal administrative agencies.*

But these services can accommodate only such a small percentage of cases that it would be unwise to rely on them as principal solutions to the problems of accessibility. Without a commitment by agencies to service the needs of their constituents, reflected in the procedures they follow and how they use them, there is little hope of having a truly open process. An agency must create an air of openness. A conscious effort

should be made to make available even material which may not be required to be produced by law, but that may be regarded by a party as significant.

The difficulties of which we speak are not necessarily apparent at the decision-making stage, for example, where an appeal on a pension matter or on an unemployment benefits claim is taken. They may arise much earlier. People should be able to learn more about an agency from their first contact with it.

While one of our principal concerns has been the interests of unrepresented individuals, it would be misleading to imply that the problems of accessibility can necessarily be solved by access to legal counsel. Even lawyers can find agencies inaccessible at times, particularly when they do not specialize in practice before administrative tribunals. In extreme cases, such as those before the Air Transport Committee of the CTC, this has helped to exclude all but a small group of lawyers from agency proceedings.

The fact that different agencies often employ different procedures can also be confusing to lawyers, especially where the procedures are not readily available in concise, readable form, if at all. While we recognize that procedures must necessarily vary to accommodate different agency functions, we recommend that:

> 6.11 *agency procedures should not be unnecessarily complex or incomprehensible to the lay public. They should not be designed solely for specialized practitioners.*

K. Need for Administrative Procedure Legislation

Our research on the Canadian federal administrative process leads to the conclusion that there is a sufficient number

of problems relating to administrative procedure — in terms of inadequacies and anomalies — to justify that we recommend:

> 6.12 *general legislation should be enacted incorporating minimum administrative procedure safeguards or providing the means for the development of common procedural guidelines.*

Administrative Procedure Acts are in effect in Ontario[178] and Alberta,[179] at the federal level and in most states in the United States,[180] and in a number of Western European countries. Guidelines developed pursuant to the *Tribunals and Inquiries Act*, 1971,[181] are used in the United Kingdom.

The Law Reform Commission is currently engaged in preparing a Working Paper on guidelines for administrative procedure in which the alternative approaches to administrative procedure legislation will be examined. That Working Paper will address in detail many of the procedural problems raised here and elsewhere in this paper. But, based on work done to date, and with reference to other recommendations made in this Paper, we can already mention a list of some of the matters which should be dealt with in such legislation: reasonable notice of a hearing to parties to any proceedings; public notice with opportunity to comment in the context of rule-making; provision for a hearing with the full panoply of traditional procedural safeguards in proceedings where the imposition of significant sanctions is being considered; the making of official decisions in writing; and the giving of reasons for decisions, at least on request by a party.

Legislation dealing generally with administrative procedure might, of course, include provisions concerning the statutory powers of administrative authorities or the establishment of a body to advise authorities on administrative law matters, as in the *Statutory Powers Procedure Act*[182] in Ontario, or regarding access to information, as in the codified *Administrative Procedure Act*[183] in the United States. However, the question whether any or all such matters should be included in one federal statute or code in Canada is a subject presently being considered by the Law Reform Commission.

CHAPTER SEVEN

Administrative Agencies and the Courts

Throughout the common law world, the courts have traditionally been looked upon as the major instrument of control to curtail abuses of power by administrative authorities. If a public authority, whether a Minister, a department or official, acts beyond its statutory powers, it can be summoned before the courts for acting in excess of its jurisdiction. As well the courts will, in certain circumstances, control administrative action that is basically unfair or unjust.

A. Various Mechanisms for Review of Administrative Action

Judicial review is, of course, by no means the only mechanism available to review administrative action. Objections made by citizens or corporations to decisions or actions of administrative authorities have become one of the major sources of litigation in the modern welfare state, and various other mechanisms have been developed to deal with them. The power to settle such disputes has been divided up among

various types of administrative bodies according to the domain of activity involved. This helps to explain the extreme fluidity of the notion of "administrative tribunal" in our law. In some cases a centralized administrative body such as a department of government contains within it entities to which appeals can be made against decisions taken elsewhere within the body. In other cases an initial or even final departmental decision may be questioned before an independent administrative agency. In yet other cases, a review body within the structure of an independent agency will review an initial decision of the agency. Certain administrative decisions, even those of independent agencies, can be the subject of an appeal to a Minister or to Cabinet. In sum, there is a complex network of means of recourse against decisions of federal administrative authorities.

B. Centralized Review in Federal Court

Despite these various means of review, however, it is the judiciary, comprised of persons chosen from the ranks of the organized bar, who are still largely depended on to guarantee fair and just government administration. This function is facilitated by the application of consistent principles developed over the years. This consistency can be furthered if there is a common core of personnel who continuously interpret and apply those principles. To this end, Parliament has granted the power of judicial review of federal administrative authorities exclusively to the Federal Court of Canada. Members of that court, now numbering sixteen, are becoming more and more expert in the field of administrative law and in the interpretation of the particular provisions of the enabling legislation of the statutory authorities whose activities they are called upon to review.

Some (though diminishing) voices still call for a return to the fragmentation among provincial superior courts of the

authority to submit federal administrative action to judicial review, as existed before the creation of the Federal Court. Such calls can find some basis in tradition, the avoidance of travel and trial scheduling convenience, but the Law Reform Commission believes these reasons are overborne by the need for consistency and expertise. For that reason, as we proposed in our Working Paper on the *Federal Court*,[184] we recommend that:

> 7.1 *the Federal Court should retain exclusive jurisdiction for judicial review of federal administrative authorities.*

C. Principles of Natural Justice

As noted earlier, the courts have evolved a body of public or administrative law founded on the principle that governmental agencies which decide rights must act in a fair and reasonable manner. Thus courts will strike down decisions not made in accordance with the principles of "natural justice", that is, those violating elementary notions of fair play. For lesser tribunals, these principles have included the right to an unbiased judge, the right to adequate notice of administrative action, the right to a hearing, the right to be advised of the case on the other side, and often the right to be given the reasons for a decision. In simple terms, natural justice has long required that a party to a court-like proceeding before an administrative tribunal be accorded a fair and honest hearing, although not necessarily the type of hearing one would receive in a court of law.

Not every administrative action calls for the full panoply of procedural safeguards within the rubric of natural justice. The courts, as a rule, require this only when administrators exercise what are categorized as judicial or quasi-judicial powers. In most cases, this means decisions where personal or property rights of an individual are at stake; for example, where land is expropriated, taxes are levied, licences revoked,

or an individual is disbarred from practising a trade or profession. This can include situations involving disputes between parties. On the other hand, decisions which are purely administrative or fully discretionary are rarely interfered with by the courts; for example, decisions made by a Minister or an official on the basis of his opinion. Such decisions can include those governing the deportation of aliens, imposing safety standards or releasing prisoners on parole.

The distinction between "administrative" decisions and "judicial" and "quasi-judicial" decisions can be viewed as arising out of the attempt by courts to fashion an appropriate role for themselves in reviewing the actions of administrative authorities. Courts are conscious of the fact that all decisions cannot be made on the basis of an official evidentiary record, and that some decisions must be made on the basis of policy considerations transcending the individual concerns of people who, in one way or another, are affected by those decisions. They recognize that in the case of decisions of an "administrative" nature, it is better for courts to exercise restraint and to defer to non-judicial processes envisaged by Parliament.

In the vast majority of cases, it is recognized that judicial review is not necessary because the orders or decisions in question do not affect anyone in a significant way and virtually no one would want to seek such review. Administration would bog down if it were otherwise. But there remain cases at the margins where there should be judicial review and yet courts have felt obliged not to act because of the somewhat arbitrary distinction between "administrative" and "quasi-judicial" decisions, and the fact that the cases in question seemed to fall on the administrative side of the fence.

D. Duty of Fairness

Although courts continue to recognize the "administrative/judicial" dichotomy, they now appear more willing to

intervene in a wider range, if not a larger number, of cases than before. Recent case law developments suggest that formal decisions by administrative authorities may be reviewed whenever basic fairness has been denied. In Canada, the terms administrative and judicial have acquired different meanings in different cases and have proven to be insufficient to express important differences among powers falling into the same category. Courts now seem more likely to recognize the necessity of looking at the circumstances of each case to determine whether there is a duty to act in a fair and reasonable manner, and to invoke attendant procedural safeguards rather than simply to categorize.

This approach has recently been accepted by the Supreme Court of Canada in *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311, a decision which will likely prove of critical importance to the future evolution of Canadian administrative law. Chief Justice Laskin, giving the majority opinion, relied on recent decisions in the British courts and other sources recognizing the emergence of a duty of fairness involving procedurally something less than the full array of safeguards afforded before lesser tribunals under traditional requirements of natural justice. He accepted the principle set forth by Megarry J., in *Bates v. Lord Hailsham* [1972] 3 All E.R. 1019 (Ch.D.), that, in the sphere of the so-called quasi-judicial, the rules of natural justice run, and that in the administrative or executive field there is a general duty of fairness. The Chief Justice further stated:

> What rightly lies behind this emergence (of a duty to act fairly) is the realization that the classification of statutory functions as judicial, quasi-judicial or administrative is often very difficult, to say the least; and to endow some with procedural protection while denying others any at all would work injustice when the results of statutory decisions raise the same serious consequences for those adversely affected, regardless of the classification of the function in question . . ."[185]

The Commission welcomes this decision. In our Working Paper on the *Federal Court*, we had expressed concern about the artificial bifurcation of administrative actions into "quasi-judicial" and "administrative".[186] The adoption of the two terms in section 28 of the *Federal Court Act*[187] has certainly

impeded clarity of reasoning in decisions of the Federal Court of Appeal on cases involving judicial review of administrative action. According to its own terms, the section applies only to "administrative decisions required by law to be made on a judicial or quasi-judicial basis". The Court has referred to this provision in refusing to impose basic procedural requirements on prison and parole authorities in their dealings with prisoners, or on customs and excise officials in the conduct of their operations under the *Anti-dumping Act*.[188] On the other hand, the labelling of certain activities of an administrative body as "quasi-judicial" has arguably led to the court's imposition of more procedural constraints on such a body than the statutory enabling provisions relating to it would seem to warrant. This appears to have been the fate of the Anti-dumping Tribunal.

The *Nicholson*[189] decision sets the stage for questioning the appropriateness of maintaining the terminological dichotomy of quasi-judicial and administrative modes of action on the part of public authorities. It may be better to regard the distinction as having served its purpose, and to concentrate on ways to articulate more precisely the considerations which should control procedural standards. Indeed, the Commission recommends that:

> 7.2 *the artificial compartmentalization of various administrative activities through the use of such labels as "quasi-judicial" or "administrative" should be avoided in any future legislation defining the scope of judicial review or regulating administrative procedures.*

Such distinctions tend to reinforce an inflexible approach to questions of administrative fairness and justice in a society which is in full evolution.

E. Limits of Judicial Review

Interestingly, the legitimacy of judicial review has never been so firmly established in Canada as in some other coun-

tries. In the United States, for example, the Constitution preserves "due process" and the *Administrative Procedure Act* of 1946[190] accords wide rights of judicial review to aggrieved persons. In Canada there is no general statute applying to federal administrative bodies, and the "due process" clause in the *Canadian Bill of Rights* has yet to receive any significant judicial content, although in the case of *Commonwealth of Puerto Rico v. Hernandez* (No. 2), [1973] 2 F.C. 1206, the Federal Court of Appeal appeared to equate this with the principles of natural justice. However that may be, courts have for long insisted that it is their role to review the decisions made by administrative agencies where certain conditions exist. Even where legislatures have expressly stated that administrative decisions are to be final and not subject to appeal or review of any kind, courts have nonetheless intervened and overturned decisions on the ground of lack of jurisdiction. More specific provisions are sometimes enacted by Parliament, for example, subsection 122(1) of the *Canada Labour Code*, as amended in 1978,[191] which limits such review to paragraph 28(1)(*a*) of the *Federal Court Act*.[192] In our Working Paper on the *Federal Court*, we noted our reservations about the use of the so-called privative clauses. We there expressed the view that the better way to cope with such issues is through the exercise of judicial restraint.[193] The question is by no means free from difficulty, however, and we propose to return to the question in a Report.

At common law, the courts had developed a broad concept of jurisdiction embracing many defects such as the denial of natural justice, extension of a statutory mandate through a misinterpretation of the statute, and procedural error of a fundamental nature. While reluctant to interfere patently with the merits of a decision (except where exercising a statutory appellate role), courts have steadfastly persevered to keep decision-makers honest and fair and within the limits of their mandate.

F. Statutory Right of Appeal

Today at the federal level, the principle of judicial review of public administration has considerable support in legislation. The enabling statutes of a number of the more important administrative agencies, for example the Canadian Radio-television and Telecommunications Commission, the Canadian Transport Commission, the National Energy Board and the Immigration Appeal Board provide for an appeal if leave is granted to the Federal Court of Appeal on a question of law or jurisdiction. Thus, if an agency errs in law or acts beyond its statutory powers or contrary to natural justice, its decision can be reviewed by the Federal Court of Appeal and ultimately by the Supreme Court of Canada.

