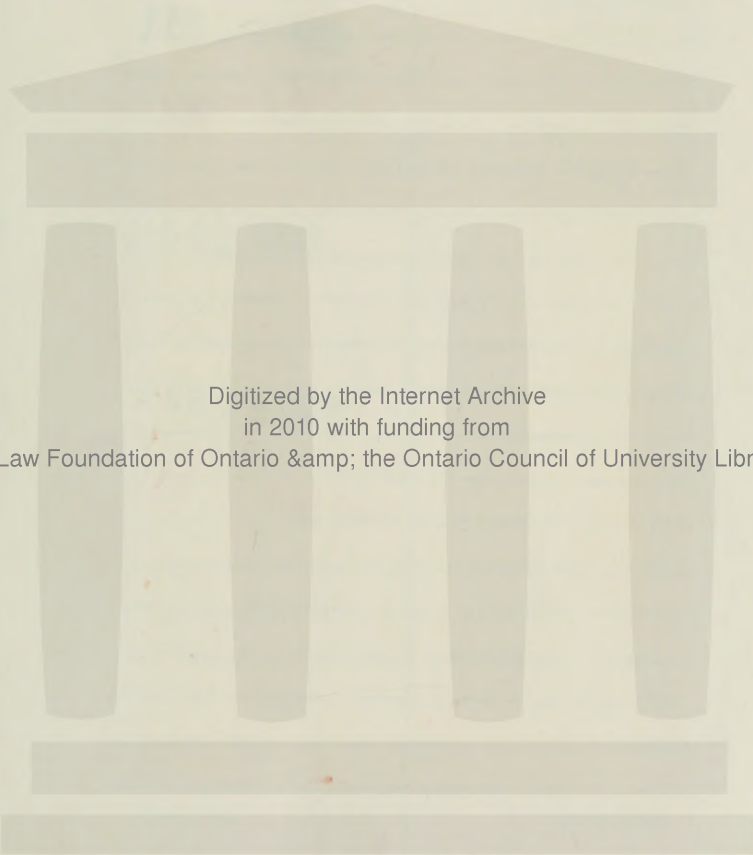






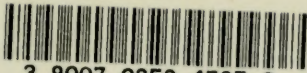
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ONTARIO

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# ROYAL COMMISSION INQUIRY INTO CIVIL RIGHTS

## REPORT / NUMBER ONE

1968

COMMISSIONER

HONOURABLE JAMES CHALMERS McRUER, LL.D.

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**ROYAL COMMISSION  
INQUIRY INTO CIVIL RIGHTS**

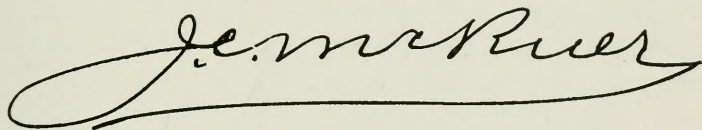
**VOLUME 1**

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To His Honour,  
The Lieutenant-Governor of the  
Province of Ontario.

May it please Your Honour:

Having been appointed by Royal Commission to perform the duties set out in the Commission and the Order in Council authorizing it, I submit to your Honour Report Number 1.

A handwritten signature in cursive script, reading "J. M. Ruer". The signature is written in black ink and features a long, sweeping underline that extends across the width of the signature.

*Commissioner.*

February 7, 1968



[Seal]



*Herbome.*

PROVINCE OF ONTARIO

ELIZABETH THE SECOND, by the Grace of God of the United Kingdom, Canada and Her other Realms and Territories Queen, Head of the Commonwealth, Defender of the Faith.

TO THE HONOURABLE JAMES CHALMERS McRUER, of Our City of Toronto, in Our Province of Ontario, Chief Justice of Our High Court of Ontario, and One of Our Counsel learned in the Law,

GREETING:

WHEREAS in and by Chapter 323 of the Revised Statutes of Ontario, 1960, entitled "The Public Inquiries Act", it is enacted that whenever Our Lieutenant Governor in Council deems it expedient to cause inquiry to be made concerning any matter connected with or affecting the good government of Ontario or the conduct of any part of the public business thereof or of the administration of justice therein and such inquiry is not regulated by any special law, he may, by Commission appoint one or more persons to conduct such inquiry and may confer the power of summoning any person and requiring him to give evidence on oath and to produce such documents and things as the commissioner or commissioners deem requisite for the full investigation of the matters into which he or they are appointed to examine;

AND WHEREAS Our Lieutenant Governor in Council of Our Province of Ontario deems it expedient to cause inquiry to be made concerning the matters hereinafter mentioned:

NOW KNOW YE that WE, having and reposing full trust and confidence in you the said James Chalmers McRuer DO HEREBY APPOINT you to be Our Commissioner, under the designation "Inquiry into Civil Rights",

1. To examine, study and inquire into the laws of Ontario including the statutes and regulations passed thereunder affecting the personal freedoms, rights and liberties of Canadian citizens and others resident in Ontario for the purpose of determining how far there may be unjustified encroachment on those freedoms, rights and liberties by the Legislature, the Government, its officers and servants, divisions of Provincial Public Service, boards, commissions, committees, other emanations of government, or bodies exercising authority under or administering the laws in Ontario.
2. After due study and consideration to recommend such changes in the laws, procedures and processes as in the opinion of the commission are necessary and desirable to safeguard the fundamental and basic rights, liberties and freedoms of the individual from infringement by the State or any other body.

AND WE DO HEREBY CONFER on you, Our said Commissioner, the power to summon any person and require him to give evidence on oath and to produce such documents and things as you Our said Commissioner deem requisite for the full investigation of the matters into which you are appointed to examine;

AND WE DO HEREBY FURTHER ORDER that all our departments, boards, agencies and committees shall assist you, Our said Commissioner, to the fullest extent, and that in order to carry out your duties and functions, you shall have the authority to engage such counsel, research and other staff and technical advisers as you deem proper;

TO HAVE, HOLD AND ENJOY the said Office and authority of Commissioner for and during the pleasure of Our Lieutenant Governor in Council for Our Province of Ontario.

IN TESTIMONY WHEREOF We have caused these Our Letters to be made Patent, and the Great Seal of Our Province of Ontario to be hereunto affixed.

WITNESS: THE HONOURABLE WILLIAM EARL ROWE, A Member of Our Privy Council for Canada, Doctor of Laws, LIEUTENANT GOVERNOR OF OUR PROVINCE OF ONTARIO

at our City of Toronto in Our said Province, this twenty-first day of May in the year of Our Lord one thousand nine hundred and sixty-four and in the thirteenth year of Our Reign.

BY COMMAND

(Signed) JOHN YAREMKO,  
PROVINCIAL SECRETARY AND  
MINISTER OF CITIZENSHIP





## ORDER-IN-COUNCIL

Copy of an Order-in-Council approved by His Honour the Lieutenant Governor, dated the 21st day of May, A.D. 1964.

The Committee of Council have had under consideration the report of the Honourable the Prime Minister, dated May 20, 1964, wherein he states that,

Recognizing that the evolution, development and growth of the traditional parliamentary powers of the Legislature, and of the administrative authority and processes of Government, give rise to continuing readjustments in the internal structure of society and the need to preserve and protect basic principles relating to the civil liberties, human rights, fundamental freedoms and privileges of the individual inherent in citizenship,

The Honourable the Prime Minister recommends that pursuant to the provisions of The Public Inquiries Act, R.S.O. 1960, Chapter 323, and effective May 1, 1964, a commission be issued appointing

THE HONOURABLE JAMES CHALMERS McRUER, Chief Justice of the High Court for Ontario, a commissioner, under the designation "Inquiry into Civil Rights",

1. To examine, study and inquire into the laws of Ontario including the statutes and regulations passed thereunder affecting the personal freedoms, rights and liberties of Canadian citizens and others resident in Ontario for the purpose of determining how far there may be unjustified encroachment on those freedoms, rights and liberties by the Legislature, the Government, its officers and servants, divisions of Provincial Public Service, boards, commissions, committees, other emanations of government or bodies exercising authority under or administering the laws in Ontario.
2. After due study and consideration to recommend such changes in the laws, procedures and processes as in the opinion of the commission are necessary and desirable to safeguard the fundamental and basic rights, liberties and freedoms of the individual from infringement by the State or any other body.

The Honourable the Prime Minister further recommends that pursuant to the said Act the Commissioner shall have the power of summoning any person and requiring him to give evidence on oath and to produce such documents and things as the Commissioner deems requisite for the full investigation of the matters into which he is appointed to examine.

And the Honourable the Prime Minister further recommends that all Government departments, boards, commissions, agencies and committees shall assist the Commissioner to the fullest extent in order that he may carry out his duties and functions and that he shall have authority to engage such counsel, research and other staff and technical advisers as he deems proper.

The Committee of Council concur in the recommendations of the Honourable the Prime Minister and advise that the same be acted on.

Certified,

(Signed) J. J. YOUNG,  
Clerk, Executive Council.

## ACKNOWLEDGMENTS

Acting on the powers conferred under the Commission, your Commissioner appointed Professor David W. Mundell, Q.C., B.C.L. (Oxon.) of the staff of Osgoode Hall Law School, Toronto and Professor Robert S. Mackay, Q.C., LL.M. (Columbia) of the Faculty of Law of the University of Western Ontario as his Assistants, and Dr. J. A. Corry, B.C.L. (Oxon.), LL.M., LL.D., F.R.S.C., Principal of Queen's University, and John D. Arnup, Q.C., LL.D., then Treasurer of the Law Society of Upper Canada, to be Consultants to the Commission.

Your Commissioner wishes to acknowledge with gratitude the generous services rendered by Professor Mundell and Professor Mackay in the production of this Report and those of Principal Corry and Mr. Arnup in acting as Consultants to the Commission.

The Commission has been greatly assisted by John W. Morden, LL.B., who has acted as Counsel to the Commission since its inception, and Stephen Borins, LL.B., who has been associated with Mr. Morden as Counsel since July, 1966. Mr. Morden and Mr. Borins have rendered an important public service with dedication and distinction.

The Commission is much indebted to Mrs. Carol M. Creighton, LL.B., of the Ontario Bar, Research Assistant to the Commission, and to Professor Paul S. A. Lamek, B.A., B.C.L. (Oxon.) and Professor Paul C. Weiler, M.A., LL.B., LL.M. (Harvard), of the staff of Osgoode Hall Law School, and Barry B. Swadron, LL.M., of the Ontario Bar, for the research work they have done in the service of the Commission.

We express our thanks to all those engaged in the public service of the Province who have been consulted from time to time regarding matters that have come within the Terms of Reference. We have received from them generous cooperation at all times.

Your Commissioner has had most useful conferences with those engaged in the public service in Great Britain, Denmark, Sweden, the Commonwealth of Australia, the States of West Australia, Victoria, New South Wales and New Zealand.

We wish to acknowledge particularly the courtesies and assistance extended to the Commission by the following:

### **Great Britain**

Lord Parker of Waddington, Lord Chief Justice of England  
Lord Denning, Master of the Rolls

Lord Tenby, Chairman of the Council on Tribunals

Sir William Fitzgerald, Chairman of the Lands Tribunal

Alistair Macdonald, Secretary of the Council on Tribunals

Lionel M. Gordon, Crown Agent for Scotland

Angus MacLeod, Procurator Fiscal of Midlothian County

David B. Bogle, W.S., Chairman, Scottish Committee Council  
on Tribunals

H. B. Wilson, Home Office

M. F. Cairncross, Home Office

P. Beedle, Home Office

G. I. de Deney, Home Office

H. W. Stotesbury, Home Office

K. Dawson, Home Office

W. T. C. Skryme, Secretary of Commissions, Lord  
Chancellor's Office

R. C. L. Gregory, Lord Chancellor's Office

Professor W. A. Robson, B.Sc., Ph.D., LL.M. of London  
School of Economics

Professor C. J. Hamson, LL.M. (Cantab.) of Cambridge  
University

Professor H. W. R. Wade, LL.D., D.C.L. (Oxon.) of Oxford  
University

W. N. Last, Head Clerk, Crown Office

N. J. Skelhorn, Q.C., Director of Public Prosecutions

### **Denmark**

Professor Stephan Hurwitz, Ombudsman for Denmark

Gran Jensen, Formerly Deputy Ombudsman for Denmark

**Sweden**

Alfred Bexileus, Ombudsman for Sweden  
Hans Blix, Special Legal Adviser to the Foreign Office  
Judge Carl Johan Cosmo, Associate Appeal Court Judge  
Gunnar Ingvarson, Ministry of Justice  
Judge Pier-Erik Fürst, Member of the Court of Appeal

**Commonwealth of Australia**

H. E. Renfree, Crown Solicitor  
J. D. Clark, Principal Legal Officer  
W. S. Frey, Legal Officer  
E. J. Hook, Secretary to the Attorney General's Department  
N. Good, Deputy Attorney General

**State of Victoria**

B. L. Murray, Q.C., Solicitor General  
R. J. Lackie, Prosecutor for the Queen  
J. C. Fenemore, Public Services of Victoria  
E. R. Inglis, Public Services of Victoria  
A. X. Lyons, Public Services of Victoria  
H. W. Pascal, Coroner for the City of Melbourne

**State of West Australia**

S. G. Good, Solicitor General

**New Zealand**

G. S. Orr, Senior Crown Counsel  
Judge D. J. Dalgleish, Chairman of the Compensation Court  
C. W. Ogilvie, Advisory Officer on Expropriation  
Sir Guy Powles, Parliamentary Commissioner (Ombudsman)

All those engaged in the work of this Commission join with me in expressing their grateful appreciation of the efficient and conscientious services rendered by the Secretary, Mrs. Olga Tate, and the staff that worked with her. We likewise express our appreciation of the services rendered by her predecessor, Mrs. Mabel Rogers, who acted as Reporter for the Commission.



# PROCEEDINGS OF THE COMMISSION

Following the constitution of the Commission letters containing the text of the Terms of Reference were sent to the following:

Members of the Ontario Legislative Assembly;  
Ontario members of the Parliament of Canada;  
The headquarters of some 32 trade unions;  
The boards of trade and chambers of commerce in Ontario;  
All of the universities in Ontario;  
All of the newspapers and radio stations in Ontario;  
All of the lawyers in Ontario;  
Several particular organizations and associations in Ontario such as the Association of Ontario Mayors and Reeves, the John Howard Society and the Elizabeth Fry Society.

All those to whom letters were sent were invited to bring to the attention of your Commissioner, for consideration, any matters coming within the Terms of Reference.

A detailed agenda showing the proposed outline of the areas and subjects to be considered by the Commission was given wide distribution and published in the Ontario Reports in order that it might reach all members of the Law Society of Upper Canada. In October, 1964, a notice was published in 47 daily newspapers summarizing the Terms of Reference and inviting the submission of briefs.

Public hearings, of which due notice was given by publication in the particular localities, were held at:

Toronto, December 7 to 9, 1964  
April 26 to 30, 1965  
May 3 to 6, 1965  
October 4 and 5, 1965  
Ottawa, January 12 and 13, 1965  
Kingston, January 18, 1965  
Windsor, January 25, 1965  
London, January 28, 1965  
Hamilton, February 22, 1965

Sudbury, May 17, 1965

Sault Ste. Marie, May 19, 1965

Port Arthur, May 20, 1965

To all those who responded to the invitation to submit briefs and appear before the Commission we express our appreciation and indebtedness.

For reasons that we give later, we have not attempted to deal with individual grievances, or specific problems, that were raised in the briefs, and in oral testimony submitted at the public hearings. We made it clear that we did not consider it to be our duty to attempt to adjust individual grievances or give opinions with respect thereto. These submissions were treated as evidence for consideration in relation to the broad questions coming within the Terms of Reference.

In order that immediate legislation may be considered in relevant areas, which will be covered in our Report, we have come to the conclusion that it is desirable to submit two reports—Report Number 1 submitted herewith speaks for itself. In Report Number 2 we shall deal specifically with the following subjects:

A Bill of Rights for Ontario;

A Legislative Commissioner or Ombudsman for Ontario;

The Continental system of providing safeguards against unjustified encroachment on civil rights through administrative courts such as the *Conseil d'Etat*; and

Compensation for damage suffered by specific individuals through the exercise of statutory powers.

In addition, we shall analyze and discuss the powers and procedures of boards and tribunals acting under the authority of provincial legislation. In this analysis and discussion we shall endeavour to apply the conclusions and recommendations contained in the relevant parts of Report Number 1. In Report Number 2 we shall recommend what additional safeguards should be provided in the legislation governing provincial boards and tribunals as will adequately protect the civil rights of individuals affected by their decisions. Report Number 2 will contain an index to both reports.



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# General Introduction

## TERMS OF REFERENCE

It is useful to repeat here the Terms of Reference of the Commission in part.

- (1) To examine, study and inquire into the laws of Ontario, including the statutes and regulations passed thereunder affecting the personal freedoms, rights and liberties of Canadian citizens and others resident in Ontario, for the purpose of determining how far there may be unjustified encroachments on these freedoms, rights, and liberties by the Legislature, the Government, its officers and servants, divisions of Provincial Public Service, boards, commissions, committees, other emanations of government or bodies exercising authority under or administering the laws in Ontario.
- (2) After due study and consideration to recommend such changes in the laws, procedures and processes as in the opinion of the Commission are necessary and desirable to safeguard the fundamental and basic rights, liberties and freedoms of the individual from infringement by the State or any other body.

A study of the laws of Ontario as they affect the personal freedoms, rights, and liberties of the individual necessarily includes a study of the common law, the statute law, regulations made by the Lieutenant Governor in Council, and rules made under the authority of any Act of the Legislature, as well as the procedures and processes authorized by law. The study is for the purpose of determining how far there may be "unjustified encroachment on the personal freedoms, rights, and liberties of the individual".

Following investigation and study, the ultimate task of the Commission has been to recommend such changes in the

laws, procedures, and processes of government as, in the opinion of the Commission, are necessary and desirable to safeguard "the fundamental and basic rights, liberties and freedoms of the individual from infringements by the State or any other body."

The terms "unjustified", "fundamental", and "basic" all recognize that there are encroachments that are justified and necessary and that there are "rights, liberties and freedoms" that are not fundamental and basic. It therefore becomes necessary to formulate some standards of value by which encroachments by governmental action on fundamental and basic rights are to be measured.

In so doing it has not been the duty of the Commission to determine whether the social schemes embodied in the laws of Ontario are wise or beneficial. These are matters of policy for the Legislature. By our Terms of Reference, however, we are required to investigate and report on the statutory methods by which the powers of the State are brought to bear in the carrying out or administering of such social schemes. The processes of the Legislature itself do not come within the Terms of Reference.

The formulation of standards of value to measure unjustified encroachments or infringements on fundamental and basic rights, liberties and freedoms cannot be done with precision. Any effort to do so must be relevant to well-recognized social needs and to conflicting claims on legislative action. All standards should be framed with two dominant purposes in mind: to do justice to the individuals who make up the State, and to promote the Rule of Law in the State. There is no place in a true democracy for a doctrine of the welfare of the corporate State as distinct from the welfare of the individuals who are its components.

Apart from its being a means of protection against the invader, the sole purpose of the democratic state is to regulate and promote the mutual rights, freedoms and liberties of the individuals under its control. State power is something in the nature of a trust conferred by the people on all those in positions of authority. While the State is an attribute of sovereignty, it is not the warden of freedom but the guardian of

the right to be free. Law as the expression of the power of the State, and its enforcement, are not weapons but shields serving to protect and regulate the respective rights, freedoms and liberties of individuals *inter se*, from whom the authority of the State is derived. Excessive or unnecessary power conferred on public authorities corrupts and destroys democratic institutions and gives life to all forms of tyranny—some petty and some extreme.

The fundamental and basic rights, freedoms and liberties of the individual are very difficult to define. There is no absolute standard.<sup>1</sup> The framers of the Declaration of Independence of the United States of America could go no further than the use of general terms:

“We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain inalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness—That to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed, that whenever any Form of Government becomes destructive of these Ends, it is the Right of the People to alter or abolish it, and to institute new Government. . . .”<sup>2</sup>

The Virginian declaration of 1776 was slightly more definite. “Inherent rights” were stated to be:

“. . . the enjoyment of life and liberty, with the means of acquiring and possessing property and pursuing and obtaining happiness and safety.”<sup>3</sup>

The Canadian Bill of Rights in some measure catalogues rights that are declared to “have existed and shall continue to

<sup>1</sup>Analysis of “legal rights” by jurists (e.g., Hohfeld, *Fundamental Legal Conceptions*) gives no basis for classifying legal rights as either basic or fundamental. Analysis of different types of rights in a technical legal sense has separated several concepts: i.e., the term “right” includes a claim to require other persons to take action or to refrain from acting in the interest of the person in whom the right is vested; a power to affect others legally, although this does not include power to deprive that other person of powers vested in him without his consent; and freedom to take action without legal consequences. These distinctions do not provide a basis for the evaluation of legal rights on the grounds that some are more basic than others. All rights are technically of equal value.

<sup>2</sup>*Dictionary of American History*, Vol. II, 122.

<sup>3</sup>A. D. Lindsay, *The Modern Democratic State*, 90.

exist", and at the same time other enumerated rights are given a limited protection.<sup>4</sup>

Notwithstanding the difficulties in formulating standards of value to determine whether encroachments are justified—or whether the rights, liberties and freedoms that are infringed are basic—the fundamental standard of our legal system, a standard of justice, must predominate. The individual who suffers from an unjust decision made by a statutory tribunal suffers just as acutely as from an unjust decision made in the ordinary courts. In fact he may suffer more acutely because in many cases he has no right of appeal, he does not know on what material the decision is based, nor the reasons for the decision. The concept of justice is elusive and developing. It has been the subject of debate throughout the history of religion, philosophy, ethics and social science. The individual, as the philosopher, may be hard put to define and describe the characteristics of justice, but even the humblest citizen may have an acute and often accurate sense of injustice when his rights are adversely affected. The safeguards we are asked to recommend are aimed at achieving as far as possible justice and freedom for the individual under law.

## NATURE OF SAFEGUARDS

Safeguards may be of a legal or non-legal nature. Their nature and breadth in our system and in other legal systems are often not understood. They do not form a logical or integrated whole but frequently overlap.

Safeguards recognized in our system and in other systems include:

Recognition of the underlying principle of the Rule of Law;

Recognition that powers of encroachment by governmental action on rights of individuals, should be conferred only where necessary and only to the extent necessary;

Bills of Rights legally restricting the powers of the Legislature to authorize encroachments or infringements on fundamental and basic rights;

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<sup>4</sup>Can. 1960, c. 44. The Canadian Bill of Rights will be discussed more fully in Report No. 2.

Competent and efficient courts of justice of appropriate jurisdiction with procedure and processes that are not cumbersome, expensive or dilatory;

Elected representatives of the individual in a representative assembly that is responsible for the laws that are made and to whom the citizen may appeal for help;

Ministerial responsibility in a Parliamentary system;

Competent and responsible public servants;

Wide dissemination of information to inform individuals of their rights;

A competent legal profession readily available to the individual;

Fair procedure to be followed before the exercise of governmental authority;

Requirements that reasons be given to an individual explaining and justifying action adverse to his interests;

Judicial supervision to control the proposed or purported exercise of governmental powers from the point of view of legality and rationality;

Appeals from decisions involving encroachment or infringements either to the ordinary courts or special tribunals;

Freedom of expression by the individual to criticize or to complain about action adverse to his interests;

Publicity through freedom of the media of communication, e.g. the press, radio and television, to criticize and voice complaints;

Expansion in some countries of the functions of governmental departments to receive complaints or criticisms with varying powers of action;

Establishment in other countries of special departments or of a single official such as the Ombudsman to perform these functions.

Some of these safeguards are found in our system, although others are not. Similarly, some of these safeguards are found in other legal systems and some are not.

For example, in several Commonwealth countries with Parliamentary systems, constitutional Bills of Rights have not been enacted, although they are found in the constitutions of many other countries.

Appropriate fair procedure required to be followed in the exercise of statutory powers is recognized in virtually all systems but effected by different legal devices. In the United States and some other countries it is provided by a general code in considerable detail. In the United Kingdom provision is made for the legal enactment of appropriate codes of procedure for specific tribunals. In Canada and many other Commonwealth countries the development of procedural requirements has been left largely to the courts.

In common law countries judicial review is conducted by the ordinary courts of justice. In France and other Continental countries it is conducted by the *Conseil d'Etat* or some similar body. In such countries as Poland and Russia no provision is made for judicial review and in Japan it is generally ineffective.

In the majority of countries a competent and adequate legal profession is available to assist the individual.

In Commonwealth countries there is usually no appeal from administrative decisions to a General Administrative Appeal Board, although specific rights of appeal from decisions of particular tribunals are provided. General appeals are provided to the *Conseil d'Etat* in France and to comparable bodies in other Continental countries, and within the administrative hierarchy in other jurisdictions.

In the Scandinavian countries, the United Kingdom, New Zealand, and in the Provinces of Alberta and New Brunswick in Canada, provision is made for an Ombudsman.

Professor Gellhorn, in vividly reviewing and discussing the relationship of virtually all these safeguards for the elimination of errors of government affecting the rights of individuals, says:

“. . . the responsibilities committed to administrators have everywhere been enlarged. At the same time, efforts to suppress blunders (regardless of motives) have intensified. Insensitivity, often reflected in slowness, is no doubt the



largest generator of dissatisfaction with officials; it may afflict the upright as well as the corrupt. Imprecision may appear in the work of usually careful craftsmen (even Homer is said to have nodded). Persons not in the least 'power hungry' may misconceive the scope of their responsibility or its relationship to competing public interests. Scrupulously unbiased minds can faultily analyze issues of fact or law, as witness the frequency with which appellate courts reverse the decisions of respected judges. Taking note of all these possibilities, sophisticated societies constantly seek governmental equivalents of what industrialists call quality controls. That is to say, they are trying to maintain output at a desired level of quality without adding inordinately to costs. . . . Quality controls tend to be cumulative, not mutually exclusive."<sup>5</sup>

In formulating recommendations for safeguards, the Commission has given consideration to the cumulative safeguards of fundamental and basic rights that now exist in our system, to their reinforcement, if necessary and desirable, and to the introduction of additional safeguards proposed to us or that have come to our attention in other social systems adaptable to ours.

Persons trained under one legal system and in one society necessarily suffer from some handicap in dealing with a different legal system and a different society, particularly when the differences are substantial. We have been fortunate in being able to rely on the writings of scholars who have studied the relationship of citizen and State in many countries, forming a vast collection of legal literature. To these scholars and writers we acknowledge our indebtedness. From their material we have endeavoured to appraise institutions in other countries which might be of value in the Ontario system. In the utilization of this material we must accept errors of comprehension or interpretation as our responsibility.

The course to be followed by the Commission has been that laid down by our Terms of Reference. We commenced with an examination and study of the laws of Ontario for the purpose of determining ways in which unjustified encroachment has been or may be made on rights of individuals by government institutions or bodies exercising authority under or administering the laws of Ontario. We then gave considera-

<sup>5</sup>Walter Gellhorn, *Ombudsmen and Others*, 420-21.

tion to our recommendations for such changes in the laws, procedures and processes as in our opinion are necessary and desirable to safeguard fundamental and basic rights, liberties and freedoms of the individual, including safeguards against unjustified encroachment on his rights, from infringement by the State or any other body.

### **UNJUSTIFIED ENCROACHMENT ON RIGHTS OF THE INDIVIDUAL BY INSTITUTIONS OF GOVERNMENT OR BODIES EXERCISING GOVERNMENTAL AUTHORITY**

The major concern of the Commission with respect to unjustified encroachment by institutions of government or bodies exercising governmental authority has been twofold:

- (1) The existence and exercise of powers to abrogate or vary the rights of an individual by unilateral action and without his consent;
- (2) The existence and exercise of powers to determine authoritatively the rights of an individual by tribunals other than the ordinary courts of justice.

The mere existence and possible exercise of these powers is an encroachment on the rights of individuals for they create a gap in the protection otherwise afforded to rights by the law, or by their determination in the regular courts of law. As will be discussed later, powers of encroachment of this kind are usually statutory powers.

### **THE COURTS AS SAFEGUARDS OF FUNDAMENTAL AND BASIC RIGHTS FROM INFRINGEMENT BY THE STATE OR ANY OTHER BODY**

Rights, liberties, and freedoms do not speak for themselves to proclaim that they are fundamental and basic, nor are all fundamental and basic rights necessarily legal rights in our system. Many fundamental and basic rights represent social entitlements that have no legal force.

One of the fundamental and basic rights of an individual with which we have been much concerned is the social entitlement that a citizen has to the protection of his rights in the

courts. He has a legal right of access to the courts. But he has a greater right. It is not sufficient that he have merely a legal right to bring his claim before some legally established court. He is entitled as a citizen to be able to bring his claim before competent and independent courts of justice of appropriate jurisdiction, with efficient procedures and processes. His claim ought to be disposed of as promptly and with as little expense as possible.

The citizen has this same social entitlement to a just operation of each of the procedures and processes in the administration of justice through the courts.

While consideration has been given to these wide, fundamental, and basic rights of the citizen in this Report, we have not interpreted the Terms of Reference as requiring a detailed and comprehensive investigation into all aspects of the administration of justice in the Province of Ontario.

## **ORGANIZATION OF REPORT**

We have divided the Report into five Parts:

- Part I —The Exercise and Control of Statutory Powers in the Administrative Process;
- Part II —The Administration of Civil and Criminal Justice in the Province;
- Part III—Safeguards Against the Unjustified Exercise of Certain Special Powers;
- Part IV—General Safeguards Against Unjustified Encroachments or Infringements;
- Part V —Application of General Principles to Specific Statutory Tribunals.

In Part I we consider statutory powers that may give rise to “unjustified” encroachment in governmental processes apart from processes relating to the administration of justice through our system of courts.

In Part II we discuss the encroachments or infringements on fundamental and basic rights arising within the provincial government’s field of responsibility in the administration of

justice, both civil and criminal, in relation to the functions of the courts in operation.

In Part III we give separate and detailed consideration to the exercise of certain special statutory powers of broad application, i.e., Expropriation, Licensing, Family Benefits, Self-Government of Professions and Occupations, and Confinement of the Mentally Ill.

In Part IV we consider certain proposed general safeguards that are new to our legal system in this Province, e.g., a Bill of Rights, an Ombudsman, and Administrative Courts.

In Part V we survey the statutes of Ontario that confer powers of encroachment or infringement in detail with specific recommendations. In this Part we consider all the boards and commissions, established under statutes of Ontario, exercising statutory powers of encroachment, or those whose activities may infringe upon fundamental and basic rights.

## **MATTERS NOT INCLUDED IN REPORT**

This Report is necessarily limited primarily to the laws of Ontario and safeguards for fundamental and basic rights, liberties and freedoms over which the Legislature of Ontario has constitutional authority. We have been concerned with other laws and rights only indirectly as they affect those within the constitutional authority of the Legislature.

We have not reported on alleged unconstitutional laws or infringements as the ordinary courts now provide adequate safeguards against unconstitutional action.

We have not reported on breaches of legal rights of individuals by private individuals, i.e., breaches of the law not associated with the exercise of governmental powers. Our Terms of Reference limit us to encroachments by government or by bodies exercising governmental powers.

We have not considered it our function to inquire in detail into and report on specific subject matters whose independent investigation and study by specialized bodies has been otherwise provided for. We do not report in detail on the administration of taxation laws of Ontario within the Terms of Reference of the Ontario Committee on Taxation. Simi-

larly a detailed report on matters within the Terms of Reference of the Royal Commission Inquiry into Labour Disputes has been excluded. We do not report on the safeguarding of rights against discrimination on grounds of race, creed, colour, nationality, ancestry or place of origin, nor against employment on grounds of age. The continuing study and safeguarding of these rights is already entrusted to the Ontario Human Rights Commission by the Ontario Human Rights Code,<sup>6</sup> and by the Age Discrimination Act.<sup>7</sup>

Our Terms of Reference do not authorize us to investigate and report on past encroachments arising out of the exercise of governmental powers, which may call for remedial action. Our investigation is directed to "laws", and the existence or possible exercise of powers of encroachment, rather than specific instances of past encroachment, for which we have been given no powers of remedial action. Although the Commission has not investigated and does not report on past encroachments for the purpose of remedial action in particular cases, we wish to acknowledge our gratitude to all persons who have made individual complaints of past encroachments. These have been valuable in bringing to our attention the existence and exercise of powers of encroachment which we have studied.

<sup>6</sup>Ont. 1961-62, c. 93, as amended by Ont. 1965, c. 85.

<sup>7</sup>Ont. 1966, c. 3.



# PART I

## THE EXERCISE AND CONTROL OF STATUTORY POWERS IN THE ADMINISTRATIVE PROCESS

## INTRODUCTION

We have divided this Part into the following Sections:

Section 1—Basic Concepts and Constitutional Principles

Section 2—Statutory Powers: Administrative and Judicial Powers of Decision

Section 3—Statutory Powers: Subordinate Legislative Powers

Section 4—Statutory Powers: Powers of Investigation

In Section 1 we discuss the essential nature of statutory powers—legislative, judicial, and executive powers—and define the terminology we shall use. We then outline the constitutional principles and concepts developed under our system for safeguarding the rights of the individual. Finally, we attempt to formulate general principles—for evaluating encroachments on the rights of individuals—applicable to all statutory powers.

In Sections 2, 3, and 4 we make some analysis of particular statutory powers in accordance with the general principles discussed in Section 1, for the purpose of formulating more detailed criteria of specific practical application.



# Section 1

## **BASIC CONCEPTS AND CONSTITUTIONAL PRINCIPLES**



## CHAPTER 1

# Legislative, Judicial and Executive Powers

THE true nature of the powers of government and the relationship of the individual to them can only be understood by a consideration of the legal system as a whole. Certain familiar concepts basic to the legal system, which at first glance may appear to be well understood, on closer consideration present difficulties long familiar to lawyers and legal writers but possibly not as well appreciated by those who do not work in the legal field. We shall consider the fundamental legal concepts of legislative, judicial and executive power in some detail.

As a mechanism for the control of the individual, every legal system's effective enforcement in specific cases depends upon the existence of organized forces (e.g., the sheriffs, police officers and armed forces) controlled on behalf of the community to ensure that individuals conform to prescribed social patterns. These forces achieve enforcement. The general subject of the way in which these relatively small forces control the mass of individuals making up the community, in accordance with prescribed social policy, is a subject of jurisprudence that is beyond the Terms of Reference of this Commission. It is the operation of the means of control that comes within the Terms of Reference.

We leave aside any consideration of special emergency powers and the use of community forces on an *ad hoc* basis, i.e. the control of individuals during insurrection. What we are concerned with is the use of these forces as part of a mechanism which controls conduct through rules of law.

A rule of law may be defined, although not exhaustively, as a statement made in advance with constitutional authority that when certain hypothetical facts occur and an individual conducts himself in a certain way, the community forces shall take certain prescribed action. This is no doubt an oversimplification, for so-called rules of law are seldom expressed with such simplicity, and in most instances several rules operate together or successively before specific action is taken by the enforcing authority. Even in our Criminal Code, in which offences are created by apparently self-contained sections, these sections are supplemented by general definitions, general enforcement and procedural provisions that operate to produce the ultimate punishment of the offender. In other more complex branches of the law the whole law on a particular subject matter may be expressed in many rules that individually appear to be remote from possible action on the part of the ultimate enforcing authorities. Nevertheless, the statement expresses a broad truth.

A legal system operating through rules of law gives rise to three distinctive powers of government: the legislative, executive and judicial powers. To understand fully the nature of these powers in an actual legal system, it is useful to start with theoretical definitions of the corresponding powers in a hypothetical legal system. Our hypothetical legal system is based on three assumptions:

- (1) All rules of law are stated as general rules and are exhaustive. By exhaustive we mean that at any one time all occasions for action by the organized community forces and the nature of their action are stated.
- (2) All rules of law are stated only by a legislature.
- (3) All rules of law are stated with such clarity of language that no difficulty arises in their application to particular states of fact.