G. Application for Judicial Review

In addition, the *Federal Court Act*[194] makes general provisions for judicial review of federal administrative action. As already mentioned, section 28 permits the Court of Appeal to review final decisions required to be made on a "judicial" or "quasi-judicial" basis. Other decisions may be reviewed by the Trial Division of the Federal Court. Section 18 gives that division the right to issue injunctions and writs of *certiorari*, prohibition, *mandamus* or *quo warranto*, or to grant declaratory relief against federal boards, commissions or tribunals. This statutory scheme provides a fertile field for technical distinctions and jurisdictional disputes, and invites controversy about the steps to be taken to get an administrative law matter before the Federal Court in a given case. To solve this problem, we proposed in our Working Paper on the *Federal Court*,[195] and we recommend again here that:

> 7.3 *the Federal Court Act should be amended so that judicial review may be initiated by a single type of appli-*

cation for review, whatever form of relief may be desired, thereby doing away with the arcane knowledge and obscurities surrounding the prerogative writs.

H. Extent of Court Jurisdiction

In the Working Paper, other suggestions for improving the law regarding judicial review of administrative action are made. One recommendation we reiterate here is that:

> 7.4 *judicial review, whether for illegality or unfair procedure, should continue to extend to all federal statutory authorities, whether they be Ministers, government officials, or administrative bodies.*

However, it also stated that the Cabinet, in making decisions, should be subject to review for illegality but not for unfairness on the ground that political responsibility was the appropriate safeguard to respond to the latter charges. In light of the decision of the Federal Court of Appeal in the case of *Inuit Tapirisat of Canada v. The Right Honourable Jules Léger*, [1979] 1 F.C. 213, such a statement appears to be too categorical. Therefore, we propose to qualify our position appropriately in our Report.

I. Grounds of Review

The Working Paper further recommends, and we do so again here, that:

> *7.5 the grounds of review and the forms of relief should be expressly articulated in legislation, but in an open-ended way so as to permit future evolution.*

It proposes that the court should be enabled to review federal administrative authorities for action contrary to law, including:

failure to observe the principles of natural justice; failure to observe prescribed procedures; acting *ultra vires*; error in law; fraud; unreasonable delay in reaching a decision or performing a duty; lack of evidence or other material to support a decision; and failure to reach a decision or to take action where there is a duty to do so. The term "administrative action" would include a "decision" and failure to make a decision as well as reports and recommendations that are likely to be acted upon.

J. Forms of Relief

The Paper also proposes that the court should be able to grant relief by way of any such order as may be necessary to do justice between the parties, including: an order quashing or setting aside a decision; an order restraining proceedings undertaken without jurisdiction, any breach of natural justice, or any breach of procedural requirements prescribed by statute or regulation; an order compelling the exercise of jurisdiction or observance of natural justice or statutory or regulatory procedures; an order referring the matter back for further consideration; a mandatory order compelling action unlawfully withheld or unreasonably delayed; or an order declaratory of the rights of the parties. It also says that relief against the Crown should continue to be by declaration of rights, although consideration should be given to extending the power to issue an interim injunction to cover the Crown as well.

Beyond the recommendations of that Paper, we recommend that:

> 7.6 *consideration should be given, as far as possible, to putting the Crown on the same footing as individuals with respect to claims for judicial relief against it.*

We propose to study broader problems related to the privileged position of the Crown in litigation and administrative action at some point in the future.

K. Alternatives to Present System of Judicial Review

The foregoing proposals assume a type of judicial review according to existing legal approaches. Aside from the prevalent opinion regarding judicial review of administrative action, however, there are two alternative and conflicting views which have been mooted and merit discussion. Under one view, the courts should become interventionist and review administrative actions *de novo* and on the merits, as well as on the basis of legality and fairness. Under the other approach, courts should stay away from reviewing administrative action, letting expert administrators implement their decisions and bear responsibility without outside interference.

The extent to which courts, through devices like judicial review, should be relied upon to give shape to the administrative process poses difficult questions. Is the process in need of increased emphasis on lawyers' values, aimed at fairness to the individual? To what extent, if at all, will this lead to better decisions? Does not even unsuccessful judicial review put pressure on an agency to modify its policies or procedures?

Many considerations must be taken into account before attempting to answer these questions. Can we afford to aggrandize the role of judicial review in the face of mounting costs associated with litigation? Judicial review is expensive, and a substantial increase in its incidence may be a luxury our society can ill afford. It is time-consuming and frequently unproductive. Relatively speaking, few administrative decisions are, or are susceptible to being overturned. Those overturned are always subject to legislative reversal if the result of a court's decision is not in line with the policy of the government. Also, short of legislative reversal, an agency itself can attempt to effectively circumvent unpopular decisions through the time-honoured method of distinguishing them from a case currently under consideration before it.

Another consideration concerns the ability of courts to make proper decisions in areas of expertise that have been

entrusted to agencies because of a perceived need for specialized handling of these areas. There is a risk that the intervention of courts into many areas of the administrative process, if not made with careful restraint, will have a detrimental influence on the ability of agencies to cope with the problems for which they were established to respond.

Yet another consideration concerns the ability of ordinary courts of justice, as they are now organized, to provide an adequate forum for review of administrative action. Adjudicating between two or more parties, as judges do most of the time, may not be the most appropriate way of achieving the skills and outlook required to carry out an effective review of administrative action. True, judges trade in justice, and justice certainly is the concern of judicial review. To seek justice in the relationships between private individuals is not, however, the same as seeking justice in the very special environment of relationships between private individuals and public authorities. Justice, in this context, requires both an efficient management of public interests and the existence of adequate safeguards for private interests. The structure of our courts does not at present reflect this basic difference in the roles of the judiciary as adjudicators on private rights and as reviewers of administrative action. This has led several commentators in this country to advocate the setting up of administrative courts or of administrative divisions within the ordinary courts.

These commentators question whether the ordinary courts can make proper decisions in areas where administrative authorities have a particular type of expertise to deal with problems which, in the opinion of Parliament itself, require specialized handling. Review of administrative action, it is urged, requires an extensive knowledge and a clear understanding of the requirements of modern government. This, in turn, makes it desirable that public administrators and those who are called upon to review their actions to keep them within the bounds of legality and fairness be brought intellectually closer together. We have already mentioned the tensions that arise between public administrators and lawyers about the ends and means of administrative action. Unless a better mutual understanding is achieved, judicial review will in

many cases remain a rather academic exercise. One would look to a reviewing body itself to go beyond these tensions, and to strike the right balance between them. Critics wonder if our courts, as they are now organized, could develop such a integrated approach.

The Law Reform Commission is not so pessimistic about the role of the judiciary in guaranteeing good public administration. The courts can play an important part in supporting a system of checks and balances among branches of the government. They can enforce the principle of legality and insist that statutory standards are met. We also believe that maintaining residual powers in the courts to support basic constitutional values, reinforce procedural safeguards and to respond to injustice has a salutary effect. The approach now taken by the courts allows them to decide on matters involving principles of natural justice or the duty of fairness. In connection with the administrative authorities and situations over which Federal Court jurisdiction is maintained, we favour, as noted earlier, providing that court with simpler forms and more liberal grounds of review than now exist under the *Federal Court Act*.[196]

If some commentators question the ability of courts to deal appropriately with administrative questions, others would support more judicial intervention and demand that administrative decisions generally be supported by "substantial evidence". Yet others would like to see courts or other appellate bodies involved in *de novo* consideration of administrative decisions on the merits. We would not go so far. Any major changes from present institutional modes of review of federal administrative action would require long deliberations and difficult policy choices by the executive branch and Parliament. Basically, what we suggest here and in the Working Paper on the *Federal Court*[197] are improvements in the existing system, as well as a number of complementary reforms.

L. Institutional Reforms Needed

One approach to institutional reform meriting consideration is the rationalization of administrative review structures, either at an intermediate level or in the form of novel type of court. The authors of the Commission's study paper on *Unemployment Insurance Benefits* recommended that one administrative review tribunal be set up to deal with any litigation involving federal social security schemes such as Unemployment Insurance, the Canada Pension Plan, Old Age Security Benefits, and Family Allowances.[198] In a majority of cases the tribunal's jurisdiction would be at a second level of appeal, its involvement coming only after intervention on an initial level by authorities referred to by the Acts establishing the various schemes. This would remove the heavy burden now imposed on judges of the Trial Division to act as umpires on unemployment insurance benefits appeals. In the longer term, it would be conceivable that the tribunal's jurisdiction could be extended to include veterans' pensions and allowances. We think the proposal has considerable merit, and recommend at this time that:

> 7.7 *the members of the Trial Division of the Federal Court should no longer sit as unemployment umpires; this task should be assigned to a specialized tribunal.*

Whether the decisions of such a tribunal should, in turn, be subjected to judicial review by the Federal Court is another question. It could be a specialized court other than the Federal Court with the Supreme Court of Canada retaining the power of ultimate judicial review.

We would prefer the centralization of review functions in the Federal Court of Appeal, so as to maintain as much consistency in federal administrative law as possible. This, however, presupposes that the members of the court would not be burdened with too many cases. As we noted in the Working Paper on the *Federal Court*, the Court of Appeal's jurisdiction should be so framed as to ensure it adequate time for reflection and to allow it to function collegially, so that it

can provide consistent guidance to the Trial Division and administrative authorities.[199] In particular, the high volume of immigration appeals the Court now has to deal with should be lifted from its shoulders.[200] The Commission recommends that:

> 7.8 *immigration appeals should be transferred out of the Federal Court of Appeal to the Trial Division (as we proposed in the Working Paper on the Federal Court), or to a specialized administrative tribunal (as proposed by the Canadian Bar Association's Commission on the Federal Court).*

In either case, there could be an appeal to the Court of Appeal, and with leave of the court or the Supreme Court to the Supreme Court of Canada.

CHAPTER EIGHT

Professional Standards

Administrative agencies can be helped to respond to certain basic values of the administrative process through technical procedural requirements imposed by law. However, real success in furthering these values in the end depends on the competence and commitment of agency members and staff. To be successful an agency must achieve a high degree of credibility, and the most important factor that contributes to credibility is a perception on the part of the public that those who serve on the agency are well qualified to do so. Consequently, the government must appoint the right people to run the various kinds of agencies, and give them the proper training, guidance and incentives to carry out their tasks.

Independent agencies need to maintain both professional standards and political sensitivity while working under statutory directions that are often dated or incompletely articulated, in a complex political milieu with fluctuating reference points as to what constitute the relevant facts and values to take into account in making decisions. That such agencies must always be scrupulously non-partisan hardly needs further emphasis. Effective and appropriate agency management under such conditions is rendered more difficult because of the vulnerability of governmental bodies that do not operate under the

immediate supervision of Cabinet Ministers, and so do not have a direct and legitimated source of political support, the voting public.

A. Appointment of Agency Members

An agency's approach and responsiveness to its diverse responsibilities is highly influenced by factors relating to the people who comprise it, their backgrounds, outlooks, preferences and obligations. The status, training and career patterns of members of administrative agencies, therefore, raise issues of legal policy that cannot readily be ignored.

All of the members — as distinct from staff — of federal independent agencies are appointed by the Governor in Council. This is also true of judges, but judicial appointments have come to be systematized in the context of a structure of consultation designed to ensure the quality of the appointees. Even these controls, which are informal and themselves subject to continuing abuse and criticism, are absent in the process of appointments to administrative agencies. In general terms, the appointment of agency members proceeds as follows.[201]

The senior appointments process is administered by a small secretariat within the Privy Council Office that reports to the Assistant Secretary to Cabinet responsible for Machinery of Government. This secretariat has come into operation only within the last decade — an indication of how great the proliferation of agencies has been in recent years. When a vacancy appears in the membership of an agency, or when a new agency is created, nominations are made to this Secretariat. Appointments of members of independent administrative agencies are made completely without reference to the Public Service Commission and never involve public advertisement. Nominations for the position of chairman or vice-chairman usually come from the Prime Minister's Office or

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circumstances in which it needs doing. For new or reorganized agencies, of course, it often takes a while to develop appropriate parameters for their operations, and thus specific job criteria for their members and staff.

In the majority of cases, highly competent individuals are appointed to agency membership. Even so, isolated cases do persist of appointments of individuals totally unsuited to the tasks required. More objectionable than these isolated cases is the negative public perception generated by this unstructured system of political appointments. It gives rise to the appearance of partisan government reward to "politically helpful" individuals rather than appointment for intrinsic merit. It also has the effect of creating the impression that the agencies are used to assist loyal but feckless individuals who are having job placement or career maintenance problems elsewhere. This perception hampers agencies because their effectiveness can be impeded if, whatever may be the truth of the situation, members are believed to have insufficient professional qualifications.