## THEORETICAL LEGISLATIVE, JUDICIAL AND EXECUTIVE POWERS IN A HYPOTHETICAL LEGAL SYSTEM

In our hypothetical legal system the persons comprising the legislature, who state the rules of law, decide when and how the community forces will be ordered to take action. The rules based on their decisions are designed to promote or carry out some social program. Their decisions are decisions of policy. Although the term "policy" eludes exact definition, a policy decision may be described generally as one based primarily on social needs or social objectives, formed after considering matters of opinion and expediency as well as matters of fact. Policy decisions contrast with judicial decisions, which are based on the application of rules of law wherein the policy is stated; these will be discussed later.

In our hypothetical system in which the rules of law are general and exhaustively define when and how the organized community forces will be ordered to take action, those formulating the law are the sole policy-makers. The authority to state the rules of law as a matter of policy is a purely legislative power in the theoretical sense. As under our assumptions only the legislature may state rules of law, the legislators are the sole policy-makers of the legal system.

If rules of law are considered as statements of policy, to the effect that when certain hypothetical facts actually occur and an individual conducts himself in a certain way action by the organized community forces will be taken, it is apparent that in any particular case, before these forces can take action, it must be determined that the required facts exist. The application of the relevant rule, the action required to be taken, must be declared. In theory this is the exercise of judicial power. It is confined to two operations:

- (1) A determination of the facts in a particular situation;
- (2) A declaration of the action required to be taken under the relevant rule of law.

We emphasize that the second of these functions is in theory purely declaratory. No policy need be made as we have assumed that the general rules of law are exhaustive and

the policy has already been fully decided and clearly stated in them by the legislature.

In theory, when the legislature has made a rule of law and the judicial power has declared the action required under the rule, all that remains to be done is to order the community forces to take action pursuant to the declaration. This order, like a warrant of committal after a conviction, follows automatically as a consequence of the judicial decision, without the intervention of any power of decision. The power to issue the order is purely executive power in a strictly technical sense.

Executive powers are not, however, limited to the issue of orders for action by the organized community forces. The legislature may by a rule of law directly order the executive forces to take prescribed action if certain facts exist. The essential distinction between executive powers and legislative and judicial powers is the absence of any authoritative power of decision, whether on grounds of policy or on the application of the rule of law. In strictly executive powers, no power of authoritative decision is conferred as to whether the prescribed facts exist. We discuss this aspect of ministerial powers later. The officer or tribunal in the exercise of the power functions as a mere minister or automaton.

Ministerial powers of this nature appear to be the only truly theoretical executive powers. As is explained later, the term "executive" is used with a variety of meanings. For precision, the type of power we have just described is referred to as "theoretical executive power".

Reflection will show that these powers — legislative, judicial and executive — embrace all possible, theoretically distinctive, government powers. The significant differences are:

- (1) Legislative power, the statement of rules of law, involves an authoritative decision as to what the rules should be, arrived at on grounds of policy;
- (2) Judicial power involves an authoritative decision as to what the legal requirements are under rules of law on the facts in the particular case;

(3) Executive power involves no power of "authoritative decision" but is a direction to take prescribed action in a prescribed factual state.

Although this is broadly true, the practical nature of legislative, judicial and executive powers operating in an actual legal system differs substantially from these theoretical definitions.

## LEGISLATIVE POWER IN AN ACTUAL LEGAL SYSTEM

In our hypothetical legal system we assume that legislative power is confined to a legislature's statement of general rules of law, to be applied to hypothetical facts. Legislative power is exercised in this way in our legal system, but that does not exhaust the modes of exercising legislative power.

Legislative power may be exercised not only to make general rules but to prescribe specifically as a matter of policy particular rights or liberties to which persons are entitled, or legal penalties to which they are subject.

A statute of Henry VIII is an historic instance of specific legislation. It provided:

"It is ordained and enacted by authority of this present Parliament that the said Richard Rose shall be therefore boiled to death without any advantage of his clergy."

Whatever exemption Richard Rose might have been entitled to prior to this enactment, his rights were taken away and a penalty to which he was not previously liable was imposed. This was a change in the law based on a decision of policy that it was expedient, notwithstanding the general policy of the law, that Richard Rose be put to death. The enactment was therefore legislative, even though confined to specific facts and a specific person. Laws can be made that do not enact general rules.

Again, in our legal system the exercise of the power to legislate is not confined to the Legislature. The Legislature may, and often does, delegate law-making power to subordinates. The delegated legislative power may be a rule-making power to make general rules in the form of regulations, which

we call "subordinate legislative power", or may be power to legislate specifically as in the case of Richard Rose, in relation to particular persons in the apparent form of a decision and the direction of an administrative official, which we call "administrative power". We emphasize the term "power" and shall discuss this terminology in more detail later.

The Private Investigators and Security Guards Act<sup>1</sup> section 4 affords a useful example of delegated legislative power of a specific nature: administrative "power".

"No person shall, . . .

(c) act as a private investigator or security guard unless he is the holder of a licence therefor."

"The Registrar shall issue a licence or renewal of a licence where in the opinion of the Registrar the proposed licencing is not against the public interest, and the licence may be subject to terms and conditions."<sup>2</sup>

The first is a general statement of the law made by the Legislature, but the Legislature has not declared the whole law. It has delegated to the Registrar the power to legislate for the granting of licences in specific cases, after deciding on policy based on his opinion of the public interest.

## JUDICIAL POWER IN AN ACTUAL LEGAL SYSTEM

Theoretical judicial power in the sense we have discussed does not exist in a pure state in an actual legal system. A person exercising an adjudicative function under law must often go beyond a merely declaratory action and exercise some choice or discretion on grounds of policy in making his decision, notwithstanding that it is his duty to decide according to law.

There are at least two main reasons for this. Unlike the rules of the hypothetical system we have discussed, the rules of an actual legal system are never at any one time exhaustively stated so as to cover all present and future situations of fact and their legal consequences. When facts arise that are not precisely covered by the rules that have been established,

<sup>1</sup>Ont. 1965, c. 102, s. 4(1)(c).

<sup>2</sup>*Ibid.*, s. 8(1).



existing rules have to be adapted or new rules have to be formulated. In either case a decision is required on grounds of policy as to what the adaptation or the new rules should be.

Even where rules purport to be completely expressed as, for example, in a statute, the imperfections of language as a means of communication often result in obscurity or ambiguity in the application of the rules to particular facts. In such instances a court applying the statute is required to give a precise meaning to the language for the purpose of applying it to those facts. In the process of interpretation, which we discuss in a moment, the judge must often base his decision in part at least upon policy considerations.

Since policy is the badge of legislative power, the courts to this extent exercise legislative power coupled with their purely judicial power. No mutually exclusive distinction between legislative and judicial power can be drawn in our legal system.<sup>3</sup>

It is convenient as a premise for future discussion to consider two specific aspects of the exercise of judicial power in practice.

### Mixed Questions of Fact and Law

In our description of theoretical judicial power we have suggested that there is a hard and fast distinction between the determination of facts and the declaration of legal consequences, but this is not true. Because facts must be described and legal consequences expressed in language, a mutually exclusive distinction cannot be drawn. Findings of fact and conclusions of law tend to merge into one another. At the one extreme the enunciation of a legal rule or standard or the definition of a legal concept may fairly clearly be distinguished as a conclusion of law. At the other extreme a

<sup>3</sup>The difficulties of drawing any clearcut distinction between legislative and judicial power are sharpened by some jurists' discussion of the various linguistic devices through which the law operates: principles, rules, concepts and standards. It is not necessary for our purposes to develop this discussion in detail. For a summary of the discussion and references to the literature and cases see Paton, *Jurisprudence* (2nd ed.), 175 ff. In our discussion of the exercise of judicial power we refer merely to the application of rules or standards. We have also omitted reference to "judicial discretion", whereby the law expressly gives to the courts a power of decision on policy grounds.

finding that certain events or acts or states of mind have happened or been done or exist, without adverting to their legal significance, may analytically be distinguished as a finding of fact.

In between, however, questions arise as to the application of legally established rules, standards or concepts to facts. For example, the question whether a person is an "employee" within the meaning of this term used in a statute turns on the nature of the factual communications between the parties and their conduct—questions of fact; but also it depends on the meaning that is legally to be given to the term "employee"—in law, the facts that can constitute a person an employee. The term "employee" in general usage in the language may have a variety of meanings depending on the context in which it is used. One or more of these must be selected and applied as being embraced within the legal meaning of the particular statute. The facts that are relevant and necessary to a decision turn on the particular meaning selected.

These questions of application of law to facts are frequently referred to as questions of "mixed law and fact". They are not, however, precisely distinguishable as a separate class from either questions of fact or questions of law in the strict sense. Questions of fact and questions of law shade into each other through a grey area of mixed questions of law and fact. Where the meaning of a legal concept—the facts to which it applies—is well known and precise, its application becomes merely a matter of determining the facts, and the legal conclusion follows virtually automatically, not requiring the exercise of legal judgment. Where a legal concept is a broad one embracing several possible meanings, the selection and application of the appropriate meaning or meanings requires the exercise of a considerable degree of legal judgment, making the question virtually a question of law in the strict sense. In between these extremes we come to mixed questions of fact and law wherein the law must be interpreted, and the relevant facts under such interpretation must be determined.

The three categories of questions form a spectrum shading from questions of fact in the analytical sense through mixed

questions of fact and law which are close to questions of fact in the analytical sense, to mixed questions that are close to questions of law in the strict sense, thence to questions of law in the strict sense with no dividing line. "The knife of policy alone effects an artificial cleavage."<sup>4</sup>

Attempts to base legal consequences on a clearcut and mutually exclusive distinction between findings of fact and conclusions of law are bound to present difficulty. Where necessary a broad distinction may be recognized and the classification of borderline questions must be made on a pragmatic basis, having regard to the purpose of the classification.

### **Function of Our Courts in the Interpretation of Statutes**

We have said that in the interpretation of ambiguities or obscurities in the language of a statute, the courts must make a policy decision. The function of our courts in making policy decisions is a limited one. The basic concept underlying our principles of interpretation is the supremacy of the Legislature. Within constitutional limitations, the Legislature is supreme and any enactment made by it must be given effect by the courts. It follows that if a statute is expressed clearly in the delineation of facts to which it applies, and the particular facts are found by the court, the function of the court is simply to give effect to its terms in determining the legal result. Thus in a strict sense the court performs no interpretative function and its action closely approximates a merely declaratory function. The primary principle of interpretation under our legal system is therefore the "literal" interpretation of the language of statutes.

But as we have said, imperfections of language frequently result in obscurity or ambiguity in the application of a statute to a particular set of facts. In such case the interpretive function of the courts is to give that meaning to the language of the statute which accords most closely with and gives effect to the social scheme of the statute as expressed by the Legislature. Under our principles of interpretation, it is the duty

<sup>4</sup>Dickinson, *Administrative Justice and the Supremacy of the Law*, 55. See also Davis, *Administrative Law Treatise*, 30.01-02.

of the courts objectively to appraise the policy which the Legislature intends to be carried out, not to formulate policy on their own initiative. The courts then interpret the statute to carry out that policy.

In performing this function, however, a gloss of presumptions as to the intention of the Legislature has been superimposed on the general principles. Thus the courts presume that the Legislature in carrying out a relatively routine social scheme does not by mere general words intend to restrict the personal freedom of individuals, or impose charges in the nature of taxes or intend legislation to have retrospective effect, or to authorize arbitrary action. These presumptions are in general negative—presumptions of courses that the Legislature does not intend to adopt unless it clearly expresses them.

This limited interpretative function of the courts in our system has been criticized on the ground that the courts should take a more constructive part in the formulation of the law, even where it is based on statute. We can see no alternative to the principles now applied in a system which recognizes the supremacy of the Legislature. The powers of the courts must and should be subordinate to the will of the sovereign Legislature.

In our view our principles of interpretation operate on the whole as satisfactorily as more activist, but often equally unpredictable, principles. The intransigence of language will give rise to difficulties under any principle of interpretation. Our principles provide for the proper allocation of policy responsibilities between the Legislature and the courts.

## **EXECUTIVE POWER IN ACTUAL LEGAL SYSTEM**

Legislative and theoretical executive power often cannot be clearly distinguished in our actual legal system. Frequently these powers are merged. A statute may create new rights or liabilities and may impose ministerial duties to carry them out at the same time. The statute ordering that the Bishop of Rochester's cook be put to death is an example. The statute not only deprived the cook of his right to continued

life but ordered his execution. No judicial function intervened between the specific legislation and the order to carry it out. Many examples of combined legislative and executive powers could be drawn from the exercise of administrative powers.

## TERMINOLOGY

We have taken pains to demonstrate that there are no precise and mutually exclusive definitions of legislative, judicial and executive powers so as to dispel any idea that any clear distinction could be drawn when solving problems referred to the Commission. The absence of clear distinctions raises problems of terminology. Probably in no other branch of the law or political science are the difficulties arising from terminology as great. We therefore feel it is necessary in the interest of the reader to define our own terms in the sense in which we use them.

We emphasize that in so doing we recognize that there is no magic in words. It is the ideas with which we are concerned. Nevertheless, there may be a kind of black magic in imprecise terminology. We do not wish to be accused of "conceptual thinking" as this expression is sometimes used in a derogatory way; but defined concepts are essential to clear thinking and clear communication. In defining terms we wish not to become a "prisoner" of words but rather their "master".

### "Subordinate Legislative Power"

We use this expression to describe rule-making powers conferred by a statute on a person or persons outside the Legislature. No great difficulty arises in practice in distinguishing this type of power; a power conferred by statute to make regulations which have the force of law is clearly of a legislative character and is subordinate to the Legislature. We use this expression rather than the term "delegated legislative power", which is often used synonymously, to avoid difficulties that have arisen with reference to the meaning of the expression "delegated".

**“Administrative” and “Judicial” Powers**

Later in the Report we develop different principles that are applicable to the exercise of administrative powers and judicial powers of decision. The distinction is a difficult one. As we have seen, no clearcut and mutually exclusive distinction can be drawn between judicial power and legislative power. Judicial power requires that decisions be based in many instances on policy. Administrative power, to make decisions that constitute specific legislation, may not require wide policy considerations. We use the following terminology.

A power is “administrative” if, in the making of the decision, the paramount considerations are matters of policy. The power may be conferred on a board or commission or official such as the Registrar with power to grant licences under the Private Investigators and Security Guards Act, to which we have already referred.<sup>5</sup> It is in the sense of a specific legislative power to make decisions that we use the expression “administrative power”.

A power is primarily “judicial” where the decision is to be arrived at in accordance with governing rules of law; in their application policy enters in only to the limited extent already discussed in connection with the exercise of judicial power.<sup>6</sup> This type of decision will be referred to as a judicial decision.

In using these terms with these meanings it must be emphasized that no clearcut and mutually exclusive distinction exists between administrative and judicial powers.

**“Tribunals”: “Administrative” or “Judicial” Tribunals**

We propose to use the term “tribunal” to denote any person or group of persons or corporate body—however described as commissioner, commission, or board—on whom a statutory power, whether administrative or judicial, is conferred.

The term “tribunal” originally signified in its primary meaning a judicial body consisting of several persons. In current usage in Ontario the expression “administrative

<sup>5</sup>See p. 22 *supra*.

<sup>6</sup>See pp. 22-3 *supra*.

tribunal" is loosely used as embracing virtually any body exercising power that apparently forms part of the administrative process of government, whether its power is administrative or judicial.

We adopt the expression "tribunal" as embracing corporations, groups of persons or single persons exercising either administrative or judicial powers. We use it to avoid repetition and because of the lack of any other term. In so doing we recognize that the term "tribunal" is used in other jurisdictions, e.g. in the United Kingdom, in a different sense.

It is, however, necessary for us in this Report to distinguish between tribunals exercising "administrative" and "judicial" powers. If the power conferred on a tribunal is administrative we will refer to it as an "administrative tribunal". If the power so conferred is judicial the tribunal will be referred to as a "judicial tribunal".

Certain tribunals, for example, the Ontario Municipal Board, exercise both administrative and judicial powers. In such case in discussing the tribunal we will refer to the nature of the specific power in issue in the discussion.

### **"Quasi-Judicial" and "Purely Administrative" Powers**

The terminology in this branch of the law of Ontario is further complicated by a subdivision of administrative powers. In legal parlance it is said in some cases administrative powers must be exercised by "acting judicially". That is, the decision, although administrative because it is arrived at on grounds of policy, is to be made after compliance with certain minimum standards of fair procedure, somewhat resembling judicial procedure. For example, the tribunal exercising the power may be required to hold a hearing not unlike a trial before it reaches its decision. In these cases, the administrative power is termed "quasi-judicial". In other cases no obligation to act judicially—no requirement to follow any minimum standards of fair procedure—is imposed in the exercise of the administrative power. In such cases the power is termed "purely administrative". Although the use of this terminology raises other problems in addition to the initial

difficulty of distinguishing between administrative and judicial powers, the classification of "quasi-judicial" and "purely administrative" powers is recognized in current usage and we use these terms in this broad sense.

### "Ministerial" and "Discretionary" Powers

We have used the term "ministerial" in our discussion of theoretical executive power. Since early times this term has been used to refer to a power to take a defined action in defined circumstances, coupled with a duty to take the action in those circumstances. The person or tribunal exercising the power is a mere instrument or automaton, and has no "authoritative" power to decide whether he will act or what he will do. It is true that he must make up his own mind as to whether the defined circumstances have in fact arisen, but this is not a final, authoritative, legal decision.

"A ministerial duty, the performance of which may in proper cases be required of the head of a department by judicial process, is one in respect to which nothing is left to discretion. It is a simple definite duty arising under conditions admitted or proved to exist, and imposed by law."<sup>7</sup>

Under modern usage the term "ministerial" has acquired other meanings which may lead to confusion. The term is sometimes used to describe powers which are conferred on "ministers" of the Crown, often referred to as "ministerial". It is also used to describe certain actions by inferior officers acting on instructions.<sup>8</sup> We propose to use it in its older and more precise meaning.

In early usage the term "discretionary" was employed in contrast with "ministerial". A discretionary power included a power of authoritative decision and a "discretion" meant a power of decision requiring a choice to be made according to the judgment of the person exercising the power. In this sense discretionary powers include subordinate legislative, administrative and judicial powers.

<sup>7</sup>*Re Massey Mfg. Co.* (1866), 13 O.A.R. 446, 453, per Osler J. A. quoting with approval *The State of Mississippi v. Johnson*, 4 Wall. 475, 498. See also Griffiths and Street, *Principles of Administrative Law* (3rd ed.), 150.

<sup>8</sup>See de Smith, *Judicial Review of Administrative Action*, 30.



However, in modern usage the term "discretionary" is used in a narrower sense to contrast administrative decisions with judicial decisions—to distinguish policy decisions from decisions made according to law. Because of this ambiguity we avoid the use of the term and refer directly to subordinate legislative, administrative or judicial powers.

Having discussed and analyzed the terminology to be applied in considering encroachments on and infringements of civil rights, it is now necessary to examine the relevant constitutional principles involved in determining whether infringements or encroachments are "unjustified" and whether they are encroachments or infringements on "fundamental" or "basic rights".

## CHAPTER 2

# Constitutional Principles

### DOCTRINE OF SOVEREIGNTY OF PARLIAMENT

#### In the United Kingdom

IN the United Kingdom, Parliament has supreme legislative authority, controlled only by political considerations and the authority of the electors. Legally, Parliament can create new rights, liberties and freedoms or may abrogate or limit existing rights, liberties and freedoms of the individual without restriction. Parliament may confer subordinate legislative or administrative powers without any legal limitations. In addition its constitutional power is unlimited to establish new courts or new judicial tribunals that exercise the powers of the courts.

#### Limitations on the Sovereignty of the Legislature of Ontario

The Canadian federal system, based on a "constitution similar in principle to that in the United Kingdom"<sup>1</sup> embodies the doctrine of the sovereignty of Parliament, but in Canada neither Parliament nor the Legislature has sovereign legislative power equal to that of the Parliament of the United Kingdom. Under our Federal constitution legislative power is distributed between the Parliament of Canada and the Legislatures of the provinces.

<sup>1</sup>British North America Act, 1867, 30-31 Vict., c. 3.

In Ontario, although the legislative authority of the Legislature is wide, it is subject to two main limitations:

- (1) Laws can be made only in relation to matters over which legislative power is given to it affirmatively by the provisions of the British North America Act (mainly but not exclusively by Section 92 of that Act, which will hereafter be referred to as the B.N.A. Act);
- (2) Even in the field committed to it the Legislature cannot make laws repugnant to or inconsistent with provisions of the B.N.A. Act.

Within the affirmative powers conferred on it, and subject only to minor restrictions imposed by the second limitation, the Legislature can create or abrogate or limit rights, liberties or freedoms, and can confer subordinate legislative and administrative powers. The second limitation puts a significant restriction on the power of the Legislature to establish new judicial tribunals or judicial tribunals to act in the place of the superior, district or county courts. This restriction is of great importance, governing the solution of many problems coming before the Commission.

The affirmative authority of the Legislature to establish courts is derived from Section 92 of the B.N.A. Act, empowering it to make laws in relation to

“The administration of justice in the Province, including the constitution, maintenance, and organization of provincial courts. . . .”

If this section stood alone it would include not only the constitution of provincial courts, with any jurisdiction deemed appropriate, but also the appointment of judges or presiding officers to exercise the powers conferred. However, Section 96 of the B.N.A. Act provides that

“The Governor General [of Canada] shall appoint the judges of the superior, district and county courts in each Province. . . .”

The scheme of the B.N.A. Act envisages that the provincial Legislatures will establish the courts, but the Federal government is to have the sole power to appoint judges of the super-

ior, district and county courts. It follows that while the Legislature may establish a superior, district or county court or a tribunal analogous thereto, it has no power to provide for the appointment of judges by the provincial government, for this would be inconsistent with section 96.<sup>2</sup>

This limitation is one of substance and not merely of form. It cannot be evaded by a Legislature purporting to establish a body not called a court with jurisdiction analogous to that exercised by superior, district or county courts. Because of the substance of its powers, such body would be classified as a court. This limitation does not affect the authority of the Legislature to establish tribunals that are clearly administrative; nor does it affect the power of the Legislature to establish tribunals that exercise judicial powers, as long as these powers do not broadly conform to the type of jurisdiction exercised by the superior, district and county courts, or are not analogous thereto; nor does it prevent the Legislature from establishing lesser courts than superior, district or county courts and providing for the appointment of officers to preside over such courts.

No useful purpose can be served by an elaborate discussion of the difficulties that arise from time to time in determining whether or not the Legislature can confer judicial power on a particular tribunal. Our purpose in pointing out these difficulties is twofold:

- (1) To emphasize the distinction that must be drawn between the power of the Legislature of Ontario to confer judicial power on tribunals, and that exercised by the Parliament of the United Kingdom and many other countries of the world;
- (2) To emphasize their significance in relation to the subject of judicial review by the Superior courts of proceedings before the inferior courts or statutory tribunals.

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<sup>2</sup>*Toronto v. York*, [1938] A.C. 415; *Attorney-General for Ontario v. Victoria Medical Bldg. et al.*, [1960] S.C.R. 32; *Brooks v. Pavlick*, [1964] S.C.R. 108, following *Labour Relations Board of Saskatchewan v. John East Iron Works Ltd.*, [1949] A.C. 134.

Historically the supervisory jurisdiction to review proceedings before inferior courts or statutory tribunals flowed from the inherent powers of the Superior courts as Superior courts. From its nature the power of review appears to be a matter that can only be considered to be within the jurisdiction of the Superior courts. In the view of the Commission such jurisdiction cannot be taken from the Superior courts and entrusted to members of a tribunal appointed by the government of the Province. This matter will be discussed more fully in connection with the subject of judicial review<sup>3</sup> and the submissions made to the Commission suggesting the establishment of an administrative court on the pattern of the *Conseil d'Etat* of France.

Subject to the limitations we have just discussed, the doctrine of supremacy of Parliament has attributes of fundamental importance to this Commission:

(1) In a matter of pure law, as long as it stays within the powers conferred on it under the B.N.A. Act, the Legislature has power to take away or curtail any of the rights that an individual may have, and in strict law it is not required to provide any compensation for the rights taken away or curtailed. Such encroachment cannot be said to be *legally* "unjustified". As a practical matter, in the absence of constitutional safeguards in the nature of a bill of rights, the full exercise of the Legislature's *legal* legislative power is only curtailed by its accountability to its electors.<sup>4</sup>

(2) The power to constitute the courts but not the appointment of judges confers on the Legislature power to determine the jurisdiction of the courts. However, the provincial courts are subject to the appellate jurisdiction of the Supreme Court of Canada, in some cases without leave and in some cases with leave.<sup>5</sup> The Legislature cannot of its own powers limit or affect the right of appeal to the Supreme Court.<sup>6</sup>

<sup>3</sup>See Chapters 20-26 *infra*.

<sup>4</sup>Subject only to possible disallowance under the B.N.A. Act, s. 90.

<sup>5</sup>The Supreme Court Act, R.S.C. 1952, c. 259.

<sup>6</sup>*Crown Grain Co. Ltd. v. Day*, [1908] A.C. 504. The appellate jurisdiction of the Supreme Court of Canada is limited by Parliament in the Supreme Court Act to final judgments of the court of last resort in the province.

(3) Within the limitations discussed in this chapter, the Legislature can and does confer judicial and administrative authority on statutory tribunals that are not courts and from whose decision there may be no right of appeal. Where the Legislature does not make it clear whether the tribunal is a judicial or administrative one, problems of classification are raised when the courts are exercising their common law powers of judicial review, which are often very difficult to resolve.

(4) The Legislature can and does confer legislative and administrative authority on subordinate bodies. This is often done in the widest terms. The subordinate body is, however, strictly confined in the exercise of the power conferred within the limits set out in the statute.

The significance of these attributes of the sovereignty of Parliament will be dealt with later in this Report.

### **Political Control of Legislative Power**

The ultimate political control of the legislative power of the Legislature of Ontario, within its constitutional limits, rests with the electors. In theory the direct exercise and control of power in the Legislature is in the charge of the elected representatives who are responsible for the policies of our legal and governmental system. Under our parliamentary system a direct curtailment of liberties of individuals without their personal consent and without remedial compensation by a law enacted by the Legislature is presumed in *theory* to be justified in the general interests of the community. In *theory* this is a premise upon which the democratic process under the parliamentary system is based. The reasoning is that a majority of the elected representatives who come from all areas, groups and interests in the community are subject to the restraining influences of a vocal and informed opposition and that the proceedings of the Legislature are in public and are reported and commented upon by responsible and informed media of general communication. It is presumed that the majority of the legislators will work within the standards of justice and propriety generally recognized throughout the community so as to avoid onerous actions taking away or

changing the rights of an individual or group, unless clearly justified in the general interests.

As will be indicated in due course, the practical operation of the Legislature may differ from the theoretical. In practice these premises and presumptions are not always sound. This fact has been acknowledged by all democratic countries that have either legislative or constitutional restrictions on the power of the legislature in the nature of a bill of rights, either merely declared or actually entrenched in the constitution.

It is unrealistic to suggest that an individual who has suffered an unjustified legal encroachment on his rights has a sufficient remedy for his particular complaint in the prospect of having the government of the day defeated at the polls at the next general election. In most cases the electors would know or care very little about the effect certain legislation or authorized legal action might have on the specific rights of a particular individual affected thereby.

Bodies exercising subordinate legislative power to make regulations are in theory not even subject to the same controls as the Legislature itself. New rules of law, which change or curtail rights or freedoms, made by persons or groups of persons acting outside the Legislature (whether called ministers, boards, commissioners or inspectors) are not subject to public scrutiny or public debate before they are made. Although it is recognized that it is necessary for effective modern government to confer the power to legislate in proper cases, there should be constant vigilance to retain adequate control by the representative Legislature and practical and effective safeguards against abuse of the subordinate power. Where the Legislature unnecessarily gives up control and fails to provide proper safeguards for the rights of the individual there is the possibility of an "unjustified encroachment" on those rights.

As we have indicated, where an administrative tribunal makes a decision taking away any rights of an individual it exercises a specific legislative authority conferred on it by the Legislature. Such authority is generally conferred to be exercised in particular circumstances as a matter of convenience or it may be exercised, having in mind policy considerations

which are often too comprehensive to permit the enactment of detailed rules of law governing the course to be followed in all cases. Therefore the exercise of administrative authority may be a departure from the principle that legislative power should be exercised or controlled by the Legislature and also a departure from the basic constitutional concept of the Rule of Law, which we shall discuss later.

Where the Legislature has conferred legislative power on a tribunal to be exercised either generally or specifically, it is no answer to say that rights of the individual are adequately safeguarded against an abuse of the power or careless exercise of it because the Legislature can withdraw the power by legislative action or the government may dismiss the body or persons exercising it. This was suggested to the Commission as an adequate safeguard during discussion of the exercise of licencing powers. It is cold and unrealistic comfort to an individual who has suffered an encroachment on his civil rights by a wrongful exercise of such a power to be told that he always has a right to persuade the government to dismiss the tribunal.

Where power is conferred to take away or change rights of individuals without all practical safeguards, the mere existence of the power undermines the security of all rights that may be affected and is an encroachment on those rights. Sir Ivor Jennings, discussing the possible contraction of the "freedom of the individual" during the war, said:

"... Individual liberty is not so much a question of legal remedies as of governmental power. There has been no limitation of the remedies available to the citizen but his liberty has been restricted because governmental powers have increased."<sup>7</sup>

The term "right" could be substituted for "remedies" in this quotation and we adopt the language with emphasis.

## THE EXECUTIVE BRANCH OF GOVERNMENT

The nature of theoretical executive powers has been referred to as the power to order community forces to take action or to exercise other ministerial powers affecting the

<sup>7</sup>Ivor Jennings, *The Law and the Constitution* (2nd ed.).



rights of an individual.<sup>8</sup> However, functions of the executive branch of government, and we emphasize that we are discussing the “functions” of the branch of government commonly referred to as the “executive” in contrast with “powers”, are not confined to issuing orders to the sheriff, the police, or armed forces or to the exercise of merely ministerial powers. Such actions form only part of the activity of persons engaged in the executive branch of government. These activities may be divided into two broad categories:

- (1) The conduct of the business operations of government, and
- (2) The exercise of statutory subordinate legislative, administrative, judicial and ministerial powers.

### **The Business Operations of Government**

Her Majesty in right of Ontario is in law the person who is legally head of the executive branch of the government. All property considered to be public property is legally vested in Her Majesty, all government monies legally belong to Her Majesty, all officers and servants in the executive branch are legally officers and servants of Her Majesty and the business operations of government such as the management of property and entry into contracts are carried on as Her Majesty’s business and in Her name. We have no personification of the state with regard to all public property, money and employees vested in or employed by the state, nor are government operations carried out on behalf of the state. From a practical point of view our monarchical form of government differs little in result from that of a personified state. In either case, in a democracy, the executive operations must be so controlled as to carry out democratically selected objectives. The controls, which we shall discuss in due course, operate as effectively under our monarchical system of government as they would if we had a personified state.

The salient characteristic of this part of the activities of persons engaged in the executive branch is that the business of Her Majesty as a person is now carried on under the general law in substantially the same way as the business of

<sup>8</sup>See p. 20 *supra*.

any other person. It is the duty of Her Majesty and of every branch of the executive in these operations to abide by and obey the law.<sup>9</sup>

In early times there was a distinct difference between the sovereign's legal position and that of private persons, defined in special rules which formed part of the royal prerogative conferred on the sovereign.<sup>10</sup> Even in the sphere of ordinary business operations certain special rights and certain special powers and liberties not enjoyed by the ordinary citizens were conferred on the sovereign. Virtually all prerogatives in the business operation of the government that operated to the disadvantage of the citizen have now disappeared in Ontario as a result of legislation.<sup>11</sup> It may be generally said that the business operations of the government, subject to minor qualifications, are now carried on under the law in a manner corresponding very closely to the business operations of an individual or a corporation, and the persons in the executive branch carry on these business operations as agents or servants of Her Majesty and are subject to the law as ordinary citizens.

Since the business operations of government are carried on under the law through agents or servants of Her Majesty who are themselves subject to the law, there are no *legal* encroachments or infringements on the rights of individuals in this part of the executive branch's activity. Therefore the Commission has not found it necessary to consider the activities of the executive branch from this point of view. In saying this we do not exclude consideration of safeguards against maladministration of government, nor against any departure from honest and efficient dealings.

### **Subordinate Legislative, Administrative and Judicial Powers in the Executive Branch**

Under the common law the sovereign possessed many special prerogative powers; for example, the power to incorporate companies by letters patent. These special powers

<sup>9</sup>*Eastern Trust Company v. Mackenzie, Mann and Co. Ltd.*, [1915] A.C. 750, 759.

<sup>10</sup>*Blackstones' Commentaries*, Chitty Ed., Vol. I, 180, 239 in original paging.

<sup>11</sup>See, for example, *The Proceedings Against the Crown Act*, Ont. 1962-63, c. 109, as amended by Ont. 1965, c. 104.

appear to have been largely legislative in character. In Ontario, so far as an individual's rights may be affected, virtually all these common law powers have either disappeared or are now controlled by statute and do not require extensive separate consideration.

On the other hand many statutes now confer special powers on the Lieutenant Governor in Council, upon Ministers, subordinate officials and other bodies in the executive branch. Persons in the executive branch on whom such powers are conferred are in an entirely different position from persons who act only as agents or servants of the sovereign in business operations carried on under the ordinary law. By the exercise of these powers they can change or take away or determine finally the rights of individuals. They have, therefore, a power to encroach or infringe on rights.

### **The Structure of the Executive Branch**

With respect to its carrying on the business operations of government, the structure of the executive branch resembles a pyramid. The sovereign as the legal head of the executive is at the apex of the pyramid. Spreading out under the sovereign is an organization with the Lieutenant Governor in Council representing the sovereign at the top, and under him Ministers, senior officials, junior officials and servants. The authority to act on behalf of the sovereign as agents or servants flows downward.

With respect to the exercise of special statutory powers, the structure of the executive branch does not adhere to this pattern. Statutes may confer power on the Lieutenant Governor in Council or directly on Ministers, or directly on officials or other bodies. The officials or other bodies are sometimes wholly outside the normal hierarchy of officials under the sovereign. Where the power is conferred by statute the recipient of the power is in just the same position with respect to its exercise, whether he is within or without the hierarchy.

The Legislature has frequently established statutory corporations consisting of groups of individuals, sometimes completely outside the hierarchy, to carry on some segment of the

public business. These corporations may act either as agents or servants of the Crown in the conduct of ordinary government business operations, or they may exercise special statutory powers, or both. Maitland noted, as long ago as 1888, that a fragmentation of the executive branch of government was then taking place.<sup>12</sup>

### The Term "Executive"

The term "executive" must be used with great care. Persons in the executive branch of government act as agents or servants of the Crown to assert Crown rights or to defend them, or to enter into transactions on behalf of Her Majesty under the general law. As we have stated, the same person may also exercise subordinate legislative, administrative, judicial and ministerial powers. The term "executive" cannot in practice, therefore, be used as a term of legal art to designate any power that is of a distinctively legal nature. In its broadest sense the term can be applied to any action taken by a person in the executive branch of government, whatever the legal nature of the action may be. Even in this sense difficulties are raised by the changing structure of the executive branch. Many questions arise, depending on the context and the sense in which the term is used, e.g., does the term "executive" apply only to action taken by persons directly within the hierarchy of persons under the Crown? or does executive action include action taken by persons outside the hierarchy, exercising statutory powers? Sometimes the term is used as a synonym for "administrative" in the business sense, that is, the administration of the business operations of the Crown, and sometimes the term "executive" is used as a synonym for the term "purely administrative" to designate an "administrative power" that is not required to be exercised by "acting judicially".<sup>13</sup> Because of these difficulties the use of the term "executive" is avoided in this Report as describing any distinctive legal power.

<sup>12</sup>Maitland, *Constitutional History of England*, 415.

<sup>13</sup>*Border Cities Press Club v. Atty.-Gen. for Ontario*, [1955] O.R. 14.

## Legislative Control of the Executive Branch: Ministerial Responsibility

The control and supervision of the executive branch of government by the Legislature, to ensure that the policies of a democratically selected government are carried out, is exercised through legal controls and constitutional conventions.

### LEGAL CONTROLS

One of the most important legal controls is the limitation imposed on the expenditure of Her Majesty's monies by The Financial Administration Act<sup>14</sup> when read together with Section 126 of the B.N.A. Act. The effect of these statutes is to require legislative authority for all payments of Her Majesty's money out of the Consolidated Revenue Fund. Each year Supply Acts<sup>15</sup> are passed which appropriate specific sums of money to be spent by the executive branch for specific purposes. Many other illustrations of legal controls may be given, e.g. those relating to the alienation of Crown lands and recruitment of employees for the Civil Service. The general effect of such legal controls is to prevent persons in the Executive Branch from acting in any manner other than that provided by the Legislature.

### CONSTITUTIONAL CONVENTIONS

As a purely legal matter, it might appear that the sovereign as the legal head of the executive is able personally to carry on the government business and its operations within the legal limitations imposed, and for that purpose to employ as chief advisors and subordinates such persons as the sovereign wishes to act on the instructions of the sovereign. This, however, is not the case. Two basic constitutional conventions establish complete control by the Legislature over action by or on behalf of the sovereign:

- (1) The sovereign is bound by convention (reinforced in some instances by legal controls) not to take any action except on the advice of her Ministers.

<sup>14</sup>R.S.O. 1960, c. 142.

<sup>15</sup>See Ont. 1966, c. 151.

(2) The sovereign is bound to select as her first Minister the party leader who commands the support of the Legislature. He is the leader of the majority of the members in the Legislature in which such a majority exists, or is usually from the largest party in the event that no majority exists.

The result of these two conventions is that the sovereign's Ministers, who are in practice members of the Legislature, are accountable to it for their actions. Each Minister is held to be responsible and accountable for anything done within the segment of the public business under his control and direction, be it the ordinary business operations of government or the exercise of statutory powers conferred on him or on subordinates under his control and direction. This is the doctrine of ministerial responsibility.

The general principle underlying the control of the executive branch by the Legislature is therefore that every segment of the public service should be under the direction and control of a Minister who can be called to account by and in the Legislature. The power of control of his department conferred on a Minister is the foundation of his responsibility for it. We think much uninformed criticism is directed at the present time at the principle of ministerial responsibility and at the growth of a "bureaucracy". This criticism suggests that public servants in some way act independently in carrying out their duties, without regard to the public interest and not subject to the control of a Minister. We find this criticism unjustified. Ministers do exercise very real day to day control over action taken on behalf of their departments. That is not to say that a Minister does everything personally, but he does control departmental action through his Deputy Minister and senior officials. The Deputy Minister is familiar with all segments of the departmental activities and is in daily contact with his Minister. He becomes familiar with his Minister's views on the conduct of the whole range of departmental business. Senior officials through contact with the Deputy Minister and the Minister acquire a similar familiarity in their branches of the department. The Minister's policy on familiar and routine matters should be well known. The

experience of senior public servants makes them professionally sensitive in distinguishing between problems on which the Minister's policy has already been made clear and those that raise novel considerations or that are entirely new and upon which they must seek instructions from a higher level in the department, ultimately from the Minister. We are fortunate in Ontario in having competent and professional public servants who are aware of their duties and responsibilities and the limitations on their powers. Few instances of any lack of appreciation of their functions have come to our attention in our discussions with them.<sup>16</sup>

We have found no basis for depreciating the value of the doctrine of ministerial responsibility as a mode of control of the public business, nor for concluding that there is an absence of ministerial control in the branches of the public service controlled and directed by Ministers. We do criticize the abdication of ministerial responsibility in certain cases by the conferment of special powers on boards or other bodies. We consider later the effectiveness of the doctrine of ministerial responsibility in conferring adequate safeguards for the rights of the individual against encroachments and in providing remedial action.<sup>17</sup>

The practice of conferring powers—either to carry on business operations of government or to exercise subordinate legislative or administrative powers on boards, commissions and corporations that are outside the normal hierarchy of public servants and which may act independently of the control of a Minister—is a departure from our constitutional principles. The absence of the ultimate control by the Legislature, exercised through Ministers responsible for the exercise of subordinate legislative or administrative powers by such persons or bodies, is a relevant factor in determining whether such powers constitute an unjustified encroachment on the rights of individuals.

Different considerations apply to the exercise of judicial powers.

<sup>16</sup>See H. W. R. Wade, *Towards Administrative Justice*.

<sup>17</sup>See Report No. 2.

## COURTS OF JUSTICE

The third branch of government under our constitution consists of the courts of justice. The general principle of our constitution with respect to judicial power is that judicial power should be exercised by tribunals having the traditional characteristics of courts of justice. To appreciate the operation of this general principle in relation to statutory tribunals some precise understanding of the nature of courts of justice is required.

No accepted definition of courts of justice which clearly distinguishes courts of justice from other tribunals has ever been formulated. For reasons already stated, the mere fact that a tribunal may exercise judicial power does not afford a helpful distinction, for, as we have seen, the boundaries of judicial power cannot be defined with certainty. In addition, tribunals other than courts may exercise judicial power within limitations already discussed. From the point of view of the exercise of judicial power alone, courts of justice are merely one type of judicial tribunal.

Notwithstanding that no satisfactory definition of courts of justice can be formulated, they have certain well defined and recognized characteristics. Not all of these characteristics will be found at all times in every court of justice, but some of them will be found in different courts. These characteristics have been developed over centuries to promote the ultimate objective of the courts, which are instruments to do justice under the law. Since the characteristics of courts afford recognized standards of justice in relation to the powers of judicial decision exercised by them, it is useful now to consider these characteristics in some detail. We shall later discuss them in relation to statutory judicial and administrative tribunals.

### Independence

The most essential and fundamental characteristic of courts of justice is that they be independent. The Magna Carta of the British judicial system, the Act of Settlement,<sup>18</sup> was won only after hundreds of years of struggle and two

<sup>18</sup>See 12 & 13 Wm. III, c. 2.



revolutions to secure protection against arbitrary power exercised by or on behalf of the Crown. The caption of the Act and its recitals not only describe its purpose but constitute in some measure a declaration of the rights of the individual that is worth repeating in the context of this Report. The Act was declared to be

“An Act for the further limitation of the Crown and better securing the rights and liberties of the subject. . . .”

and the recital reads in part,

“. . . and whereas the laws of England are the birthright of the people thereof, and all the kings and queens who shall ascend the throne of this realm ought to administer the government of the same according to the said laws and all their officers and ministers ought to serve them respectfully according to the same.”

To preserve their independence the judges were given security of tenure of office, in that they hold office during good behaviour, a security which all Superior Court judges enjoy in Ontario today.<sup>19</sup> Although county court judges and magistrates do not enjoy the same constitutional security of tenure enjoyed by Superior Court judges, there are statutory safeguards for their independence.

The independence of the judges is reinforced by the fact that, in addition to security of tenure, judges of courts of record are exempt from legal liability for anything done or spoken in the exercise of their office and within the scope of their jurisdiction.<sup>20</sup> This is not a rule that exists for the protection of the judges but for the protection of the public, to secure the independence of the judges.<sup>21</sup>

## Impartiality

Impartiality is a necessary attribute not only of courts of justice but of all bodies holding the power of decision. Two basic characteristics of courts combine to promote impartiality.

<sup>19</sup>B.N.A. Act, 1960, 9 Eliz. II, c. 2, s. 1 amending B.N.A. Act s. 99.

<sup>20</sup>*Anderson v. Gorrie*, [1895] 1 Q.B. 668; 9 Halsbury, *Laws of England* (3rd ed.), 120.

<sup>21</sup>*Fray v. Blackburn* (1863), 3 B. & S. 576; *Scott v. Stansfield* (1868), L.R. 3 Exch. 220.

The first is the rule against bias. Viscount Cave stated the principle with great clarity:

“My Lords, if there is one principle which forms an integral part of the English law, it is that every member of a body engaged in a judicial proceeding must be able to act judicially; and it has been held over and over again that, if a member of such a body is subject to a bias (whether financial or other) in favour of or against either party to the dispute or is in such a position that a bias must be assumed, he ought not to take part in the decision or even to sit upon the tribunal. This rule has been asserted, not only in the case of Courts of justice and other judicial tribunals, but in the case of authorities which, though in no sense to be called Courts, have to act as judges of the rights of others.”

“From the above rule it necessarily follows that a member of such a body as I have described cannot be both a party and a judge in the same dispute, and that if he has made himself a party he cannot sit or act as a judge, and if he does so the decision of the whole body will be vitiated.”<sup>22</sup>

The test of what is bias in law is a broad one. If the judge or member of a tribunal has a pecuniary interest in the matter in dispute, however small, bias is presumed and it matters not whether the tribunal has acted impartially. It is equally true that there is another class of case in which the objection is not founded on any pecuniary interest but is in the nature of what is called a challenge of favour. Lord Justice Vaughan Williams said of such cases:

“. . . there is no such presumption as arises in the case of a pecuniary interest, but the question is whether there is a real likelihood arising from circumstances such as would give rise to a challenge to the favour, that the judge or justice would have a bias.”<sup>23</sup>

That is a question to be answered depending on the facts of each case.

The second characteristics of the courts of Canada, relative to impartiality, which distinguishes them not only from other tribunals but from courts in many other countries is that the courts do not act on their own initiative to investigate

<sup>22</sup>*Frome United Breweries Co. v. Keepers of the Peace and Justices for County Borough of Bath*, [1926] A.C. 586, 590, 591.

<sup>23</sup>*The King v. Justices of Sunderland*, [1901] 2 K.B. 357, 371.

disputes or charges. They only deal with matters brought before them by private parties or public authorities. Under our system the courts take no part in investigating breaches of the law. These are investigated by public officers who are employed for that purpose. The courts do not therefore appear in the role of prosecutors and judges in the same cause. This is not true of certain other tribunals.

### **Qualification of Judges**

That it is essential to the just functioning of the courts of justice that they be presided over by persons of scrupulous integrity requires no emphasis. In this context "integrity" means much more than "incorruptibility". It connotes intellectual integrity in the broadest sense. The need for a knowledge of the law in the judicial process and a habit of objectively applying it is fundamental. Of equal importance to a knowledge of law is another quality which may often be overlooked. It is that ability that a well-trained lawyer should have, due to his professional training and knowledge, to develop an intuition with respect to the demands of justice in each case that comes before him. This applies particularly to matters of procedure.

### **Just Procedure**

The procedure of the courts has been developed over centuries to the end that disputes will not only be decided fairly but that fairness will be apparent. This procedure requires that no step in the proceedings be taken without notice to the parties to the dispute; that they be entitled to seek the advice of and be represented by counsel of their own choice; that they be given an opportunity to prepare their cases with reasonable knowledge of the case they have to meet; that governmental authority to compel the attendance of witnesses and the production of necessary documents be at their disposal; that a full oral hearing, open to the public, take place in the presence of the parties; that each party have the right to examine not only his own witnesses but to cross-examine the witnesses of the other side to bring out their evidence in full, or develop any inconsistencies in it; that only

proof of relevant facts having real evidentiary value is admissible; that the decision must be based on the proven facts and those that are so well known as to be judicially noticed as common knowledge not requiring proof; and that reasons be given for the decision.

All these procedural elements are founded on a belief derived from experience that they are necessary in the cause of justice, and that it be made apparent that the courts are seeking justice. If respect is to be built and maintained for the judicial machinery, not only must justice be done but it must be seen to be done. Certain aspects of the procedure in courts deserve emphasis.

### **Public Hearings**

Courts of justice are and should continue to be open to the public. But only a few members of the public can attend personally in the courts at any one time. The remainder must depend for their information on the established means of communication: the press, the radio and the television. The openness of the courts is one of the basic safeguards of the right of the individual to a fair and just trial; it has a disciplinary effect on the bench, on counsel and on witnesses. "Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men."<sup>24</sup>

### **Decisions Based on Evidence and Judicial Notice**

Questions of fact arising in disputes brought before the courts are decided on the basis of the material proved in evidence adduced by the parties. Only factual matters of common knowledge that require no proof may judicially be noticed without proof in the ordinary way. On matters requiring expert knowledge, opinion evidence may be given and form the basis of the decision. Whether the prevailing laws of evidence require revision is not a matter that comes within the Terms of Reference of this Commission. Proper rules of

<sup>24</sup>*Ambard v. Attorney-General for Trinidad and Tobago*, [1936] A.C. 322, 335. Freedom to publish evidence given before the courts will be discussed in Chapter 49 *infra*.

evidence promote justice when every party to a dispute is free to put all material relevant to the case before the court and have full opportunity to answer the case of the other party.

### Reasons for Decisions

The obligation to give reasons for a decision is elementary to the administration of justice. Every individual who may be affected by a decision adverse to his interests is entitled to know the reasons why the case has been decided against him. In addition, the requirement to give reasons obliges the court to demonstrate that the matter before it has been properly considered and thoroughly weighed, thus reinforcing the appearance of justice.

### Appeals

Provision for a right of appeal is well recognized as an essential part of every judicial system. There may have been cases in which the right of appeal has been abused and appeals have been taken vexatiously, but such cases are rare. The basic safeguard against arbitrary judicial action—the right to an appeal—far outweighs any detriment from its possible abuse. The knowledge that a right of appeal exists has a proven disciplinary effect on any tribunal that exercises a power of decision affecting rights. The nature and character of the appeals and the procedure to be followed must vary according to the nature of the matters that are dealt with in the courts. The fact that there is a right of appeal is of greatest importance. The procedure to be followed should provide as far as possible for an expeditious hearing and a prompt decision by the appellate court.<sup>25</sup>

## JUDICIAL REVIEW BY THE SUPREME COURT OF THE EXERCISE OF SUBORDINATE LEGISLATIVE, ADMINISTRATIVE AND JUDICIAL POWERS

In order to ensure that powers conferred by the Legislature are not exceeded and that they are properly exercised, virtually every legal system provides that there be some method for the enforcement, restraint or review of the exercise or purported exercise of subordinate legislative, administrative or

<sup>25</sup>For a full discussion of the principles governing appeals, see Chapter 15 *infra*.

judicial powers. The basic principle in our constitution has been that judicial review is a function of the Superior common law courts. Unlike Continental countries, no special courts or tribunals have been established in Canada for this purpose.

This is an historic supervisory jurisdiction of ancient origin exercised through the prerogative writs of *mandamus*, prohibition, *certiorari*, *quo warranto* and *habeas corpus*. To these have been added in modern times actions for declaratory judgments and injunctions.<sup>26</sup>

### COMPENSATION FOR LOSS TO AN INDIVIDUAL CAUSED BY GOVERNMENTAL ACTION IN THE PUBLIC INTEREST

In this Province there is no constitutional restriction on the power of the Legislature to deprive an individual of his property rights without compensation. In some countries, e.g. the United States of America, safeguards against such action are written into the constitution. Notwithstanding the absence of such a legal requirement in Ontario, the principle of compensation has been widely adopted; for example, when land is taken in the public interest. This principle may be accorded the status of a constitutional principle against unjustified encroachments. But the principle is not extended or applied to all cases in which legal rights are taken away or infringed by statute. A zoning by-law may take away or diminish property rights but no compensation is provided. The application of the principle is extraordinarily difficult and brings up many questions of substantive law.

### DOCTRINE OF THE SEPARATION OF POWERS IN ONTARIO

By the eighteenth century the separation of powers between the executive, legislative and judicial branches of government seemed to be an essential characteristic of the English constitution.<sup>27</sup> In effect the doctrine of separation of powers as developed by Montesquieu holds that in any gov-

<sup>26</sup>This subject is discussed in detail in Chapter 16 *infra*.

<sup>27</sup>Montesquieu, *L'Esprit des lois*, Book XI, Chap. VI.

ernment which has liberty for its object no one person or bodies of persons ought to be allowed to control the legislative, executive and judicial powers, or any two of these. Montesquieu attributed the comparative security of the freedom of British subjects in his time, when contrasted with that of the subjects or citizens under continental systems, particularly of France, to the separation of powers.

This interpretation of the British constitution was not accurate even at that time, and certainly has become less apposite today. Even then, Ministers were also members of and responsible to Parliament, and we have seen that with the development of the strict rule of ministerial responsibility these Ministers, as the operative heads of the executive branch, are accountable to Parliament. On the other hand, the Ministry comprising all the Ministers at any one time is, through its party organization, the dominant controlling group in Parliament. The fact is, as Bagehot noted in the last century, "The efficient secret of the English constitution may be described as the close union, the nearly complete fusion of the executive and legislative powers."<sup>28</sup>

Even the judicial power in the United Kingdom cannot be said to be an entirely separate power from that of the other branches of government, since the Lord Chancellor is the head of the judiciary, is the government leader in the House of Lords, and the House of Lords is itself the final court of appeal. In substance however the judges in the United Kingdom are independent of executive direction. In Canada the separation of the judicial from the executive and legislative branches of government is more complete than it is in the United Kingdom, for the office of Lord Chancellor does not exist and the final court of appeal is the Supreme Court of Canada. Notwithstanding this, there has never been a complete separation of powers in the practical sense and as we have seen such separation is impossible.

In the United States where the doctrine of the separation of the powers was at one time considered to be at least

<sup>28</sup>Quoted with approval by Holmes, *Collected Legal Papers*, (1920), 263. To the same effect see Maitland, *1 Collected Legal Papers*, (1888), "The Shallows and Silences of Real Life", 478. Both referred to by Davis, *Administrative Law Treatise*, Vol. I, 70.

implicit in the constitution, the impossibility of strict application in the courts is now recognized. We discuss the doctrine in the United States in greater detail later.

Since no absolute line of demarcation can be made between legislative, judicial and executive powers, the distinction, for the purpose of applying the doctrine of separation of powers, must be one of degree and related to functions.

Speaking in terms of functions rather than powers, the doctrine of separation under our constitution may be expressed in two basic principles:

- (1) The performance of the judicial function should be independent of political control, and
- (2) The performance of the functions of the executive branch of government—the execution of government business and the exercise of subordinate legislative or administrative power—instead of being wholly separated from the legislative function should be exercised subject to the control and direction of or through channels accountable to the Legislature.

This formulation of principles suggests that there is a clear distinction between judicial and administrative powers; but no clear theoretical or abstract test exists by which they can be classified. The only solution to the problem is to attack the classification directly by an examination of the function of the powers. The principles can be reformulated, emphasizing the functional approach, in this way:

- (1) If it is appropriate that a particular power should be exercised by impartial persons independent of political control, who, in making their decisions, strive to do justice in the same sense as the courts, the power should be treated as a judicial power.
- (2) If it is appropriate that the exercise of a particular power should be subject to political control, the power should be treated as an administrative power and its exercise should be subject to the control and direction of or accountable through appropriate channels to the Legislature.



The criteria for determining the "appropriateness" of classifying a power in this way cannot be specified in detail. In general, where the decision turns on the application of more or less explicit rules or standards to be applied in an even-handed way to all persons affected, e.g. the award of compensation to injured workmen, the power should be considered to be judicial. In contrast, where the power is to decide, having regard to the particular circumstances in the case, e.g. the granting or refusal of a licence to operate transportation facilities between two cities, the power should be considered to be administrative. Although the classification is difficult to express in abstract terms its application to concrete cases does not usually present great difficulty.

To the constitutional principles dealt with in this chapter must be added the Rule of Law, which we discuss briefly in the next chapter.

## CHAPTER 3

# The Rule of Law

THE expression "Rule of Law" derives its status as a veritable constitutional dogma of the United Kingdom from Professor A. V. Dicey's book, *The Law of the Constitution*.<sup>1</sup> After explaining the doctrine of the supremacy of Parliament, which permits Parliament to change or take away all rights of individuals, he went on to explain how fundamental rights and freedoms were protected in the United Kingdom. This protection was attributed to the Rule of Law. There are three attributes of the Rule of Law as he explained it.<sup>2</sup> It is sufficient for our purposes at this time to discuss two of them.

The first attribute was stated:

"We mean in the first place that no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land. In this sense the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint."

In effect Dicey envisaged the English legal system as a system of law of the hypothetical kind postulated in Chapter 1 in which all rules of law are completely stated so that the courts in the application of the law are not required to exercise any policy judgment. In such a system an individual has defined

<sup>1</sup>Dicey, *The Law of the Constitution*, 9th ed.

<sup>2</sup>*Ibid.*, 188 ff.

rights protected in the ordinary courts which can only be taken from him by the exercise of the sovereign legislative authority of Parliament. He is protected from detrimental action by Parliament through the political and practical limitations on its authority under our democratic system.

Statutory power to make regulations does not formally conflict with this aspect of Dicey's Rule of Law in so far as regulations, as rules of law defining rights, are enforced or given effect in the ordinary courts. Power to make regulations does, however, conflict with the underlying principle that rules of law should be made by Parliament through the ordinary democratic processes. The establishment of special statutory tribunals that may make administrative or judicial decisions clearly conflicts with Dicey's Rule of Law. Administrative orders depriving individuals of their rights would be considered by Dicey to be discretionary and arbitrary. The determination of the rights of an individual by a statutory judicial tribunal departs from his requirement that such determinations should be made by the ordinary courts of justice.

The second attribute of Dicey's Rule of Law was stated as follows:

"We mean in the second place, when we speak of the 'rule of law' as a characteristic of our country, not only that with us no man is above the law, but (what is a different thing) that here every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals."<sup>3</sup>

The significance of Dicey's view on equality before the law is that, as already indicated, under our system a person who is in a position of high authority is subject to the ordinary law, except as specifically otherwise provided by Parliament. When a public officer of whatever rank commits a trespass or other civil wrong in carrying on the business operations of government, he is personally liable even though he was acting on public business.<sup>4</sup> Where he purports to act in the exercise of legislative, administrative or judicial statutory power, but

<sup>3</sup>*Ibid.*, 193.

<sup>4</sup>We omit discussion of the very limited doctrine of "Acts of State".

exceeds the limits of his power, he is liable for any wrongs done by him. Whether he is the Prime Minister or any person lower in the hierarchy of government, he is liable to any individual for any illegal encroachment on the rights of the individual. Where, however, wide powers are conferred by the Legislature on a tribunal and within these powers that tribunal encroaches on the rights of the individual, the tribunal and its members will not be liable for the encroachment. This is a departure from Dicey's concept of equality before the law.

Dicey's statement of the Rule of Law was not completely accurate as applied to the English legal system in his own time, since subordinate legislative, administrative and judicial powers were even then being conferred on persons outside of Parliament and the courts. Because of the inaccuracy of Dicey's statement, the concept of the Rule of Law has been subject to criticism. This criticism seems to be unwarranted as Dicey himself recognized that his statement was not intended as a statement of universal truth, but rather as a general principle or an ideal objective. He acknowledged that in time of emergency, departures from the Rule of Law might be justified by the exigencies of the situation. Nevertheless, the Rule of Law should be the paramount aim of every sound legal system as a protection against any disposition on the part of those with power to exercise it arbitrarily or capriciously.

The Rule of Law has been given international recognition and a different emphasis since the end of World War II by the International Commission of Jurists. The objective of this international body—consisting of judges, law teachers, practitioners of law and other members of the legal community in many countries—is the support and advancement throughout the world of the Rule of Law. Recognizing the shortcomings of Dicey's formulation of the Rule of Law the Commission has described it to mean:

“The principles, institutions and procedures, not always identical, but broadly similar, which the experience and traditions of lawyers in different countries of the world, often having themselves varying political structures and economic

background, have shown to be important to protect the individual from arbitrary government and to enable him to enjoy the dignity of man.”<sup>5</sup>

The International Commission of Jurists outlined in its report certain more specific conclusions as to the relation of the Rule of Law to the legislative and executive branches of government, the criminal processes, the judiciary and the legal profession.

The concept of the Rule of Law envisaged by the International Commission is a modernization of Dicey’s concept. The weight of Dicey’s doctrine was against the creation of subordinate legislative or administrative powers or of judicial powers exercisable outside the ordinary courts. In his view the ideal legal system was one in which such powers did not exist, so arbitrary action by their exercise was not possible. The concept of the International Commission recognizes the inevitability of the existence of such powers in modern government. The objective remains the same, however, the avoidance of arbitrary action by the limitation of such powers to those that are necessary and unavoidable, and by the establishment of safeguards on their exercise. The Rule of Law as enunciated by the International Commission is therefore much more complex than Dicey’s. It embraces the adoption in each legal system of safeguards appropriate to it to protect the rights of individuals from unjust encroachment or infringement on basic rights by arbitrary action. We have previously discussed some of the divers legal and non-legal safeguards.<sup>6</sup> In this Report we recommend certain changes in the laws, procedures and processes to reinforce the Rule of Law by appropriate legal safeguards and to assure fuller freedom of operation to non-legal safeguards.

<sup>5</sup>A Report on The International Congress of Jurists, New Delhi, 1959, 324.

<sup>6</sup>See General Introduction to this Report.

## CHAPTER 4

# Statutory Powers: Introduction to Sections 2, 3 and 4

THE principles governing encroachments or infringements on the rights of individuals through the existence or exercise of statutory powers will be dealt with in the succeeding Sections of this Part:

Section 2—Administrative and Judicial Powers

Section 3—Subordinate Legislative Powers

Section 4—Powers of Investigation or Inquiry

These exhaust all the powers that require consideration for the purposes of this Report. Language used in different statutes may give the impression that there are many other kinds of statutory powers, but whatever the language used the power conferred must fall within one or more of these categories. A statute may confer power to make "regulations", "rules", "orders" or "to pass by-laws" or "to establish a plan" or "to prescribe a scheme"; or a statute may confer authority on a person to make decisions on particular matters by using expressions such as: "in his opinion", "in his judgment", "he deems", "it appears to him", "in his discretion", "he may approve", "he may order", "he may direct", "if he is satisfied"; or a statute may confer power in terms of action to be taken, e.g., "to issue, refuse, suspend or revoke a licence" or "to enter on the register", and the statute may provide that

the power "may" be exercised, or it may provide that it "shall" be exercised. But notwithstanding the language used, there are only three basic types of governmental powers in a legal system operating through rules of law: legislative, judicial and theoretical executive power.

For reasons already given, theoretical executive power does not require separate consideration. Legislative power conferred by statutes may be subordinate legislative power to make rules and regulations, or administrative power to make a legislative decision on particular matters. The statutory powers we consider are subordinate legislative powers, administrative powers and judicial powers. Powers of investigation and inquiry involve no different powers, although they differ in their main purpose from either judicial or administrative powers as they do not result in a decision affecting rights but merely in a report. They will be dealt with separately.

It would appear to be logical to deal with subordinate legislative and administrative powers together as they are based on policy decisions. However, for practical reasons it is more convenient to deal with administrative and judicial powers together as decisions made in their exercise relate to particular matters. Since they are more complex than subordinate legislative powers they will be discussed first.

As a preface to this discussion certain preliminary matters require consideration.

## **GENERAL PRINCIPLES GOVERNING ENCROACHMENTS OR INFRINGEMENTS**

In determining whether a statutory power constitutes an unjustified encroachment or infringement, the following are matters to be considered:

- (1) The nature and scope of the power;
- (2) The persons by whom it is exercised;
- (3) The procedure by which it is exercised;
- (4) The right of appeal or opportunity for reconsideration afforded;
- (5) The control by the courts of its exercise;

(6) The provisions for compensation in proper cases for injuries resulting from the exercise of the power.

The first three comprise the three main aspects of a statutory power: the power itself, the persons who exercise it and its mode of exercise. The last three involve basic doctrines: rights to appeal, judicial review and remedial compensation.

Certain general principles relating to the matters we have just enumerated should be applied in framing legislation conferring powers which encroach on civil rights.

(1) The nature and scope of the power should comply with the basic principle underlying the Rule of Law: it must be necessary, and even if necessary, it must not be unnecessarily wide.

(2) The tribunal should consist of qualified persons and be established in accordance with proper constitutional principles, i.e. tribunals exercising judicial powers should be independent of political control; tribunals exercising administrative or subordinate legislative powers should be subject to political control.

(3) The power should be exercisable in accordance with a procedure that is fair and just in the circumstances.

(4) In all proper cases a right of appeal or reconsideration should be provided.

(5) The proposed or purported exercise of the power or wrongful refusal to exercise it should always be subject to judicial control by simple and efficient procedure in the ordinary courts.

(6) Adequate compensation should be provided for injury or loss resulting from the exercise of powers, suffered by specific individuals as distinct from members of the community generally.

Unjustified encroachments or infringements on the civil rights of the individual by the existence or the exercise of a statutory power may arise through the failure in some way to comply with one or more of these principles. Their application will be considered in Sections 2, 3 and 4.



## INGREDIENTS OF STATUTORY POWERS

An analysis of the ingredients of statutory powers is a necessary preliminary to the subjects dealt with in Sections 2, 3 and 4 of this Part. These control the nature and scope of a power and the extent of the supervision of the courts on judicial review.

### An Authoritative Mental Decision

The power to make a legally authoritative decision in the exercise of mental judgment is the basic ingredient in subordinate legislative, administrative or judicial power, no matter what language is used by the statute conferring the power. Where the statute says directly "the tribunal may decide", the power of decision is clearly expressed. Even where the statute speaks in terms of taking action, for example, that a tribunal "may make regulations" or "may issue a licence", it is implied that before any action is taken a decision must be made.

The significant quality of the decision made in the exercise of subordinate legislative, administrative or judicial power is that the decision is legally authoritative. By "authoritative" is meant that the decision will be recognized as effectively settling the matter decided for the purpose of the legal system.

Accordingly, rules made in the exercise of subordinate legislative power will be treated as rules of law creating new rights or taking away or abridging existing rights in the same way as rules of law made by the Legislature, and they will be enforced in the courts. Decisions made on particular matters in the exercise of administrative or judicial power finally determine the rights of the persons affected for the purposes of the legal system.<sup>1</sup>

### Ingredients of Statutory Powers Other Than a Mental Decision

Examination of statutory powers shows that in addition to the mental decision there are other common ingredients

<sup>1</sup>In contrast with subordinate legislative, administrative or judicial powers, theoretical executive powers, being ministerial, confer no authoritative power of decision. Reference has already been made in this connection on pp. 30 ff. *supra*. The emphasis is on the word "authoritative".

which may be conditions to the existence of a valid power of decision or conditions to, limitations on, or requirements to be met for its valid exercise. These ingredients are:

- (1) The constitutional validity of the statute conferring the power;
- (2) The valid appointment of members of the tribunal exercising the power;
- (3) Matters of fact, law, or mixed law and fact, that are conditions precedent to the existence of the power of decision;
- (4) Impartiality of the tribunal in making the decision;
- (5) Procedure required to be followed before a decision can be made;
- (6) Limitations on the scope or area of the matters for decision;
- (7) Considerations to be taken into account in making the decision;
- (8) Provisions governing the manner in which the tribunal is to arrive at its decision;
- (9) Action required to be taken to make the decision effective.

Although this classification of the ingredients of a statutory power appears to indicate that the ingredients are quite separate and distinct, this is not true as they cannot be distinguished with precision. The distinctions are largely matters of degree as categories tend to merge, depending on the wording of the particular statute. The classification is, however, useful for the purposes of discussing the applicable principles and the provisions of particular statutes.

### **Objective and Subjective Ingredients**

The ingredients of statutory powers may be divided into two broad categories—objective and subjective. The terms “objective” and “subjective” are not as distinctive as might be desired but some terminology is necessary and these terms

have been recognized in the Court of Appeal of Ontario, in the Supreme Court of Canada and by distinguished authors.<sup>2</sup>

Objective ingredients are requirements that must be met or complied with if a valid and effective decision is to be made. The tribunal has no power to decide whether these requirements have been met. Determination as to whether they have been met falls to the courts. As far as the tribunal is concerned they are "objective" since it has no power to decide authoritatively whether they are complied with or not.

Where the tribunal is required to act on its opinion or belief, the requirement is a "subjective" ingredient.

The distinction between objective and subjective ingredients will appear more clearly from examples to be given.

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<sup>2</sup>*Canadian Bank of Commerce v. Attorney General of Canada*, [1962] O.R. 253; S.C.R. 729; H. W. R. Wade, *Administrative Law*, 67; de Smith, *Judicial Review of Administrative Action*, 241; Orr, *Report on Administrative Justice in New Zealand*, 108.



## Section 2

**STATUTORY POWERS:  
ADMINISTRATIVE AND JUDICIAL  
POWERS OF DECISION**

## INTRODUCTION

This Section is subdivided into five subsections:

- Subsection 1—Nature and scope of a Power of Decision;
- Subsection 2—Structure and Organization of Tribunals exercising powers of decision;
- Subsection 3—Procedural requirements for a valid decision;
- Subsection 4—Appeals from decisions made in the exercise of statutory powers;
- Subsection 5—Control by the courts of the exercise of statutory powers: Judicial Review.

These subsections deal in order with the detailed application of the first five general principles set out on page 62, as principles to be considered when determining whether a statutory power of decision constitutes an unjustified encroachment or infringement on civil rights. The sixth enumerated principle will be dealt with later.

Subsection 1

**NATURE AND SCOPE OF A POWER OF DECISION**

## INTRODUCTION

In this Subsection we discuss the effect on the nature and scope of a statutory power of six of the ingredients enumerated on page 64. The first two ingredients—constitutional validity of the statute conferring the power and validity of the appointment of members of a tribunal—are omitted because they do not affect the nature or scope of a power conferred. The fifth ingredient—procedure required to be followed before a decision can be made—is of such importance that it is discussed separately in Subsection 3.

Subsection 1 is divided into the following chapters:

Chapter 5—Objective ingredients of administrative and judicial powers of decision other than procedure;

Chapter 6—Subjective ingredients of administrative and judicial powers of decision other than procedure;

Chapter 7—Significance of ingredients of administration and judicial powers other than procedure.



## CHAPTER 5

# Objective Ingredients of Administrative and Judicial Powers of Decision Other Than Procedure

It is convenient to discuss objective ingredients under the following headings:

1. Conditions precedent to the existence of the power of decision;
  2. Impartiality as a requirement before a valid decision can be made;
  3. Limitations on the scope or area of matters to be decided;
  4. Matters to be taken into account in making a decision;
  5. Provisions governing the manner in which the decision is to be arrived at;
  6. Action required to effect the decision.
- 1. OBJECTIVE CONDITIONS PRECEDENT TO THE EXISTENCE OF THE POWER OF DECISION**

The terms of a statute conferring a power may require that certain matters of fact, law, or mixed law and fact exist or occur before the power of decision, the central element in

the power, will arise. These are commonly known as preliminary facts, or preliminary matters of law or of mixed law and fact.

### **Preliminary Facts**

The nature of preliminary facts as conditions precedent can best be explained by examples. Under the Mental Hospitals Act (prior to its repeal in 1967):

“Where a person has been apprehended either with or without a warrant and charged with any offense, a judge or magistrate may, by order, remand that person to an institution for a period not exceeding sixty days if the order is accompanied by the prescribed history form.”<sup>1</sup>

The power, although drastic, may only be exercised “where a person has been apprehended, either with or without a warrant and charged with any offense”. It is clear that in the absence of these facts, i.e. apprehension and charge, a judge or magistrate cannot order detention and an order for detention would not be legally authorized.

The Schools Administration Act provides another illustration:

“Where a teacher uses a text-book, or negligently or wilfully permits to be used as a text-book by the pupils of his school, in a prescribed subject, a book that is not approved by the Minister or the regulations, the Minister, on the report of the inspector of the school, may suspend the teacher. . . .”<sup>2</sup>

The Minister may suspend the teacher only if the preliminary facts exist, namely, if the “teacher uses a text book or negligently or wilfully permits to be used as a text book . . . a book that this is not approved . . .” and there is a report of the inspector of the school. If in fact the teacher has not used or permitted to be used such a text book, or there is no report, then the statute confers no power of suspension and a purported suspension would not fall within the terms of the power.

These two statutes employ the classic method of wording provisions that lay down factual conditions precedent, namely,

<sup>1</sup>R.S.O. 1960, c. 236, s. 38(1), as amended by Ont. 1962-63, c. 81, s. 6.