To improve the quality of the membership of independent agencies it would be beneficial to obtain appropriate professional advice regarding appointments in addition to the advice provided by existing Privy Council mechanisms. In the United Kingdom, the Home Secretary must take into account recommendations made by the Council on Tribunals before appointing members to administrative tribunals.[202] At the federal level in Canada, we recommend that:

> 8.2 *an Administrative Council, discussed further in Chapter Nine, could advise the government on appointments of members to agencies; but, even if that were not to be done, existing associations in the private sector could be asked to comment on a short list of nominees in appropriate circumstances. With respect to appointments to major regulatory agencies in areas such as transport, communications and energy, prior consultation with provincial governments might also be desirable.*

To promote the recruitment of competent persons for agency membership, we recommend that:

8.3 *the government should consider placing public job advertisements asking interested people to file applications for full-time posts as members of agencies. Nominations to the post of chairman or vice-chairman could remain dependent on final determination by the Cabinet.*

Whatever the appointments process may be, an attempt must be made to select individuals who represent the various interests an agency must take into account in performing its function. Professional training, job experience in a relevant sector, geographical and minority group concerns, and, in appropriate cases, such interests as consumer or environmental ones, should be taken into account in filling agency positions. The Commission recommends that:

8.4 *greater effort should be made to broaden the perspectives of agencies through the appointment in appropriate cases of persons with varying backgrounds and training who represent interests an agency must take into account in performing its functions.*

In particular, the Commission recommends that:

8.5 *the government should sustain a high level of commitment to placing qualified women in key positions. This goal can frequently be more easily achieved by means of appointment by Order-in-Council than by filling positions through the public service job placement process. Through the appointment of more women to them as members, independent agencies could be in the forefront in giving equal status for equal qualifications.*

B. Provisions for Tenure

Unlike judges, who are appointed during good behaviour to a statutory age of retirement, members of most independent agencies are appointed for diverse terms of years pursuant to the various enabling Acts; those who are not may be

appointed "at pleasure".[203] This can create uncertainty in the minds of agency members concerning subsequent employment opportunities. The fact that the career of the member of an agency may depend upon other government appointments, together with the fact that the Cabinet itself determines salary ranges and annual increments, means that agency members may feel (or may be thought by the public to feel) subjected to heavy political pressures owing to their ongoing scrutiny by the government of the day.

As was pointed out in a Commission research paper on the *Composition of Federal Administrative Agencies*, the membership of federal independent agencies is heavily weighted toward people who are age 55 or over, and who are settling into their last position in the employment market before retirement.[204] The Commission recommends that:

> 8.6 *the terms of service of agency members respecting such matters as the number of years an appointment will last and security of tenure should be re-examined so as to make agency positions attractive to a wide range of persons.*

C. Performance Evaluation

All agency members are subject to annual performance evaluation that is used to assess individual candidates for reappointment, promotion or for a new appointment.[205] A performance evaluation sheet is completed each year by the agency head on each of the other members of the agency. This form is then forwarded to the senior member of the Committee of Senior Officials (C.O.S.O.) on Executive Personnel, which is responsible for reviewing the performance of Order-in-Council appointees. C.O.S.O. is composed of the Clerk of the Privy Council, the Secretary of the Treasury Board, the Chairman of the Public Service Commission, and three deputy ministers appointed for three-year terms. There is no requirement that the performance evaluation be shown to, or dis-

cussed with, the various members. However, in 1978 the Privy Council Office wrote to agency heads suggesting that in view of the privacy provisions of the *Canadian Human Rights Act*[206] it might be appropriate practice to discuss with members their individual evaluations.

The performance of agency chairmen and vice-chairmen is assessed at annual meetings which the Secretary to the Privy Council, the Assistant Secretary to the Privy Council responsible for Machinery of Government, and the senior members of C.O.S.O. hold with individual Ministers to discuss all high level executives who report to each Minister. These assessments go to C.O.S.O. together with relevant performance information gathered from the Treasury Board and the Public Service Commission. C.O.S.O. makes a collective judgment about performance and makes a recommendation to the Cabinet Committee of the Public Service regarding salary adjustments. Cabinet, with advice from the Advisory Group on Executive Compensation and from C.O.S.O., sets the salary ranges for the senior positions (D.M., S.X. and some P.M. classifications), and within these ranges Cabinet also determines annual increments. Salaries among ordinary full-time members of any given agency are usually set at a common level, with personal incentives, if any, depending largely on the more desirable job assignments being given to worthier members by their chairman.

As with the appointments process, the current method of performance evaluation sometimes gives rise to the perception that rewards are given to individuals whose decisions are "politically helpful", and punishment is rendered to individuals who have not been so helpful. In practice, the performance appraisal of senior appointees probably reflects a more realistic judgment than the annual appraisals of civil servants; the percentage of senior appointees rated as superior and above average is much less than in the public service in general. However, the psychological influence which the evaluation process may have on agency members is unknown and the perception that it may be unduly influential and inappropriate is a real concern.

Another issue that permeates the rating of appointees to agency positions is how to determine the value of one agency as distinct from another in terms of levels of job classifications for status and salary purposes and relative effectiveness of the performances of agency members. Presumably, a move towards better defined agency mandates and job descriptions, and a more open and structured selection process would facilitate such evaluation.

D. Professionalism

The existing appointments and performance evaluation processes require reform in order to facilitate the overall improvement of agency professional standards. The independent agencies play a major role in government administration, and political authorities should respect the status of appointees to agencies in keeping with the importance of the positions to be filled. Professionalism is a value to be appreciated as much in government as in the private sector.

Of course, government political interests and goals, together with the attractiveness for temporary occupation at the level of the highest agency posts, should be weighed against the importance of designating competent people with relevant training and skills to get the job done. It should be recognized that certain jobs, especially those concerned with broad policy-making functions, might best be conferred upon generalists rather than specialists.

The possible impact of the past experience of a candidate for an agency post should be considered by the appropriate authorities in making appointments. Some agencies, for example, the Canada Labour Relations Board, are deliberately structured to provide representation for the major contrasting interests coming before them. Most agencies, however, including those in the regulatory field, are not, and more emphasis seems to have been placed on factors like effective administration and expertise.

Problems may readily surface where the regulated industry has been developed within government, or within a government-industry partnership arrangement. An example has been the relationship between the Atomic Energy Control Board and the nuclear industry, much of which industry in Canada, outside the mining sector, has been government owned. Until the early 1970's the AECB consisted almost entirely of the heads of other government agencies involved in the nuclear industry or in nuclear research. Despite efforts to broaden the perspectives of the Board, it still has no members with backgrounds in law, social sciences, environment or health, nor a specific representation from such economic sectors as labour.[207] However, the manner in which that Board is constituted might well be changed in the near future. In November 1977, a draft *Nuclear Control and Administration Act*[208] which would have replaced the old AECB with a new Nuclear Control Board, was introduced before Parliament. The proposed Board is designed more along the lines of other regulatory agencies, and appointees to it would, presumably, be representative of varying backgrounds.

E. Bias and Conflict of Interest

Improved professional standards require that agency members pursue their functions in an unbiased manner. In one sense, however, bias is inevitable when competent professionals are sought, because the experience and training they have which benefits an agency in a particular subject-matter often carries with it the sharing of a value system with some of those whose interests are at stake in the agency's decision-making process. This means that there can be excessive sensitivity to the claims of those emerging from a similar milieu. Thus, the very characteristics which enable the regulator to understand the technical problems of the regulated industry may handicap him in fulfilling his role as protector of the public interest. Since this kind of bias is inevitable, agency

procedures and practices should be designed to ensure the forceful advocacy of interests other than those of the major regulated industries — a theme more fully developed in Chapter Five.

In addition, administrators must take extraordinary care to avoid the appearance of bias.[209] Clear cases of conflict of interest regarding Order-in-Council appointees are now dealt with under the Public Servants Conflict of Interest Guidelines issued by the Governor in Council in December, 1973,[210] and are supplemented to a certain degree by specific provisions under the enabling legislation of certain agencies.[211] Such things as accepting offers of expensive gifts, or of showing favouritism to one applicant as opposed to another without taking into account the merits of their proposals, are matters which administrators readily perceive as inappropriate. However, administrators must regularly deal with situations which are not so easy to define as being unacceptable, but may, nevertheless, give rise to the appearance of bias. For example, regulators must stay in close contact with the daily activities of the regulatees; one method is to meet periodically for meals or at conferences with industry representatives to discuss activities. If the agency member permits the regulatee to pay for these, or even if he pays but these meetings are frequent, the appearance of bias may be created. Even outside what the regular courts say about the principles of natural justice and what conflict of interest provisions prohibit, agency members need to develop a special sensitivity regarding such situations in order to protect and project the high standards of character and integrity required of such important officials.

F. Problems of Collegial Agencies

One impediment to the continuing improvement of professional standards is the confusion resulting when agencies are composed of several members and must take decisions and actions on a collegial basis. Confusion may derive from the

lack of direction as to what is expected of individual members and the lack of definition of the relationship among members, between the chairman and other members, and between members and staff.

A number of the enabling Acts for specific agencies do not give the chairman explicit power to direct the work of co-members, as opposed to the power to direct staff which is always granted. The Commission recommends that:

> 8.7 *the chairman of each independent collegial agency should be given statutory power to direct and control the members and staff, unless a particular member or members carry out major functions unrelated to those of the agency as a whole.*

Regardless of whether the chairman assumes a dominant role in agency activities and the setting of priorities, it should be assumed that the routine work of an agency as outlined under its statutory mandate will be carried out. However, the relations between staff and individual agency members and the way in which discretionary activities, particularly those of conceptual significance, are carried out will be strongly influenced by the type of leadership, whether it is relatively unified under the chairman or dispersed among members or staff.

The leadership of the chairman can be viewed as operating along a spectrum, from a *de minimis* position of influence where he or she serves principally as a point of contact with external individuals or bodies, through an intermediate position where he or she works to allocate roles and jobs effectively between members and among staff, to a directorial and supervisory position where the chairman's own style and managerial stamp are put on agency decision-making, planning and administration. Somehow, a happy medium needs to be struck to keep an agency operating effectively while at the same time keeping fellow agency members and staff content. The clarification of job descriptions and mutual expectations before an individual is employed would be helpful; but perhaps the most challenging part of agency leadership is how to treat certain matters of potential or actual interest most

effectively before they become ensconced as a part of the official agency agenda.

From an administrative law point of view, a number of specific questions might arise in connection with different collegial leadership patterns and role allocation. To what degree should official agency decision-making be made by agency members as a collegial body? Should the chairman, or other members individually give direction to interpretation of statutory and regulatory provisions in "case" judgments or policy statements? Should official dissenting opinions be allowed by individual agency members or, indeed, should individual opinions be allowed to be voiced at all? There are no pat answers applying across the entire spectrum of agencies.

The extent to which members give agency staff specific directives or allow them discretionary leeway is also important, and raises interesting questions. To what degree should staff be given its head as to conceptualization, research and advisory work, and so forth, within the bounds of the statutory framework of the agency and within limits of discretion and decorum which demand at a minimum the rubber-stamping by agency members of official agency acts which in reality have been initiated and implemented by staff? What are the functions of the agency's legal counsel during hearings? Such questions are very important in day-to-day agency operations and deserve careful attention.

More specificity in job descriptions, greater definition of the role of the agency head and the institution of proper management practices can serve to alleviate some of these difficulties. However, real improvement also depends on the institution of regular training programs.

G. Training Programs

In order that agencies may continue to improve professional standards, there should be some organized system of training, both introductory and continuing, for agency members and staff. Some training programs dealing with general

issues on procedures could involve members from all agencies. Here the experience and insights of members of one agency are instructive to members of other agencies. A pilot program of this sort was held in April, 1978 under the joint auspices of the Law Reform Commission, the Public Service Commission, and the Privy Council Office for members of federal agencies.[212] A second program under the same auspices was carried out in March, 1979, and not so restricted.[213] It was a success too, in our view. The government should consider instituting similar programs on a permanent basis.

This type of training program, cutting across agency lines, would also be useful at the staff level. One result might be the definition of new or better defined categories of jobs common to many agencies. Thus, for example, a corps of persons capable of serving as hearing examiners to find facts and develop evidentiary records for agency members might be developed. These individuals would then be available, as caseloads demanded, for posting in one agency or another within a group of agencies with similar powers and procedures.

Regular training programs are held by the federal government of the United States for agency hearing examiners or, as they are now called, administrative law judges. An excellent guidebook, the *Manual for Administrative Law Judges*, written for training and informational purposes, was prepared in 1974 under the auspices of the Administrative Conference of the United States by Mr. Merritt Ruhlen, a retired administrative law judge.[214] The Law Reform Commission is planning to examine this approach to the training of hearing examiners to see if it might be adapted to meet Canadian needs.

Training programs or kits of training materials should also be developed in the context of each individual agency. The precise skills and knowledge required for particular tasks would be highlighted and the general concerns dealt with in inter-agency training programs could be applied in the particular context.

Some agencies have already instituted a system of training for their new members. The most developed of these is that of the Canadian Pension Commission.[215] For a new Commis-

sioner there is a three to six month "break-in" period during which the new member is assigned to an experienced commissioner who acts as the new member's prime tutor. Several minor tutors may also be assigned. For most of the period the new member is assigned to cases only as an observer. Near the end of the period the new member is permitted to write one or two decisions concerning pension entitlement, and these are subjected to rigorous critical scrutiny both as to style and substance. It is only after this process that the member is assigned a full case load. However, all members are subject to ongoing scrutiny through a system of quality control over decisions. Under this system all decisions made by any one commissioner must be reviewed by two other commissioners. Those three must agree on the decision before it can be issued as a decision of the Canadian Pension Commission. If they cannot agree, then the file must be reviewed by a panel of five commissioners; if that panel cannot agree, then all commissioners currently in Ottawa must meet to assess the entire file.

Training and monitoring such as this would be valuable for any agency. However, few agencies are as large as the Canadian Pension Commission, which has twenty-four members. Consequently, most agencies would not have the time or resources to develop their own in-house training materials and programs. It would, therefore, seem appropriate for a government body responsible for training programs, the key example presently being the Public Service Commission, to assist them. It should avail itself of the support and input of other appropriate government bodies or individual officials in carrying out this task. In keeping with the needs for training mentioned above, the Commission recommends that:

> 8.8 *there should be some organized system of training, both introductory and continuing, for agency members and staff in order that agencies may continue to improve professional standards; to assist agencies which are too small to organize their own training programs or materials economically, or to prepare programs in which various agencies with similar interests desire to participate, a government body responsible for training programs should be asked to undertake a major organizational role.*

CHAPTER NINE

New Institutional Controls over Administration

It is with a bewildering array of institutions possessing various combinations of powers, procedures and practices that the Government of Canada engages in the regulation of social and economic activities and promotes its own projects. For the near future it seems almost inevitable, and not altogether undesirable, that a variety of independent agencies will continue to be created to meet the needs and desires of Canadian society.

Diversity in approach to the solution of diverse problems is essential; but the value of diversity must not be a cloak for disorganization, failure to render governmental bodies accountable, or lack of regard for fairness to the individual. Variations of institutional arrangements and activities which have this negative effect should be reduced. One way to establish some degree of order over a miscellany of governmental bodies is to impose systematically arranged administrative controls. Unfortunately, there is no such system of controls in Canada at the present time.

In Chapter Two, a passage from the Report of the Glassco Commission on Government Organization was cited that referred to "general legislative efforts" by other jurisdictions designed "to establish greater consistency of principle

and regularity of form and practice" in respect of administrative agencies.[216] This chapter will examine some institutional initiatives toward administrative law reform which Canada might take in the light of certain foreign efforts in that direction.

If one takes administrative action as a central point of interest in administrative law reform, then one asks how the administrative environment might be shaped and administrative authorities motivated to act appropriately in various circumstances. An obvious response to this question is that means should be provided to allow those touched by the administrative process to involve themselves effectively in it, and controls over administration should be devised to prevent institutional distortions or maladministration to the degree that this is practical, to guide administrative procedure, and to provide corrective measures in response to those cases where injustice still occurs.

Although a certain number of controls over administration are now in place at the federal level in Canada, there remain obvious gaps in the structuring of the machinery of government and in the provision of means of protection of the public. In light of this situation, we examine here a few institutional reforms which could be instituted to meet Canadian needs.

A. Freedom of Information Legislation

In contemplating the interests of the citizenry, there comes to mind the need in Canada, as a parliamentary democracy, to encourage more open government and more opportunity for public debate on issues of importance to the polity. As we stated in Chapter Five, this calls for access to information which may be available under present government practices to government officials, but not to interested persons outside the government or to the public at large.

There has long been interest in many circles in Freedom of Information legislation which would, *inter alia*, put federal administrative authorities under an affirmative obligation to inform the public about their structures and operations, and make agency manuals and internally developed law available to the public. As was also mentioned in Chapter Five, administrative authorities should adopt those practices whether legislation is passed on the subject or not. Furthermore, interested persons should be allowed to demand the duplication at cost of information on file with an administrative authority, provided such information does not fall within limited categories of information exempted from disclosure.

The Liberal government of the day took a step in this direction when it first released a Green Paper on *Legislation on Public Access to Government Documents* in June, 1977,[217] and then proceeded to discuss the terms of related draft legislation with government officials during the following two years. Spokesmen for the Conservative Party, then in opposition, continued to press for a more comprehensive Freedom of Information Act, as they had for some time past.

About the same time, the Province of Ontario had established the Williams Royal Commission on Freedom of Information and Individual Privacy that carried out in-depth research on the subject,[218] and the Provinces of Nova Scotia and New Brunswick passed legislation.[219]

The Canadian Bar Association (CBA) has also actively encouraged the passage of a federal Freedom of Information Act, and in March, 1979 published a draft bill prepared by the Association's Special Committee on Freedom of Information.[220] In the bill, a review mechanism is provided in the form of an Information Commissioner acting as an officer of Parliament to respond to applications from individuals who feel they have been improperly denied access to information requested.[221] The Commissioner is vested with power to examine records and issue advisory reports and, in the face of Ministerial refusal to release information, independent judicial review is allowed with the court being given power to order the release of records.[222] The desirability of establishing an

Information Commissioner as a level of first appeal from refusals of government officials to release information, is also mentioned in our study paper on *Access to Information*.[223] Such an institutional innovation would avoid the extremes of a complete blockage of information through Ministerial refusal or of immediate appeal to the judiciary for assistance following such refusal.

As was pointed out in a study published by the CBA under the title *Freedom of Information in Canada: Will the Doors Stay Shut?*,[224] the government, in preparing any type of freedom of information legislation, will have to take into account current legal and administrative provisions binding civil servants under the *Official Secrets Act*,[225] section 41 of the *Federal Court Act* dealing with Crown privilege,[226] the effect of the oath of secrecy[227] on how civil servants deal with documents, the classification system for documents,[228] the 1973 guidelines for the production of papers to Parliament,[229] and the rules governing the transfer of documents to the public archives.[230] The Law Reform Commission recommends that:

> 9.1 *general legislation dealing with freedom of information, including provision for an Information Commissioner, should be passed and proclaimed as soon as it is practicable; however, the Government should also make appropriate changes in practices and legislation regarding official secrets and confidentiality, and the status and use of claims to Crown privilege.*

B. Creation of an Ombudsman

Experience in Canada and other countries strongly suggests the need to improve the mechanisms whereby administrative decisions can be challenged by aggrieved individuals. One mechanism for the control of the exercise of administrative discretion which has steadily gained more

prominence than any of the others is the Ombudsman. The office of the Ombudsman has been defined in the following manner:

> An office provided for by the constitution or by action of the legislature or parliament and headed by an independent, high-level public official who is responsible to the legislature or parliament, who receives complaints from aggrieved persons against government agencies, officials, and employees or who acts on his own motion, and who has the power to investigate, recommend corrective action, and issue reports.[231]

Originating as an institution in Sweden in 1809, the ombudsman notion first took roots in a common law jurisdiction in New Zealand in 1962,[232] and has rapidly expanded to other countries since then. No attempt will be made here to summarize the voluminous literature on the use by other jurisdictions of this technique. The fact that there is, as yet, no federal Ombudsman with general jurisdictional authority here does not indicate any lack of acceptance in Canada of the "grievance office" approach to redress of grievances relating to government administration. Indeed, each of the provinces of Canada, except Prince Edward Island, now has its own Ombudsman.[233]

Furthermore, at the federal level, the *Canadian Human Rights Act*[234] creates an institution with a substantial ombudsfunction. In addition to the Human Rights Commission's powers to receive and investigate complaints,[235] the Act also creates a Privacy Commissioner to act in effect as an ombudsman in relation to matters of personal information contained in government data banks.[236] Also, the Office of the Correctional Investigator has operated for several years as an ombudsman in respect of the grievances of inmates of federal penitentiaries.[237]

Draft legislation creating a federal Ombudsman, tabled by the then government of the day in 1978,[238] displayed an even greater acceptance of the ombudsman approach to improving government administration. It was designed to bring the Privacy Commissioner and Correctional Investigator within the aegis of a new Office of Ombudsman. Experience in New Zealand, Australia,[239] the United Kingdom[240] and nine

Canadian provinces indicates that there is a large volume of complaints about government maladministration in jurisdictions following the British parliamentary tradition that are not effectively responded to through traditional techniques, such as the use of the good offices of elected representatives, or of internal administrative complaint bureaux. The Law Reform Commission recommends that:

> 9.2 *legislation creating a federal Office of Ombudsman, which would incorporate in its list of functions those presently carried out by the Privacy Commissioner and the Correctional Investigator, be passed as soon as possible.*

C. The Use of Administrative Appellate Bodies

The major political parties have declared their commitment to the ombudsman technique as a necessary tool for protecting citizens against governmental abuses. However, the ombudsman technique should not be depended on to deal with administrative problems to the extent that the overall systemic improvement in the review of administrative action is diminished. Generalized improvements in the assessment of decision-making quality and in arrangements for administrative review will not alone result from the operation of a mechanism designed principally to deal with single problems in isolation. While attention to individual complaints is essential, more widespread change must be informed by a broader perspective and approach.

The Law Reform Commission recommends that:

> 9.3 *the examination of existing discretionary powers held by administrative authorities and of the modes of review to which they are presently subjected be made an object of ongoing research across jurisdictional lines by appropriate governmental bodies, in order to determine what review structures might be rationalized and how the review process itself might be simplified or made more effective.*

In those cases where review is not made by a departmental authority or internal to an agency, it would be worthwhile to determine whether a small number of appellate tribunals, or even a single tribunal sitting in several divisions, might not be a more easily accessible and rational way of providing review than a number of specialized appellate tribunals. For example, as was mentioned in Chapter Seven, it might well be desirable for all appeals from decisions of benefits agencies, with the possible exception of those operating under the aegis of Veterans Affairs, to be dealt with by a single tribunal rather than by the various specialized tribunals or Federal Court judges sitting as umpires, as is now the case.

Administrative decisions in other than social benefits areas seem somewhat less amenable to this type of unification; however, ongoing research across jurisdictional lines is required to identify other areas that might benefit from rationalized review structures. Such research might be carried out by the Law Reform Commission, the proposed Administrative Council discussed *infra*, or some other body designated by the government.

To give an example of a common law country which has recently undertaken radical reforms in the review of administrative action, Australia created in 1975 a single administrative appeal tribunal comprised of a General Administrative Division, a Medical Appeals Division, a Valuation and Compensation Division, and may eventually include such other divisions as can be prescribed under the *Administrative Appeals Tribunal Act*.[241] It can and does review the exercise of statutory discretionary powers on the merits as well as on the law. Anyone aggrieved by a decision made pursuant to a statutory power scheduled to the Act is entitled to apply to the Tribunal for a "*de novo*" review — i.e., the Act places the Tribunal in the same position as the initial decider to exercise any power which could have been exercised by the initial decider. It is too early in the life of this tribunal to assess its impact, but the Australian Law Reform Commission in its Report Number 10(1978) indicates that the Tribunal is taking a fairly activist role, and is not reluctant to review government policy even at the highest level.

D. Review by a Separate Administrative Court System

An example of a more radical approach to the treatment of administrative law cases is the French system in which there is a set of administrative tribunals totally separate from the regular courts to deal with litigation between the state and individual parties. Since the time of the French Revolution when the old provincial high courts called *Parlements* were frustrating attempts at governmental reform made by the revolutionary national administration, the machinery of justice for public law, overseen by a central government body called the *Conseil d'État*, has been divided from that of private law.[242]

The *Conseil d'État* was created at that time with an administrative litigation branch established to hear public law cases of importance to national public administration. Today it also serves as an appellate body on cases originating before regionalized administrative tribunals. Before 1953 the institutional predecessors of the lower tribunals appeared on government organizational charts as subordinate bodies under the umbrella of general powers of the *Conseil d'État*, but since then they have been linked administratively to central government organs only through the Ministry of the Interior.

It has been in the British tradition to fear interference with primary legal values by the Crown more than intervention by the judiciary. The days of the Jacobites and the Star Chamber are still remembered. Dicey identified administrative law in a negative manner with the French *droit administratif*, a special body of law relating to administrative authorities which is applied through an administrative tribunal system separated from civil courts of justice. Lord Chief Justice Hewart, author of the *New Despotism*,[243] decried the growth in the power of the bureaucratic state and declared that the best way to control the administration is to subject it to the laws administered by the ordinary courts using traditional legal remedies, and not to tribunals of lawyers trained also in public

administration who could apply special remedies of their own in the administrative field. This criticism hearkens strongly to traditional notions of the rule of law. However, several common lawyers versed in administrative law matters, as well as civilian lawyers, have pointed out that the *Conseil d'État* has managed to be at least as effective in protecting the public against arbitrary administration as have the ordinary courts in common law countries.[244]

One apparent result of the combined jurisdiction of common law courts over both the private sector and government administration is the gradual spread of public administrative procedural law principles to cover, arguably inappropriately, the actions of private sector bodies in society to which individuals belong and which they wish to remain separate from state administrative police actions. In a strange sense, both libertarians desiring limited state influence and persons leaning toward increased state activity of professional quality but not of a totalitarian nature might favour a separate administrative court system. However, their motives differ. Libertarians wish to protect intermediate institutions and individuals in society from having their affairs unduly encroached upon by the state. Many persons concerned about the professional quality of state activity but not necessarily in limiting its orbit, believe that the introduction of a separate public law system would promote excellence in government. But there remain those who associate the state with homogeneous societal interests and see at least a partial "public" element in all groups or associations. They might wish to encourage the further spread of common law court review of administrative action from state to other "public" authorities.

The preceding comments may well raise a moot point. To suggest at this time the development of a separate system of Canadian public law would probably be perceived as requiring a radical change in attitudes on the part of government and the legal profession, and perhaps citizens. In any event, the delineation of recommendations in that direction at this time would entail stepping beyond the bounds of administrative law reforms discussed in this paper.