<sup>2</sup>R.S.O. 1960, c. 361, s. 20(2).

that where certain facts exist, if certain other facts or events exist or occur, a person may take certain action.<sup>3</sup> As pointed out by Driedger, Coode's classic formula is not always adaptable in the framing of legislation. The requirement that certain facts exist as conditions precedent to the existence of a power of decision contained in an administrative or judicial power, can be achieved by different language. The same effect was achieved, although expressed differently, in the Professional Engineers Act:

"The council may, in its discretion, suspend or cancel the membership or license of any person who has been guilty of unprofessional conduct, or of gross negligence or incompetence or of continued breach of the by-laws of the Association, or any member or licensee convicted of a serious criminal offense by a court of competent jurisdiction, or may reprimand or censure such member or licensee.

"The council shall not take any such action until after a complaint under oath has been filed with the secretary or the registrar, and a copy forwarded to the member or licensee accused. . . ."<sup>4</sup>

The Medical Act states:

"The registrar may remove the name of any person registered under subsection 2 from the Educational Register upon the termination of the employment of such person in the hospital in which such employment entitled him to registration."<sup>5</sup>

In these cases the substance of the provision is that the prescribed action can only be taken where certain facts exist. Unless these facts exist the relevant statute confers no power either of decision or of action.

The requirement that such preliminary facts exist limits and controls the power that is conferred so that it can be exercised only in certain defined circumstances.

Where no preliminary facts are required a wider power is conferred, as in the Provincial Auctioneers Act: "The Minister may revoke any licence under this Act at any time for any cause appearing to him sufficient."<sup>6</sup>

<sup>3</sup>See Coode, *On Legislative Expression*, reprinted in Driedger, *The Composition of Legislation*, 167 ff.

<sup>4</sup>R.S.O. 1960, c. 309, s. 28 (1) (2).

<sup>5</sup>R.S.O. 1960, c. 234, s. 20 (3).

<sup>6</sup>R.S.O. 1960, c. 312, s. 4.

There are no conditions precedent to the exercise of this power and the Minister may act on his own initiative. Conceivably it could be conditioned in several ways, e.g. by requiring that a complaint be made before the Minister could undertake to decide that a licence be revoked. The effect would be to lessen the power conferred.

### Preliminary Matters of Law

Under the Public Accountancy Act, if a person licensed under the Act has been convicted of a criminal offence the council may revoke his licence.<sup>7</sup>

The preliminary requirement is not merely that he be "convicted" for an offence but for a criminal offence. These are legal requirements and the second may present some difficulty in application.<sup>8</sup> Criminal offences may be limited to offences enacted by Parliament as criminal law in the sense that that term is used in the British North America Act, but they may in some contexts include offences for breaches of regulatory legislation. The question of whether or not an offence is criminal has to be determined.

The Schools Administration Act provides another example:

"Subject to the regulations, a resident pupil,

- (a) who is required to attend school under Part I, and
- (b) in respect of whom a report recommending his admission to an auxiliary class established by the school board has been made and approved . . .

may be required by the school board to attend such auxiliary class."<sup>9</sup>

In this case the school board may require a pupil to attend an auxiliary class only, among other things, if he is a pupil "who is required to attend school under Part I". This is a legal requirement that must exist before the school board can make a relevant decision affecting the pupil.

<sup>7</sup>R.S.O. 1960, c. 317, s. 19 (1).

<sup>8</sup>See *Rex v. Nat Bell Liquors, Limited*, [1922] 2 A.C. 128, 167.

<sup>9</sup>R.S.O. 1960, c. 361, s. 57(3).

### Preliminary Matters of Mixed Law and Fact

The difficulty of distinguishing matters of pure fact and matters of pure law has already been referred to, and the nature of matters of mixed fact and law has been discussed.<sup>10</sup> A requirement that a matter of mixed law and fact exist or be complied with may be a condition precedent to the existence of a power of decision, just as a matter of a pure fact or law may be.

The provision already quoted from the Mental Hospitals Act<sup>11</sup> provides a relevant illustration. A judge or magistrate may remand a person to an institution "where a person has been apprehended with or without a warrant and charged with an offence". Often the question whether a person has been apprehended and has been charged with an offence is simply a matter of establishing the action taken by a police officer and the laying of the charge by the filing of necessary papers. In such case the conditions precedent appear to be matters of pure fact, but cases may arise in which it must be determined whether in the result the individual was in law "apprehended" or "charged with an offence". A large element of legal judgment may be required in applying these statutory concepts to the facts.

Similarly, for example, where the term farmer as used in a statute is not defined, a power of decision may depend on whether a person has the status of a "farmer". An element of legal judgment is involved in determining the meaning of the term "farmer" in the particular statute and in applying it to the facts.

Although we have referred to preliminary facts, matters of law or mixed law and fact, as if they were quite separate—and they are often so dealt with in the cases—it is not necessary to classify them in any particular case in order to determine whether they operate as conditions precedent. If on interpretation of a statute by the courts any such requirement is found to constitute a condition precedent to the existence of a power of decision and it has not been complied with, the courts will hold that no power to make the relevant decision existed.

<sup>10</sup>See p. 23 *supra*.

<sup>11</sup>See p. 72 *supra*.

Difficulties in interpreting statutes to determine whether requirements are preliminary matters, i.e., conditions precedent to the existence of a power of decision, or are matters that fall within the scope or area of the powers of decision, have given rise to criticism of the usefulness of the concept of preliminary matters and proposals have been made for its virtual abandonment. This could be achieved by interpreting a statute conferring powers as giving to the tribunal the power to decide all matters that must be decided for the existence or exercise of the power, whether we call them preliminary or otherwise.

We do not think this would be wise for two reasons. First, the concept is deeply embedded in our law.<sup>12</sup> It flows from our constitutional doctrine that the powers of the courts are subject to the sovereignty of the Legislature. Our courts are "powerless . . . in the face of an Act of Parliament".<sup>13</sup> If a statute requires that factual or legal requirements must be met before a power comes into existence, the courts have no alternative but to give effect to it. Difficulties of interpretation cannot be escaped; they may be reduced by a precise understanding of the nature of preliminary matters on the part of draftsmen and by clearer expression in the light of this understanding in the preparation of statutes.

Second, preliminary matters as objective conditions precedent to powers of decision are desirable safeguards against the arbitrary exercise of the powers. They restrict the exercise to defined occasions.

## 2. IMPARTIALITY AS A REQUIREMENT BEFORE A VALID DECISION CAN BE MADE

Impartiality on the part of anyone who decides anything has long been recognized as essential to the attainment of justice, and it is enshrined as one of the Rules of Natural Justice: "no man may be a judge in his own cause." The

<sup>12</sup>*Re McEwen, Board of Review for Manitoba, et al. v. The Trust and Loan Co. of Canada*, [1941] S.C.R. 542; *The Bank of Commerce v. Minister of National Revenue*, [1962] S.C.R. 729; *Eshugbayi Eleko v. Government of Nigeria*, [1928] A.C. 459; *Re Income Tax Special Purpose Commissioners* (1888), 21 Q.B.D. 313; de Smith, *Judicial Review of Administrative Action*, 73.

<sup>13</sup>H. W. R. Wade, *Towards Administrative Justice*, 61-2.

rationale of this branch of the Rules of Natural Justice is that justice requires that a person who is given the power of decision should exercise it in a frame of mind that will permit him to decide impartially and justly.

The emphasis placed by Dicey, in his statement of the Rule of Law on the determination of rights through the ordinary courts of justice, is based on the established impartiality of the courts. The impartiality of the courts in our system rests on a twofold basis;

1. The rule against interest or bias and
2. The adversary system under which the courts do not take action on their own initiative so that they avoid being both prosecutor and judge in the same cause.

### **Interest or Bias**

The rule against interest or bias applies without qualification (other than necessity as in the case of the courts) to judicial tribunals other than the courts. If a member of a tribunal has an interest in the subject matter or is biased, he is disqualified from making a decision, and if he purports to do so his decision will remain unauthorized.

The rule also applies to administrative tribunals exercising powers, with two possible qualifications:

- (1) Where a power is conferred on a minister and the power is exercisable in connection with governmental objectives, the political interest of the minister in promoting these objectives will not disqualify him from making a valid decision.
- (2) Where a tribunal is constituted to provide representation on it of certain general interests, such as employers and employees as in the case of the Ontario Labour Relations Board,<sup>14</sup> the general interest of the members as employer or employees will not disqualify them from acting for they are selected because of their special knowledge and expertness. What interest they may have in their respective capacities does not alter the binding effect of the oath of

<sup>14</sup>R.S.O. 1960, c. 202, s. 75 (2), as amended by Ont. 1966, c. 76, s. 28 (1).

impartiality provided under the Act.<sup>15</sup> The representative members of a tribunal are not advocates for the interests they represent, but as judges owe an equal duty to all interests affected by the decision. If a representative member has a special personal interest as a member of a particular class, he may be disqualified.

Provision is sometimes made, expressly prohibiting tribunal members from having an interest in matters that may be affected by the decision of the tribunal. These provisions are sometimes very wide.

Under the Ontario Municipal Board Act:

“No member or officer of the Board shall, directly or indirectly,

(a) hold, purchase, take, deal in or become interested in any stock, bond, debenture, share or other security of any municipality in Ontario or of any railway or public utility company or any company that in any way controls a railway or public utility;

(b) become concerned or interested in any contract, undertaking or work with or for any municipality, railway or public utility company;

(c) have any interest in any device, appliance, machine, patented process or article or in any part thereof that may be required or used for the purpose of the business of any municipality, railway or public utility company.”<sup>16</sup>

Under the Workmen's Compensation Act<sup>17</sup> a member of the Board is prohibited, among other things, from being the holder of shares, bonds, debentures, or other securities of any company that carries on the business of employers' liability or accident insurance, or to have an interest in any device, machine or appliance, patented process or article that may be required or used for the prevention of accidents.<sup>18</sup>

Such provisions do not limit the rule against bias. The rule applies with equal force whether the statutes have or have not the express rules against interest or bias.

<sup>15</sup>R.S.O. 1960, c. 202, s. 75 (5), as amended by Ont. 1966, c. 76, s. 28 (4).

<sup>16</sup>R.S.O. 1960, c. 274, s. 17.

<sup>17</sup>R.S.O. 1960, c. 437.

<sup>18</sup>*Ibid.*, s. 66 (1).



## Prosecutor and Judge in the Same Cause

The adversary system in the ordinary courts excludes the necessity for a specific rule that a judge should not be prosecutor and judge in the same cause. Notwithstanding this, the decision of a judge may be set aside if he assumes that role beyond the bounds of propriety.

No specific rule applying to tribunals generally has been developed but the principle is of importance, having regard to the nature and functions of a particular tribunal.

Certain statutes ignore the principle entirely. Under the Liquor Licence Act<sup>19</sup> the Board may make such investigation as it deems expedient for the due administration of the Act respecting any person or the affairs or conduct of any person, and into any matter pertaining to the sale or handling of or transactions in liquor.<sup>20</sup> The Board may refuse to issue, transfer or renew a licence to any person who in the opinion of the Board is not a fit and proper person.<sup>21</sup>

Under these provisions the Board is empowered to investigate the conduct of an individual and to base its decision on its own investigation. It performs the functions of prosecutor and judge.

Whether the members of a statutory tribunal are disqualified by interest or bias from making a decision is not a question for the tribunal to decide "authoritatively"; it is one to be determined by the courts as an objective requirement to the exercise of the power of the tribunal.

### 3. LIMITATIONS ON THE SCOPE OR AREA OF MATTERS TO BE DECIDED

Objective limitations on the scope or area within which decisions may be made in the exercise of statutory powers, either administrative or judicial, are usually made clear in the statute and require little discussion. An obvious example is a territorial limitation restricting the action to be taken or the decisions to be made to matters arising within a particular geographical area.

<sup>19</sup>R.S.O. 1960, c. 218.

<sup>20</sup>*Ibid.*, s. 17, as amended by Ont. 1965, c. 59, s. 4(1).

<sup>21</sup>*Ibid.*, s. 28(1).

Examples illustrating the nature of other types of limitations may be taken from the Athletics Control Act and the Industrial Standards Act.<sup>22</sup>

Under the Athletics Control Act, when the Athletics Commissioner or any other person charges that a boxing contest was conducted in violation of the Act, the Commissioner may order any person to deliver to him forthwith any moneys that were paid or may be payable in connection with the contest.<sup>23</sup>

Under this provision the power of the Commissioner to order the delivery of any moneys to him is limited and cannot be exercised unless the preliminary jurisdictional condition precedent exists, that is, that a charge has been made that the boxing contest was conducted in violation of the Act. The Commissioner's power to order the delivery of moneys to him is limited to the delivery of moneys payable in connection with the contest. An order to deliver other moneys would be unauthorized by the statute.

An inspector under the Energy Act, 1964, "may give directions orally or in writing to any person for the carrying out of any matter or thing regulated, controlled or required by this Act or the regulations. . . ."<sup>24</sup>

In this case there are no preliminary matters of fact or law controlling the action of the inspector. He may act on his own initiative in exercising the wide power conferred on him. Notwithstanding its breadth the inspector's power is limited to his giving directions within the precise terms of the statute. He cannot give general directions to the operator of the business as to how his business is to be carried on, unless the directions have connection with something regulated, controlled or required by the Act or the regulations.

These are examples of objective limitations, for the tribunal upon which the power is conferred has no authority to decide whether or not a particular matter falls within the particular limitations. That decision is one for the courts.

<sup>22</sup>R.S.O. 1960, c. 26; R.S.O. 1960, c. 186, as amended by Ont. 1964, c. 46.

<sup>23</sup>R.S.O. 1960, c. 26, s. 5(1).

<sup>24</sup>Ont. 1964, c. 27, s. 2(4).

## Collateral Matters

Matters falling within this type of limitation are often classified as "collateral". The expression is used to distinguish matters that a tribunal is authorized to decide from matters "lying aside from the main issue" but arising in the course of the exercise of the power. The tribunal is not authorized to decide them. These may be matters of fact, law or mixed law and fact. In the example taken from the Athletics Control Act<sup>25</sup> which empowers the Athletics Commissioner to order any person to deliver to him forthwith "any moneys that were paid or may be payable" in connection with a boxing contest, there may be a disputed question as to whether moneys were so paid or payable. The Athletics Commissioner is not authorized to decide this question. It is collateral to his power to order payment of the moneys described, and whether moneys were so paid or payable would be decided by the courts.

Determination of whether a matter is "collateral" to the power of decision conferred on the tribunal and therefore outside its scope, or falls within the power of decision given to the tribunal, is often a difficult question of interpretation of the authorizing statute.

In the case of *The King v. Bradford*<sup>26</sup> a statute authorized Justices of the Peace to license town authorities to take road building materials from enclosed land if the land was not a "park". If the property was a park the Justices had no power to grant a licence. The statute did not clearly state that the Justices of the Peace were empowered to decide whether particular lands were or were not parks. Neither did the statute make it clear that this question was to be decided by the courts. The courts had to interpret the statute to determine whether the Justices or the courts were to make the decision. Applying ordinary rules of interpretation they had to reach a decision which in their view accorded with the scheme of the statute. In the result, the court held that it was not within the power of the Justices finally to determine whether certain land was a "park". The court determined this question.

There is a strong resemblance between collateral matters

<sup>25</sup>See p. 80 *supra*.

<sup>26</sup>[1908] 1 K.B. 365.

and preliminary matters. They often tend to merge. The broad distinction is that preliminary matters are conditions precedent to the existence of a statutory power, while collateral matters arise where the power of decision has come into existence but the particular matters fall outside the scope or area of the matters to be decided by the tribunal.

These difficulties in interpretation have given rise to the same criticisms of the concept of "collateral matters" as are levelled at the concept of "preliminary matters", and the same proposals for abandoning the concept are made. The concept of collateral matters should be retained for the same reasons the concept of preliminary matters should be retained: the concept is embedded in our law and furnishes a desirable safeguard against the arbitrary exercise of statutory powers.<sup>27</sup>

#### 4. CONSIDERATIONS TO BE TAKEN INTO ACCOUNT IN MAKING A DECISION

Assuming that all jurisdictional conditions precedent to the existence of a statutory power of decision have been met, that the tribunal is impartial and that the matters for decision fall within the area or scope of the power, the statute may require as a further ingredient of the power that certain prescribed matters should govern or be taken into account in arriving at the decision.

Considerations entering into a decision fall into two categories: facts that may be looked at in findings of fact in issue, and matters that govern or guide the kind of decision that may be based on the findings of fact.

Since the principles governing facts that may be considered—evidence—are interwoven with procedure to be followed by a tribunal, it is convenient to discuss them together with the subject of procedure. This we shall do in Subsection 3 of this Section.<sup>28</sup>

The broad distinction between judicial powers and administrative powers is based on the considerations to be taken into account in arriving at the decision. Again, the difficulties of this distinction are emphasized.

<sup>27</sup>See p. 76 *supra*.

<sup>28</sup>See p. 133 *infra*.

## Judicial Powers of Decision

Judicial power is a power to make a decision according to law, and the person deciding must apply the law in the same way as it would be applied in a court of justice.

There will be areas in which some choice on policy must be made. In those areas the tribunal should be guided by the same principles as would be applied by a court, i.e., the general policy of the law if the matter arises under common law, and the ordinary canons of construction and the scheme of the statute if the decision arises solely under the terms of a statute. If the members of the tribunal come to a decision wilfully and totally disregarding the law and legal techniques, their decision will not be authorized by the statute because they have not taken into account the required considerations. A statutory judicial tribunal cannot ignore the law and decide according to its own view of equity and good conscience. The rules of law are objective considerations that must be taken into account in arriving at a decision. The effect of a wrong decision in law, made in good faith by a tribunal with power to decide questions of law, will be discussed in Subsection 5.

## Administrative Powers of Decision

Where an administrative power of decision is conferred on a tribunal, the tribunal must act within the objective legal limitations on the scope or area of the matters to be decided, but within that area its decision is based primarily on policy. Even in this area there are certain objective legal limitations.

It is always implicit in a statute conferring an administrative power of decision that the power can only be exercised for the purpose of carrying out the legislative scheme—the social policy—of the Act, and that it cannot be used for an ulterior purpose. For example, a decision made for purposes of personal advantage or from corrupt motives would not be authorized. This limitation, however, goes beyond such blatant and obvious misuse of power. A decision, though made in good faith in the sense that it is made honestly in order to carry out a public policy quite unrelated to the personal advantage of the members of the tribunal, is unauthorized if the

social policy to which it is directed falls outside the social policy of the statute conferring the power. Thus a power conferred by a statute to license premises for the purpose of controlling the sanitary condition of restaurants cannot be utilized for the social purpose of establishing restaurant zoning requirements. Such an exercise of a power is sometimes said to be in bad faith in a technical sense as it is for a purpose ulterior to the statute.

If the general purposes of the statute conferring the power are not specifically stated in it, the policy must be derived from the scheme of the Act as a whole. Some statutes expressly provide the purposes for which the administrative power of decision may be exercised. In exercising the power in such cases the members of the tribunal must address their minds to these purposes only, and if they do not, or address their minds to ulterior or irrelevant purposes, the purported decision is unauthorized.

In addition to the overriding social purposes of the Act, a statute may require a tribunal in the making of an administrative decision to give effect to some broad principle of policy.

Under the Public Commercial Vehicles Act<sup>29</sup> the Minister is empowered to issue licences to operate public commercial vehicles, but he may not exercise the power without first obtaining the approval of the Ontario Highway Transport Board, as evidenced by the Board's certificate of public necessity and convenience, and only in accordance with that certificate. Public necessity and convenience is a broad principle of policy limiting the Board's power of decision. If it has regard to any other principle its decision is unauthorized.

The Planning Act provides a good example:

"In considering a draft plan of subdivision, regard shall be had, among other matters, to the health, safety, convenience and welfare of the future inhabitants and to the following:

- (a) whether the plan conforms to the official plan and adjacent plans of subdivision, if any;
- (b) whether the proposed subdivision is premature or necessary in the public interest;

<sup>29</sup>R.S.O. 1960, c. 319, s. 4(1).

- (c) the suitability of the land for the purposes for which it is to be subdivided;
- (d) the number, width, location and proposed grades and elevations of highways, and the adequacy thereof, and the highways linking the highways in the proposed subdivision with the established highway system in the vicinity, and the adequacy thereof;
- (e) the dimensions and shape of the lots;
- (f) the restrictions or proposed restrictions, if any, on the land, buildings and structures proposed to be erected thereon and the restrictions, if any, on adjoining lands;
- (g) conservation of natural resources and flood control;
- (h) the adequacy of utilities and municipal services;
- (i) adequacy of school sites;
- (j) the area of land, if any, within the subdivision that, exclusive of highways, is to be conveyed or dedicated for public purposes.”<sup>30</sup>

A decision approving a plan of a subdivision must not only be governed by the general requirement that it carry out the social purpose of the Act and any specific purposes expressed in the Act, but the factors specifically enumerated must be taken into account. If it was established that any one of these factors was not considered, a purported decision would not be authorized.<sup>31</sup>

The foregoing limitations of purposes, principles and factors for consideration are objective limitations on the power of a decision, which the courts will examine to determine whether a decision is directed at the authorized purposes, or there has been an application of the prescribed principles, or the prescribed factors have been taken into account.

## 5. THE DECISION

Where the tribunal consists of a single person, the only requirement to the making of a decision in the exercise of the power is that the individual make a mental decision. Where the tribunal consists of three or more persons the

<sup>30</sup>R.S.O. 1960, c. 296, s. 28 (4).

<sup>31</sup>*Seereelall Jhugroo v. Central Arbitration Board*, [1953] A.C. 151.

general rule is that each person must make up his mind and reach his own decision, and the decisions of the majority of the members constitute the decision of the tribunal.<sup>32</sup> There is no general rule which applies to a tribunal consisting of only two persons.

Where a tribunal consists of a number of persons, the statute creating it may expressly provide the way in which the decision is to be reached. It may establish a quorum and lay down specific requirements as to how the quorum is to be constituted. For example, the Labour Relations Act<sup>33</sup> as amended provides that:

“(2) The Board shall be composed of a chairman, one or more vice-chairmen and as many members equal in number representative of employers and employees respectively as the Lieutenant Governor in Council deems proper, all of whom shall be appointed by the Lieutenant Governor in Council.

(6) The chairman or a vice-chairman, one member representative of employers and one member representative of employees constitute a quorum and are sufficient for the exercise of all of the jurisdiction and powers of the Board.

(7) The Board may sit in two or more divisions simultaneously so long as a quorum of the Board is present in each division.

(8) The decision of the majority of the members of the Board present and constituting a quorum is the decision of the Board, and, in the event of a tie vote, the presiding member has a casting vote.”

In this case the statute must be strictly complied with. The decision of the tribunal must be that of a quorum constituted as provided in the statute.

### **The Rule Against Delegation of a Power of Decision**

In addition to the rules of limitation we have discussed and specific statutory provisions, the rule against delegation limits all powers of decision. The decision must be the decision of the members of the tribunal themselves. Unless expressly or impliedly authorized to do so, the members cannot

<sup>32</sup>Interpretation Act, R.S.O. 1960, c. 191, s. 27 (c).

<sup>33</sup>R.S.O. 1960, c. 202, s. 75, as amended by Ont. 1966, c. 76, s. 28 (1) (p).



delegate the making of the decision given to them by statute to any other person or persons.

The rationale of the rule against delegation is the doctrine of the sovereignty of the Legislature. Where the Legislature has declared that a decision is to be made by a tribunal, it is the judgment and the decision of the members of that tribunal only that is effective.<sup>34</sup>

The requirement that the judgment of the members of the tribunal must be brought to bear on the questions to be decided, demands that in reaching a decision they must have a substantial understanding of the matters of fact, opinion or law, and any principles or factors required to be considered which bear on the matter to be decided. Rules governing the way in which members of the tribunal acquire such an understanding are matters of procedure and will be dealt with under that heading.<sup>35</sup> True procedural rules do not confer a power of decision.

Where the tribunal or the members of the tribunal are assisted by subordinates at stages leading up to the decision, e.g., the collection of information, there may appear to be a delegation of at least part of the process of decision. This is not however a true delegation of the type we are concerned with here, which relates only to making the final effective decisions.

### **Express Power of Delegation**

It is not uncommon for the statute conferring a power expressly to authorize delegation. A statute may confer a power on a Minister and provide that he may authorize a subordinate to exercise the power. In such case the Minister need not actually make the decision but may confer the power to do so on another person, who may be the actual deciding officer, in which case it is the judgment of the subordinate that is exercised in the making of a decision. This is a true delegation of the power and not a matter of procedure.

<sup>34</sup>de Smith, *Judicial Review of Administrative Action*, Ch. 6.

<sup>35</sup>See Subsection 3, p. 133 *infra*.

### **Implied Power of Delegation**

An authority to delegate power of decision may be implied in the parliamentary system of the United Kingdom, which we have inherited in Ontario. Where a power is conferred on a Minister who is the head of a large department, it may be a necessary implication that the power should be exercised through the ordinary administrative process of his department. In such cases it is assumed that the Legislature knew of the wide range of functions which the Minister must perform and that all of these could not be performed by him personally. In proper cases the statute may be interpreted as contemplating that the Minister would employ the ordinary administrative processes by which the Minister confers power on subordinates to act in his place. This is a true delegation because the decisions made are those of subordinates exercising their judgment, even though doing so in the Minister's name.<sup>36</sup>

Where there is an implied power of delegation there may be cases where the Minister may still in effect himself exercise his power by indicating in advance a hypothetical decision, defining facts to which it may be applied by subordinates when they arise.

### **Delegation of Ministerial Acts**

The limitation against delegation does not require that every act done in connection with the exercise of a power must be done by members of the tribunal on whom a power is conferred. It is the mental decision of the member or the members of the tribunal, based on a substantial understanding of the facts and other matters for consideration, that cannot be delegated. Acts associated with the exercise of the power, but not requiring any decision to be made, may be done by subordinates. For example, it is not necessary for members of a board personally to attend to the service of notices that may be required. It is recognized throughout judicial and administrative processes that such acts may be done by subordinates.

<sup>36</sup>For discussion of a similar doctrine in the United States see Cooper, *State Administrative Law*, 92-3; Davis, *Administrative Law Treatise*, Ch. 9.

## 6. ACTION REQUIRED TO CARRY THE DECISION INTO EFFECT

A final ingredient of statutory powers relates to what must be done under the statute, following a mental decision, in order to give it legal effect. Of necessity, the decision must, as a practical matter, be communicated to someone or it will remain secret. Apart from statutory requirements there is no general rule that a decision must be communicated to the persons affected by it in order to make it legally effective. Statutes usually provide the way in which a decision is to be made operative. These requirements may result in the communication of the decision to the person affected. The following are illustrations of the kinds of steps that may be required:

“ . . . where an expropriating authority has exercised its statutory powers to expropriate land, it shall register without undue delay in the proper registry or land titles office a plan of the land signed by the expropriating authority and by an Ontario land surveyor, and thereupon, but not otherwise, the land vests in the expropriating authority.”<sup>37</sup>

Under the Medical Act the council is given power to impose penalties but its members “may direct that the name of the member concerned be erased from the register”.<sup>38</sup>

In the former case it is the deposit of the plan in the registry office that gives legal effect to the decision of the expropriating authority, and in the latter case the decision of the council is made legally effective by the erasure of the member's name from the register.

In general, the terms of the statutes are exhaustive and if all the requirements have been met with respect to the making of the mental decision and if the appropriate acts are done following the decision, the decision will be legally effective and will be recognized. It is not an ingredient of a legal decision that reasons should be given by the tribunal, unless the statutes creating it so require.

<sup>37</sup>The Expropriation Procedures Act, Ont. 1962-63, c. 43, s. 4. See also s. 5.

<sup>38</sup>R.S.O. 1960, c. 234, s. 40 (3), as amended Ont. 1962-63, c. 80, s. 2.

## CHAPTER 6

# Subjective Ingredients of Administrative and Judicial Powers of Decision

**S**UBJECTIVE ingredients may be dealt with under the following headings:

1. Subjective conditions precedent to the existence of a power of decision;
2. Subjective provisions governing the scope or area of matters to be decided;
3. Subjective considerations to be taken into account in making a decision.

### **1. SUBJECTIVE CONDITIONS PRECEDENT TO THE EXISTENCE OF A POWER OF DECISION**

The nature of these conditions precedent can best be demonstrated by examples.

Under the Bees Act:

“Where in the opinion of an inspector disease of a virulent type exists in any bees . . . he may, by order in writing  
(b) require the bee-keeper to destroy . . . such bees.”<sup>1</sup>

Under this provision the condition required to exist before the inspector can take action is not objective in the

<sup>1</sup>R.S.O. 1960, c. 33, s. 5(1).

sense that he can only take action if "disease of a virulent type" actually exists in the bees. All that is required is that he form an opinion that such disease does exist. If he has formed this opinion, he has under the statute authority to order destruction of the bee-keeper's property.

Under the Lakes and Rivers Improvement Act:

"Where the Lieutenant Governor in Council deems it expedient for the public service, he may declare any company formed under this Part dissolved, and may declare all its works to be public works upon payment to it of the then actual value of the works to be determined in accordance with The Public Works Act."<sup>2</sup>

Here the condition precedent is in the broadest terms. All that is required, before the Lieutenant Governor in Council may make the order of dissolution, is that he decide that the action to be taken will be "expedient in the public service". Once this is determined the condition precedent is satisfied.

Under the Department of Labour Act:

"Where an inspector is of the opinion that any work on any undertaking or any part thereof to which any Act or regulation administered by the Department applies is being done in a manner or under conditions that are dangerous to life or property, he may, by written order to any person responsible for or in charge of the work, require the immediate cessation of the work or any part thereof that he considers dangerous."<sup>3</sup>

The opinion of the inspector that the work is being done in a manner or under conditions that are dangerous to life or property is the sole condition precedent to the power of decision vested in the inspector.

These examples illustrate conditions precedent consisting of findings of fact or opinions based on policy considerations.

Subjective conditions precedent may require determination of matters of law or matters of mixed law and fact.

The Construction Safety Act provides:

"Where an inspector is of the opinion that any provision of this Act or the regulations is being contravened, he may give

<sup>2</sup>R.S.O. 1960, c. 203, s. 52.

<sup>3</sup>R.S.O. 1960, c. 97, s. 11, as amended by Ont. 1962-63, c. 33, s. 2.

to the person whom he believes to be the contravener such order in writing as he deems necessary to ensure compliance with this Act and the regulations, and such order shall specify that it shall be carried out forthwith or before the expiry or such period as is specified therein.”<sup>4</sup>

Before the inspector may give an order he must make a legal decision that the facts found by him show that the Act has been contravened.

An effective decision dependent on a subjective condition precedent involves two powers of decision: the decision that the subjective condition has been met, and the decision as to the action that should be taken. A power dependent on a subjective condition precedent is broader than one dependent on an objective condition precedent, for in the absence of a right of appeal the courts will not review the decision of the tribunal that the subjective condition precedent has been met.

Sometimes a statute may convert conditions precedent of fact or law, which would otherwise be objective, into subjective conditions by giving the tribunal authority to decide relevant questions of fact or law.

The Ontario Labour Relations Act authorizes the Ontario Labour Relations Board, among other things, to certify “trade unions” as bargaining agents for “employees” in their relations with their employer.<sup>5</sup> If there were no other provisions in the statute, the requirements that a particular organization be a “trade union” or that its members be “employees” might be interpreted to be objective conditions precedent to the Board’s authority to act (or, which amounts to very much the same thing, to be matters collateral to its powers of decision). If they were conditions precedent which the Board would not be authorized to decide, they could only be decided by the courts. The Act, however expressly provides:

“The Board has exclusive jurisdiction to exercise the powers conferred upon it by or under this Act, and, to determine all questions of fact or law that arise in any matter before

<sup>4</sup>Ont. 1961-62, c. 18, s. 17 (1).

<sup>5</sup>R.S.O. 1960, c. 202, s. 5, as amended by Ont. 1966, c. 76, s. 2.

it, and the action or decision of the Board thereon is final and conclusive for all purposes. . . .”<sup>6</sup>

The effect of this provision is to convert all questions of fact or law that arise in connection with the Board’s authority under the Act into subjective conditions precedent or limitations.

## 2. SUBJECTIVE PROVISIONS GOVERNING THE SCOPE OR AREA OF MATTERS TO BE DECIDED

Under the Public Health Act:

“Where a medical officer of health, inspector or other person in making an inspection or examination under section 84 finds that any premises are used for the accommodation of aged or infirm persons, or children between the ages of three years and sixteen years, for gain or reward, he may give such orders or directions as, in his opinion, are necessary to ensure that such persons receive proper care and treatment and, in the event that his orders and directions are not carried out, he may order that the premises cease to be used for such accommodation.”<sup>7</sup>

Here the scope or area of the order of the medical officer is limited only by his judgment as to what is necessary. He may “give such orders or directions as, in his opinion, are necessary to ensure that such persons receive proper care and treatment”.

The provisions of the Construction Safety Act,<sup>8</sup> in addition to affording an example of a subjective condition precedent, provide a good example of subjective definition of the scope or area of a decision.

Where an inspector has formed the opinion that the provisions of the Act or regulations have been contravened, he may give such order “as he deems necessary to ensure compliance” with the Act and the regulations. The inspector is empowered to decide what steps are necessary in his opinion to ensure compliance with the act and the regulations.

<sup>6</sup>*Ibid.*, s. 79 (1), as amended by Ont. 1961-62, c. 68, s. 13.

<sup>7</sup>R.S.O. 1960, c. 321, s. 85.

<sup>8</sup>See pp. 91-2 *supra*.

### 3. SUBJECTIVE CONSIDERATIONS TO BE TAKEN INTO ACCOUNT IN MAKING A DECISION

The Provincial Auctioneers Act provides a good illustration of subjective considerations involving not only fact and law but public policy that must be taken into consideration in making a decision.

The Act provides that "The Minister may revoke any licence under this Act at any time for any cause appearing to him sufficient."<sup>9</sup> Under this provision the Minister is made the sole judge of the reasons for revoking a licence.

A statute may achieve the same result by attaching no limitation on the power of the tribunal. Acting pursuant to the Gasoline Handling Act,<sup>10</sup> the Minister may grant or refuse to grant a licence to any person and may revoke or suspend any licence issued under the Act. Here the Minister responsible appears to be given power to decide what may be sufficient reason to act in each particular case.

<sup>9</sup>R.S.O. 1960, c. 312, s. 4.

<sup>10</sup>R.S.O. 1960, c. 161, s. 3(4).



## CHAPTER 7

# Significance of Ingredients of Statutory Powers Other Than Procedure

THE nature and scope of a statutory power are determined by its ingredients, i.e. whether it is an administrative power or a judicial power, and the conditions to and the limitations on the power. It is therefore important to understand the ingredients of a power in relation to all the matters with which this Commission is concerned.

When appraising existing powers and creating new powers, two underlying principles of the Rule of Law demand consideration and an understanding of the ingredients of statutory powers. These principles are:

(1) No administrative power should be conferred unless it is necessary and unavoidable in order to achieve the social objective or policy of the statute. It ought not to be conferred where rules or standards for judicial application can be stated.

(2) Where an administrative power is necessary and unavoidable, the power should be no wider in scope than is demanded to meet the necessity.

If these principles are violated there will be an unjustified encroachment on civil rights.

The process of determining whether any power is necessary, and if so the nature and scope required to carry out the statutory scheme, must precede the application of other constitutional doctrines. It is only after the nature and scope of the power has been settled that there can be a determination of the appropriate tribunal to exercise it, and of the extent to which the exercise of the power should be controlled by judicial review or appeal. These matters may be interwoven. For clarity of discussion it is necessary to separate them.

In determining whether a particular existing power or a proposed power is or will be an unjustified encroachment on civil rights under the principles we have stated, the social policy of the statute must be examined. The policy of the statute determines what power will be required to carry it out effectively. The policy must be analyzed in detail to determine whether a power of any kind is required, and if so the characteristics it should possess. No general formula for the abstract analysis of the infinite variety of social policies that may be the subject of legislation can possibly be laid down. It is, however, possible to illustrate how an appreciation of the possible ingredients of powers that may be conferred by statute can assist in furnishing a technique for the analysis of a particular power in relation to the particular policy of the statute conferring it. Certain general conclusions can then be drawn.

These illustrations may be discussed under two headings: "Nature of the Power" and "Conditions and Limitations".

## NATURE OF THE POWER

Under the Provincial Auctioneers Act<sup>1</sup> the Minister of Agriculture may grant to persons, who in his opinion possess special qualifications, licences to sell purebred livestock by public auction. No principles for granting licences are set out in the statute beyond the requirement that, in the opinion of the Minister, the licensee must possess special qualifications. The Act then provides that

"The Minister may revoke any licence under this Act at any time for any cause appearing to him sufficient."<sup>2</sup>

<sup>1</sup>R.S.O. 1960, c. 312.

<sup>2</sup>*Ibid.*, s. 4.

The apparent general purpose of the statute is to ensure that auctioneers of purebred cattle are competent and responsible, but there are no general principles controlling the granting of licences set out in the statute. Whatever other regulatory policies relating to the granting of licences may have been intended, it seems reasonably clear that the only grounds for revoking a licence should be lack of competence or integrity on the part of the licensee. If this is the actual policy behind section 4, it should so state. To grant a wider power of revocation would be an unjustified encroachment on civil rights. The section might be revised in skeleton form as follows:

“4. The Minister may at any time revoke an auctioneer’s licence if in his opinion,

(a) the conduct of the auctioneer establishes that he is not a responsible person in whom the public can place trust, or,

(b) the auctioneer is not competent to act as an auctioneer of purebred cattle.”

Under the suggested revision, the power of revocation is still conditioned on subjective conditions precedent since it is the Minister’s opinion whether they have been met that governs. Certain objective standards are however to be applied by the Minister. His power is limited to determining that the reasons set out in the statute exist. These standards are very broad and leave a considerable area in which the opinion of the Minister will be final but they do check or limit the arbitrary power of the Minister to take an auctioneer’s means of livelihood from him.

The power of the Minister might be more strictly limited in the following manner:

“4. The Minister may at any time revoke an auctioneer’s licence if in his opinion,

(a) the auctioneer has made fraudulent or false representations in the course of his business as an auctioneer, has abused a confidence imposed in him by a vendor or purchaser at an auction conducted by him, or has failed to carry out an undertaking given by him to a vendor or purchaser at an auction, or

(b) the auctioneer is not competent to act as an auctioneer of purebred cattle.”

The grounds of revocation set out in paragraph (a) of this illustration are defined more strictly than those set out in paragraph (a) of the previous illustration.

The application of this provision could in fact be classified as the exercise of a judicial power. The grounds for revocation are specific. There appears to be no reason why there should be a political control. Revocation on these grounds should be entrusted to a judicial tribunal and not a Minister.

The power conferred under paragraph (b) might also be classified as a judicial power if standards of competence could be stated or established by expert evidence. This type of power however is frequently entrusted to expert tribunals as is done under statutes providing for professional status. There should be no element of political control and the power should not be conferred on a Minister.

We thus have an illustration of virtually completely unrestricted administrative power that can be changed into a judicial power by the statement of rules or standards.

The power of expropriation conferred by the Public Works Act contrasts with the provisions of the Provincial Auctioneers Act just discussed.

“The Minister may for and in the name of Her Majesty purchase or acquire and, subject as hereinafter mentioned, may without the consent of the owner thereof enter upon, take and expropriate any land that he deems necessary for,

- (a) the public purposes of Ontario; or
- (b) the use or purposes of any department of the Government thereof.”<sup>3</sup>

The taking of the property for public purposes is governed by a variety of factors differing in particular circumstances. The property may be required for schools, or highways, or public buildings, or parks, or for many other purposes. Its location, existing utility, value, suitability in comparison with other available properties, along with other factors, have to be weighed in relation to the purpose for which the property is required. Standards or rules cannot be laid down to govern the decision. The decision is essentially

<sup>3</sup>R.S.O. 1960, c. 338, s. 13.

one of policy, arrived at by balancing individual and social interests, and it therefore must be an administrative decision.

These illustrations demonstrate how considerations to be taken into account in making a decision may vary from comparatively rigid standards of an objective nature, capable of judicial application, to purely subjective ingredients. The extent to which they can be applied depends on the policy of the Act. The illustrations contrast the powers that may be conferred to carry out different policies. In the one case the policy of the Act permits objective rules or standards capable of judicial application to be laid down, and in the other case the considerations to be taken into account must be subjective and expressed in wide administrative terms without governing rules or standards.

There are however cases in which the power, though primarily administrative, may be controlled to some extent by specifying the factors to be taken into account in reaching a decision in the exercise of the power, e.g., the provision discussed with reference to the Planning Act<sup>4</sup> which requires that certain specific matters be considered before a subdivision is approved. In such cases, although the power appears to be primarily administrative because the factors cannot be expressed as rules to govern the decision, the relevant tribunals must direct their minds to the factors set out before they make a decision. The requirement to consider such factors does not change the basic nature of the power but it is analogous to the establishment of rules or standards because it controls the exercise of the power to a limited extent.<sup>5</sup>

There is a grey area in which judicial and administrative powers merge, as in the case of the powers conferred on the Transport Board<sup>6</sup> under the Public Commercial Vehicles Act.<sup>7</sup> The Board must determine whether "public necessity and convenience" warrant the granting of a licence. The Legislature has defined the policy in the very broad terms "public necessity and convenience", but it has left the factors to be

<sup>4</sup>See pp. 84-5 *supra*.

<sup>5</sup>For an elaboration see Cooper, *State Administrative Law*, 71 ff., 94.

<sup>6</sup>See p. 84 *supra*.

<sup>7</sup>R.S.O. 1960, c. 319, s. 4 (1).

applied in determining "public necessity and convenience" to the Board. Such a power presents real problems when it becomes necessary to consider whether the power should be treated as a judicial or administrative one.

## CONDITIONS AND LIMITATIONS

When the policy of the statute is determined, the possible ingredients of the power to be conferred on the tribunal should then be weighed and considered. We have already used the Provincial Auctioneers Act for purposes of illustration.<sup>8</sup> The Minister has power to revoke any licence "at any time for any cause appearing to him to be sufficient". We suggested that the causes for revocation should be set out. Two further questions arise:

- (1) Should conditions not be prescribed limiting the power of the Minister to act?
- (2) Should the statute not require that the opinion of the Minister be based on reasonable grounds?

To safeguard against arbitrary action, or by the Minister's acting without reasonable cause, the statute might be revised to read as follows:

"4. Where a complaint is made to the Minister with respect to the conduct or competency of any licensed auctioneer, the Minister may, after a hearing at which the licensee is entitled to be present with counsel and to know all charges made against him and to present evidence, by an order in writing specifying the reasons for the revocation, revoke the auctioneer's licence if he believes on reasonable grounds that,

- (a) the conduct of the auctioneer establishes that he is not a responsible person in whom the public can place trust, or
- (b) the auctioneer is not competent to act as an auctioneer of purebred cattle."

This revision introduces some procedural provisions that will be discussed further in relation to general legislation and rules.<sup>9</sup>

The purpose of the power must dictate the specifications of the conditions to be laid down before administrative action

<sup>8</sup>See pp. 94, 96-8 *supra*.

<sup>9</sup>See Chapter 19 *infra*.

can be taken. Those cases in which immediate and prompt measures must be taken to preserve the health or safety of man or beast require special consideration, but even in such cases there should be some limitation on the power. The Bees Act already referred to provides a useful illustration.

“Where in the opinion of an inspector disease of a virulent type exists in any bees . . . he may by order in writing . . . require the bee-keeper to destroy by fire, within such period as the order requires, such bees. . . .”<sup>10</sup>

The power of the inspector is capable of arbitrary exercise. It is limited only by the subjective condition precedent, “the opinion of the inspector”. The addition of the following objective element to the subjective condition precedent would provide a limitation or control: “where the inspector believes on reasonable and probable grounds, disease of a virulent type exists in any bees . . .” or language similar to that used in the Energy Act, applicable in the exercise of an emergency power: “An inspector may tag a work or appliance in relation to which he has reason to believe that an offence against this Act or the regulations has been . . . committed. . . .”<sup>11</sup>

These are important illustrations of a class of provision whereby power is conferred on an inspector or similar official to take immediate action in the interest of health or safety. Such provisions will be discussed later in greater detail.

## CONCLUSIONS

The illustrations we have given demonstrate how an existing or proposed power should be appraised to determine the ingredients appropriate to the carrying out of the social policy or scheme of the statute. Methods of appraisal are discussed later in relation to many individual statutes or groups of statutes. Certain general principles may be stated as they relate to the nature of the power to be conferred.

(1) Where a statute confers a power of decision, rules or standards to govern the exercise of the power capable of judicial application should be stated in the statute as long

<sup>10</sup>R.S.O. 1960, c. 33, s. 5(1).

<sup>11</sup>Ont. 1964, c. 27, s. 3(1).

as the policy of the statute is preserved. Where rules or standards for judicial application are stated, rather than broad administrative power conferred, the risk that unforeseen cases may be omitted must be accepted if possible arbitrary action is to be avoided. Unforeseen cases should be left to be dealt with by future amendments to the statute.

(2) Where a statute makes provision for the removal of a right or a status enjoyed by an individual under the statute for reasons not related to the general policy of the statute but personal to the person affected (i.e. that the right or status is to be taken away by reason of the person's conduct, character or competency), rules or standards should be stated.

(3) Where rules or standards for judicial application cannot be stated so as to govern the exercise of an administrative power necessary to the carrying out of the policy of the statute, and subjective considerations are stated, then wherever possible objective factors or purposes to be taken into account in reaching the decision should be expressed in the statute.

(4) If it appears, when a statute is first enacted, that administrative power is necessary and unavoidable because it is not possible to confer a judicial power on the tribunal, the statute should be reviewed periodically and rules or standards enacted as experience in the operation of the statute may warrant.

The ingredients of powers, objective and subjective conditions precedent, bias, limitations on the scope of the power, delegation of the power of decision and the mode of exercise, are all inextricably related to procedure and judicial review. It is therefore convenient to discuss them further under those headings.



Subsection 2

**STRUCTURE AND ORGANIZATION  
OF TRIBUNALS EXERCISING  
STATUTORY POWERS OF DECISION**

## INTRODUCTION

In Subsection 1 we have discussed a technique for analyzing existing statutory powers or proposed statutory powers to ensure that they are appropriate in their nature and are properly limited or conditioned as to scope and exercise.

Once a power has been appropriately formulated in accordance with this technique, other constitutional principles prescribe the structure and attributes of the tribunal that should be established to exercise the power. In this Subsection we propose to discuss these principles and their application in Ontario.

It is helpful to preface this discussion by a consideration of the principles applied in the United Kingdom and the principles applied in the United States. This Subsection will therefore deal with:

- (1) Structure and organization of bodies exercising statutory powers in the United Kingdom;
- (2) Structure and organization of bodies exercising statutory powers in the United States;
- (3) Proposed structure and organization of tribunals in Ontario.

The subject matter of structure and organization of tribunals necessarily overlaps to some extent with the subject matter of procedure to be followed by them and the nature of the appeals that should be provided. In this Subsection some reference to procedure and appeals dealt with in Subsections 3 and 4 of this Section cannot be avoided, but these subjects will be discussed fully in those Subsections.

## CHAPTER 8

# Structure and Organization of Bodies Exercising Statutory Powers in the United Kingdom

ALTHOUGH statutory powers were exercised from early times in the United Kingdom by justices of the peace and others, their development in modern form began towards the middle of the nineteenth century. Their growth was greatly accelerated during the years of and following the First World War.

The development was not in accordance with any acknowledged system of organized principles. Powers of decision in accordance with rules or standards and powers of decision on policy grounds were conferred on Ministers, tribunals and officials. Their mode of exercise varied. In some cases a hearing by the deciding body was required before a decision was made. In other cases, although a hearing by the deciding body was not required, provision was made for an inquiry. These inquiries were held by an inspector, as a hearing officer from the Minister's department. They were usually required to be public and to be held in the locality in which the persons or the subject matters affected were located. A notice was required to be given of the intention to make a decision and of the inquiry. Persons concerned with the matter for decision were given an opportunity at the inquiry to submit

evidence and argument in favour of or against the proposed decision. Thereafter, the inspector made a report to the Minister and a decision was then made by the Minister. In other cases neither a hearing nor an inquiry was required.

Public concern arose as to whether the powers were being properly conferred or justly exercised. This concern was aggravated by Lord Hewart's severely critical book, *The New Despotism*, published in 1929 when he was Lord Chief Justice of England.

### THE DONOUGHMORE COMMITTEE

On October 30, 1929, The Lord Chancellor appointed a Committee on Minister's Powers under the chairmanship of the Earl of Donoughmore:

“. . . to consider the powers exercised by or under the direction of (or by persons or bodies appointed specially by) Ministers of the Crown by way of (a) delegated legislation and (b) judicial or quasi-judicial decision, and to report what safeguards are desirable or necessary to secure the constitutional principles of the sovereignty of Parliament and the supremacy of the Law.”

The Committee (known as the Donoughmore Committee) reported on March 17, 1932. We are concerned here only with the portions of the Report dealing with the structure and organization of bodies to exercise judicial or quasi-judicial powers.

At the time the Committee was appointed the terms “judicial” and “quasi-judicial” had no clear meanings that were generally recognized. The Committee therefore found it necessary to formulate its own definitions. The following distinctions were drawn:

- (1) In the view of the Committee a true judicial decision presupposes an existing dispute between two or more parties. After a hearing, findings of fact and arguments of law, the decision is made by the application of law to the facts found.
- (2) A quasi-judicial decision also presupposes an existing dispute between two or more parties but, after a hearing

or inquiry and findings of fact and possibly arguments of law, the decision is made in the exercise of a policy discretion.

(3) "Purely administrative" decisions, in the view of the Committee, were decisions in which the deciding officer need not consider and weigh submissions and arguments or collate any evidence but the grounds upon which he acts, and the means which he takes to inform himself before acting, are left entirely to his discretion.<sup>1</sup>

The salient characteristic of both judicial and quasi-judicial decisions was stated by the Committee to be a dispute between two or more parties. The clear implication from the term "dispute" and reference to "parties" is that the contest involves rights between the parties. So far as these definitions go they correspond to the distinction we draw between judicial and administrative decisions, as the first are based on law, and the second on policy. In our definitions however, we have included decisions, both judicial or administrative, that may apparently concern only the rights of one party. Notwithstanding its definitions, the Committee seems also to have taken this view as it treated a claim for a benefit submitted by an individual to an insurance officer as one requiring a judicial decision,<sup>2</sup> and a decision to grant or revoke a licence as a quasi-judicial one.<sup>3</sup>

The real distinction that appears to have been adopted by the Committee, therefore, corresponds to the distinction we have made between judicial decisions made in accordance with law, and administrative (policy) decisions required to be made after a hearing and submissions. The Committee considered these administrative decisions to be "quasi-judicial" where they resemble judicial proceedings in requiring a hearing and submissions. Understood in this sense, the terms judicial and quasi-judicial as applied by the Committee correspond very closely to the meaning we have attributed to these terms.<sup>4</sup>

<sup>1</sup>The Donoughmore Report, 73-4, 81-2.

<sup>2</sup>*Ibid.*, 87.

<sup>3</sup>*Ibid.*, 81.

<sup>4</sup>See pp. 28-9 *supra*.

The Report of the Committee is confined to “judicial” and “quasi-judicial” powers in the sense defined. It does not deal with “purely administrative” powers and to this extent its studies are more limited than ours.

In reviewing general principles relevant to its terms of reference the Committee took the view that

“... the separation of powers is *prima facie* the guiding principle by which Parliament when legislating should allocate the executive and judicial tasks involved in its legislative plan. If the statute is in general concerned with administration, an executive Department should be entrusted with its execution; but if the measure is one in which justiciable issues will be raised in the course of carrying the Act into effect, and truly judicial determination will be needed in order to reach decisions, then *prima facie* that part of the task should be separated from the rest, and reserved for decision by a Court of Law—whether ordinary or specialized, as in the circumstances Parliament may think right.

It is only on special grounds that judicial functions should be assigned by Parliament to Ministers or Ministerial Tribunals. . . .

But quasi-judicial decisions stand on a different footing. The presumption as to the correct legislative course is the other way; for a decision which ultimately turns on administrative policy should normally be taken by the executive Minister.”<sup>5</sup>

From the context it is clear that the term “Ministerial Tribunal” is used to describe a judicial tribunal in a Ministry as distinguished from courts. With reference to the procedure followed where an inquiry precedes a policy decision by a Minister, the Committee pointed out

“... that such an inquiry is to some extent judicial. But the inquiry does not finally determine the rights of the parties affected; it is merely a first stage. The rights are determined at the second stage by the exercise of the Minister’s discretion. He has to make up his own mind, after considering the report on the inquiry, about the appropriate action to be taken . . . . In reaching a decision he must, of course, be actuated by the elementary principles of reason and justice; none the less his decision is not judicial but administrative.

The person holding the public inquiry never takes the final decision. He must be competent and impartial; he must examine the evidence and the information offered, and he

<sup>5</sup>The Donoughmore Report, 92-3.

must do so critically and dispassionately; he must listen to representations and weigh objections; he may have to hear counsel; he must duly and faithfully report; and he may submit recommendations and tender advice: but when he has done all this, his task is done, and the final decision has to be taken by the responsible Minister himself. Whilst this is the general position under present practice, we think that Parliament would be well advised to bear in mind the suggestion which we have already made . . . that where in any legislative scheme it appears likely that in the course of its administration important issues will be raised calling for a judicial decision before the Minister takes his final decision and that the interest of the Department will be such as to disqualify the Minister from giving the judicial decision, the statute should itself provide for the segregation of judicial issues and their determination by an independent Ministerial Tribunal as a condition precedent to action by the Minister.

Just as some elements of the judicial function may thus enter into activities which are mainly administrative, so where the problem is in essence or predominatingly judicial—i.e., not merely quasi-judicial—there may be executive or legislative elements involved in the performance of the particular judicial task, or so inseparably connected with it, that Parliament in working out its statutory plan will have to choose between (1) splitting the problem into two so as to leave the judicial side to a Court, whilst entrusting the non-judicial side to the Minister whose Department is concerned, and (2) assigning certain limited functions of an executive or legislative order to the Court charged with the judicial decision.”<sup>6</sup>

The Committee emphasized that the doctrine of separation of powers is not sacrosanct and that it might have to give way where sound reasons of public policy so require.<sup>7</sup>

Relative to this discussion the Committee made the following specific recommendations:

“I. Judicial, as distinct from quasi-judicial, functions should normally be entrusted to the ordinary Courts of Law, and their assignment by Parliament to a Minister or Ministerial Tribunal should be regarded as exceptional and requiring justification in each case.

II. Where Parliament considers it necessary to depart from the normal course, it should entrust the judicial functions

<sup>6</sup>*Ibid.*, 93-4.

<sup>7</sup>*Ibid.*

involved in the legislation to a Ministerial Tribunal rather than to the Minister personally. The appointment of such a tribunal may be left to the Minister, but the tribunal should be independent of him in the exercise of their functions. In regard to the more important jurisdictions so set up, the Lord Chancellor should be consulted before appointments are made.

Judicial functions should not be entrusted to the Minister personally unless there is some very special and exceptional reason for that course and even in that event not where there is 'interest' [of a departmental nature giving rise to bias].

III. Quasi-judicial decisions fall naturally to Ministers themselves and not to courts of Law or Ministerial Tribunals. But in any exceptional case in which it appears probable that a Minister may be disqualified by an 'interest' of the kind last-mentioned from discharging impartially the judicial functions involved in the quasi-judicial decision, Parliament should consider the desirability of dividing the decision and entrusting the judicial functions to a Ministerial Tribunal whose adjudication would be binding on the Minister when in his discretion he completes the quasi-judicial decision by administrative action."<sup>8</sup>

It will be seen that the Committee, although only stating one principle really relied on two: the doctrine of the Separation of Powers, and the control and direction by Ministers in political matters. It would appear that the latter is not expressly emphasized because it was so generally recognized as to require no comment.

It would appear to be implicit in the recommendations that the inquiry procedure should not be applied in the exercise of judicial powers since such powers are to be entrusted to individual tribunals, the members of which would actually hear and determine the issues. The procedure whereby an inquiry is conducted by a hearing officer, who reports to a Minister who is the deciding officer, is limited to the exercise of administrative powers of decision on grounds of policy.

After this Report was made, the number of statutory tribunals and of statutory powers exercisable after an inquiry greatly increased, particularly during and after the Second

<sup>8</sup>*Ibid.*, 115-16.



World War. The general principles for the establishment of tribunals and inquiries recommended by the Donoughmore Committee were broadly followed. In 1955 widespread debate arising out of the well-known Crichel Down case gave rise to a demand for further investigation of the jurisdiction, practices and procedures of tribunals and inquiries.

## THE FRANKS COMMITTEE

On November 1, 1955, the Lord Chancellor appointed a Committee on Administrative Tribunals and Inquiries, under the chairmanship of Sir Oliver Franks. The Terms of Reference of the Committee (now known as the Franks Committee) were:

“To consider and make recommendations on:

- (a) The constitution and working of tribunals other than the ordinary courts of law, constituted under any Act of Parliament by a Minister of the Crown or for the purpose of a Minister’s functions.
- (b) The working of such administrative procedures as include the holding of an inquiry or hearing by or on behalf of a Minister on an appeal or as the result of objections or representations, and in particular the procedure for the compulsory purchase of land.”

The Franks Committee was unable to discern any principle that had been applied for distinguishing classes of adjudications that should be made by tribunals from classes of decisions that should be made by Ministers. The members therefore interpreted their Terms of Reference as not requiring them to consider these matters at large but as confining their studies to existing tribunals established by statute as tribunals, and to existing statutory powers conferred on Ministers, exercisable only after an inquiry has been held. The Committee did not investigate the nature or the exercise of other statutory powers where no tribunal was established and no inquiry was required. The Committee also held that its Terms of Reference confined its investigation to tribunals “constituted by a Minister or for the purpose of a Minister’s functions”. Domestic tribunals such as statutory governing

bodies of professional groups were not included. The Committee's Terms of Reference were therefore much narrower than ours and required a more limited investigation.

Although the main part of the Report of the Franks Committee was concerned with the procedure to be followed by Tribunals or Inquiries,<sup>9</sup> the Committee had some recommendations to make with respect to the Constitution of Tribunals and the status of inspectors.

### Tribunals

With respect to the constitution of Tribunals exercising judicial powers, the following recommendations of the Committee may be paraphrased:

(2) Chairmen of tribunals should be appointed by the Lord Chancellor (or alternatively, in Scotland, by the Lord President of the Court of Session or the Lord Advocate). Members should be appointed by the Council on Tribunals. Recommendations for appointments by the Crown should be made by the Lord Chancellor.<sup>10</sup>

(3) Responsibility for the removal of chairmen and members should rest with the Lord Chancellor or alternatively, in Scotland, with the Lord President of the Court of Session or the Lord Advocate.<sup>11</sup>

(4) All chairmen of tribunals exercising appellate functions should have legal qualifications; chairmen of tribunals of first instance should ordinarily have legal qualifications.<sup>12</sup>

(5) In general, tribunal service should not be whole-time or salaried.<sup>13</sup>

(6) Some appointments should be paid, and remuneration should be reviewed by the Council on Tribunals.<sup>14</sup>

(7) The present arrangements for providing clerks of tribunals should continue. The duties of a clerk should be confined to secretarial work, the taking of notes of evidence, and advice on the tribunal's functions when requested. Unless sent for to advise he should be debarred from retiring with the tribunal.<sup>15</sup>

<sup>9</sup>See Section 3 of this Part, pp. 335 ff. *infra*.

<sup>10</sup>The Franks Report, paragraphs 48-49, 53-54.

<sup>11</sup>*Ibid.*, paras. 51, 53.

<sup>12</sup>*Ibid.*, paras. 55, 58.

<sup>13</sup>*Ibid.*, para. 57.

<sup>14</sup>*Ibid.*, para. 57.

<sup>15</sup>*Ibid.*, para. 61.

These recommendations were directed towards making the tribunals independent of political control and to giving chairmen and members a judicial status; ensuring that in general tribunals should have available legally trained personnel; and towards providing for impartial decisions. The Council on Tribunals referred to in the recommendations was a proposed new body, the establishment of which was recommended to provide for supervision of tribunals.

Subsequently Parliament enacted the Tribunals and Inquiries Act in 1958,<sup>16</sup> establishing the Council. General effect has been given to the first two of these recommendations, except that the Council on Tribunals is not empowered to make appointments. Appointments are made by the Lord Chancellor or the Minister concerned. Recommendation No. 4 has been implemented with some exceptions. The Lord Chancellor had indicated that the Council's advice would be sought in general terms on the other matters mentioned.<sup>17</sup>

The functions of the Council include supervision of procedures to be followed by Tribunals, which will be discussed in Subsection 3 of this Section.

## Inquiries

The inspectors employed to conduct hearings were in some instances officers of the department concerned and in other instances were appointed *ad hoc*. No uniform practice prevailed, although the Ministry of Housing and Local Government, which is responsible for most of the inquiries, maintained a large staff of inspectors. On occasion these inspectors were employed on loan to other departments.

The Committee considered arguments for and against Departmental inspectors as against independent inspectors. The main argument in favour of Departmental inspectors was that since the questions for decision after the inquiry were questions of policy, the inspectors should be familiar with Departmental policy when conducting their inquiry. The main argument in favour of independent inspectors was that public confidence in the procedure at the inquiry stage would

<sup>16</sup>6 & 7 Eliz. II, c. 66.

<sup>17</sup>Annual Report, Council on Tribunals (1963), 28, 29.

be strengthened. It was contended that the use of independent inspectors would tend to remove the feeling that the scales were weighted against the individual, particularly where the proposal had been initiated by the Minister, whose inspector was conducting the inquiry. Various subsidiary arguments on both sides were considered by the Committee.<sup>18</sup>

The Franks Committee made a recommendation which may be paraphrased:

The main body of inspectors in England and Wales should be placed under the control of the Lord Chancellor, but inspectors may be kept in contact with policy developments in the Departments responsible for enquiries. The preference of certain Departments for independent inspectors appointed *ad hoc* need not be disturbed. If a corps of inspectors is established for Scotland, the Lord Advocate should assume responsibility for it.<sup>19</sup>

The Committee based this recommendation on the belief that if the inspector was no longer identified with the Department of the deciding Minister, his impartiality would be emphasized in the minds of objectors to a proposal at an important stage of the adjudication, and this would do much to allay public misgivings. The Committee saw no obstacle to the inspector being kept in close contact with the policy of the Department responsible for the subject matter of the inquiries. The Committee recommended no change in the cases where *ad hoc* inspectors were appointed. Although it might be argued that the change was one of name only, as there had been no real complaints about the conduct of inspectors, the Committee felt no need to argue the point because it was convinced "that here the appearance is what matters".<sup>20</sup> This recommendation was rejected by the Government.<sup>21</sup>

<sup>18</sup>The Franks Report, paras. 291-304.

<sup>19</sup>*Ibid.*, paras. 303-304.

<sup>20</sup>*Ibid.*, para. 303.

<sup>21</sup>Annual Report, Council on Tribunals (1963), 36.

## CHAPTER 9

# Structure and Organization of Bodies Exercising Statutory Powers in the United States

THE two main relevant principles governing the structure and organization of the agencies of government exercising statutory powers in the United States are:

- (1) The doctrine of the separation of powers;
- (2) The rule against the delegation of powers.

### SEPARATION OF POWERS

The doctrines of separation of powers in the United Kingdom and in the United States mean quite different things.

In the United Kingdom the doctrine calls for a distinction between kinds of powers—judicial powers and administrative powers—in determining the appropriate type of body on which the power should be conferred. In the United Kingdom it is thought that the tribunal exercising judicial powers should be independent of political control, while a body exercising administrative powers only, should be subject to the control of a politically responsible minister.

In the United States the doctrine does not call for a distinction to be drawn between kinds of powers—legislative,

judicial and executive powers—for the purpose of determining the particular type of governmental machinery with which they should be entrusted. Either or all three (including powers we have termed administrative) powers may be conferred with propriety on an “independent agency”. The crux of the doctrine of separated powers in the United States is that each branch of government must be kept free from the control or coercive influence of other branches of government. The whole power of one branch should not be exercised by the same persons who possess the whole power of another branch. The doctrine does not prevent particular types of power being conferred on independent agencies as part of the executive government, but controls the extent to which such powers may be conferred.

The state courts have inclined to the view that legislative, prosecutory and adjudicatory functions may be combined in a single agency where practical necessity so requires, and so long as workable checks and balances (such as reservation of a superintending control in the Legislature or the availability of reasonably broad judicial review) are maintained to guard against abuses of administrative discretion. In the absence of such safeguards the state courts are still prepared to strike down statutes which grant an agency power so unlimited as to give it, within its sphere of action, power to supplant the legislature and the courts. The validity of legislation is not determined by the type of power—whether it is judicial or administrative—but by its breadth and the safeguards that are provided. Federal courts have taken a more tolerant attitude towards combination of powers.<sup>1</sup>

The constitution and organization of each agency depend on and are controlled by the statute establishing it. An agency may exercise judicial or administrative powers, or both. It may be independent in the sense that it is not always subject to direction and control by a political member of the government, as in the United Kingdom. It may be called to account by Committees of Congress or the Legislature at the time of making appropriations.

<sup>1</sup>See Cooper, *State Administrative Law*, 16-7.

## DELEGATION OF POWERS

In contrast with the United Kingdom and Ontario, where there are no constitutional limits to the delegation of powers, in the United States and the respective states the rule against delegation has a distinct bearing on the structure and organization of agencies. It was formerly thought that as a general proposition legislative and judicial powers could not be delegated by a legislative body to an agency. There is no express statement in the Constitution of the United States prohibiting the delegation of powers. The provisions of State constitutions vary.

For a long time the view taken by courts and text writers was that the citizens have delegated legislative and judicial powers to the legislatures and the courts respectively, and that the granting of such powers did not permit subdelegation to executive agencies. The maxim *delegata potestas non potest delegari* was applied. Likewise it was asserted that the legislature could not delegate judicial duties to administrative officers. Cooper says:

“But candor compels recognition of the hard fact that these statements have become mere shibboleths, shattered by the hard course of decision—reverently repeated, but not followed in practice.”<sup>2</sup>

It is occasionally suggested that delegation of uncontrolled powers to an administrative agency violates constitutional requirements of the due process of law.

The force of the doctrine of non-delegation of legislative and judicial powers has been eroded in application by attempts to devise means of limiting the doctrine. Cooper says:

“Gradually, the sheer, hard logic of the early cases retreated in the face of the felt necessities of the times. Though the old rubrics prohibiting delegation are still occasionally repeated, they no longer shape decision.”<sup>3</sup>

Attempts were made to limit the application of the doctrine by distinguishing between “truly” legislative powers or “truly” judicial powers which could not be delegated to agencies, and those that could; or by distinguishing “pure”

<sup>2</sup>*Ibid.*, 47.

<sup>3</sup>*Ibid.*, 48.

legislative or "pure" judicial functions from "quasi-legislative" and "quasi-judicial" functions. The former could not be delegated while the latter could. Terminological distinction of this sort does not furnish a satisfactory guide or logical basis for deciding what powers may be delegated and what powers may not be delegated.

Attempts to meet the "necessities of the times" have been made through the development of the doctrine that power might be delegated if, when conferring statutory powers, the legislature prescribes standards for the exercise of discretion. With this development of the doctrine the courts went further and implied standards from the scheme of the statute, and in cases the court supplied the standard themselves.<sup>4</sup>

## CONCLUSIONS

In the result there is no general principle of law in the United States that requires judicial powers to be entrusted to independent agencies, and administrative powers to be entrusted to politically controlled agencies, corresponding to the doctrine of the separation of powers as applied in the United Kingdom. The doctrines of separation of powers and non-delegation of powers are applied to limit the scope or extent of the powers conferred, but not their nature.

Subdelegation of certain of their functions by agencies raises problems somewhat similar to those that arise in the United Kingdom with respect to inquiries. Where a large agency, given the power of making decisions, is required to conduct a hearing, the hearing will in general be held by an "examiner", corresponding to the "inspector" under the English inquiry procedure. It is sufficient to say here that federally, and in many States, provision is made in line with the concept that the agencies are independent, and the mode of appointing "examiners" and their tenure of office is aimed at establishing a corps of independent and impartial experts. Under the Federal Government and in many States the examiners are attached to each agency. In the State of California, hearing officers (with legal training and experience) constitute

<sup>4</sup>*Ibid.*, 46-70.



a separate corps under an Office of Administrative Procedure, and are assigned by it to hearings of different agencies. In California examiners are the presiding officers at all agency hearings, including self-governing professional tribunals, even though they do not participate in the decision.

For the reasons that have been given and will be developed in the next chapter we reject the American concept of an independent board to make policy decisions not subject to ministerial control.

## CHAPTER 10

# Recommended Structure and Organization of Tribunals in Ontario

SUBJECT to one constitutional limitation, the same basic principles in the organization of governmental machinery for the exercise of powers apply to the Legislature in Ontario as apply to the governmental processes in the United Kingdom. These are:

- (1) Separation of judicial powers; and
- (2) Political control of administrative powers.<sup>1</sup>

The constitutional limitation, stated briefly, is that the Legislature cannot confer on a body other than a court presided over by a judge appointed by the Governor-General of Canada, jurisdiction that broadly conforms to the type of jurisdiction exercised by superior, district and county courts.<sup>2</sup>

For the purpose of applying these principles a distinction must be made between judicial and administrative powers. We have seen that no mutually exclusive analytical distinction can be drawn.<sup>3</sup> Notwithstanding the absence of such a distinction in most cases, no practical difficulty arises and a

<sup>1</sup>See p. 110 *supra*.

<sup>2</sup>See pp. 33 ff. *supra*.

<sup>3</sup>See pp. 22 ff. *supra*.

power can be readily classified. Where difficulty does arise the distinction can only be drawn after an examination of the function of the power, when it has been properly framed in accordance with the principles discussed in Chapter 7.<sup>4</sup> In this examination two principles are applicable:

(1) If it is appropriate that a particular power should be exercised by impartial persons independent of political control, who, in making their decisions, strive to do justice in the same sense as the courts, the power should be treated as a judicial power.

(2) If it is appropriate that the exercise of a particular power should be subject to political control, the power should be treated as an administrative power and its exercise should be subject to the control and direction of, or be accountable through appropriate channels to, a responsible Minister, and through him to the Legislature.<sup>5</sup>

As we have said these principles can only be applied in relation to specific powers and little guidance can be given of a general nature. In practice the application of this distinction does not present great difficulty.

Not infrequently at the present time both judicial powers and administrative powers are conferred on the same tribunal. We agree with the recommendations of the Donoughmore Committee that because of the different principles that apply to the constitution of judicial tribunals and of administrative tribunals discussed below, the judicial and administrative powers should be separated and conferred on different tribunals where this can be done.

We turn now to the principles that should govern the structure and organization of tribunals in Ontario. For purposes of discussion we divide them into four categories:

- (1) Judicial tribunals;
- (2) Administrative tribunals;
- (3) Tribunals exercising both judicial and administrative powers which, for practical governmental purposes, cannot be separated; and

<sup>4</sup>See p. 95 *supra*.

<sup>5</sup>See p. 54 *supra*.

(4) Certain classes of tribunals or specific tribunals whose functions might be classified as judicial or as administrative, but to which the principles governing tribunals to exercise these powers cannot be generally applicable.

## 1. JUDICIAL TRIBUNALS

The doctrine of the separation of powers requires that judicial powers be conferred on bodies that are independent of political control and that are so constituted and operate in such a manner as to render them impartial in the application of rules of law or legal techniques in the making of decisions between parties.<sup>6</sup>

One of the basic concepts of the Rule of Law emphasizes that judicial powers should normally be entrusted only to the appropriate ordinary courts of law (whether superior or inferior) and should be assigned to special tribunals other than these courts only in exceptional circumstances.<sup>7</sup>

Exceptional circumstances which may justify conferment of judicial powers on special tribunals other than the ordinary courts within our constitutional limits, cannot be specified exhaustively or with particularity. The decision must rest on practical judgment, giving due weight to the primary principle. The two main circumstances are:

- (1) The need for specialization and expertise in the personnel of the tribunal to facilitate the administration of justice;
- (2) The need for a special procedure affording greater speed, accessibility, economy or informality than can be provided by the procedure of the ordinary courts.