E. Need for Administrative Law Advisory Body

Within the context of the current legal system in Canada, there remains the need to initiate one key institutional reform to federal administrative law which has not yet been prepared in the form of draft legislation. This is the establishment of an advisory body on administrative law and procedures. Such bodies have been created in the United Kingdom, the United States and Australia, countries with economic systems and legal traditions akin to those of Canada. These bodies are called the Council on Tribunals,[245] the Administrative Conference[246] and the Administrative Review Council,[247] respectively. The Statutory Powers Procedure Rules Committee in Ontario, created under the Act of the same name, is of a similar nature.[248] The backgrounds and description of, and the justification for such bodies are treated in some detail in a study paper being prepared on the desirability of establishing a monitoring mechanism or an advisory body on the administrative process.[249]

1. *Legislative Planning and Drafting*

The first effective controls to be devised for an administrative authority come at the stage of initial legislative planning for its establishment. In the Canadian context, this requires the Cabinet or the responsible Minister, assisted by officials who are experts on the machinery of government and administrative law, and by legislative draftsmen, to draft appropriate legislation for eventual introduction to Parliament once the creation of a new authority is adopted as a governmental priority.

Unfortunately, there is no institutional mechanism in Canada at this time having at its disposal the number of persons and expertise required to ensure that new or modified statutory authorities which the government wishes to bring into existence will possess a blend of functions, powers and

procedures fitting well into the overall structure and scheme of administration. Although the Privy Council Office has a handful of officials responsible for overseeing the machinery of government, they cannot hope to do more than monitor or give occasional guidance to new development. The demands made on the time of these officials, their limited resources, and the desirability of keeping Privy Council secretariats small so that the officials therein can interact effectively, while at the same time leaving departments and other governmental bodies to go about their business, makes it virtually impossible for the Privy Council Office to exercise general control.

Lawyers in the Legislative Drafting Section and in Legal Services for the Privy Council are kept so busy preparing or vetting the details of legislation and subordinate statutory instruments, respectively, that they cannot be expected to reflect on how proposed administrative activities might best be fitted into the structure of administration.

One effective step which can be taken to ensure that new statutory authorities are designed to operate well while taking into account the existing machinery of government and administrative traditions is to establish a specialist administrative body to advise the government on what should be contained in draft administrative legislation and statutory instruments arising thereunder, among other things.

In France, this is a role long played by the *Conseil d'État*, which is one of a handful of central consultative bodies on economic, social and other governmental matters advising the government. The practice has also evolved in the United Kingdom of referring all draft legislation affecting the British administrative tribunal system to the Council on Tribunals for study and comment.

2. *Monitoring Administrative Procedures*

Advisory bodies of the three common law countries mentioned above concentrate much of their attention on monitoring the procedures followed by administrative authorities. The

Council on Tribunals is limited in its jurisdiction to a study of the constitution and workings of independent, mostly local, tribunals in a unitary state, while the Australian and American bodies have a mandate to study their respective federal statutory administrative authorities in general.

The Statutory Powers Procedure Rules Committee in Ontario has to maintain under continuous review the practices and procedures of tribunals with a view to their improvement. The Committee also acts as a consultative body in the making of appropriate rules additional to the minimal rules for tribunals specified in the Act, and in the making of rules for the exercise of statutory powers of certain classes of tribunals to which the statutory minimal rules provisions do not apply. In principle, the Committee reports annually to the Minister of Justice and Attorney General, but in fact it has done so formally only once.[250]

3. *Consultations on Appointments to Independent Agencies*

As was mentioned in Chapter Eight, the Home Secretary must take into account recommendations made by the Council on Tribunals before appointing members to administrative tribunals in the United Kingdom. A Canadian federal administrative law advisory body could perform the same function here.

4. *Administrative Council Proposal*

The Law Reform Commission is convinced that an institutional focal point is necessary to develop and maintain sound administrative practices at the federal level in Canada. To that end, we recommend that:

> 9.4 *an Administrative Council should be created to perform the types of activity assigned to similar administrative law consultative bodies in other common law jurisdictions.*

We also recommend that:

> 9.5 *the Administrative Council should have a role to play in the planning and drafting of legislation concerning administrative authorities, monitoring the proceedings of such authorities, and in advising them on procedures and practices they might adopt; as suggested before, it could also be consulted on appointments of members to independent agencies.*

It is conceivable that one piece of legislation could be used both to create an Administrative Council and to provide for guidelines or minimum statutory standards for federal administrative proceedings. This is presently a subject of research at the Commission.

An Administrative Council could be created within the present institutional framework, and might not necessarily require much additional organization. However, it would benefit from advice tendered by a consultative committee composed of persons with experience both inside and outside of government. It could consist of as small a unit as a research secretariat directed by a committee of senior officials drawn from the Privy Council Office, the Department of Justice, and the Law Reform Commission, among other governmental bodies. On the other hand, it could be structured as an independent agency with its own full-time chairman. It could report either directly to Parliament or through a responsible Minister such as the Minister of Justice, or perhaps through the Prime Minister as does the Economic Council.[251] The latter model has the advantage that the proposed Council would not be battling departmental advisors sharing the same responsible Minister regarding which policy directions to follow. Whatever the organizational structure chosen for an Administrative Council, the Commission recommends that:

> 9.6 *a broadly based consultative committee for the Administrative Council should be established, which would include representatives from outside of government who could help to give direction to recommendations on reforms regarding broad problems relating to procedures before administrative authorities.*

Experience gained by administrative law specialists working with the Administrative Conference in the United States and with the Law Reform Commission of Canada also indicates that administrative reform proposals are often most appreciated and effectively implemented when they are made in the context or on the basis of studies of individual administrative authorities. The Commission recommends that:

> 9.7 *the Administrative Council should have the power, at the request or with the permission of the Government, the responsible Minister, or an administrative authority itself, to conduct a study of the authority for the purpose of measuring the quality of its practices and procedures, and making recommendations for their reform.*

To a certain extent, this has been a role played by the Law Reform Commission's individual agency studies to date.

F. Conclusion

To sum up its position on the introduction of institutional reforms in the field of administrative law, the Law Reform Commission thinks it necessary: for an Administrative Council to be established to consult the government on legislation and procedures relating to administrative authorities and appointment of members of independent agencies; for an Office of Ombudsman to be created; for administrative tribunal review mechanisms to be rationalized to the degree presently practicable and inquiry to be made regarding more basic reforms in the whole system of review of administrative action; and for general legislation to be passed dealing with freedom of information, including provision for an Information Commissioner, and consequential changes to be made to the law and government policy on secrecy in government and Crown privilege.

Summary of Recommendations

CHAPTER THREE: The Legislative Framework and the Role of Parliament

The Commission recommends that:

3.1 where independent administrative agencies have analogous purposes, they should be designed along similar lines. In relation to similar types of functions carried out by various agencies, there should be similar sets of powers relating to those functions, drafted in uniform terminology. Agencies with similar types of powers and procedures should also have the same statutory label. (P. 50)

3.2 the Government should consistently follow the practice of preparing in advance a list of legislation to be introduced according to priority in each session of Parliament, and legislative drafters should be engaged in the preliminary preparation of legislation early in the planning process. (P. 51)

3.3 legislation should be drafted in plain language and arranged in a logical and intelligible manner instead of using antiquated conventions and archaic terminology. (P. 51)

3.4 drafters should use model checklists to ensure conformance of draft legislation with basic requirements of form, phraseology and substantive law. (P. 52)

3.5 the same statutory format should be followed, where feasible, in all cases where the same type of legislation is involved. (P. 52)

3.6 comprehensive subject indexing, with references appropriate for lay readers as well as specialists, should be

prepared for the Revised Statutes of Canada and for each new volume of statutes as it appears. Indexing of individual Acts should be continued as part of the general index. (P. 53)

3.7 a summary of legislative provisions should be placed at the beginning of statutes, especially those which are long or complicated. (P. 53)

3.8 the Government should sponsor the publication of the Statutes of Canada Annotated, statutory rules being annotated with explanatory notes to promote comprehension of the law. (P. 53)

3.9 the practice of according powers to an agency by declaring it a "court of record", should be abandoned. More specific drafting terminology should be developed to deal with the various issues of status, powers and procedure, such as problems of contempt, which the present term has been used, in different ways at different times, to cover. (P. 57)

3.10 the practice of granting blanket administrative powers by, for example, adopting by reference the powers given to commissioners under Part I of the *Inquiries Act* should be abandoned. (P. 58)

3.11 more attention should be paid to giving administrative authorities sanctioning powers appropriate to their mandates. (P. 59)

3.12 when an independent agency is established its policy mandate or guidelines should, in principle, be stated clearly in its enabling Act. (P. 62)

3.13 when an agency has through experience appropriately articulated a once vague mandate, it should be inserted into the Act. (P. 63)

3.14 if the Governor in Council, pursuant to the *Public Service Rearrangement and Transfer of Duties Act*, transfers administrative powers or duties from a statutory agency to a department or other agency of government, Parliamentary approval should be required. (P. 63)

3.15 independent agencies should prepare detailed annual reports which should be automatically and permanently referred to the appropriate standing committees of the House of Commons and subjected to close scrutiny there. (P. 63)

3.16 Parliamentary Standing Committees to which annual reports are referred should be strengthened. Each Committee should be allocated its own operational budget, part of which should be used to pay for permanent research staff adequate in size for the committee to scrutinize administration effectively, and, in appropriate cases, conduct additional research on administrative operations. (P. 64)

3.17 the *Statutory Instruments Act* should be amended to require the Clerk of the Privy Council to make available on a regular basis to the Standing Joint Committee on Regulations and Other Statutory Instruments lists and summaries of all statutory instruments to be registered with the Privy Council which are placed on the weekly agenda of the Cabinet Committee responsible for statutory instruments. Such listed instruments as the Joint Committee expressed an interest in examining should then be made available to it; but Committee members should undertake not to make public the contents of instruments exempted from inspection under section 27 of the Act. (P. 69)

3.18 provision should be made in the Standing Orders of the House and the Rules of the Senate for debate on questionable statutory instruments at the request of at least ten members of the particular Chamber within a limited delay period, and for the making of resolutions to refer statutory instruments to the responsible Minister for reconsideration; and

3.19 detailed provisions should be set out regarding the procedures to be followed in the House and Senate to carry out affirmative or negative resolutions regarding statutory instruments. (P. 72)

The Commission recommends that:

4.1 to avoid unnecessary confusion regarding the sources of policy direction for an agency, its enabling Act should contain provisions chosen with a conscious view to the degree to which the agency should be provided with political insulation or Ministerial control at different stages of the administrative process. (P. 74)

4.2 the presumption should operate in structuring the machinery of government, that administrative authorities be established within departmental confines unless there are very good reasons for constituting them as independent agencies. (P. 74)

4.3 agencies performing solely a court-like function should be kept free from governmental interference. (P. 75)

4.4 there should be some direct line of accountability to elected officials for all delegated legislation; where an agency is given power to make its own regulations without government direction or approval, those regulations should be made subject to affirmative or negative resolution by Parliament. (P. 84)

4.5 if there is to be Ministerial control over agency decision-making, it should in principle be done on a general policy level in advance of specific cases. (P. 84)

4.6 the power to issue directions should be used, but sparingly and not as a general political control device, in giving policy directions over well-defined areas of activity to agencies having relatively broad mandates to elaborate and apply policy. (P. 85)

4.7 prior to the issuance of a policy direction to an independent agency, the Government should refer the matter to the agency, which may request public submissions thereon and shall make a public report within ninety days or such longer period as the Government may specify, and further, such direction should be published in the *Canada Gazette* and tabled in the House of Commons. (P. 85)

4.8 in order to provide for the possibility of Parliamentary control over directions, Parliament should retain a power to pass a negative resolution within seven days after a direction is issued. (P. 86)

4.9 the Governor in Council should have the power to issue a "stop order", effectively halting agency proceedings for a period of up to ninety days, in order that an appropriate general direction might be issued for the agency to consider in arriving at a final decision. (P. 86)

4.10 in order that agencies to which directions have been issued might benefit from further clarification of the meaning of directions, they should have the power to refer them back to the issuing authority for interpretation. Such interpretation should then be issued within thirty days. (P. 86)

4.11 an arrangement whereby the Governor in Council is required to consider for approval every decision of a regulatory agency pertaining to a particular field should not be adopted as a model political control device. (P. 87)

4.12 provisions for the final disposition by the Cabinet or a minister of appeals of any agency decisions, except those requesting an equivalent of the exercise of the prerogative of mercy or a decision based on humanitarian grounds, should be abolished. (P. 88)

4.13 departments and agencies should have not only the right but the responsibility to intervene in proceedings of special interest to them before other departments or agencies and, conversely, the responsibility to hear the views of those others which seek to make representations before them. This should occur as much as possible in public proceedings. (P. 90)

4.14 *ex parte* communications to an agency from any governmental authority or other sources making representations pertaining to particular proceedings should be put on the record in the course of those proceedings. (P. 90)

4.15 where the Government decides to establish structures or initiate programs the arrangements for which might fly

in the face of existing economic or social legislation, there should be means for the Government to deal with such matters itself. The least controversial device would, of course, be special legislation. (P. 92)

CHAPTER FIVE: Public Interest Representation and Rule-making

The Commission recommends that:

5.1 independent agencies should experiment with innovative notice techniques in connection with those types of proceedings where it is important to ensure that an agency will obtain a balanced picture of the issues at stake because there is a wide range of constituent interests affected by decisions flowing from the proceedings. (P. 101)

5.2 each agency should have a designated information officer or staff equipped to answer in simple language standard questions posed about the jurisdiction, procedures and policies of the agency. There should also be prompt and adequate responses to inquiries from the public. (P. 104)

5.3 agencies should produce for the public written materials explaining in simple lay terms their organization and jurisdiction, their general rules of procedure, and how the public may obtain information and make submissions or requests. (P. 104)

5.4 agencies should consolidate and make available for public inspection and copying: their decisions and reasons for judgment, including concurring or dissenting opinions; rules of general applicability adopted by the agency; and administrative manuals, instructions or guidelines on the basis of which advice is given or action is taken, except those that must be kept confidential for reasons of effective enforcement policy and the like. (P. 104)

5.5 government funding should continue to be made available for worthwhile public interest intervention activities. (P. 106)

5.6 agencies discharging a substantial policy planning function should commit themselves to utilize such techniques as community animation, public information initiatives and public education programs whenever appropriate to induce effective public participation in such planning. (P. 111)

5.7 in order to strike the best balance in interest representation in the format of agency proceedings, agencies should engage in experimentation with different procedures, forms and techniques allowing such representation. Innovation should be encouraged. (P. 113)

5.8 each agency should eventually develop for itself an appropriate set of rules of procedure taking into account public interest representation. (P. 114)

5.9 statutory authorities should move towards increased rule-making which, as much as possible, should take place in special proceedings designed for the purpose. Rules made pursuant to such proceedings would include regulations and other statutory instruments, directions from the executive branch, formal policy elaborated in policy-making proceedings such as those conducted by the CRTC, and so forth. (P. 115)

5.10 procedures for rule-making should include, at a minimum, a legal requirement that an authority provide public notice identifying draft rules being considered for adoption, allow time for interested persons to comment on them, and take into account any comments made. (P. 115)

5.11 enabling legislation should, as much as possible, expressly authorize rule-making by most agencies, so that the grounds for the exercise of discretionary power will receive maximum exposure. (P. 116)

CHAPTER SIX: Guidelines for Administrative Procedure

The Commission recommends that:

6.1 parties to any proceedings should be given reasonable notice of a hearing by the administrative authority

responsible, and informed of the nature of the proceedings, the time and place of hearing, and the issues to be raised. (P. 122)

6.2 hearings with the full panoply of traditional procedural safeguards, including the right of parties to call and examine witnesses and present their arguments and submissions, the conducting of cross-examination of witnesses and the making of decisions based on the hearings record, should be used by agencies in proceedings involving initial restraints on the liberty of persons, the confiscation of substantial property rights, or the imposition of other significant sanctions. (P. 125)

6.3 in those types of cases where a court-like hearing is not warranted, but some kind of hearing is required for the sake of fairness or accuracy, minimum procedural safeguards should be adopted requiring that appropriate notice of hearings be given and written comments from interested persons be solicited and considered. Supplementary use could be made of written interrogatories, oral submissions and cross-examinations in certain cases or on specific issues, at the discretion of the agency. This kind of hearing would include rule-making proceedings. (P. 130)

6.4 in cases where individual life or liberty is not at stake, parties should be allowed to waive procedural rights so that safeguards otherwise required would not be applicable and case resolution might be expedited. (P. 131)

6.5 agencies should develop official policies concerning the conditions under which informal advice can be given by staff, and procedures under which such advice can be easily referred to a higher level for review. (P. 131)

6.6 each agency should establish procedures whereby it may keep control over its proceedings and the timetable followed therein, and provision should be made for appropriate sanctions against parties who fail to comply with procedural rules. (P. 132)

6.7 the practice of delegating formal authority to individual agency members or hearing officers to hold hearings and

make findings or recommendations for final decisions by an agency should be adopted, when appropriate, in proceedings where problems of time or geographic dispersion of cases are too burdensome for the agency sitting as a collegial body. (P. 133)

6.8 agencies should, in appropriate cases, release and distribute information at their disposal, including research papers by staff members which deal with relevant matters not elsewhere disclosed in documentation available to participants; but agency documents should not attribute to the staff any official position with respect to any issues raised. (P. 136)

6.9 agencies should make official decisions in writing. They should also be required, at least when requested, to give reasons for their decisions. Reasons should be made available, even when no hearings have been held, where decisions are taken directly and adversely affecting persons whose dossiers are the subject of a decision. (P. 138)

6.10 the federal and provincial attorneys-general should designate appropriate officials to study jointly the possibility of incorporating into legal aid plans and federal-provincial cost sharing formulae, an effective mechanism for legal representation of individuals, where appropriate, before federal administrative agencies. (P. 139)

6.11 agency procedures should not be unnecessarily complex or incomprehensible to the lay public. They should not be designed solely for specialized practitioners. (P. 140)

6.12 general legislation should be enacted incorporating minimum administrative procedure safeguards or providing the means for the development of common procedural guidelines. (P. 141)

CHAPTER SEVEN: Administrative Agencies and the Courts

The Commission recommends that:

7.1 the Federal Court of Canada should retain exclusive jurisdiction for judicial review of federal administrative authorities. (P. 145)

7.2 the artificial compartmentalization of various administrative activities through the use of such labels as "quasi-judicial" or "administrative" should be avoided in any future legislation defining the scope of judicial review or regulating administrative procedures. (P. 148)

7.3 the *Federal Court Act* should be amended so that judicial review may be initiated by a single type of application for review, whatever form of relief be desired, thereby doing away with the prerogative writs. (P. 150)

7.4 judicial review, whether for illegality or unfair procedure, should continue to extend to all federal statutory authorities, whether they be Ministers, officials, or administrative bodies. (P. 151)

7.5 the grounds of review and forms of relief should be expressly articulated in legislation, but in an open ended way so as to permit future evolution. (P. 151)

7.6 consideration should be given, as far as possible, to putting the Crown on the same footing as individuals with respect to claims for judicial relief against it. (P.152)

7.7 the members of the Trial Division of the Federal Court should no longer sit as unemployment umpires; this task should be assigned to a specialized administrative tribunal. (P. 156)

7.8 immigration appeals should be transferred out of the Federal Court of Appeal to the Trial Division or a specialized administrative tribunal. (P. 157)

CHAPTER EIGHT: Professional Standards

The Commission recommends that:

8.1 for each agency composed of Governor-in-Council appointees as members, there should be general guidelines in writing setting forth the desired qualities or expertise for an appointee to a given post. (P. 161)

8.2 an Administrative Council, referred to in recommendation 9.4, could advise the Government on appointments of members to agencies; but, even if that were not to be done, existing associations in the private sector could be

asked to comment on a short list of nominees in appropriate circumstances. With respect to appointments to major regulatory agencies in areas such as transport, communications and energy, prior consultation with provincial governments might also be desirable. (P. 162)

8.3 the Government should consider placing public job advertisements asking interested people to file applications for full-time posts as members of agencies. Nominations to the post of chairman or vice-chairman could remain dependent on final determination by the Cabinet. (P. 163)

8.4 greater effort should be made to broaden the perspectives of agencies through the appointment in appropriate cases of persons with varying backgrounds and training who represent interests an agency must take into account in performing its functions. (P. 163)

8.5 the Government should sustain a high level of commitment to placing qualified women in key positions. This goal can frequently be more easily achieved by means of appointment by Order-in-Council than by filling positions through the public service job placement process. Through the appointment of more women to them as members, independent agencies could be in the forefront in giving equal status for equal qualifications. (P. 163)

8.6 the terms of service of agency members respecting such matters as the number of years an appointment will last and security of tenure should be re-examined so as to make the positions attractive to a wide range of persons. (P. 164)

8.7 the chairman of each independent collegial agency should be given statutory power to direct and control the members and staff, unless a particular member or members carry out major functions unrelated to those of the agency as a whole. (P. 169)

8.8 there should be some organized system of training, both introductory and continuing, for agency members and staff in order that agencies may continue to improve professional standards; to assist agencies which are too small to organize their own training programs or mate-

rials economically, or to prepare programs in which various agencies with similar interests desire to participate, a government body responsible for training programs should be asked to undertake a major organizational role. (P. 172)

CHAPTER NINE: New Institutional Controls over Administration

The Commission recommends that:

9.1 general legislation dealing with freedom of information, including provision for an Information Commissioner, should be passed and proclaimed as soon as it is practicable. However, the Government should also make appropriate changes in legislation and practices regarding official secrets and confidentiality, and the status and use of claims to Crown privilege. (P. 176)

9.2 legislation creating a federal Office of Ombudsman, which would incorporate in its list of functions those presently carried out by the Privacy Commissioner and the Correctional Investigator, should be passed as soon as possible. (P. 178)

9.3 the examination of existing discretionary powers held by administrative authorities and of the modes of review to which they are presently subjected should be made an object of ongoing research across jurisdictional lines by appropriate governmental bodies, in order to determine what review structures might be rationalized and how the review process itself might be simplified or made more effective. (P. 178)

9.4 an Administrative Council should be created at the federal level in Canada to perform the types of activity assigned to similar administrative law consultative bodies in other common law jurisdictions. (P. 184)

9.5 the Administrative Council should have a role to play in the planning and drafting of legislation concerning administrative authorities, in monitoring the proceedings of such authorities, and in advising them on procedures and practices they might adopt. As suggested before, it

could also be consulted on appointments of members to independent agencies. (P. 185)

9.6 a broadly based consultative committee for the Administrative Council should be established, which would include representatives from outside of government who could help to give direction to recommendations on reforms regarding broad problems relating to procedures before administrative authorities. (P. 185)

9.7 the Administrative Council should have the power, at the request or with the permission of the Government, the responsible Minister, or an administrative authority itself, to conduct a study of the authority for the purpose of measuring the quality of its practices and procedures, and making recommendations for their reform. (P. 186)

Endnotes

1. A. V. Dicey, *An Introduction to the Study of the Law of the Constitution*. Seventh Edition (1908), at 330.
2. Law Reform Commission of Canada, Working Paper 9, *Expropriation* (1975), and *Report on Expropriation* (1976).
3. Law Reform Commission of Canada, *Report on Evidence* (1975).
4. Law Reform Commission of Canada, Working Paper 17, *Commissions of Inquiry: A New Act* (1977).
5. Law Reform Commission of Canada, Working Paper 18, *Federal Court: Judicial Review* (1977).
6. *Federal Court Act*, S.C. 1970-71-72, c. 1; R.S.C. 1970, 2nd Supp., c. 10.
7. P. Anisman, *A Catalogue of Discretionary Powers in the Revised Statutes of Canada*, 1970. (1975) Law Reform Commission of Canada.
8. I. A. Hunter and I. F. Kelly, *The Immigration Appeal Board*. (1976) Law Reform Commission of Canada.
9. G. B. Doern, *The Atomic Energy Control Board: An Evaluation of Regulatory and Administrative Processes and Procedures*. (1976) Law Reform Commission of Canada.
10. P. Carrière and S. Silverstone, *The Parole Process: A Study of the National Parole Board*. (1976) Law Reform Commission of Canada.
11. P. Issalys and G. Watkins, *Unemployment Insurance Benefits: A Study of Administrative Procedure in the Unemployment Insurance Commission*. (1977) Law Reform Commission of Canada.
12. H. N. Janisch, *The Regulatory Process of the Canadian Transport Commission*. (1978) Law Reform Commission of Canada.
13. A. R. Lucas and T. Bell, *The National Energy Board: Policy, Procedure and Practice*. (1977) Law Reform Commission of Canada.
14. C. Johnston, *The Canadian Radio-Television and Telecommunications Commission*. (to be published) Law Reform Commission of Canada.
15. P. Issalys, *The Pension Appeals Board*. (1979) Law Reform Commission of Canada.
16. P. Slayton, *The Anti-dumping Tribunal*. (1979) Law Reform Commission of Canada.

17. S. J. K. Kelleher, *The Canada Labour Relations Board*. (to be published) Law Reform Commission of Canada.

18. P. Slayton and J. Quinn, *The Tariff Board*. (to be published) Law Reform Commission of Canada.

19. G. B. Doern, I. A. Hunter, D. Swartz and V. S. Wilson, "The Structure and Behaviour of Canadian Regulatory Boards and Commissions: Multi-disciplinary Perspectives", (1975) 18 Can. Publ. Adm., at 189-215.

20. R. T. Franson, *Access to Information: Independent Administrative Agencies*. (1979) Law Reform Commission of Canada.

21. D. Fox, *Public Participation in Administrative Proceedings*. (to be published) Law Reform Commission of Canada.

22. L. Vandervort, *Political Control of Independent Agencies*. (to be published) Law Reform Commission of Canada.

23. F. Slatter, *Parliament and Administrative Agencies*. (to be published) Law Reform Commission of Canada.

24. J. A. Leadbeater, *Supervision with Independence in the Administrative Process*. (to be published) Law Reform Commission of Canada.

25. D. J. Mullan, *The Federal Court Act: A Study of the Court's Administrative Law Jurisdiction*. (1977) Law Reform Commission of Canada.

26. Federal Court Paper, *supra*, note 5.

27. *Federal Court Act*, S.C. 1970-71-72, c. 1; R.S.C. 1970, 2nd Supp., c. 10.

28. In Working Paper 18, *Federal Court: Judicial Review* (1977), the term "administrative authority" was introduced to replace the more ambiguous term "administrative tribunal" when referring to governmental bodies or persons having or exercising jurisdiction or powers conferred by or under an Act of Parliament, as set forth in section 2 of the *Federal Court Act* under the definition of a "Federal board commission or other tribunal".

29. The definitions of effectiveness, economy and efficiency are borrowed from the *Report of the Auditor General of Canada*, 1978, at 34-35.

30. This chapter draws upon information compiled in J. E. Hodgetts, *The Canadian Public Service*: A Physiology of Government (1867-1970) (1973), and in a research paper by S. Hyson, *Federal Administrative Agencies: Origins and Evolution* (1975), in the files of the Law Reform Commission of Canada.

31. *The British North America Act*, 1867, R.S.C. 1970, App. II, No. 5; 30 & 31 Victoria, c. 3 (U.K.).

32. Report on Evidence *supra*, note 3, at 32-34, and 82-83.

33. R.S.C. 1970, App. II, No. 5; 30 & 31 Victoria, c. 3 (U.K.).

34. *Canadian Bill of Rights*, R.S.C. 1970, App. III; 8-9 Eliz. II, c. 44 (Canada).

35. *Canadian Human Rights Act*, S.C. 1976-77, c. 33.

36. *Official Languages Act*, R.S.C. 1970, c. O-2.

37. For a thumbnail sketch of railway regulatory developments in Canada up to 1903, see Hyson, *supra*, note 30, at 7-12.

38. *Report of the Royal Commission on Railways*. Sessional Paper No. 8a. 2nd Session of the 6th Parliament Canada (1888).

39. The Interstate Commerce Commission of the United States was created under the *Interstate Commerce Act*, Feb. 4, 1887, ch.104, 24 U.S. Stat. 379.

40. The British Government set up a Board of Railway Commissioners in 1846 and abolished it in 1851. A new Railway and Canal Commission was established in 1873 and reconstituted with wider powers in 1888. See R. E. Wraith and P. G. Hutchesson, *Administrative Tribunals*. Allen & Unwin: London (1973), at 25-28.

41. *Reports upon Railway Commissions, Railway Rate Grievances and Regulative Legislation*. Sessional Paper No. 20a. 2nd Session of the 9th Parliament. Canada (1902).

42. *Railway Act*, S.C. 1903, 3 E. VII, c. 58.

43. See the *International Boundary Waters Treaty Act*, R.S.C. 1970, c. I-20 (an Act of 1911 ratifying the Boundary Waters Treaty of 1909 that provided for an International Joint Commission).

44. By the Rivers and Harbors Act of 1902, the United States Congress requested the President of the United States to invite Great Britain to jointly establish an international commission to be composed of three American and three Canadian representatives. This led to the establishment of the International Waterways Commission. See J. G. Castel, *International Laws Chiefly as Interpreted and Applied in Canada* (Toronto: Butterworths, 3rd ed., 1976), at 367-378.

45. *Canada Grain Act*, S.C. 1912, c. 27.

46. *Civil Service Act*, S.C. 1918, c. 12.

47. *Public Service Rearrangement and Transfer of Duties Act*, S.C. 1918, c. 6.

48. *Act to Amend the Public Service Rearrangement and Transfer of Duties Act*, S.C. 1925, c. 23.

49. *Regulations Act*, R.S.C. 1970, c. R-5, repealed by the *Statutory Instruments Act*, S.C. 1970-71-72, c. 38.

50. *Combines and Fair Prices Act*, S.C. 1919, c. 45.

51. Report of the Royal (Rowell-Sirois) Commission on Dominion-Provincial Relations. (3 vol.) 1940. Book I, at 103.

52. J. J. Deutsch, "The Public Service in a Changing Society", (1968) 11 Can. Pub. Adm. 1.

53. *Federal Court Act*, S.C. 1970-71-72, c. 1; R.S.C. 1970, 2nd Supp., c. 10.

54. The (Glassco) Royal Commission on Government Organization, vol. 5, Report (1963), at 75.

55. G. Ganz, "Allocation of Decision-Making Functions (Part II)", (1972) Public Law 299, at 308.

56. For a more extensive list of the reasons for the creation of administrative agencies, see F. Slatter, *Parliament and Administrative Agencies*, *supra*, note 23.

57. *Federal Court Act*, S.C. 1970-71-72, c. 1; R.S.C. 1970, 2nd Supp., c. 10.

58. *Combines Investigation Act*, R.S.C. 1970, c. C-23, as am., S.C. 1974-75-76, c. 76.

59. *Public Service Staff Relations Act*, R.S.C. 1970, c. P-35.

60. *Customs Act*, R.S.C. 1970, c. C-40, s. 47.

61. *Excise Tax Act*, R.S.C. 1970, c. E-13, s. 59.

62. *Anti-dumping Act*, R.S.C. 1970, c. A-15, s. 19.

63. *Income Tax Act*, S.C. 1970-71-72, c. 63, s. 169.

64. *Unemployment Insurance Act*, 1971, S.C. 1970-71-72, c. 48.

65. *Pension Act*, R.S.C. 1970, c. P-7.

66. *Civilian War Pensions and Allowances Act*, R.S.C. 1970, c. C-20.

67. *Canada Pension Plan*, R.S.C. 1970, c. C-5.

68. *Unemployment Insurance Act*, 1971, S.C. 1970-71-72, c. 48.

69. *Quebec Pension Plan Act*, R.S.Q., c. R-9.

70. *War Veterans Allowance Act*, R.S.C. 1970, c. W-5.

71. The term "polycentric", first used by M. Polanyi in *The Logic of Liberty: Reflections and Rejoinders* (1951), at 171, was introduced in a legal context by Lon Fuller in "The Forms and Limits of Adjudication", initially written in 1957 and published posthumously in 92 Harv. L. Rev. 353 (1978), at 394.

72. Catalogue of Discretionary Powers, *supra*, note 7, at 8-18.

73. UIC Study, *supra*, note 11, at 246-247.

74. *Income Tax Act*, S.C. 1970-71-72, c. 63.

75. *Immigration Act*, 1976, S.C. 1976-77, c. 52.

76. *Canada Labour Code*, R.S.C. 1970, c. L-1.

77. *Anti-dumping Act*, R.S.C. 1970, c. A-15.

78. *Statute Revision Act*, 1974, S.C. 1974-75-76, c. 20.

79. Report on Evidence *supra*, note 3, at 9.

80. *National Transportation Act*, R.S.C. 1970, c. N-17.

81. *Canadian Radio-television and Telecommunications Act*, S.C. 1974-75-76, c. 49, s. 14, referring to *Broadcasting Act*, R.S.C. 1970, c. B-11, s. 3.

82. *Railway Act*, R.S.C. 1970, c. R-2.

83. R.S.C. 1970, c. N-17.

84. S.C. 1974-75-76, c. 49, subs. 14(2).

85. Bill C-14, Nuclear Control and Administration Act, First reading, Nov. 24, 1977.

86. *Combines Investigation Act*, R.S.C. 1970, c. C-23.

87. P. Pichet, *Courts of Record and Administrative Tribunals* (Draft) June, 1976. Research Paper for the Law Reform Commission of Canada.

88. The Anti-dumping Tribunal is given the powers of a superior court of record under the *Anti-dumping Act*, R.S.C. 1970, c. A-15, s. 27, and the Immigration Appeal Board is given similar powers under the Immigration Act, 1976, S.C. 1976-77, c. 52, s. 65.

89. See, *inter alia*, *Magnasonic Canada Ltd. v. Anti-dumping Tribunal* [1972] F.C. 1239 and *Sarco Canada Ltd. v. Anti-dumping Tribunal* [1979] 1 F.C. 247.

90. *Srivastava v. M.M.I.* [1973] F.C. 138. See also the IAB study, *supra*, note 8, at 36-43.

91. CTC study, *supra*, note 12, at 107-108.

92. *Id.*, at 105-106.

93. *Inquiries Act*, R.S.C. 1970, c. I-13, ss. 4 and 5.

94. S.C. 1976-77, c. 52, s. 113.

95. R.S.C. 1970, c. I-13.

96. *Id.*, ss. 4 and 5.

97. The Law Reform Commission's Police Powers Project is currently engaged in a series of studies on search and seizure operations carried out on behalf of federal administrative authorities. This should provide a substantial amount of information for any future study on investigative powers.

98. NEB study, *supra*, note 13, at 49-50.

99. AECB study, *supra*, note 9, at 44 and 84-85.

100. *Supra*, note 85.

101. *An Act to amend the Canada Labour Code*, S.C. 1977-78, c. 27, s. 43, amended *Labour Code, Canada*, R.S.C. 1970, c. L-1, s. 122, so that the Federal Court of Appeal could only review CLRB decisions under paragraph 28(1)(*a*) of the *Federal Court Act*, R.S.C. 1970, 2nd Supp., c. 10.

102. *Nicholson v. Haldimand — Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311.

103. Royal (Lambert) Commission on Financial Management and Accountability. Final Report (1979), at 370.

104. Parliament and Administrative Agencies study, *supra*, note 23.

105. *Statutory Instruments Act*, S.C. 1970-71-72, c. 38.

106. S.C. 1970-71-72, c. 38, subs. 3(2).

107. The *Canada Gazette* is published in three parts: Part I contains proclamations, appointments and royal assents; Part II contains statutory instruments; Part III contains statutes and amendments to statutes.

108. S.C. 1970-71-72, c. 38, s. 27.

109. *Id.*

110. R.S.C. 1970, c. R-5, repealed, 1970-71-72, c. 38.

111. S.C. 1970-71-72, c. 38, par. 2(1)(*d*).

112. Second Report to Parliament of the Standing Joint Committee of the Senate and the House of Commons on Regulations and Other Statutory Instruments. Second Session of the Thirtieth Parliament, 1976-77, at 47.

113. See the Report, *id.*, at 43-48, for a discussion of the difficulties in defining a statutory instrument under the present Act.

114. S.C. 1970-71-72, c. 38, s. 26, with the exception of regulations made pursuant to paragraph 27(*d*).

115. *Interpretation Act*, R.S.C. 1970, c. I-23.

116. R.S.C. 1970, 2nd Supp., c. 29, subs. 1(3).

117. R.S.C. 1970, c. I-23.

118. *Second Report*, note 112, at 38. The Report refers to the statutory provision in question as Section 28A of the *Interpretation Act*, as added by subsection 28(3) of the *Statutory Instruments Act*, S.C. 1970-71-72, c. 38, but the proper citation is to the *Statutory Instruments, Consequential Amendments Act*, R.S.C. 1970, 2nd Supp., c. 29, subs. 1(3), that replaced provisions of s. 28 of the *Statutory Instruments Act* which had been repealed by *Schedule A* to R.S.C. 1970, 2nd Supp.

119. Canada Parliament. *Third Report of the Special (MacGuigan) Committee on Statutory Instruments*. 1968-69, at 88.

120. *Id.*

121. *Id.*

122. Political Controls Study, *supra*, note 22.

123. CTC Study, *supra*, note 12, at 18, n. 49.

124. *Broadcasting Act*, R.S.C. 1970, c. B-11, s. 27.

125. *Atomic Energy Control Act*, R.S.C. 1970, c. A-19, s. 7.

126. Royal (Lambert) Commission on Financial Management and Accountability, Final Report (1979), at 316.

127. Canada Parliament *Third Report of the Special (MacGuigan) Committee on Statutory Instruments*. 1968-69, at 34-35.

128. R.S.C. 1970, c. A-19.

129. *National Transportation Act*, R.S.C. 1970, c. N-17.

130. Political Controls Study, *Supra*, note 22, discussed in first draft at 50-69.

131. See *Inuit Tapirisat of Canada v. His Excellency the Right Honourable Jules Léger*, [1979] 1 F.C. 213 (T.D.), rev'd, 1 F.C. 710 (C.A.).

132. Political Controls study, *supra*, note 22, First Draft at 219. The letter was submitted as evidence at the Telesat hearing by the Consumers' Association of Canada, whose counsel had found it on a CRTC file.

133. NEB study, *supra*, note 13, at 79-98.

134. Political Controls study, *supra*, note 22, First Draft at 221-222.

135. *Id.*, First Draft, at 209-215.

136. *Northern Pipeline Act*, S.C. 1977-78, c. 20.

137. Interview with NEB legal counsel.

138. Public Participation study, *supra*, note 21, (Draft) Introduction.

139. NEB study, *supra*, note 13, at 42.

140. New CRTC Telecommunications Rules of Procedure, Telecom Orders, CRTC 79-297, went into effect on July 20, 1979.

141. AECB study, *supra*, note 9, at 66-67.

142. Access to Information study, *supra*, note 20.

143. See the *Annual Report* 1978-79, Regulated Industries Program, Consumers' Association of Canada, at 1-5 and 70.

144. The CTC held hearings on the question of awarding costs to intervenors from April 2 to 4, 1975. Commissioner Gray wrote a report to his colleagues, submitted on August 19, 1975, that concluded that costs could not be awarded under existing circumstances.