Matters for decision in the exercise of a statutory judicial power may fall within both of these categories, e.g. both specialized judges and special procedure may be required.

Where exceptional circumstances do justify the establishment of a special tribunal to exercise judicial power, a negative

<sup>6</sup>*Ibid.*

<sup>7</sup>See p. 56 *supra*.

principle applies: the tribunal should not be a Minister nor consist of officials subject to the control and direction of a Minister. The basic concept of the separation of judicial powers from political control, developed over the centuries in relation to the courts, applies equally to all judicial tribunals.<sup>8</sup>

The application of these principles generally requires that members of a judicial tribunal other than the courts (unless appointed by the parties) should not be appointed by the Minister of a Department that will be affected by their decisions, and to whom they might be under an obligation of loyalty. They should be appointed by the Attorney General or the Lieutenant Governor in Council. The members should hold office for life or a fixed term of adequate duration to ensure their independence. They should be subject to removal only by the Lieutenant Governor in Council and for cause in accordance with the defined principles and procedures analogous to those applicable to the removal of magistrates. Similarly, the rules disqualifying a member of a tribunal by reason of bias or interest,<sup>9</sup> and the principle that powers of investigation should not be combined with powers of decision,<sup>10</sup> should apply to special judicial tribunals. The history of the development of our courts, and the investigations we have made of the practices in other jurisdictions,<sup>11</sup> emphasize that these are minimum requirements to ensure independence and impartiality of judicial tribunals.

### Qualification of Members

In general one or more members of a judicial tribunal should have legal training. Emphasis is placed on the need for legal experience, particularly for officers who preside at hearings, so that proper rules of procedure<sup>12</sup> and of evidence will be applied. Where the decision relates to purely technical, scientific or professional matters, a legally-trained member of the tribunal may not be necessary. In such cases tests or

<sup>8</sup>See pp. 52 ff. *supra*; United Kingdom, p. 109 *supra*.

<sup>9</sup>See p. 48 *supra*.

<sup>10</sup>*Ibid.*

<sup>11</sup>United Kingdom, p. 112 *supra*.

<sup>12</sup>See Subsection 3, pp. 134 ff. *infra*.

examinations by scientifically trained members, or the application of professional standards by members of the profession, may properly ensure the administration of justice.

### **A Hierarchy of Tribunals**

We have discussed the establishment of special judicial tribunals other than the courts as if only a single tribunal need be established with powers to decide a particular class of disputes or claims. One of the circumstances that may justify the establishment of a special tribunal is the need for accessibility, economy, informality or speed in the disposition of a large volume of matters. In such case a number of special tribunals may be needed to decide disputes or claims within one class. A hierarchy of tribunals may be needed. In this discussion we anticipate, with respect to the constitution of appellate bodies, our later general discussion of appeals.

The Workmen's Compensation Act<sup>13</sup> provides an example of both the type of tribunal that should be classified as a special judicial tribunal and of the need for such a hierarchy. The constitution and operation of the Workmen's Compensation Board will be fully discussed<sup>14</sup> and it is sufficient to refer to it here merely to illustrate these two points.

The statute provides for the payment of compensation for certain industrial injuries. It lays down rules or standards governing entitlement and disentitlement to compensation. It is clear that the right of a workman to receive compensation should not be subject to the political control of ministers. The powers of decision under the statute meet all the requirements of judicial powers. These judicial powers of decision are conferred on the Workmen's Compensation Board, a tribunal of three persons.

In 1966 the number of claims required 373,000 decisions to be made. Obviously the three members of the Board could not hear and decide all these claims, sitting as a Board.

The work of the Board has been organized to provide for the disposition of claims by a hierarchy of tribunals. When a claim is made it is first considered by administrative officials

<sup>13</sup>R.S.O. 1960, c. 437.

<sup>14</sup>See Report No. 2.

in the Claims Department, who conduct such inquiry or investigation as they consider necessary and, without a hearing, decide whether to allow the claim, or to reject it in whole or in part. If the claim is rejected in whole or in part the claimant may appeal to a Review Committee which reviews the submissions to the Claims Officer and may order additional inquiries and investigations, but does not hold a hearing. If it decides to reject the appeal, a further appeal lies to an Appeal Tribunal which may grant a hearing and may make further inquiries and investigations. The members of this tribunal constitute an autonomous body consisting of three members with no administrative duties. The claimant may appear before the Appeal Tribunal, either alone or with witnesses, and may be represented by counsel or by a friend, for example, a representative of a labour union. A final appeal lies to the Workmen's Compensation Board.

The establishment of such a hierarchy was necessary to dispose of the volume of claims. Such a hierarchy may be established in two ways. The statute may directly confer power on Claims Officers, the Review Committee, the Appeal Tribunal, as well as on the Workmen's Compensation Board. Alternatively, the power of decision may be conferred on the Workmen's Compensation Board, with power given to it to delegate powers of decision to subordinates. In our opinion, where judicial power is to be exercised by a hierarchy of tribunals, the statute should establish them directly.

In general, the principles providing for independence and impartiality of single tribunals should apply to each tribunal in a hierarchy of judicial tribunals. Considerations of expedition, informality and economy may, however, justify a departure from the principle that powers of investigation should not be combined with powers of decision with respect to initial or even secondary tribunals in the hierarchy, as in the case of claims for Workmen's Compensation, if provision is made for the matter for decision to come at some stage before a properly constituted tribunal to which these principles and rules are fully applicable.<sup>15</sup>

<sup>15</sup>These matters should be considered in relation to appeals discussed in Chapter 15 *infra*.

## 2. ADMINISTRATIVE TRIBUNALS

In the administrative processes of the provincial government, political control is maintained through the doctrine of ministerial responsibility or, to state it more precisely, through the control and direction by Ministers of all administrative action taken by officials or subordinates. This doctrine requires that a statutory power to make administrative decisions—decisions on grounds of policy—be conferred either on a Minister or on persons subject to the control and direction of a Minister so that the Minister can be called to account for the policy he pursues in the Legislature.<sup>16</sup>

Formerly emphasis was placed on the doctrine of ministerial responsibility as affording protection for individuals against unjust encroachment on their rights from administrative action. This aspect of the doctrine has been criticized in recent times on the ground that such protection is no longer effective. The expansion of governmental operations, and the monopolization of legislative time by broad questions, prevent an individual from obtaining proper consideration of his legitimate complaints. It is therefore suggested by some critics that the whole doctrine should be regarded as being obsolete. We later consider the criticism of the doctrine as a protection against individual injustices.

In our opinion, however, the suggestion that the doctrine of ministerial responsibility is obsolete overlooks its most important aspect. The general principle that all governmental decisions on grounds of policy should be made by Ministers, or under the control and direction of Ministers who are members of the Legislature, renders all executive action accountable to and subject to the supervision of the Legislature. The existence of the doctrine, as much as or more than its invocation in individual cases, ensures that executive action will not run counter to the will of the Legislature. This doctrine is the mechanism by which the Legislature maintains its control.

The consistent application of this principle requires that apparently independent officials, boards or commissions, ought not to be set up to make administrative decisions when in

<sup>16</sup>See pp. 44 ff. *supra*.



fact their decisions are controlled politically. This practice has become fairly common in all governments in Canada. The objective often is to relieve the government of responsibility for policy decisions that may be embarrassing politically. The practice is undesirable on two grounds. If the official, board or commission considers that the statute under which the power is conferred actually requires an independent decision, the decision may conflict with government policy. In such case the government has abdicated one of its true functions: to decide and control policy. If the exercise of the power is given the appearance of independence, but the power is exercised in consultation with or under the control of a Minister, this appearance is a mere deceptive façade. The government should bear responsibility, notwithstanding the formal façade.

Application of the primary general principle that all administrative powers of decision should be conferred on or be subject to approval by a Minister, gives rise to the application of two other principles.

(1) Where an administrative power is conferred on a Minister, ideally the Minister should himself make or approve all decisions in the exercise of the power.

(2) Where a Minister is to make or approve an administrative decision after affording a hearing to interested parties, ideally he should personally hear the individual and personally consider his representations. Recognized standards of justice and sound administration<sup>17</sup> frequently now require that as a general principle an individual whose rights will be affected by a decision, should be entitled, even though the decision is an administrative one, to notice of the intention to make the decision, and to a hearing and opportunity to make representations.

Two practical considerations prevent the attainment of these ideal requirements:

(1) The volume of public business and the number of decisions that have to be made is such that it is not possible for a Minister personally to make or approve of all administrative decisions;

<sup>17</sup>See Subsection 3, pp. 134 ff. *infra*.

(2) Even where a Minister makes decisions personally it is not practical or possible for him personally to hear all individuals who may be affected.

Three courses are open to reconcile the ideal requirements of ministerial control, with the practical impossibilities of all decisions being made by Ministers or all hearings conducted by Ministers:

(1) The power of decision may be conferred on the Minister with an express power to delegate his power of decision to officials under his control and direction. Notwithstanding that in many instances power of delegation may be implied, it should be expressly given to remove uncertainty and clearly fix the responsibility for proper control and direction on the Minister. Where procedural standards require a hearing before the decision is made, the official to whom the power is delegated should, where possible, personally conduct the hearing.

(2) The Minister may retain the power of decision, but if a hearing is required he may invoke the inquiry procedure developed in the United Kingdom. One of his officials should conduct the inquiry at which the interested parties are heard, and should report on the submissions made to the Minister, who thereupon makes the decision.

(3) There may be a combination of the first two. Where necessary the Minister may be empowered to delegate the making of a decision to one official, but may require it to be exercised only after an inquiry by another official.

The course to be adopted with respect to any particular power of decision must depend on the nature of the decision. Important decisions involving considerations of broad policy should be reserved for the personal attention of the Minister. Where administrative justice requires that the person to be affected should be afforded a hearing, and the Minister cannot himself entertain the hearing, an inquiry should be held and the result reported to the Minister before he makes his decision.

Where decisions are less important, particularly those matters that are very numerous and with respect to which policy principles may be relatively well defined, power should be given to the Minister to delegate decisions to subordinates. If a hearing should be afforded, the subordinate, wherever possible, should conduct the hearing. In such cases, as a general principle, the deciding officer should be the hearing officer.

The third course, of delegating a power of decision to one official to be made after an inquiry by another, should be adopted only where necessity requires it and after a balancing of the factors discussed in connection with the first two alternative courses.

In some cases inquiries are now required to be held in Ontario, and in other cases inquiries are sometimes held informally. The principles underlying the inquiry system have not, however, been recognized. We recommend its adoption and later discuss the procedure as applied to expropriation cases.<sup>18</sup> Quite apart from generally recognized standards of justice, a strong argument in favour of an inquiry is that the decision is likely to be a better decision if both sides are fully heard. A second persuasive reason for inquiries is that an inquiry will allay suspicion and afford to individuals affected at least an explanation of the course followed.<sup>19</sup>

Where a Minister or an official to whom power is delegated cannot personally conduct an inquiry, the inquiry should be held by a responsible person. Different statutes may require different types of hearing officers. In some cases it may be that a cadre of hearing officers might be established. Consideration would have to be given to whether these hearing officers should be officials in the department concerned or an independent group under the Attorney General. Where the number of inquiries does not justify a permanent corps, the hearing officers may be appointed *ad hoc* when required, as is the practice in Scotland. We feel that the system of

<sup>18</sup>Chapter 66 *infra*.

<sup>19</sup>H. W. R. Wade, *Administrative Law*, 175. A practical application of this principle to expropriation proceedings is dealt with in Chapter 66 *infra*.

hearing officers should be introduced, but that the solution of all problems that will arise has to be left to the development of the system.<sup>20</sup>

One departure from the general principle of ministerial responsibility for policy decisions has been recognized in our present governmental structure.

Administrative power may be conferred on a special tribunal rather than on a Minister, where the matter to be decided requires specialized technical knowledge and full and detailed inquiries into the facts of each case before a decision can be made (for example the granting of certificates of convenience and necessity, or the fixing of rates to be charged by public utilities). The general policy to be applied in making the decision should be expressed in the statute, unless the principles and considerations to govern the decision are well understood. Even in these cases, as we discuss later, decisions should be subject to the approval of the Minister, or there should be a right of appeal to the Minister or to a committee of the Lieutenant Governor in Council.<sup>21</sup>

It may well be argued that the powers falling within this exception are more akin to judicial powers than to administrative powers. If the principles to govern the decision are stated in the statute with sufficient particularity the power would probably be judicial. Where the principles are really broad principles of policy, for example, "public convenience and necessity" with the determination of the requirements of "public convenience and necessity" left with the tribunal, the power should probably be subject to political control and treated as administrative. We have adopted this view and recommend that ultimately there should be some political control.

We recommend that the general structure of tribunals to exercise administrative powers should follow the principles we have outlined.

<sup>20</sup>For a discussion of an inquiry, and the nature and disposition of the hearing officer's report, see the next Subsection, pp. 134 ff. *infra*.

<sup>21</sup>See Report of the Committee on the Organization of the Government of Ontario (1959), 65 ff.

### **3. TRIBUNALS EXERCISING BOTH JUDICIAL AND ADMINISTRATIVE POWERS WHICH, FOR PRACTICAL GOVERNMENTAL PURPOSES, CANNOT BE SEPARATED**

Where necessities of good government require the establishment of a tribunal to exercise both judicial and administrative powers which are so interwoven that they cannot be separated, it is obvious that the principles governing the structure and organization of judicial and administrative tribunals, of independence on the one hand and political supervision on the other, cannot be reconciled. Nor can any new general principles be stated. The most that we can recommend is that departure from the general principles should be governed and limited by the necessities giving rise to the establishment of the tribunal. The underlying concepts should be effected as far as possible.

### **4. CERTAIN CLASSES OF TRIBUNALS OR SPECIFIC TRIBUNALS WHOSE FUNCTIONS MIGHT BE CLASSIFIED AS JUDICIAL OR AS ADMINISTRATIVE, BUT TO WHICH THE PRINCIPLES GOVERNING TRIBUNALS TO EXERCISE THESE POWERS CANNOT BE GENERALLY APPLICABLE**

The nature of these tribunals is such that not only do they differ in the way in which tribunals are constituted but, as we shall see, different considerations must be taken into account in connection with their procedure and appeals from their decisions. These tribunals deal with the following types of powers:

(a) Where emergency action is required to be taken for the protection of public health or safety by an inspector or official, and effective action can only be taken if he has power to act on belief as to the existence of facts after inspection or a view, e.g., seizure of contagious meat, power to take such action may properly be conferred on such an official or inspector. This power, though probably a judicial power in an analytical sense, cannot be brought under the

ordinary principles applying to such powers. The power should however be conditioned on the existence of reasonable and probable grounds for the belief.

(b) Where the sole question for determination is the application of a technical or scientific standard prescribed by or under the authority of a statute, e.g., the testing of milk, and the surest method of ensuring compliance with it is by technical or scientific tests made by a trained expert, power to make the decision may be conferred on an expert. Again, this power, though judicial, need not be governed by the ordinary principles.

(c) Where the decision to be made is not a finding of objective facts but essentially the formation of an expert opinion, the power to decide, i.e., to form the opinion, can properly be conferred directly on an expert or panel of experts rather than on a lay tribunal which could only reach its decision, i.e. form the opinion, second-hand on the basis of expert opinion evidence. An example of this kind of decision is the determination of the degree of disability suffered by an injured workman. The decision is a medical question of opinion which, although probably a judicial question, can best be decided by a medical panel.

## LOCAL GOVERNMENT

We have discussed the relevant principles applicable to the organization and constitution of tribunals in the provincial government. The principles of independence of judicial tribunals and political control of the exercise of administrative powers apply equally in local government. The political control may in appropriate circumstances be provided by the elected council of a municipality. We discuss the application of these principles in relation to particular statutes later.<sup>22</sup>

<sup>22</sup>See Chapter 65 *infra* with respect to powers of expropriation.

### Subsection 3

#### **PROCEDURAL REQUIREMENTS FOR A VALID DECISION**

## INTRODUCTION

One of the ingredients of a statutory power referred to in Chapter 4, but not previously discussed, is a requirement that a tribunal follow a prescribed procedure as a condition precedent to reaching a valid decision. We propose now to discuss this requirement on the assumption that the application of the techniques and principles outlined in Subsections 1 and 2 have resulted in the conferment of a power, having a proper nature and scope, on a properly constituted tribunal.

The discussion will deal with the following matters:

- (1) Procedural requirements under the present law of Ontario and criticisms of the present law;
- (2) Procedural requirements under the law of the United States;
- (3) Procedural requirements under the law of England;
- (4) Conclusions and recommendations on appropriate procedure for Ontario.

Any person attempting a discussion of comparative law is confronted with a dilemma. Should the law of each jurisdiction to be compared be stated separately and then the comparison be made? Or should the discussion deal with selected topics with the comparison of the law under each topic, so that the various legal systems are interwoven in the discussion? The second course is in general the most realistic and concrete and therefore preferable; but for a number of reasons we have concluded that it is not practical for our purposes.

For our purposes we are concerned with comparing many of the detailed procedural provisions. The difference in the detailed procedural requirements and their application under the law of England and the law of the United States results from a different general legal and political framework. An outline of the general framework is therefore essential. Some of the detailed provisions in one jurisdiction, for example, the



United States, have no corresponding provisions in England or in Ontario, e.g., official notice.\* An explanatory introduction of these detailed provisions which is necessary, would not fit conveniently into an interwoven discussion. We therefore set out the law of Ontario, the United States and England separately and conclude with our recommendations for revision of the Ontario law.

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\*See pp. 168 ff. *infra*.

## CHAPTER 11

# Administrative Procedure in Ontario: Present Law

A STATUTE that confers a power of decision may or may not make provision for the procedure to be followed in arriving at the decision. Where no procedure is prescribed, and even in some cases where procedure is prescribed for the exercise of its powers, it is necessary for the tribunal to decide whether in the circumstances the procedural rules of natural justice are essential to valid decision.

The courts have developed a presumption of interpretation which applies to many statutes conferring powers, that a fair procedure must be followed as a condition to the valid exercise of the power. They have also developed rules laying down the requirements of a fair procedure. If the circumstances are such that these rules must be applied and followed, but they are not, the decision may be set aside and the consequent order quashed.

Although the concepts of natural justice cannot be comprehensively or precisely defined, it is a term of comprehensive and real meaning and real application. Other language and terms have been used to express the same concept: "substantial justice", "the essence of justice", "fundamental justice", "rational justice", "the principles of British justice", or simply "justice" without any epithet.<sup>1</sup>

We think the word "justice" sufficiently expresses the meaning of the concept which gave rise to the rules of natural justice.

<sup>1</sup>de Smith, *Judicial Review of Administrative Action*, 102.

## RULES OF NATURAL JUSTICE

Where rules of natural justice apply to a power of decision, the following requirements in certain cases must be met, and in other cases may or may not have to be met, depending on the circumstances and the nature of the decisions.

- (1) Notice of the intention to make a decision should be given to the party whose rights may be affected.<sup>2</sup>
- (2) The party whose rights may be affected should be sufficiently informed of the allegations against his interest to enable him to make an adequate reply.<sup>3</sup>
- (3) A genuine hearing should be held at which the party affected is made aware of the allegations made against him and is permitted to answer.<sup>4</sup>
- (4) The party affected should be allowed the right to cross-examine parties giving evidence against his interest.<sup>5</sup>
- (5) A reasonable request for adjournment to permit the party affected to properly prepare and present his case should be granted.<sup>6</sup>
- (6) The tribunal making the decision should be constituted as it was when the evidence and argument were heard.<sup>7</sup>

When and under what conditions these procedural requirements must be followed will be discussed in due course. They have been superimposed by the courts on statutory provisions conferring powers of decision, which either do not prescribe the procedure to be followed or only partially prescribe it, and they are designed to ensure that a party who may be adversely affected by the statutory decision will be given a fair opportunity to influence the decision. In the main, the rules follow the procedural rules of courts that have been

<sup>2</sup>*The Board of Health for the Township of Saltfleet v. Knapman*, [1956] S.C.R. 877; *L'Alliance des Professeurs Catholiques de Montréal v. Labour Relations Board*, [1953] 2 S.C.R. 140.

<sup>3</sup>*Re Fairfield Modern Dairy Limited and the Milk Control Board of Ontario*, [1942] O.W.N. 579.

<sup>4</sup>*Re Allinson and the Court of Referees*, [1945] O.R. 477.

<sup>5</sup>*Re Toronto Newspaper Guild, Local 87, et al.*, [1951] O.R. 435, 449.

<sup>6</sup>*Re Ramm and the Public Accountants Council for the Province of Ontario*, [1957] O.R. 217.

<sup>7</sup>*Re Ramm, supra*; *Mehr v. Law Society of Upper Canada*, [1955] S.C.R. 344.

developed over centuries, but they are not as formal nor as rigid as the procedure laid down for courts.

The requirements we have set out do not apply uniformly to all statutory powers of decision. On review the courts may hold that one or more of the requirements need not be complied with in the exercise of a particular statutory power. For example, in the *Newspaper Guild* case the requirement that the Ontario Labour Relations Board permit cross-examination was imposed because in the particular circumstances the party affected could not produce evidence to support his case except by cross-examination of the witnesses for the other side. On the other hand, in *Wilson v. Esquimalt and Nanaimo Railway Company*,<sup>8</sup> where a squatter's claim against the otherwise rightful owner of the land was made and allowed, it was held that the tribunal in question was not required to allow cross-examination.

In certain instances an expert tribunal may be allowed to take into account its own knowledge and experience in reaching a decision without furnishing to a party affected information as to its knowledge or experience.

The procedural rules of natural justice do not impose any requirement defining the admissibility of evidence before a tribunal, nor do they require tribunals to give reasons for their decisions.

Two questions arise out of this discussion:

- (1) When do the procedural rules of natural justice apply in respect of a statutory power of decision?
- (2) When the rules do apply, what procedure is required to be followed?

## APPLICATION OF PROCEDURAL RULES OF NATURAL JUSTICE

### Where the statute does not prescribe any procedure

No certain test can be laid down concerning the application of procedural rules of natural justice. Until recently one of the main difficulties arose out of uncertain terminology.

<sup>8</sup>[1922] 1 A.C. 202.

In the early cases powers of decision under statutes were termed "judicial" which now would normally be regarded as administrative.<sup>9</sup> When the courts found that a power was a judicial one, it was presumed that the Legislature intended that the power should not be exercised arbitrarily, and it was held that a fair procedure should be followed before there could be a valid exercise of the power. Later the term "quasi-judicial" was developed and applied to administrative powers that were to be exercised by "acting judicially", that is, in a manner analogous to the exercise of judicial powers through the application of procedural rules of natural justice. An administrative power that was not required to be exercised by "acting judicially" came to be known as "administrative" or "purely administrative", or sometimes involving "executive action"<sup>10</sup> in contrast with judicial or quasi-judicial powers.

The employment of this terminology developed a circular type of reasoning. In some cases courts attempted to classify powers as either judicial, quasi-judicial or administrative for the purpose of deciding whether from such classification the rules of natural justice did or did not apply to their exercise. The distinction between a quasi-judicial and administrative or purely administrative power in this context depends on whether or not the rules of natural justice apply to its exercise. Its classification therefore depends on whether the rules should be applied. The reasoning is therefore circular and confusing.<sup>11</sup>

Since no completely clear distinction can be drawn between judicial and administrative power, terminology does not provide a satisfactory basis for deciding when the rules of natural justice should be applied. Attempts have, therefore, been made to formulate general principles for the purpose. In *Board of Education v. Rice*,<sup>12</sup> Lord Loreburn attempted to formulate certain principles which have been adopted in many cases. He said:

"Comparatively recent statutes have extended, if they have not originated, the practice of imposing upon departments

<sup>9</sup>H. W. R. Wade, *Administrative Law*, 144 ff.

<sup>10</sup>See pp. 29, 42 *supra*.

<sup>11</sup>H. W. R. Wade, *Administrative Law*, 145 ff.

<sup>12</sup>[1911] A.C. 179.

or officers of State the duty of deciding or determining questions of various kinds. In the present instance, as in many others, what comes for determination is sometimes a matter to be settled by discretion, involving no law. It will, I suppose, usually be of an administrative kind; but sometimes it will involve matter of law as well as matter of fact, or even depend upon matter of law alone. In such cases the Board of Education will have to ascertain the law and also to ascertain the facts. *I need not add that in doing either they must in good faith and fairly listen to both sides, for that is a duty lying upon every one who decides anything.* But I do not think they are bound to treat such a question as though it were a trial. They have no power to administer an oath, and need not examine witnesses. They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view."<sup>13</sup> (Emphasis added)

In *The Board of Health for the Township of Saltfleet v. Knapman*,<sup>14</sup> the Supreme Court of Canada held to be invalid an order by a local board, closing certain premises without giving the owners an opportunity to make submissions or of a hearing. The statute contained no provisions for such procedural steps. The court said:

"... It would, I think, require the plainest words to enable us to impute to the Legislature the intention to confer upon the local board the power to forcibly eject the occupants of a building for certain specified causes without giving such occupants an opportunity to know which of such causes was alleged to exist or to make answer to the allegation; and I find no such words in the statute of the schedule."<sup>14a</sup>

A stronger statement of principle was made by Rinfret, C.J.C., in relation to a power to cancel the certification of a trade union:

"The principle that no one should be condemned or deprived of his rights without being heard, and above all without having received notice that his rights would be put at stake, is of a universal equity and it is not the silence of the law that should be invoked in order to deprive anyone of it. In my opinion, nothing less would be necessary than an express

<sup>13</sup>*Ibid.*, at 182. Adopted in *Re Toronto Newspaper Guild, Local 87, et al.*, [1951] O.R. 435, 447; affirmed [1953] 2 S.C.R. 18.

<sup>14</sup>[1956] S.C.R. 877.

<sup>14a</sup>*Ibid.*, per Cartwright J. at 879.

declaration of the legislature in order to put aside this requirement which applies to all appeal courts and to all the bodies called upon to render a decision that might have the effect of annulling a right possessed by an individual.”<sup>15</sup>

These broad and apparently clear statements of the law have been made less broad and less clear in their application. In *Calgary Power v. Copithorne*<sup>16</sup> the company had power to expropriate land with the permission of the Minister of Agriculture. The Minister gave permission to expropriate the property in question, without giving notice to the owner of the application for permission. It was held that the permission was validly granted. Martland, J. stated:

“. . . the respondent submitted that a function is of a judicial or quasi-judicial character when the exercise of it effects the extinguishment or modification of private rights or interests in favour of another person, unless a contrary intent clearly appears from the statute. This proposition, it appears to me, goes too far in seeking to define functions of a judicial or quasi-judicial character. In determining whether or not a body or an individual is exercising judicial or quasi-judicial duties, it is necessary to examine the defined scope of its functions and then to determine whether or not there is imposed a duty to act judicially. As was said by Hewart, L.C.J., in *Rex v. Legislative Committee of the Church Assembly*, (1928) 1 K.B. 411 at 415:

‘In order that a body may satisfy the required test it is not enough that it should have legal authority to determine questions affecting the rights of subjects; there must be super-added to that characteristic the further characteristic that the body has the duty to act judicially.’<sup>17</sup>

The learned judge summarized his conclusions:

“In my view the powers of the Minister, under the statute in question here, were to make an executive order. His functions were not judicial or quasi-judicial. His decision was an administrative decision to be made in accordance with the statutory requirements and to be guided by his own views as to the policy which, in the circumstances, he ought to pursue.”<sup>18</sup>

<sup>15</sup>*L'Alliance des Professeurs Catholiques de Montréal v. Labour Relations Board*, [1953] 2 S.C.R. 140, 154. (Translation)

<sup>16</sup>[1959] S.C.R. 24.

<sup>17</sup>*Ibid.*, 30.

<sup>18</sup>*Ibid.*, 34.

The statements of Martland, J. and Hewart, L. C. J. make it clear that it is the substance of the power, not the terminology, that determines whether the tribunal must act judicially.

The judgment of Roach, J. A. in *Bishop v. Ontario Securities Commission*,<sup>19</sup> is an illustration of the application of the doctrine that the scheme of the statute governs the court in deciding whether the procedural rules of natural justice must be applied. The Securities Act provided that in certain circumstances benefits or privileges enjoyed by individuals with respect to prescribed transactions can be revoked. The chairman of the Commission, who was authorized to exercise the power of the Commission, revoked the privileges of an individual without giving him any notice or giving him a hearing. The revocation was held to be authorized without such procedural steps. The learned judge said:

“ . . . It is to protect the public from being defrauded that the Legislature by s. 19(3) empowered the Commission to withhold in certain circumstances the benefits or privileges flowing from s-s. (1) and (2) of s. 19. If the public are to be protected from being defrauded the power and duty entrusted to the chairman under s. 3 may have to be exercised promptly. The whole purpose of the Act might be defeated if the chairman could make an order or ruling under that section only on notice to the person or company affected and after a hearing. Many days might elapse between the giving of the notice to the persons or company sought to be affected and the conclusion of the hearing during which time those persons or that company if dishonest and disreputable could continue to prey upon the public and plunder and fleece many people. For that reason it was essential to the purpose of the Act that the chairman should be empowered to act promptly and without notice to the person or company sought to be affected . . . ”<sup>20</sup>

The cases do not attempt to lay down guiding principles or rules to determine when the duty to act judicially is imposed. Those we have discussed, and many others, demonstrate that this is often a matter of great difficulty. Lord

<sup>19</sup>[1964] 1 O.R. 17.

<sup>20</sup>*Ibid.*, 23.



Loreburn in *Board of Education v. Rice* made a statement sound in principle, but difficult to apply in all cases. It is not possible to establish any exhaustive classification of powers to which the rules of natural justice apply. It is clear from the decisions of the courts that the matter is not determined by the use of the terms "judicial", "quasi-judicial" or "administrative", nor does the expression "it is a matter of substance that is determined by the general legislative scheme of the statute taken as a whole" give any distinct guide. It would probably be more useful to say that the rules of natural justice should be presumed to apply unless their application would defeat the purposes of the legislation taken as a whole. An example is provided by the provision of the Department of Labour Act already quoted.<sup>21</sup> If the rules of natural justice applied to the exercise of the power of the inspector—to require immediate cessation of work where the work is being done under conditions that are dangerous to life and property—the whole purpose of the statutory provision providing the power might be defeated.

It has been said that there are two clear cases where the rules of natural justice should be applied, but even in these cases there may be exceptions:

- (1) Wherever a tribunal is required to decide a dispute between two or more parties—a *lis inter partes*—particularly where rules or standards are to be applied but including cases where the decision is one of policy;
- (2) Where charges or allegations relating to the personal competency, conduct or character of an individual are made grounds for refusing or revoking a status or rights under a statute. The *Bishop* case made an exception to this class.

Whether legal scholarship can reconcile the decisions we have discussed and many others is not of consequence to this Commission. What is of consequence is this: by what rules are those engaged in the administration of the governmental affairs to be guided as they perform their day-to-day tasks of exercising their statutory powers? How are they to determine

<sup>21</sup>See p. 91 *supra*.

whether rules of natural justice apply to the powers they exercise? It is little comfort to them to tell them that they must examine the defined scope of their functions and the purpose of the statute in question. The problem cannot be satisfactorily solved by leaving the respective tribunals without reasonably clear guide lines or rules.<sup>22</sup>

### The application of rules where the statute prescribes a procedure

It is seldom if ever that the procedural steps to be followed in the exercise of a power of decision, conferred by statute, exhaustively cover in detail all possible matters of procedure that may arise. Where procedural requirements are specifically expressed in the statute, the presumptions of interpretation giving rise to the rules of natural justice may be applied in aid of the interpretation of the express statutory requirements, or to supplement them. *In re Fairfield Modern Dairy Ltd. and the Milk Control Board of Ontario*<sup>23</sup> provides an illustration of such a case. Under the Milk Control Act<sup>24</sup> the Board had power to “. . . revoke a licence . . . after due notice and opportunity of hearing to the . . . licensee”. Notice was given to a licensee of complaints and a time and place for a hearing was fixed. The licensee appeared before the Board when the general nature of the complaints was indicated to him, but he was refused details of the evidence against him, notwithstanding that he alleged that the complaints were incorrect and that he could answer them. The court, in prohibiting the Milk Board from revoking the licence, stated:

“When the Act says that the Board may suspend a licence after due notice and opportunity of hearing, it means just what it says. A hearing is a real hearing at which the charge is made known, the evidence in support of it is adduced, the supposed offender is given an opportunity of meeting that evidence by cross-examination, or by the calling of witnesses, or otherwise, as may be requisite, and it is against all ordinary principles of the administration of justice to call anything less than that a hearing. There having been no

<sup>22</sup>See Chapter 14 *infra*.

<sup>23</sup>[1942] O.W.N. 579.

<sup>24</sup>R.S.O. 1937, c. 76, s. 6.

hearing of that kind, I think that there was no hearing at all within the meaning of the Act, and that the Board was entirely without jurisdiction to suspend the licence."<sup>25</sup>

In this case the requirements of the statute were interpreted as importing the concept of a hearing contemplated by the rules of natural justice.

*Re Allinson and the Court of Referees*<sup>26</sup> provides another example of the application of the rules of natural justice by the interpretation of the statute. The National Selective Service Civilian Regulations provided that a court of referees could entertain appeals from selective service officers. The chairman had power to determine the procedure to be followed on the hearing, limited only by the provision that the court of referees could not decide an appeal until the claimant had been given a reasonable opportunity to make any representations he desired to make to the court. The court of referees had before it a detailed submission by a selective service officer on points of law and fact, some of which were not known to the claimant. This submission was not disclosed to the claimant, but he was given an opportunity to make his own representations. In effect the court heard the parties separately. On an application to quash the order of the Court of Referees, it was held that the statute was to be interpreted as affording the claimant a proper hearing at which he would have had an opportunity of dealing with all the matters before it.

Not only may the rules of natural justice be applied through interpretation of the statutory provisions, but they may supplement the procedural provisions set out in the statute. An example is provided in *re Ramm and the Public Accountants Council for the Province of Ontario*.<sup>27</sup> The question there arose under the Public Accountancy Act<sup>28</sup> with respect to the revocation of a licence to practise accountancy. The statute provided:

"Where the Council intends to revoke any licence in pursuance of clause *a*, *b* or *c* of subsection 1, the Council shall

<sup>25</sup>[1942] O.W.N. 579, 582.

<sup>26</sup>[1945] O.R. 477.

<sup>27</sup>[1957] O.R. 217.

<sup>28</sup>R.S.O. 1950, c. 302.

first cause a written notice of its intention to be served on such person in the prescribed manner and shall on application made by such person within one month from the date of the service of the notice consider any representations with regard to the matter which may be made by him to the Council, either in person or by counsel."<sup>29</sup>

The Council held a hearing and received oral arguments and the hearing was adjourned to a later fixed date for the submission of written arguments. The written argument against the claimant was delivered only three days before the proposed resumption of hearings. Counsel asked the registrar for an adjournment to give him time to prepare his reply, and he believed that such adjournment had been arranged. The Council, however, met on the appointed day and, without receiving the argument on behalf of the claimant, revoked the licence. Another point was also considered. Two members of the Council were present at the second meeting who had not heard the evidence or argument at the first hearing. The revocation was set aside on two grounds: the refusal of the adjournment in the circumstances, and the presence of two members who had not heard the evidence but had participated in the decision. Each was held to be a denial of natural justice. The statutory procedure was therefore supplemented by the application of the rules of natural justice.

## CRITICISMS OF PRESENT LAW

Criticisms of the present law fall into three categories:

- (1) Until the courts have made a decision it cannot be said with certainty whether the rules of natural justice do or do not apply to a particular statutory power of decision. This uncertainty gives rise to two administrative difficulties:
  - (a) The tribunal itself does not know whether it is required to adhere to the rules of natural justice and to govern its procedure accordingly;
  - (b) Those who may be affected by the decisions of the tribunal do not know what their procedural rights are.
- (2) Even where it is reasonably clear that a fair procedure

<sup>29</sup>*Ibid.*, s. 19(2).

must be followed, the requirements of fair procedure in the exercise of a particular statutory power may be uncertain.

(3) It is difficult for the courts to adapt rules of procedure suitable to insure the just exercise of all statutory powers of decision by the interpretative device if the rules of natural justice are to be applied. In the *Copithorne*<sup>30</sup> case the alternatives open to the courts were:

- (a) To hold that the Minister before authorizing expropriation should give notice to the owner and afford him a hearing, thus permitting him to make representations;
- (b) To hold that the rules of natural justice did not apply.

There was no intermediate course under our law.

These criticisms emphasize that the development of procedural requirements of limitations applicable to tribunals with a wide variety of powers and a wide variation in their constitution, cannot be satisfactorily left to the courts. In any case it is quite unrealistic to expect laymen to be presumed to know when and under what circumstances and to what extent the rules of natural justice apply to the statutory powers they exercise. It is also unrealistic to expect the courts to evolve suitable rules for individual tribunals. It is therefore essential that means be found to develop rules appropriate to the varying purposes and characteristics to which they are respectively applicable.<sup>31</sup>

<sup>30</sup>[1959] S.C.R. 24.

<sup>31</sup>For full discussion see Chapter 14 *infra*.

## CHAPTER 12

# Administrative Procedure in the United States

THE problems in the procedure to be followed in the exercise of statutory powers that have arisen in England and the United States have been virtually the same as in Ontario. Studies seeking for solutions to these problems have been undertaken in both countries. Those in the United States were undertaken earlier and cover a broader scope than those in England. They correspond more closely to the studies required by our Terms of Reference. Notwithstanding the constitutional differences it is convenient for us to deal first with the course taken in the United States.

Frequently suggestions have been made that we adopt, or adapt, the "American system". In view of these suggestions we consider in some detail the system in the United States.

Prior to enactment of the Administrative Procedure Act in 1946 federal administrative law broadly speaking was similar in form to but more closely detailed than the law in Ontario. It consisted largely of judge-made rules based on constitutional and other general principles corresponding to our Rules of Natural Justice requiring that a fair procedure be followed. These rules were supplemented by more or less detailed rules of procedure made with statutory authority applying to individual agencies. Agency is the term used in the United States that corresponds with our term "tribunal".

During the decade of 1930-1940 government organization and administrative law were made the subject of intensive study by officially established committees and commissions and by influential non-official bodies such as the American Bar Association.<sup>1</sup>

In 1939 the President of the United States requested the Attorney General to investigate the "need for procedural reform in the field of administrative law" in the federal sphere. He stated that "a thorough and comprehensive study should be made of existing practices and procedures with a view to detecting any present deficiencies and pointing the way to improvement". The committee reported in January of 1941 on the whole field of adjudication, rule-making and judicial review. The majority of the committee appended a draft bill to enact as law its principal recommendations for improvements in the administrative process. Since the majority rejected "the idea of a code complete and rounded", the bill did not purport to be a code. A minority appended a second draft bill which was intended to be more in the nature of a code. In addition a bill had already been introduced in Congress.

The final result of these studies was the enactment in 1946 of the Federal Administrative Procedure Act which combined features of the various drafts of bills already put forward, amended and altered by further study. (Revision of this Act is now under consideration by the Committee on the Judiciary of Congress.)

In 1937 the American Bar Association promoted studies in the field of state administrative law corresponding to those that were subsequently undertaken in the federal field. A committee was created by the Section of Judicial Administration of the Association to make a report on administrative agencies and tribunals. Numerous draft bills were proposed but the final study was not completed until after the federal Attorney General's committee reported.

In 1942 Robert M. Benjamin of the New York Bar submitted a report to the Governor of New York, entitled

<sup>1</sup>For a brief history see Cooper, *State Administrative Law*, 7.

"Administrative Adjudication for the State of New York", which corresponded in the sphere of state administration to the Attorney General's report in the federal sphere.

In 1946, following the enactment of the Federal Administrative Procedure Act, the National Conference of Commissioners on Uniform State Laws approved a Model State Administrative Procedure Act.

Further studies continued in the succeeding years and in 1961 a Revised Model State Administrative Procedure Act was adopted by the National Conference. Legislation in about twenty-five states, largely based on these Model Acts, has been passed.

The Revised Model State Administrative Procedure Act of 1961 (for brevity, hereinafter referred to as the Model Act), relating as it does to administration under state governments, is more closely relevant to administration under a provincial government in Canada than the Federal Administrative Procedure Act (for brevity, hereinafter referred to as the Federal Act.) We therefore find it useful to refer primarily to the state law and the provisions of the Model Act, although reference will be made where helpful to the Federal Act.

The general content of the Model Act is explained in the prefatory note published by the National Conference of Commissioners on Uniform State Laws. It states:

"Content of the Model State  
Administrative Procedure Act

A brief explanation of the content of the Model Act and the principles involved in it will be helpful. The act deals primarily with major principles, not with minor matters of detail. Every student of administrative law recognizes that many of the procedural details involved in administrative action must necessarily vary more or less from state to state and even from agency to agency within the same state. Each state and each agency must work out these details for itself according to the necessities of the situation. However, there are certain basic principles of common sense, justice, and fairness that can and should prevail universally. The proposed act incorporates these principles, with only enough elaboration of detail to support the essential major features,



The major principles embraced in the act as adopted by the Conference are:

- (1) Requirement that each agency shall adopt essential procedural rules, and, except in emergencies, that all rule making, both procedural and substantive, shall be accompanied by notice to interested persons, and opportunity to submit views or information;
- (2) Assurance of proper publicity for all administrative rules;
- (3) Provision for advance determination of the validity of administrative rules, and for 'declaratory rulings', affording advance determination of the applicability of administrative rules to particular cases;
- (4) Assurance of fundamental fairness in administrative adjudicative hearings, particularly in regard to such matters as notice, rules of evidence, the taking of official notice, the exclusion of factual material not properly presented and made a part of the record, and proper separation of functions;
- (5) Assurance of personal familiarity with the evidence on the part of the responsible deciding officers and agency heads in quasi-judicial cases;
- (6) Provision for proper proceedings for and scope of judicial review of administrative orders, thus assuring correction of administrative errors.

*There is no good reason why these general principles should not govern throughout the entire administrative structure. They are not details; they are essential safeguards of fairness in the administrative process. Yet too many state statutes are altogether deficient in regard to them.*" (Italics added)

The Federal Act is directed broadly at the same objectives. It covers not only matters relating to adjudication which in our terminology would include decisions in particular cases in the exercise of statutory powers by administrative or judicial tribunals, but also rule-making powers and judicial review. In this chapter we propose to direct our discussion mainly to:

- (1) A comparison of the application of the Acts to powers of decision in particular cases with the application of the rules of natural justice to such powers under Ontario law;
- (2) The procedure required to be followed under the Acts in the exercise of such powers.

**APPLICATION OF ADMINISTRATIVE PROCEDURE ACTS**

The procedural provisions of the Model Act apply to a "contested case", defined as follows:

"(2) 'contested case' means a proceeding, including but not restricted to ratemaking, (price fixing), and licensing, in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency after an opportunity for hearing;"

"Agency" is defined in the Act as follows:

"(1) 'agency' means each state (board, commission, department, or officer), other than the legislature or the courts, authorized by law to make rules or to determine contested cases;"

The application of the Model Act depends upon whether there is an "agency" that is authorized to determine "contested cases", that is, the determination of rights "required by law to be determined after an opportunity for hearing". The two definitions interact and the main question of application turns on whether or not the agency is "required by law" to make determinations after a hearing. Where such a requirement is expressly imposed by statute, no difficulty arises. Where no such requirement is expressed, the question whether a particular agency is "required by law" to give a hearing, must be determined under the general law.

The procedural provisions of the Federal Act apply—

"Sec. 5. In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing. . . ."

—with certain enumerated exceptions.

"Agency" is defined to mean:

". . . each authority (whether or not within or subject to review by another agency) of the Government of the United States other than Congress, the courts or the governments of the possessions, Territories, or the District of Columbia. . . ."

Certain specified classes of agencies such as courts-martial and military commissions and particular agencies are excluded.

The position under the Federal Act is substantially similar to that under the Model Act as there must be an "agency"

and it must make adjudications "required by statute to be determined on the record after opportunity of an agency hearing". The Federal Act clearly applies where a statute expressly requires a hearing. It will also apply, however, in the absence of an express statutory requirement, as the Supreme Court of the United States has held that if a hearing is called for by the "due process" articles in the Constitution, the statute must be read as impliedly incorporating the constitutional requirement and therefore requiring a hearing.<sup>2</sup> Therefore, in the absence of express statutory provision, reference must be made to the general law to determine if a hearing is called for.

In the absence of express statutory provisions, the general law of the United States requiring agencies to hold hearings is similar to the law in Ontario requiring a tribunal to adhere to the rules of natural justice, but the basis for the development of the law has been different. In the United States there has been a constitutional foundation that has not existed in Ontario.

By the Fifth Amendment to the Constitution of the United States it is provided that "no person shall . . . be deprived of life, liberty or property without due process of law . . ." and by the Fourteenth Amendment it is provided that no state shall ". . . deprive any person of life, liberty or property without due process of law . . .". Similar provisions are contained in the constitutions of many of the states.

In 1908 the Supreme Court of the United States held, in relation to an assessment for paving a street:

"If it is enough that, under such circumstances, an opportunity is given to submit in writing all objections to and complaints of the tax to the board, then there was a hearing afforded in the case at bar. But we think that something more than that, even in proceedings for taxation, is required by due process of law . . . . [A] hearing in its very essence demands that he who is entitled to it shall have the right to support his allegations by argument however brief, and, if need be, by proof, however informal."<sup>3</sup>

<sup>2</sup>*Wong Yang Sung v. McGrath*, 339 U.S. 33.

<sup>3</sup>*Londoner v. Denver*, 210 U.S. 373.

The basic requirement for a hearing, apart from express statutory provision, is therefore found in the constitution which has given rise to the doctrine of "procedural due process". In addition, as Professor Kenneth Culp Davis states, the courts have amplified the requirements for a hearing by "interpretation of a statutory requirement . . . or by a kind of common law that often seems to operate in this area, unanchored to any constitutional or statutory provision".<sup>4</sup>

No single basic principle or exhaustive set of organized principles has been established which clearly sets out when a hearing is required. "No general formulation can be relied upon to determine whether or not, in a given situation, notice and hearing must precede administrative action."<sup>5</sup> Professor Davis draws a distinction between types of hearings, with which we shall deal shortly, and suggests that a trial-type of hearing should be held in certain cases, and a different type of hearing in other cases. He states that "Judicial opinions have not crystallized any basic principle to guide the determination of when the method of trial should be required."<sup>6</sup> With respect to the other types of hearings ". . . the law continues to be unclear and vague concerning minimum procedural requirements with respect to issues of legislative facts . . . ."<sup>7</sup>

Earlier, the courts in the United States appear to have attempted to apply terminological tests, based on a classification of the nature of the power similar to those which our courts have attempted to apply. "The one observation to which the courts most frequently pay lip service is that an agency can act legislatively but not judicially without a hearing, but that observation, as we shall see in the next section, is often unsatisfactory in various respects."<sup>8</sup>

"The suggestion is found in some of the older cases (and in some texts) that in determining the constitutional necessity of notice and hearing, an important factor is the classification of the agency's function as legislative or judicial. The sug-

<sup>4</sup>Davis, *Administrative Law Treatise*, s. 7.02.

<sup>5</sup>Cooper, *State Administrative Law*, 140.

<sup>6</sup>Davis, *Administrative Law Treatise*, s. 7.02.

<sup>7</sup>*Ibid.*, s. 7.06.

<sup>8</sup>*Ibid.*, s. 7.02.

gested rule is that a hearing is required if the agency is exercising judicial functions, and is not required if the agency is exercising legislative functions . . . . This supposed test cannot, however, be relied on as an actual guide to decision . . . . The labelling of a function as judicial or legislative was often the result of, rather than the basis of, the court's decision on the constitutional question."<sup>9</sup>

As in Ontario, the requirement of a hearing may apply to both administrative (in the sense of specific legislative powers) and judicial powers, and depends upon a variety of factors required to be considered, such as the importance of the question, the immediacy of the effect on the parties, the practicability of an efficient hearing, the strength of the tribunal, the possibility of adequate review, and other factors.

Although it would seem in the United States that the Constitution gives rise to a presumption that a hearing is required by "procedural due process", certain exceptions to the presumption for a hearing are recognized. For example, actual inspection by an expert may be considered to be superior to a hearing. Emergency or temporary action for protection of the public health or safety may render a hearing impractical before an action is taken. An initial hearing may be unnecessary if provision is made for a full review *de novo* by a court.

The presumption in favour of a hearing may be reduced by the application of the principle that a person must have a sufficient interest or right in a decision to be entitled to a hearing. Efforts to define a sufficient interest or right in the particular case have given rise to a doctrine of "privilege". By this doctrine "a party is not entitled to a hearing when only a 'privilege' is involved as distinguished from a 'right' or a 'legal right'". The expression "privilege" as used in this connection has been applied in the United States to benefits that may be conferred in the exercise of statutory powers such as, employment in the public service, exemption of conscientious objectors, the legal status of aliens to remain in the country, and the issuing of passports.

<sup>9</sup>Cooper, *State Administrative Law*, 142.

The concept of privilege has not been precisely defined by the courts and has not been systematically applied.<sup>10</sup>

Professor Davis has attempted to analyze the circumstances in which a hearing should be required in connection with the exercise of a statutory power. He points out that hearings are of two kinds:

- (1) Trial hearings, which are those in which issues of fact must be determined on evidence, together with argument as to the result that should flow from the facts as determined;
- (2) Hearings in which facts are not to be determined on evidence. These hearings may be limited simply to a hearing for argument.

For the purpose of determining whether a hearing should be required, Professor Davis divides facts into two categories: adjudicative facts and legislative facts. Adjudicative facts are facts about the parties and their activities, businesses and properties, relating to who did what, where, when, how and why, and with what motives or intent. Legislative facts are facts that do not concern the immediate parties in any particular way but are general facts which help the tribunal to decide questions of policy either administratively or in association with judicial determinations.<sup>11</sup>

The distinction between adjudicative and legislative facts may be illustrated by a hypothetical statute providing for the granting of licences for the operation of taxicabs, "to fit and proper persons", and providing that the number of licences shall not exceed a number to be fixed as "necessary for the public service". The facts bearing upon whether an applicant is a fit and proper person for a licence would be adjudicative facts. Facts bearing on the number to be fixed as the number of licences necessary for the public service would be legislative facts. In our terminology the distinction is between facts bearing on questions which must be determined objectively, and

<sup>10</sup>For a discussion of the development and application of the doctrine of privilege in the United States, see Davis, *Administrative Law Treatise*, ss. 7.11 to 7.19; for corresponding development in the United Kingdom see de Smith, *Judicial Review of Administrative Action*, 118-119, 122-132.

<sup>11</sup>Davis, *Administrative Law Treatise*, ss. 7.02, 15.03.

facts bearing on questions of policy. They may be called local or particular facts, contrasted with political or general facts.<sup>12</sup>

Professor Davis suggests that where adjudicative facts are in issue, the parties to be affected should invariably be afforded a hearing. Justice reinforced by "due process" calls for such a hearing. Further, a hearing is of great assistance to the tribunal as these types of facts are best known to the parties who can personally place them before it.

Professor Davis suggests that where the facts in issue are legislative facts, the requirement of a hearing is not as compelling. He concludes that "due process" does not require it. Frequently the parties may have no real contribution to make in the determination of these facts. However, it is recognized that justice and the appearance of justice may even in such instances require that the parties be afforded a hearing. The conclusion is that there should be hearings in the case of some legislative facts, and possibly not in the case of others. The hearing might not take the form of a trial but be merely a hearing for argument.<sup>13</sup>

The distinction between adjudicative and legislative facts made by Professor Davis furnishes greater insight into hearings, some general guidance as to the circumstances in which they should be held, and is of even more significance in connection with the doctrine of official notice to be discussed later. But it does not furnish a certain or systematic guide to determine when hearings should be held. The distinction is not an absolute one and frequently is merely one of degree, or even an impossible one to draw. Issues both of adjudicative facts and legislative facts may arise in the exercise of a single power. The doctrine that hearings may not be required where merely a "privilege" is granted, cuts across the distinction.

The foregoing discussion shows that uncertainties exist in the administrative law of the United States with respect to the application of the procedural requirements of Administrative Procedure Acts similar to those that exist with respect to

<sup>12</sup>H. W. R. Wade, *Towards Administrative Justice*, 119-20.

<sup>13</sup>Davis, *Administrative Law Treatise*, ss. 7.06 to 7.07.

the application of the rules of natural justice in Ontario. Probably the constitutional requirements of "procedural due process" raise a presumption that a hearing is required and a greater volume of case law gives more certainty in the United States. It is clear however that in the present state of the development of the law and the experience in the United States, no general exhaustive tests as to when a hearing is required have been devised.

The suggested solutions to the uncertainty are:

- (1) To set out in the statute whether a hearing is to be held or not;
- (2) To adopt a general definition similar to that in the Model Act, limited by specific exceptions of certain agencies; or
- (3) To list agencies to which the Act applies.

In the opinion of Cooper the best course is to adopt the general definition without qualification. In the State of Wisconsin, originally the agencies to which the Act applied were listed, but in 1955 the statute was amended to include merely the general definition. The reason given by the Committee considering the statute was that the listing of specific agencies "is unnecessary and might cast doubt on the inclusion of agencies which are included within the general terms of the definition but which are in a different class than those which are enumerated". Some twenty states have adopted a general definition without specific qualifications.<sup>14</sup>

## PROVISIONS OF ADMINISTRATIVE PROCEDURE ACTS RELATING TO PROCEDURE

Both the Model Act and the Federal Act reject the view that a comprehensive and exhaustive code of universal application applying to all agencies and dealing with all procedure can be formulated. The nature of administrative agencies requires considerable diversity in their procedure.<sup>15</sup> The Acts only purport to lay down certain fundamental requirements

<sup>14</sup>Cooper, *State Administrative Law*, 99.

<sup>15</sup>See Davis, *Administrative Law Treatise*, s. 8.02.



and contemplate that detailed procedural rules applying specifically to particular agencies will be made. The desirability of having full information as to the operations of an agency and its procedure readily available to the public is recognized. Provisions to authorize detailed rules and to require publicity to be given to them are therefore enacted before the main procedural provisions.

## ADOPTION AND PUBLICATION OF RULES

The Model Act provides:

"2. (a) In addition to other rule-making requirements imposed by law, each agency shall:

(1) adopt as a rule a description of its organization, stating the general course and method of its operations and the methods whereby the public may obtain information or make submissions or requests;

(2) adopt rules of practice setting forth the nature and requirements of all formal and informal procedures available, including a description of all forms and instructions used by the agency;

(3) make available for public inspection all rules and all other written statements of policy or interpretations formulated, adopted, or used by the agency in the discharge of its functions;

(4) make available for public inspection all final orders, decisions, and opinions.

(b) No agency rule, order, or decision is valid or effective against any person or party, nor may it be invoked by the agency for any purpose, until it has been made available for public inspection as herein required. This provision is not applicable in favor of any person or party who has actual knowledge thereof."

Provision is then made for filing and publication of the rules.<sup>16</sup>

The Federal Act contains provisions to the same effect.<sup>17</sup> In September of 1946 the statements and rules published by the federal agencies comprised a volume of nearly 1,000 pages of the Federal Register.

Apart from some such provision, an agency may be

<sup>16</sup>ss. 4 and 5.

<sup>17</sup>s. 3

authorized to make rules of procedure and issue informative statements but be under no obligation to do so. In addition to recommending the imposition of such an obligation, the majority report of the Federal Attorney General's Committee recommended the establishment of an Office of Federal Administrative Procedure, composed of:

“. . . the Director, a Justice of the United States Court of Appeals for the District of Columbia designated by its Chief Justice, and the Director of the Administrative Office of the United States Courts. . . .”

The minority report was to the same effect. Amongst the duties of the Office was to be the carrying on of a continuous supervision of practice and procedures of agencies “with a view to securing the just and efficient discharge” of their responsibilities. This recommendation is not embodied in either the Model Act or the Federal Act, although somewhat similar provisions are included in some State Acts. The objective of the recommendation was to ensure that the requirements of appropriate practice and procedures and of public information would be met by agencies.

### **PROCEDURE: INFORMAL SETTLEMENTS**

As pointed out by the Federal Attorney General's Committee, even where a formal procedure is provided most decisions made in the administrative process are made informally and by mutual consent. Figures given by the Committee in the report indicate that the percentage is well over 90%.<sup>18</sup> Further, in some instances no formal procedure is provided or needed. An actual inspection or test by an expert often affords a better ground for decision than a formal hearing. Informal decisions are unquestionably an essential device in disposing of a large number of claims, without a formal hearing. Such proceedings may take place before a formal hearing is held and may avoid hardship that would result from rejecting applications which needed only some amendment to make them satisfactory. Informal procedures are also useful in

<sup>18</sup>Attorney General's Committee Report, 35.

disposing of complaints where the parties wish to consent to formal order.

Where a statute requires that a decision can be made only after notice and a hearing, *prima facie* it would seem arguable that no decision may be made without these formal requirements being met. Express provision for informal settlements removes any doubts. Moreover, the informal procedures can be expedited if the informal decision can be made by subordinates of the agency exercising delegated power to make the decision. Such authority is frequently expressly conferred. In many cases where subdelegation is not expressly authorized, clear necessity for subdelegation to subordinates may be recognized by the courts and subdelegation held to be authorized by implication from the statute conferring the power. However, whether or not such authority will be implied may be a matter of uncertainty and the result may not be known until the courts have passed upon it.

Both the majority and minority reports of the Federal Attorney General's Committee recommended in their draft bills that authority be conferred on agencies to delegate to responsible members, officers, employees, committees or administrative boards power to dispose informally of requests, applications or complaints and cases, and govern matters of preliminary, initial, intermediate or ancillary procedure.<sup>19</sup>

The Model Act provides that "in a contested case all parties shall be afforded an opportunity for hearing after reasonable notice". These provisions might be interpreted to require a hearing after notice wherever rights are determined. The Model Act therefore provides:

"Unless precluded by law, informal disposition may be made of any contested case by stipulation, agreed settlement, consent order, or default."<sup>20</sup>

The Act does not expressly provide for delegation. That presumably is left to the general law.

Similarly, the Federal Act makes no express provision for delegation, although it does provide that nothing in the Act

<sup>19</sup>*Ibid.*, 193, 218.

<sup>20</sup>s. 9(d).

is to be construed to repeal delegations of authority as provided by law.<sup>21</sup> It then provides, in section 5, that

“ . . . in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing . . . the agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, arguments, offers of settlement or proposals of adjustment, where, time, the nature of the proceedings, and the public interest permit, and (2) to the extent that the parties are unable so to determine any controversy by consent, hearing and decision upon notice and in conformity with sections 7 and 8.”

The effect is to recognize and encourage informal settlements.

### PROCEDURE ON FORMAL DECISIONS

In this discussion we do not deal with many typical routine matters dealt with by procedural rules, such as forms and documents, the filing of papers, service and the like, and where the established law of Ontario is similar to that in the United States no lengthy discussion is undertaken.

The organization of administrative machinery in the United States, particularly in the federal sphere, differs quite widely from the organization of the executive branch of government in Ontario. The greater volume of business frequently requires that an important agency cannot personally hear all matters that are to be decided by it and procedures must be adopted which provide for different degrees of subdelegation. In Ontario extensive subdelegation is not as common. In this respect the position corresponds more closely to the organization of administrative machinery in the various States. We propose, therefore, to discuss first the general state law and the provisions of the revised Model Act, although reference will be made to the Federal Act where it differs or makes additional provisions.

We shall start with the consideration of the procedure followed where the deciding officer or officers actually hear and decide matters brought before them. Thereafter, we shall consider the use made of subordinates in the process of decision, and certain other general matters.

<sup>21</sup>s. 2(a).

## THE MODEL ACT: WHERE THE DECIDING OFFICERS CONDUCT THE HEARING

### Parties

The Model Act provides that "in a contested case all parties shall be afforded an opportunity for hearing after reasonable notice".<sup>22</sup> "Party" is defined to mean:

" . . . each person or agency named or admitted as a party, or properly seeking and entitled as a right to be admitted as a party."<sup>23</sup>

The general principle is that one whose rights will be directly affected by administrative action is an indispensable party to the administrative proceedings. This principle is substantially similar to that under Ontario law. In addition, however, greater freedom appears to be given in the United States for intervention in administrative proceedings by persons who are only indirectly or collaterally affected, either as parties for all purposes or for limited purposes. The importance of the definition of party relates not only to the right to be given notice but also to rights to judicial review and to appeal. The effect of the definition is that an intervener, if admitted for all purposes, becomes a party with these rights. In addition, any person who is entitled to be admitted, whether or not he has in fact been named or admitted, has the same rights.<sup>24</sup>

### Notice

The Model Act provides:

"(b) The notice shall include:

- (1) a statement of the time, place, and nature of the hearing;
  - (2) a statement of the legal authority and jurisdiction under which the hearing is to be held;
  - (3) a reference to the particular sections of the statutes and rules involved;
  - (4) a short and plain statement of the matters asserted.
- If the agency or other party is unable to state the matters

<sup>22</sup>s. 9(a).

<sup>23</sup>s. 1(5).

<sup>24</sup>Cooper, *State Administrative Law*, 128-30.

in detail at the time the notice is served, the initial notice may be limited to a statement of the issues involved. Thereafter upon application a more definite and detailed statement shall be furnished."<sup>25</sup>

The purpose of the detailed requirements in the notice is to ensure that the issues be clearly established from the outset and to avoid the need for pleadings.

### **Pleadings**

Although the Model Act provides that "opportunity shall be afforded all parties to respond . . ." no specific mention is made of pleadings.

### **Pre-Hearing Conferences**

The Model Act makes no specific reference to such conferences although, as already mentioned, unless precluded by law informal disposition may be made of any contested case by agreement.

The practice is to emphasize prehearing conferences as a method of defining the issues and leading to an agreed settlement.<sup>26</sup>

### **Hearings**

The Model Act provides:

"Opportunity shall be afforded all parties to respond and present evidence and argument on all issues involved."<sup>27</sup>

### **Counsel for the Parties**

There is no provision in the Model Act regarding the right to counsel or the right to appear in person as in the Federal Act.<sup>28</sup> The draftsman of the Model Act evidently considered that such rights were acknowledged by the general law of the state which adopts the principle stated in the United States Supreme Court in *Powell v. Alabama*,<sup>29</sup> that a hearing "has always included the right to the aid of counsel

<sup>25</sup>s. 9(b).

<sup>26</sup>Cooper, *State Administrative Law*, 316-21.

<sup>27</sup>s. 9(c).

<sup>28</sup>See p. 177 *infra*.

<sup>29</sup>287 U.S. 45, 68.

when desired" because "the right to be heard would be in many cases of little avail if it did not comprehend the right to be heard by counsel".<sup>30</sup>

### Counsel for Witness

The Model Act makes no provision for counsel for witnesses.<sup>31</sup> There may be some doubt as to the right of a witness in an administrative proceeding to counsel. The Supreme Court of the United States has held that a witness in a state investigation is not constitutionally entitled to counsel.<sup>32</sup>

### Public Hearings

No express provision is contained in the Model Act with respect to a requirement to hold public hearings. In general, hearings are held in public except where confidential facts are involved.<sup>33</sup>

### Subpoenas and their Enforcement

The Model Act contains no provision with respect to compelling the attendance of witnesses, or the production of documents. An agency possesses no inherent power to issue subpoenas and may do so only if authorized by statute. Where authority is given it is usually conferred by the statute creating the agency, although in a few states general statutes provide for agency subpoenas.

As a rule administrative subpoenas are enforced by means of an application to a trial court for an order directing the witness to respond to the subpoena. On this application the court may determine whether a subpoena has been properly issued "in accordance with law". It is suggested by Cooper that there are three tests:

- (1) Whether the inquiry falls within the authority conferred on the agency by law;
- (2) Whether the evidence of the witness or of the documents being produced is relevant to an authorized inquiry;

<sup>30</sup>Cooper, *State Administrative Law*, 328; see also Davis, *Administrative Law Treatise*, s. 8.10.

<sup>31</sup>For provisions of the Federal Act see p. 170 *infra*.

<sup>32</sup>*In Re Groban*, 352 U.S. 330; see also Cooper, *State Administrative Law*, 330.

<sup>33</sup>Davis, *Administrative Law Treatise*, s. 8.09; Cooper, *State Administrative Law*, 350.

- (3) Whether the requirement of the subpoena is reasonable and not unduly burdensome.

Documents required to be produced must be specified with reasonable certainty. All privileges concerning testimony or production apply unless excluded constitutionally or by statute. The courts lean against a "fishing expedition".

If the court finds that the subpoena is "in accordance with law" it will issue an order directing the witness to obey it. If the court order is not obeyed the witness may be committed for contempt.

There appears to be a deep-seated reluctance on the part of legislatures in the United States to grant to non-judicial officers, bent on prosecuting their own cases, power to imprison the witness who refuses to aid them in their task.<sup>34</sup> Several state courts have held to be unconstitutional statutes which purported to invest in an administrative agency the power to punish for contempt of a subpoena.

In some states a subpoena may be issued only at the instance of the agency; in other states a subpoena may be issued on the demand of the parties.

In California the notice commencing administrative proceedings is required to contain the following provision:

"You are entitled to the issuance of subpoenas to compel the attendance of witnesses and the production of books, documents, or other things, by applying to . . . (insert proper office of agency)."<sup>35</sup>

State courts have held that it is a deprivation of procedural due process to impose unreasonable conditions on the issuance of a subpoena.

In New York it was decided that the issuance of a subpoena during the progress of a cause at the request of a party is a matter of right.<sup>36</sup> An Ohio court held that a statute that did not provide means by which a party could compel the attendance of witnesses was invalid.<sup>37</sup>

<sup>34</sup>Cooper, *State Administrative Law*, 297.

<sup>35</sup>Cal. Govt. Code, Sec. 11, 509.

<sup>36</sup>*Coney Island Dairy Products Corporation v. Baldwin*, 243 App. Div. 178, 276 N.Y.S. 682 (3d) Dept., 1935.

<sup>37</sup>Cooper, *State Administrative Law*, 315, 316.



## Adjournments

No provision is made with respect to adjournments but in practice a failure to grant a reasonable request for adjournment might be considered to result in lack of due process.<sup>38</sup>

## Burden of Proof

The onus of proof is not dealt with specifically but the general state rule, that a party who is moving the affirmative of an issue bears the burden of proof, is imposed on agencies by the courts.<sup>39</sup>

## Cross-Examination

A party as defined by the Act.<sup>40</sup>

“. . . may conduct cross-examinations required for a full and true disclosure of the facts.”<sup>41</sup>

## Evidence

A basic rule of administrative law in the United States<sup>42</sup> is that the decision must be based on the record. The evidence that is admissible to form the record is therefore of great importance. Express provision is made:

“In contested cases:

(1) irrelevant, immaterial, or unduly repetitious evidence shall be excluded. The rules of evidence as applied in [non-jury] civil cases in the [District Courts of this State] shall be followed. When necessary to ascertain facts not reasonably susceptible of proof under those rules, evidence not admissible thereunder may be admitted (except where precluded by statute) if it is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs. Agencies shall give effect to the rules of privilege recognized by law . . . . Subject to these requirements, when a hearing will be expedited and the interests of the parties will not be prejudiced substantially, any part of the evidence may be received in written form;

<sup>38</sup>*Ibid.*, 366.

<sup>39</sup>*Ibid.*, 355.

<sup>40</sup>*Ibid.*, 128.

<sup>41</sup>s. 10(3).

<sup>42</sup>Cooper, *State Administrative Law*, 430.

- [ (2) documentary evidence may be received in the form of copies or excerpts, if the original is not readily available. Upon request, parties shall be given an opportunity to compare the copy with the original;]
- (4) notice may be taken of judicially cognizable facts.”<sup>43</sup>

The provision for the application of the rules of evidence in non-jury cases, with the exceptions set out, is to be contrasted with Section 7 (c) of the Federal Act which does not define any rules for the admissibility of evidence.<sup>44</sup>

### Official Notice

As we have seen<sup>45</sup> the fair procedure developed by the courts over the centuries requires that all matters in dispute before the courts be decided on the basis of facts proved in evidence adduced by the parties, so that the parties can have an opportunity to meet allegations against them. An exception to this general proposition is that facts of common knowledge may be taken into account in reaching a decision without evidence having been introduced to prove them. If the facts are truly of common knowledge, further proof is not required.

One of the considerations leading to the establishment of administrative tribunals or of specialized judicial tribunals outside the courts is to develop in the tribunals expert knowledge and experience in the fields in which they operate. This is particularly true in relation to scientific or technical matters. In the specialized field in which certain tribunals operate many scientific and technical facts can be accepted. In order to make the best use of such specialized tribunals, and for their efficient operation, it is desirable that they ought not to be restricted in the use of their expert knowledge and experience in reaching decisions.

Notwithstanding that specialized tribunals should use their expert knowledge and experience, justice demands that interested parties be permitted to correct any inaccuracy in the use of such knowledge and experience that may adversely affect them.

<sup>43</sup>s. 10 (1) (2) (4) in part.

<sup>44</sup>See p. 177 *infra*.

<sup>45</sup>See pp. 50 ff. *supra*.

The term "official notice" is the term applied in the United States where a specialized tribunal takes notice of scientific or technical facts within the experience, common knowledge or records of the tribunal. The extent to which official notice may be taken, and the conditions thereof, are among the most difficult problems in administrative law.

Professor Davis relies on the distinction he draws between adjudicative facts and legislative facts as affording a guide to the solution of this problem. Adjudicative facts are those to which the law is applied in the process of adjudication, while legislative facts are those which help the tribunal to determine the content of the law and policy and help it to exercise its judgment in determining what course of action to take. Legislative facts are of a general character and do not concern the immediate parties.<sup>46</sup>

Adjudicative facts must be supported by evidence, while legislative facts need not be. In finding legislative facts the tribunal of fact must necessarily rely to a very considerable extent on official notice.<sup>47</sup>

Professor Davis suggests that when facts are (1) adjudicative, (2) disputed, and (3) critical to the making of a decision, nothing less than their proof through the submission of evidence, subject to cross-examination and rebuttal, should normally suffice.<sup>48</sup>

Where the facts are legislative, the alternative courses are:

- (1) To require evidence;
- (2) To require that the parties be notified of those facts of which the tribunal intends to take official notice, either at the hearing or through a preliminary report;
- (3) To require that such facts be stated in the reasons for the decision of the tribunal;
- (4) To permit such facts to be used without mention in the record or in any report.

<sup>46</sup>Davis, *Administrative Law Treatise*, s. 15.03.

<sup>47</sup>See p. 156 *supra*.

<sup>48</sup>Davis, *Administrative Law Treatise*, s.15.10.

The first three courses afford varying degrees of procedural protection and are relevant to judicial review. The fourth course gives little protection to the individual but may be adopted where the facts are clearly indisputable and of merely general application, not closely related to a particular dispute. The basic principle is that all parties should have an opportunity to deal effectively with all material that may influence the decision of the facts, and not that every fact should be proved by evidence.

In the result, the matter of taking official notice of fact must be left to the judgment of the tribunal, which should take into account all of the circumstances of each case. The exercise of this judgment should be subject to judicial review.

The subject of official notice is dealt with in the Model Act as follows:

“(4) . . . In addition, notice may be taken of generally recognized technical or scientific facts within the agency’s specialized knowledge. Parties shall be notified either before or during the hearing, or by reference in preliminary reports or otherwise, of the material noticed, including any staff memoranda or data, and they shall be afforded an opportunity to contest the material so noticed. The agency’s experience, technical competence, and specialized knowledge may be utilized in the evaluation of the evidence.”<sup>49</sup>

### Consultation by Deciding Officers

Consultation between administrative officers is a normal part of the governmental process. But where a decision affecting the rights of parties is made by an agency, special factors require consideration.

It is a long-established rule of the courts that a judge should not consult with either party in the absence of the other party, or obtain facts or hear arguments in the absence of the parties. The obvious reason for this rule is that all parties to a dispute should have a full opportunity to answer the case against them.