145. CRTC Press Release, May 23, 1978, at 3. Draft CRTC Telecommunications Rules of Procedure, May, 1978, subs. 52(1).

146. Discussed further in the Public Participation study, *supra*, note 21, (Draft) at 84-88.

147. *Id.*, at 175-176.

148. R.S.C. 1970, c. N-17.

149. *Combines Investigation Act*, R.S.C. 1970, c. C-23, s. 27.1, as added by S.C. 1974-75-76, c. 76.

150. Bill C-13, An Act to Amend the Combines Investigation Act, First Reading, Nov. 18, 1977. See, in particular, s. 19.

151. Discussed further in the Public Participation study, *supra*, note 21, (Draft) at 123-135.

152. A more detailed definition of what administrative procedure involves is provided in the UIC study, *supra*, note 11, at 3-4, and in the PAB study, *supra*, note 15, at 4-6.

153. See the case of *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311, for the first application of the doctrine of fairness by the Supreme Court of Canada. For a discussion of the background of the doctrine, see D. J. Mullan, *Fairness: The New Natural Justice?* (1975) 125 U.T.L.J. 281.

154. S.C. 1970-71-72, c. 48.

155. See the Anti-dumping Tribunal study, *supra*, note 16, at 17-19, and the Immigration Appeal Board study, *supra*, note 8 at 40-43.

156. The term "secret law" was first used by Professor K. C. Davis in 1964 in Testimony before the Subcommittee on Administrative Practice and Procedure of the Senate Judiciary Committee, 88th Cong., 2d Sess., on S. 1663, at page 273. See K. C. Davis, *Administrative Law Treatise* (2d ed., 1978), Vol. I, at 364.

157. CLRB study, *supra*, note 17, final draft at 83.

158. See the *Access to Information* study, *supra*, note 20, at 34-36.

159. *Id.*, at 50.

160. *Id.*

161. NPB study, *supra*, note 10, at 90.

162. CTC study, *supra*, note 12, at 46.

163. Public Participation study, *supra*, note 21, (Draft) at 39.

164. CTC study, *supra*, note 12, at 52-55.

165. *Id.*, at 55-57.

166. Three examples of agency enabling Acts delegating the power to conduct agency hearings to single members of panels of members are the *Broadcasting Act*, R.S.C. 1970, c. B-11, subs. 19(4), the *National Energy Board Act*, R.S.C. 1970, c. N-6, s. 13-14, and the *National Transportation Act*, R.S.C. 1970, c. N-17, ss. 17-20.

167. CTC study, *supra*, note 12, at 47.

168. *Immigration Appeal Board Act*, R.S.C. 1970, c. I-3, subs. 10(1). This Act was repealed by the *Immigration Act*, 1976, S.C. 1976-77, c. 52, and no provision similar to the old section 10 was made.

169. CRTC study, *supra*, note 14, (Draft) at 262-266.

170. R.S.C. 1970, c. N-17.

171. CTC study, *supra*, note 12, at 50.

172. *Id.*, at 87-97.

173. *Id.*, at 71-75.

174. *Tariff Board Act*, R.S.C. 1970, c. T-1, subs. 5(10).

175. *Anti-dumping Act*, R.S.C. 1970, c. A-15, subs. 29(3).

176. CTC study, *supra*, note 12, at 62-64.

177. ADT study, *supra*, note 16, at 32 and 49-50.

178. *Statutory Powers Procedure Act*, S.O. 1971, c. 47.

179. *The Administrative Procedures Act*, R.S.A. 1970, c. 2.

180. The federal *Administrative Procedure Act*, June 11, 1946, ch. 324, 60 Stat. 237, served as a model for later state legislation.

181. *Tribunals and Inquiries Act, 1971*, 19-20 Eliz. II, c. 62(U.K.)

182. *Statutory Powers Procedure Act*, S.O. 1971, c. 47.

183. Federal administrative procedure legislation in the United States has been codified and appears in the United States Code in 5 U.S.C. §§ 551 et seq., 701 et seq., 3105, 3344 and 7521 (1976).

184. Federal Court paper, *supra*, note 5, at 11-12.

185. [1979] 1 S.C.R. 311, at 325.

186. Federal Court paper, *supra*, note 5, at 35-37, 42.

187. R.S.C. 1970, 2nd Supp., c. 10, s. 28.

188. R.S.C. 1970, c. A-15.

189. [1979] 1 S.C.R. 311.

190. Now codified in 5 U.S.C. §§ 551 et seq., 701 et seq., 3105, 3344 and 7521 (1976).

191. *Act to amend the Canada Labour Code*, S.C. 1977-78, c. 27, s. 43.

192. R.S.C. 1970, 2nd Supp., c. 10, par. 28(1)(*a*).

193. Federal Court paper, *supra*, note 5, at 39,42.

194. R.S.C. 1970, 2nd Supp., c. 10.

195. Federal Court paper, *supra*, note 5, at 27.

196. R.S.C. 1970, 2nd Supp., c. 10.

197. Federal Court paper, *supra*, note 5.

198. UIC study, *supra*, note 11, at 301-309. This suggestion is also adopted in the PAB study, *supra*, note 15, at 302-304.

199. Federal Court paper, *supra*, note 5, at 17-18.

200. Federal Court paper, *supra*, note 5, at 17.

201. The subsequent passage in the text is based largely on remarks made by Gordon S. Smith in a panel discussion on Federal senior appoint-

ments to administrative agencies. *Speakers' Remarks*. Seminar for Members of Federal Administrative Tribunals (April, 1978), at 165-179.

202. *Tribunals and Inquiries Act*, 1971, 19-20 Eliz. II, c. 62, s. 5(U.K.).

203. See the research paper prepared for the Law Reform Commission of Canada by Caroline Andrew, Réjean Pelletier and Marthe Blouin, entitled *Composition of Federal Administrative Agencies*, March, 1976.

204. *Id.*, at 14.

205. The subsequent passage in the text is based largely on remarks made by Ian Dewar in a panel discussion on the appointment and evaluation of members of administrative agencies. 2nd Seminar for Members of Federal Administrative Tribunals (March, 1979). See also the comments by A. O. Solomon at the First seminar, *Speakers' Remarks*, *supra*, note 201, at 45-48.

206. S.C. 1976-77, c. 33, pt. IV, ss. 49-62.

207. AECB study, *supra*, note 9, at 34-37, 42.

208. Bill C-14, *Nuclear Control and Administration Act*, First reading, Nov. 24, 1977.

209. See *In re National Energy Board Act* [1976] 1 F.C. 20, and the same case on appeal, *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369.

210. Public Servants Conflict of Interest Guidelines, made on December 18, 1973, SI/74-2.

211. Two examples of agency enabling Acts prohibiting individuals from maintaining certain business interests during their terms as members of agencies are the *National Energy Board Act*, R.S.C. 1970, c. N-6, subs. 3(5), and the *National Transportation Act*, R.S.C. 1970, c. N-17, s. 9.

212. Seminar for members of Federal Administrative Tribunals (April 5-7, 1978), sponsored by the Law Reform Commission of Canada, the Privy Council Office, and the Public Service Commission.

213. Seminar for Members of Federal Administrative Tribunals (March 20-22, 1979), Public Service Commission, in collaboration with the Law Reform Commission of Canada and the Privy Council Office.

214. M. Ruhlen, *Manual for Administrative Law Judges* (1974), prepared for the Administrative Conference of the United States.

215. The subsequent passage in the text is based on remarks made by A. O. Solomon, Chairman of the Canadian Pension Commission. *Speakers' Remarks*, *supra*, note 201, at 36-45.

216. Glassco Commission Report, vol.5, *supra*, note 54, at 75.

217. Secretary of State. *Legislation on Public Access to Government Documents*. June, 1977.

218. The Ontario Royal Commission on Freedom of Information and Individual Privacy, established in March, 1977, is publishing a series of background research papers prepared for it.

219. Nova Scotia. *Freedom of Information Act*, S.N.S. 1977, c. 10. *New Brunswick Right to Information Act*, A.N.B. 1978, c. R-10.3.

220. *Freedom of Information in Canada: A Model Bill* (CBA, 1979).

221. *Ibid.*, ss. 11-15.

222. *Ibid.*, ss. 16-19.

223. Access to Information study, *supra*, note 20, at 65.

224. T. Murray Rankin, *Freedom of Information in Canada: Will the Doors Stay Shut?* (CBA, 1977).

225. *Official Secrets Act*, R.S.C. 1970, c. O-3.

226. R.S.C. 1970, 2nd Supp., c. 10, s. 41.

227. *Oath or Affirmation of Office and Secrecy*, in the *Public Service Employment Act*, R.S.C. 1970, c. P-32, sched. III.

228. The classification of documents for security purposes was discussed in D. F. Wall, *The Provision of Government Information*, (P.C.O., 1974), printed as an Appendix in: Parliament. First Session, Thirtieth Parliament, 1974-75, Standing Joint Committee on Regulations and other Statutory Instruments, Minutes of Proceedings and Evidence, Issue No. 32, pp. 30-71 (Queen's Printer, 1975).

229. Cabinet Directive No. 45, "Notices of Motion for the Production of Papers", tabled in the House of Commons on March 15, 1973.

230. Cabinet Directive No. 46, "Transfer of Public Records to the Public Archives and Access to Public Records held by the Public Archives and by Departments". June, 1973.

231. Definition for the office of ombudsman, as adopted by the International Bar Association at its meeting in Vancouver, August, 1974.

232. The *Parliamentary Commissioner (Ombudsman) Act* was passed by the New Zealand Parliament on September 7, 1962.

233. Alberta. *Ombudsman Act*, R.S.A. 1970, c. 268. British Columbia. *Ombudsman Act*, S.B.C. 1977, c. 58. Manitoba. *Ombudsman Act*, R.S.M. 1970, c. O-45. New Brunswick. *Ombudsman Act*, R.S.N.B. 1973, c. O-5. Newfoundland. *The Parliamentary Commissioner (Ombudsman) Act*, R.S.N. 1970, c. 285. Nova Scotia. *Ombudsman Act*, S.N.S. 1970-71, c. 3. Ontario. *Ombudsman Act*, S.O. 1975, c. 42. Quebec. *Public Protector Act*, R.S.Q., c. P. 32. Saskatchewan. *Ombudsman Act*, S.S. 1972, c. 87.

234. S.C. 1976-77, c. 33.

235. *Id.*, pt. III, ss. 31-48.

236. *Id.*, IV, ss. 49-62.

237. The post of Correctional Investigator was created on June 5, 1973, by Order-in-Council P.C. 1973-1431, and its occupant serves as a Commissioner under the *Inquiries Act*, R.S.C. 1970, c. I-13.

238. Bill C-43, Ombudsman Act. First reading, April 5, 1978, was prepared following the publication in July, 1977 of a government white paper favouring the establishment of a Canadian Federal Ombudsman.

239. *Ombudsman Act 1976*, Comm. Stats. (Australia), No. 181 of 1976.

240. *Parliamentary Commissioner Act* 1967, 15-16 Eliz. II, c. 13(U.K.).

241. *Administrative Appeals Tribunal Act 1975*, Comm. Stats. (Australia), No. 91 of 1975.

242. Numerous texts are available in French and English on the Conseil d'État. Among them are the following: Brown, L. Neville and Garner, J. F., *French Administrative Law* (2nd ed.), 1973; Debbasch C., *Institutions et droit administratifs*, P.U.F., 1978; Lefas, *et al.*, *Jurisprudence du Conseil d'État et juridictions administratives*, (16 vols.), 1976; and Mestre, A., *Le Conseil d'État, protecteur des prérogatives de l'Administration*, 1974.

243. Lord Hewart (Then Lord Chief Justice), *The New Despotism* (1929).

244. One of the most eloquent supporters of the French public law system in the common law camp has been Professor J. D. B. Mitchell. See, *inter alia*, the following articles by Mitchell: "Controlling the Administration: the Conseil d'État — an effective Solution." 61 L. Soc. Gaz. 719 (1964); "Causes and Effects of the Absence of a System of Public Law in the United Kingdom." (1965) Publ. L. 95, and "State and Public Law in the United Kingdom." 15 I.C.L.Q. 133 (1966).

245. The Council on Tribunals was created under the *Tribunals and Inquiries Act*, 1958, 6-7 Eliz. II, c. 66, s. 1 (U.K.).

246. The permanent Administrative Conference of the United States, which had two temporary predecessors, was created under the Administrative Conference Act, Aug. 30, 1964, Pub. L. 88-499, 78 Stat. 615, and is presently codified under 5 U.S.C. 571-576 (1976).

247. The Administrative Review Council was created under the Administrative Appeals Tribunal Act 1975, Comm. Stats. (Australia). No. 91 of 1975.

248. The Statutory Powers Procedure Rules Committee was established pursuant to the *Statutory Powers Procedure Act*, S.O. 1971, c. 47, pt. II, ss. 26-34.

249. Supervision with Independence study, *supra*, note 24.

250. *First Annual Report of the Statutory Powers Procedure Rules Committee*, May, 1976.

251. The last Liberal government designated the Prime Minister as the Minister responsible for receiving reports from the Economic Council of Canada and laying them before Parliament. *Economic Council of Canada Act*, R.S.C. 1970, c. E-1, s. 21.