In some cases the same agency is empowered to conduct the investigation and make the decision. It is considered a

<sup>49</sup>s. 10(4) in part.

principle of elementary justice that these functions should be separated so that the prosecutor is not also the judge.

The rule relevant to these matters as formulated in the Model Act is as follows:

“Unless required for the disposition of *ex parte* matters authorized by law, members or employees of an agency assigned to render a decision or to make findings of fact and conclusions of law in a contested case shall not communicate, directly or indirectly, in connection with any issue of fact, with any person or party, nor, in connection with any issue of law, with any party or his representative, except upon notice and opportunity for all parties to participate. An agency member

- (1) may communicate with other members of the agency, and
- (2) may have the aid and advice of one or more personal assistants.”<sup>50</sup>

The effect of this provision is to prohibit communication, as to the subject matter, with any person in the absence of the parties. There are three exceptions:

- (1) Legal advisers to the agency;
- (2) Members of the agency;
- (3) One or more personal assistants.

### Decisions on the Record

Decisions of the courts in the United States establish that the decision of an administrative agency must be based exclusively on matters that appear in the record of the agency. Extraneous matters of fact cannot be considered.

The Model Act reinforces this established doctrine:

“Findings of fact shall be based exclusively on the evidence and on matters officially noticed.”<sup>51</sup>

### Record

The contents of the record are significant not only because the decision must be based on matters in the record,

<sup>50</sup>s. 13.

<sup>51</sup>s. 9(g).

but also for the purposes of an effective judicial review. To minimize uncertainties as to what constitutes the record, the Model Act provides:

- “(e) The record in a contested case shall include:
- (1) all pleadings, motions, intermediate rulings;
  - (2) evidence received or considered;
  - (3) a statement of matters officially noticed;
  - (4) questions and offers of proof, objections, and rulings thereon;
  - (5) proposed findings and exceptions;
  - (6) any decision, opinion, or report by the officer presiding at the hearing;
  - (7) all staff memoranda or data submitted to the hearing officer or members of the agency in connection with their consideration of the case.
- (f) Oral proceedings or any part thereof shall be transcribed on request of any party.”<sup>52</sup>

The significant items as listed are (5), (6) and (7). Item (5) contemplates a situation in which there may be a hearing officer who reports to the deciding officers of an agency with proposed findings, or in which the parties submit proposed findings with respect to which an opportunity to take exception is given. Item (6) requires the report of a presiding officer at the hearing to be included in the record.<sup>53</sup> Item (7) is designed to meet a situation in which the case laid down is such that the members of the agency must act on summaries of the record made by others. When memoranda of such summaries are furnished to deciding officers they must be included in the record, so that the parties may have an opportunity of making representations to the agency or of presenting argument on judicial review as to the accuracy of the memoranda.<sup>54</sup>

### Evidence Required to Support a Finding

It is established law in the United States that there must be “substantial” evidence to support the finding of fact by an

<sup>52</sup>s. 9(e)(f).

<sup>53</sup>This may be contrasted with the law of England discussed in Chapter 13 *infra*.

<sup>54</sup>Cooper, *State Administrative Law*, 427.

agency.<sup>55</sup> This rule is of great importance in connection with judicial review. It also establishes a standard that the evidence must meet before a decision will be held to be valid.

There are two aspects of the "substantial" evidence rule.

The first is the "legal residuum" rule. The effect of this rule is that a finding will not be considered to be supported by substantial evidence unless at least a residuum of the evidence would be admissible under the ordinary rules of evidence in court. For example, if all of the supporting evidence were hearsay, the evidence would not be considered to be substantial.<sup>56</sup>

The second aspect of the "substantial evidence" rule requires that the evidence considered as a whole should form a substantial basis of fact from which the fact in issue can be reasonably inferred.

"It must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury."<sup>57</sup>

The soundness of the "legal residuum" rule is a subject of much discussion. The soundness of the "substantial evidence" rule has also been questioned on the ground that it is of uncertain application, particularly in proceedings on judicial review. As we shall discuss later, the provisions of the Model Act relating to judicial review modify the substantial evidence rule by conferring a power on the courts to quash a decision where it is "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record".<sup>58</sup>

## Decision

"A final decision or order adverse to a party in a contested case shall be in writing or stated in the record. A final decision shall include findings of fact and conclusions of law, separately stated. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings.

<sup>55</sup>*Ibid.*, 404, 724.

<sup>56</sup>*Ibid.*, 405.

<sup>57</sup>*N.L.R.B. v. Columbian Enameling & Stamping Co.*, 306 U.S. 292. See also Davis, *Administrative Law Treatise*, s. 29.02.

<sup>58</sup>s. 15(g) (5).

If, in accordance with agency rules, a party submitted proposed findings of fact, the decision shall include a ruling upon each proposed finding. Parties shall be notified either personally or by mail of any decision or order. Upon request a copy of the decision or order shall be delivered or mailed forthwith to each party and to his attorney of record."<sup>59</sup>

This provision requires that reasons be given for a decision, showing in detail the findings of fact and conclusions of law in explicit language. Specific rulings on submissions by the parties are required and the parties are to be notified of the decision. These requirements are significant as meeting the elementary principle of justice that a party should know the reasons for a decision against him. They are also basic to effective judicial review.<sup>60</sup>

### THE MODEL ACT: WHERE THE DECIDING OFFICER DOES NOT CONDUCT THE HEARING

So far in this chapter we have been considering the provisions of the Model Act as it applies to cases where the decision is made by an officer who personally conducts the hearing and makes the decision on the evidence and argument that he has heard, which form the record before him. The deciding officer may be an agency, or it may be a subordinate to whom a full power of decision has been validly delegated. We now propose to consider proceedings where a hearing is conducted by a subordinate, but the decision is made by his superiors on the basis of the record compiled by him.

The rules we have been discussing apply with equal force to such a hearing.

A just decision requires that the deciding officers be "members of the record", i.e., have a substantial understanding of the issues together with the matters of fact and law bearing on them so that they can effectively address their minds to the decision. Although this is the general rule it presents problems.<sup>61</sup> How is it to be established that the deciding officer has

<sup>59</sup>s. 12.

<sup>60</sup>See Subsection 5 of this Part, pp. 238 ff. *infra*.

<sup>61</sup>Cooper, *State Administrative Law*, 445 ff.



achieved a "substantial understanding" of the issues? The solution provided in the Model Act is:

"When in a contested case a majority of the officials of the agency who are to render the final decision have not heard the case or read the record, the decision, if adverse to a party to the proceedings other than the agency itself, shall not be made until a proposal for decision is served upon the parties, and an opportunity is afforded to each party adversely affected to file exceptions and present briefs and oral argument to the officials who are to render the decision. The proposal for decision shall contain a statement of the reasons therefor and of each issue of fact or law necessary to the proposed decision, prepared by the person who conducted the hearing or one who has read the record. The parties by written stipulation may waive compliance with this section."<sup>62</sup>

The object of this provision is to give the parties an opportunity to correct any factual errors and to present arguments against the proposed decision.

## THE MODEL ACT: LICENCES

Two basic problems arise in the granting or revocation of licences. First, what procedure should be allowed in obtaining a licence or its renewal, and what procedure should be followed where the licence is to be revoked or not renewed? A licence is defined in the Model Act to include "the whole or part of any agency permit, certificate, approval, registration, charter, or similar form of permission required by law, but it does not include a licence required solely for revenue purposes".<sup>63</sup> The Act contains the following provision:

"(a) When the grant, denial, or renewal of a license is required to be preceded by notice and opportunity for hearing, the provisions of this Act concerning contested cases apply.

(b) When a licensee has made timely and sufficient application for the renewal of a license or a new license with reference to any activity of a continuing nature, the existing license does not expire until the application has been finally determined by the agency, and, in case the application

<sup>62</sup>s. 11.

<sup>63</sup>s. 1 (3).

is denied or the terms of the new license limited, until the last day for seeking review of the agency order or a later date fixed by order of the reviewing court.

(c) No revocation, suspension, annulment, or withdrawal of any license is lawful unless, prior to the institution of agency proceedings, the agency gave notice by mail to the licensee of facts or conduct which warrant the intended action, and the licensee was given an opportunity to show compliance with all lawful requirements for the retention of the license. If the agency finds that public health, safety, or welfare imperatively requires emergency action, and incorporates a finding to that effect in its order, summary suspension of a license may be ordered pending proceedings for revocation or other action. These proceedings shall be promptly instituted and determined."<sup>64</sup>

### THE MODEL ACT: GENERAL

The Model Act contains no provision authorizing agencies to administer oaths. Such power must be conferred by the statute constituting the agency. There is no provision with respect to the disqualification of a member of an agency by reason of bias. This is left to the general laws established by the decisions from the courts, which correspond broadly to the law of Ontario. The mere interest that an agency may have in promoting the statutory scheme which it administers is not considered to be bias in law.

### THE FEDERAL ACT

The Federal Act contains provisions that differ from the Model Act or that are not contained in it. In general the federal administrative machinery concerns very large agencies which necessarily operate through the extensive use of hearing officers. More emphasis is therefore placed on this aspect by the Federal Act than by the Model Act. Provision is made for the appointment of "examiners" and their tenure of office. These provisions are aimed at establishing a corps of experts who will be independent and impartial. Under the Federal Act they are attached to each agency. The statute of the State

<sup>64</sup>s. 14. This provision will be further considered in Chapters 75 and 76 *infra* when we deal with the subject of licensing.

of California based on the Model Act contains similar provisions except that the hearing officers (with legal training and experience) constitute a separate corps under the Office of Administrative Procedure and are assigned by it to hearings for different agencies. A further feature is that hearing officers are the presiding officers at all agency hearings including self-governing professional tribunals, even though they do not participate in the decision.

The following provisions of the Federal Act are specially relevant for consideration.

### Counsel for Witnesses

A party is entitled to counsel and:

“Any person compelled to appear in person before any agency or representative thereof shall be accorded the right to be accompanied, represented and advised by counsel or, if permitted by the agency, by other qualified representative.”<sup>65</sup>

The question whether counsel either for a party or a subpoenaed witness need be a lawyer is left open:

“Nothing herein shall be construed either to grant or to deny to any person who is not a lawyer the right to appear for or represent others before any agency or in any agency proceeding.”<sup>66</sup>

### Burden of Proof

“Except as statutes otherwise provide, the proponent of a rule or order, (which includes any decision of the agency) shall have the burden of proof.”<sup>67</sup>

### Evidence

“Any oral or documentary evidence may be received but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial or unduly repetitious evidence. . . .”<sup>68</sup>

<sup>65</sup>s. 6 (a).

<sup>66</sup>*Ibid.*

<sup>67</sup>s. 7(c).

<sup>68</sup>*Ibid.*

**Official Notice**

"Where any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary."<sup>69</sup>

**Consultation: Separation of Functions of Prosecuting and Deciding Officers**

The Federal Act contains more stringent provisions than the Model Act, requiring a separation of investigating or prosecuting officers from deciding officers. No officer who decides or recommends a decision

"... shall consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate; nor shall such officer be responsible to or subject to the supervision or direction of any officer, employee or agent engaged in the performance of investigative or prosecuting functions for any agency. No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review . . . except as witness or counsel in public proceedings."<sup>70</sup>

This section does not apply in determining applications for initial licences, nor to proceedings involving the validity or application of rates, facilities or practices of public utilities or carriers; nor is it applicable in any manner to the agency or any member or members of the body comprising the agency.

**Subpoenas**

"Agency subpoenas authorized by law shall be issued to any party upon request and, as may be required by rules of procedure, upon a statement or showing of general relevance and reasonable scope of the evidence sought. Upon contest the court shall sustain any such subpoena or similar process or demand to the extent that it is found to be in accordance with law and, in any proceeding for enforcement, shall issue

<sup>69</sup>s. 7(d).

<sup>70</sup>s. 5(c).

an order requiring the appearance of the witness or the production of the evidence or data within a reasonable time under penalty of punishment for contempt in case of contumacious failure to comply."<sup>71</sup>

## Record

"The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, shall constitute the exclusive record for decision . . . and upon payment of lawfully prescribed costs, shall be made available to the parties."<sup>72</sup>

## Power of Hearing Officers

"Officers presiding at hearings shall have authority, subject to the published rules of the agency and within its powers, to (1) administer oaths and affirmations, (2) issue subpoenas authorized by law, (3) rule upon offers of proof and receive relevant evidence, (4) take or cause depositions to be taken whenever the ends of justice would be served thereby, (5) regulate the course of the hearing, (6) hold conferences for the settlement or simplification of the issues by consent of the parties, (7) dispose of procedural requests or similar matters, (8) make decisions or recommend decisions in conformity with section 8, and (9) take any other action authorized by agency rule consistent with this Act."<sup>73</sup>

## Hearing Officers' Functions

Detailed provisions relating to decisions where the hearing is conducted by a hearing officer other than the deciding officer are set out. In general the pattern established is as follows. The hearing officer is required to decide the case initially, or the agency may require the entire record to be certified to it for initial decision. Where the hearing officer makes the decision, unless application is made by way of appeal or review by the agency within a prescribed time, the decision becomes final. On appeal or review of an initial decision by a hearing officer, the agency may make the decision *de novo*. Where the agency undertakes to make the initial decision, the hearing officer forwarding the record is required

<sup>71</sup>s. 6(c).

<sup>72</sup>s. 7(d).

<sup>73</sup>s. 7(b).

to recommend a decision in the majority of cases.<sup>74</sup> Before a final decision is made the parties must be notified of the proposed findings of fact and law, and be given an opportunity to submit to the actual deciding officer representations and exceptions to the proposed decision.<sup>75</sup>

### Licences

The Federal Act contains a number of provisions relating to the initial granting of licences or to initial applications for benefits. In such cases the evidence may be in writing,<sup>76</sup> tentative decisions on which the parties may make representations may be issued,<sup>77</sup> the functions of investigation and decision need not be separated<sup>78</sup> and applications are to be disposed of with reasonable dispatch.<sup>79</sup>

Where a timely application has been made for renewal of a licence required with reference to an activity of a continuing nature, the current licence does not expire until the application has been finally determined by the agency.<sup>80</sup>

Except in cases of wilfulness, or those in which public health, interest or safety require otherwise, no agency proceedings for the revocation of a licence or other similar action may be instituted unless, prior to the institution of the proceedings, the facts or conduct upon which proceedings are to be based have been called to the attention of the licensee by the agency in writing and he has been accorded an opportunity to demonstrate or achieve compliance with all lawful requirements.<sup>81</sup>

### DECLARATORY DECISIONS

Like the Model Act the Federal Act authorizes agencies to make declaratory decisions. The purpose of such provisions is to permit an individual, before he takes action, to obtain a

<sup>74</sup>s. 8(a).

<sup>75</sup>s. 8(b).

<sup>76</sup>s. 7(c).

<sup>77</sup>s. 8(a).

<sup>78</sup>s. 5(c).

<sup>79</sup>s. 9(b).

<sup>80</sup>*Ibid.*

<sup>81</sup>*Ibid.*

ruling from the agency as to the consequences of taking that action. The respective provisions are:

“Each agency shall provide by rule for the filing and prompt disposition of petitions for declaratory rulings as to the applicability of any statutory provision or of any rule or order of the agency. Rulings disposing of petitions have the same status as agency decisions or orders in contested cases.”<sup>82</sup>

“The agency is authorized in its sound discretion, with like effect as in the case of other orders, to issue a declaratory order to terminate a controversy or remove uncertainty.”<sup>83</sup>

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<sup>82</sup>The Model Act, s. 8.

<sup>83</sup>The Federal Act, s. 5(d).

## CHAPTER 13

# Administrative Procedure in England

THE law of England relating to administrative procedure is the basis of the law of Ontario. It originated as a body of judge-developed rules of natural justice. It is helpful first to consider briefly the situation in the England prior to the report of the Donoughmore Committee,<sup>1</sup> and thereafter to discuss recommendations that were made by the Donoughmore Committee and later by the Franks Committee.<sup>2</sup>

### THE RULES OF NATURAL JUSTICE

At the time the Donoughmore Committee sat it appeared to be established that procedural rules of natural justice were presumed to apply to all judicial decisions or quasi-judicial decisions of the type defined by the Committee involving disputes between parties, and also in cases involving only the rights of a single individual.<sup>3</sup> The rules of natural justice required that where there was a dispute between two or more parties, whether to be decided on grounds of law or policy, the persons affected were entitled to notice and a hearing (not necessarily oral), and to make submissions. Two qualifications

<sup>1</sup>See pp. 106 ff.

<sup>2</sup>See pp. 111 ff.

<sup>3</sup>*Cooper v. Wandsworth Board of Works* (1863), 14 C.B. (N.S.) 180; *Board of Education v. Rice*, [1911] A.C. 179; *R. v. Electricity Commissioners*, [1924] 1 K.B. 171; *Minister of Health v. The King, Ex parte Yaffe*, [1931] A.C. 494.



were engrafted on these rules. These qualifications arose out of a decision of the House of Lords in *Local Government Board v. Arlidge*,<sup>4</sup> one of the milestones in English administrative law.

In that case the Local Government Board (in practice the powers were exercised by the President of the Board who was a Minister) was empowered to entertain an appeal against an order by a local authority to close a dwelling house. It was provided that the Board should not dispose of any appeal without first holding a public local inquiry. A householder appealed against a closing order. After holding an inquiry the Board dismissed the appeal.

The householder brought proceedings to quash the decision of the Board. His contentions were threefold:

- (1) The Report of the inspector holding the inquiry was not disclosed to him;
- (2) There was an invalid delegation of power as the decision had actually been made by an officer of the Board and not by the Board or the President;
- (3) The householder had had no opportunity of making representations to the officer who was actually making the decision.

The House of Lords held that the householder was not entitled to see the Report of the inspector nor to have an opportunity to make representations to the officer actually deciding the case. This decision qualified in two ways the rules of natural justice in the broad sense in which they had previously been understood. (1) The householder was not given the opportunity to know the material on which the decision was actually based, notwithstanding that the general concept of natural justice required that he have an opportunity to meet the case against him. (2) He was not given an opportunity to make representations to the person actually making the decision, although the right to make effective representations was considered fundamental.

<sup>4</sup>[1915] A.C. 120.

The reasoning underlying the decision appears to be as follows: (1) The householder had his "day in court" as he had a hearing before the inspector, and he was not thereafter entitled to make further representations, a procedure which would unduly impede administration. (2) The inspector's Report to the Minister was confidential and on the same footing as other reports by civil servants, which the Minister is not bound to reveal. (3) Such advice does not bind the Minister as the decision is his and he is responsible for it to Parliament. (4) He is entitled to free and frank advice. To require such advice to be revealed would destroy the confidential relationship between Ministers and civil servants and might well impair the value of the advice given.

The House of Lords also held that the delegation by the Board to a subordinate officer to make the decision was authorized, on the ground that when Parliament conferred power on the Board (which meant in practice the President of the Board, who is a Minister) it was aware of the usual practice of departments of government, and that Ministers in charge of large departments cannot personally attend to all matters within the ambit of the department.

### **PROCEDURAL RECOMMENDATIONS OF THE DONOUGHMORE COMMITTEE**

Except in two respects, the Donoughmore Committee did not make any detailed recommendations on procedure. In general it recommended greater emphasis on adherence to the rules of natural justice. Before a decision is given, whether it be judicial or quasi-judicial, each of the parties to a dispute should be given an opportunity to state his case (not necessarily orally), and also to know the case which he has to meet and to answer it if he can.<sup>5</sup>

Recommendations V and VI would have changed the law if adopted.

"V. Every Minister exercising a judicial or quasi-judicial function and every Ministerial Tribunal exercising a judicial function should give the decision in the form of a reasoned document."

<sup>5</sup>The Donoughmore Report, Recommendation No. IV, 116.

The Committee was of the opinion "that there are some cases when the refusal to give grounds for a decision may be plainly unfair; and that this may be so, even when the decision is final and no further proceedings are open to the disappointed party by way of appeal or otherwise". The Committee felt that where further proceedings are open to a disappointed party, "it is contrary to natural justice that the silence of the Minister or the Ministerial Tribunal should deprive him of his opportunity" to contest the decision.<sup>6</sup>

In the view of the Committee the reasons should state the conclusions as to the facts, and as to any points of law which have emerged.<sup>7</sup> The latter requirement is of importance in connection with judicial review, which we shall discuss later. The Committee also felt that "where the decision has been preceded by a statutory public inquiry, if the Minister modifies the recommendations or rejects the findings of fact in the inspector's report, it is especially important that his decision should draw attention to his reasons for so doing".<sup>8</sup>

"VI. In any case in which a statutory public inquiry is held in connection with the exercise of judicial or quasi-judicial functions by Ministers, the report made by the person holding the inquiry should be published; and only the most exceptional circumstances and the strongest reasons of public policy should be held to justify a departure from this rule."<sup>9</sup>

The Committee weighed the arguments for and against publication of inspectors' reports and concluded that it was desirable to dispel suspicion and reinforce public confidence by adherence to the principle of openness in the requirement of publication. It felt that to make the report public would not destroy the confidential relationship between Minister and inspector, who in any event should be acting impartially and fairly.<sup>10</sup>

In contrast with the development in the United States—where no distinction is made in the general procedure applicable to all tribunals without apparent regard for the nature

<sup>6</sup>*Ibid.*, 80.

<sup>7</sup>*Ibid.*, 100

<sup>8</sup>*Ibid.*, 100

<sup>9</sup>*Ibid.*, 116, 117.

<sup>10</sup>*Ibid.*, 106.

of the power conferred—the Committee drew a distinction between the case of a public local inquiry held preliminary to a judicial decision, and one preliminary to a quasi-judicial decision. In the case of inquiries relating to quasi-judicial decisions the Committee said, “it is not reasonable or practical that the inspectors should be entirely bound by the practice of the courts of law”. The Committee found nothing improper in the fact that:

“In certain cases, the Minister’s decision may be influenced not only by reasons of law or public policy which lie entirely outside the field of the public inquiry, but by information which reaches him through channels other than the inspector’s report. . . . But when it happens and the Minister feels it right to make a decision which is against the weight of evidence at the inquiry, we are of the opinion that he should, in communicating his reasoned decision, include a statement as to the nature of the extraneous evidence by which he has been influenced, and thereby remove at least one possible source of misunderstanding and suspicion.”<sup>11</sup>

The result is that on the inquiry the methods of natural justice should be pursued, but nevertheless the decision may be based on policy.

No specific legislation was passed to implement recommendations of the Committee with respect to the giving of reasons and the publication of the inspector’s report.

## JUDICIAL DEVELOPMENT OF THE LAW

In the years following the report of the Donoughmore Committee there was considerable development but not clarification of the relevant law through many decisions of the courts. The application of the rules of natural justice was restricted by the decisions in the *Nakkuda* case<sup>12</sup> in which it was held that these rules did not apply to the revocation of a licence to carry on a business on the ground that it was a privilege, and in the *Parker* case<sup>13</sup> in which it was held that the revocation of a licence to operate a taxi cab was a disciplinary matter.

<sup>11</sup>*Ibid.*, 106.

<sup>12</sup>*Nakkuda Ali v. Jayaratne*, [1951] A.C. 66.

<sup>13</sup>*R. v. Metro. Pol. Com’r., Ex parte Parker*, [1953] 1 W.L.R. 1150.

These decisions appeared to create exceptions to those cases where it is presumed that the rules of natural justice should be applied. Their correctness was questioned, if not disputed, in the House of Lords in *Ridge v. Baldwin*.<sup>14</sup> However, it cannot be said that this decision laid down any clear rules to guide those in the administration of government affairs so that they might know when they must apply the rules of natural justice. Lord Hodson said: "It may be that I must retreat to the last refuge of one confronted with as difficult a problem as this, namely, that each case depends on its own facts . . ."<sup>15</sup> This statement not only demonstrates the difficulty of the problem but the need for legislative action.

The requirements of natural justice have been applied to inquiries. The Court of Appeal decided that once an inquiry has been held with respect to a dispute between a local authority and objectors to a proposed scheme, the Minister could not consult either of the parties privately before making his decision.<sup>16</sup> Conversely, it has been decided that after a local inquiry has been held, a Minister who initiated the proposed action to whom the report is submitted is bound to consider the report, but is not otherwise required to act judicially.<sup>17</sup> The effect of the *Errington* decision was qualified by subsequent legislation expressly authorizing consultation by Ministers with local authorities in such cases.<sup>18</sup>

H. W. R. Wade<sup>19</sup> refers to what he terms a baffling feature of the later English decisions:

"... [T]hey approach the whole subject *de novo*, without any hint that administrative justice is a subject with which English judges have concerned themselves for more than a century, and on which they have handed down great traditions. To this accumulated law and wisdom a blind eye has suddenly been turned, as if there were no general rules for interpreting Parliament's directions, and as if every case could be decided in isolation. Not only has there been this

<sup>14</sup>[1964] A.C. 40.

<sup>15</sup>*Ibid.*, 133.

<sup>16</sup>*Errington v. Minister of Health*, [1935] 1 K.B. 249.

<sup>17</sup>*Franklin v. Minister of Town and Country Planning*, [1948] A.C. 87.

<sup>18</sup>Town and Country Planning Act (1947), 10 & 11 Geo. VI, c. 51, s. 10(3).

<sup>19</sup>H. W. R. Wade, *Administrative Law*.

attack of amnesia, there has also been a distinct judicial hostility to the doctrine that the duty to give a fair hearing lies upon 'everyone who decides anything'. Of course, there must be cases where the duty must be excluded by the nature of things; and in any case the 'hearing' need not be more elaborate than the case reasonably requires. But what sounder rule either of law or of public administration can there be than that drastic powers shall be exercised only with due consideration for those who may suffer? Government departments ought to support this principle as enthusiastically as lawyers, since it is bound to improve their technique of decision and to help them avoid the natural temptation to overlook the other side of the case."<sup>20</sup>

## THE FRANKS COMMITTEE

For convenience we repeat the Terms of Reference of the Franks Committee:

"To consider and make recommendations on:

- (a) The constitution and working of tribunals other than the ordinary courts of law, constituted under any Act of Parliament by a Minister of the Crown or for the purpose of a Minister's functions.
- (b) The working of such administrative procedures as include the holding of an inquiry or hearing by or on behalf of a Minister on an appeal or as the result of objections or representations, and in particular the procedure for the compulsory purchase of land."

As already indicated, the Committee confined its studies to existing Tribunals and to existing inquiries.

The Report deals separately with tribunals and inquiries.

### Tribunals

The Committee directed its studies mainly to tribunals required to decide in accordance with statutory rules or standards—tribunals exercising judicial powers in the sense we have used this term. Their decisions related to disputes between two or more individuals, or to claims of one individual to a statutory benefit; for example, unemployment insurance. The studies and Report of the Committee are relevant and

<sup>20</sup>*Ibid.*, 163. See also de Smith, *Judicial Review of Administrative Action*, 122 ff.

helpful in a consideration of similar judicial tribunals coming within our Terms of Reference.

The Committee considered that the governing procedure followed by these tribunals should as far as practicable meet three specific requirements.

- (1) It should be open.
- (2) It should be fair.
- (3) It should be impartial.

The Committee rejected proposals for a single code of procedure for all tribunals, or a small number of codes for certain classes of tribunals.<sup>21</sup> The view of the Committee was that there is a case for procedural differentiation and concluded that a detailed procedure for each type of tribunal, designed to meet its particular circumstances, was preferable. Submissions made for an Administrative Procedure Act, corresponding to the legislation in the United States, were not adopted.

The Committee recognized that the task of formulating rules of procedure for all tribunals was not a task which it felt properly equipped to discharge, and thought that it would be more useful if the Committee were to concentrate for the most part on the enunciation of general principles, in the light of which a council on tribunals could formulate detailed rules of procedure for various tribunals.<sup>22</sup>

The major recommendation of the Report was that a Council on Tribunals for England and Wales and one for Scotland should be established, to be responsible to the Lord Chancellor, and the Secretary of State for Scotland, respectively. It was recommended that the main function of the councils should be to advise on the constitution, organization and procedure of tribunals. The Report lays down guiding principles to be followed by the respective councils. At this point we propose to deal only with the procedural recommendations.<sup>23</sup>

<sup>21</sup>Franks Report, para. 63.

<sup>22</sup>*Ibid.*, para. 63.

<sup>23</sup>The Tribunals and Inquiries Act (1958), 6 & 7 Eliz. II, c. 66, is discussed at p. 200 *infra*.

Although the Committee's Report makes no express reference to procedural rules of natural justice, the Committee apparently considered that rules of procedure—which would meet their own requirements of openness, fairness and impartiality, and be established for each tribunal—would also meet the requirements of natural justice. It appears to have been contemplated that the rules of natural justice would continue to be a basic safeguard underlying the proposed express procedural rules. For example, notwithstanding that all formal requirements of express rules of procedure were adhered to, a court by applying the rule *audi alteram partem* might quash the decision if a tribunal arbitrarily and capriciously refused an adjournment, which refusal resulted in denying a party a fair hearing. The practical result is not dissimilar to the position in the United States, where an agency may operate under express rules of procedure but must also comply with constitutional requirements of procedural due process.

After general recommendations that detailed rules of procedure should be established for each tribunal, the Committee discussed many procedural matters, some of which would be covered by the procedural rules of natural justice, some of which were marginal instances where clarification was needed, and some of which were matters on which the Committee felt new rules should be made. It is convenient first to summarize the recommendations of the Committee as to procedure to be followed by tribunals of the first instance.<sup>24</sup> The recommendations are dealt with under three headings:

- (1) Procedure Before the Tribunal Hearing;
- (2) Procedure At the Tribunal Hearing;
- (3) Procedure After the Tribunal Hearing.

We combine existing legal rules with respect to procedure, for which no recommendations were made by the Committee, with their recommendations, so that a comprehensive view may be had of the procedure that the Committee thought should be followed.

<sup>24</sup>Appellate tribunals will be discussed in Chapter 15 *infra*.



## PROCEDURE BEFORE THE TRIBUNAL HEARING

*Information on Rights*

Provision should be made to ensure that every citizen is aware of and fully understands his right to apply to a tribunal.<sup>25</sup>

*Notice of Issues*

Every citizen should know well in advance of the hearing, the case he will have to meet. This should be set out in documentary form, showing the main points of the opposing case. It is not, however, suggested that the procedure should be formalized to the extent of requiring documents in the nature of legal pleadings.<sup>26</sup>

## PROCEDURE AT THE TRIBUNAL HEARING

*Attendance*

An adequate opportunity to attend the hearing or inspection should be given to the parties. Tribunals should have discretion to proceed with hearings and inspections in the absence of a party.

*Order of Proceedings*

An orderly procedure with an informal atmosphere should be followed, but there should be flexibility where it appears that the parties are unfamiliar with the distinction between evidence and argument.<sup>27</sup>

*Public Hearings*

All hearings should be in public except where:

- (1) Considerations of public security are involved;
- (2) Intimate financial or personal circumstances have to be disclosed;
- (3) The hearing is a preliminary investigation.

In such cases hearings should be in private.<sup>28</sup>

<sup>25</sup>Franks Report, para. 67; rec. (9).

<sup>26</sup>*Ibid.*, paras. 71, 72; rec. (10).

<sup>27</sup>*Ibid.*, para. 75; rec. (8).

<sup>28</sup>*Ibid.*, para. 81; rec. (13).

*Counsel*

Representation by counsel before certain tribunals was found to be banned by statute or rules of procedure. The Committee recommended that the right to legal representation before tribunals should be curtailed only in the most exceptional circumstances, where it is clear that the interests of applicants generally would be better served by a restriction.<sup>29</sup>

*Subpoenas*

The applicant should have the right to apply to a tribunal for a subpoena to secure attendance of witnesses or the production of documents. The issuance of the subpoena should be in the discretion of the tribunal and upon its authority.<sup>30</sup>

*Oath*

Tribunals should have the power to administer oaths. Those tribunals most akin to courts of law should always take evidence on oath. Others should not normally do so.<sup>31</sup>

*Examination and Cross-Examination*

Parties should be free to question witnesses directly, whether on examination in chief or on cross-examination, and should not be restricted to submitting their questions through the chairman.<sup>32</sup>

*Privilege*

Consideration should be given to the conferment of absolute privilege on witnesses before tribunals, at any rate on those giving evidence on oath.<sup>33</sup>

*Evidence*

Tribunals are so varied that it is impossible to lay down any general guidance on the treatment of evidence at hearings. In the more formal hearings before tribunals akin to

<sup>29</sup>*Ibid.*, para. 87; rec. (15).

<sup>30</sup>*Ibid.*, para. 92; rec. (18).

<sup>31</sup>*Ibid.*, para. 91; rec. (17).

<sup>32</sup>*Ibid.*, para. 93; rec. (19).

<sup>33</sup>*Ibid.*, para. 82; rec. (14).

courts of law, the Franks Committee saw no good reason why the same rules of evidence should not apply as do in the courts. In the majority of tribunals, however, the Committee thought that it would be a mistake to introduce strict rules of evidence. A legally qualified chairman (which the Committee recommended for the majority of tribunals) would enable the tribunal to attach proper weight to such matters as hearsay and written evidence.<sup>34</sup>

## PROCEDURE AFTER THE TRIBUNAL HEARING

### *Decision on the Record*

The Committee makes no specific mention of any requirement that the decision of a tribunal should be based solely on evidence and submissions put before it. In the second portion of its Report, dealing with decisions made following inquiries, the use of new factual evidence obtained after the closing of the inquiry is discussed.<sup>35</sup> The inference appears to be that the Committee felt that decisions of tribunals, as distinguished from decisions after inquiries, should be based on the record before the tribunals.

### *Tribunal Hearing and Deciding*

Delegation of powers of decision by a tribunal is not discussed by the Committee but it appears to be implied that a tribunal should itself hear the evidence, in contrast with the procedure later discussed with respect to inquiries in which the decision is made by persons other than the hearing officer.

### *Reasons*

The Committee recommended that tribunals should be required to give full reasons for their decisions. It was the view of the Committee that where reasons are required, the decisions would be improved for they would be more thoroughly thought out. Where there is an appeal from the decision, reasons are essential. They are also important in connection with judicial review.<sup>36</sup>

<sup>34</sup>*Ibid.*, para. 90.

<sup>35</sup>*Ibid.*, paras. 347-350.

<sup>36</sup>*Ibid.*, para. 98; rec. (22).

*Notification of Decision*

The Committee recommended that as soon as possible after the hearing a tribunal should send to the parties a written notice of its decision, which should set out the decision itself, the findings of fact by the tribunal, the reasons for the decision and the rights the parties have to appeal against the decision.<sup>37</sup>

In addition to the foregoing general recommendations applying to all tribunals, the Franks Committee made many recommendations relating to specific tribunals; it is not necessary to discuss these recommendations. The subjects of costs and legal aid were studied.

**Inquiries**

The term "inquiry", or "hearing" as used in this connection, applies to an inquiry or hearing required to be held before an administrative decision is made. Although this procedure is provided in a number of statutory fields, the major use of it is in relation to the compulsory acquisition or use of land. The Committee therefore confined its detailed study and recommendations to this area. The recommendations may be adapted to similar inquiries.

The typical standard procedure relating to the compulsory acquisition of land was described by the Committee as follows:

" . . . The acquiring authority must first advertise the compulsory purchase proposal in the local press and also serve notice on the owners, lessees and occupiers of the land. Any person may object to the proposal within 21 days of the notice or within such longer time as may be allowed. If an objection by an owner, lessee or occupier of the land (other than an objection relating solely to compensation) is not withdrawn, the Minister responsible for deciding whether or not to confirm the proposal to acquire must first provide a hearing before a person appointed by him. [Usually called an inspector.] This hearing may be private or public at the Minister's discretion. In practice a public local inquiry is held whenever several objections are lodged or the matter is one of wide public interest. The person holding the private

<sup>37</sup>*Ibid.*, paras. 99-100; rec. (23).

hearing or conducting the public inquiry submits a report to the Minister, who may then confirm the acquisition proposal (with or without modifications) or reject it. . . ."<sup>38</sup>

#### DISSATISFACTION WITH THE INQUIRY PROCEDURE

The main objection to the inquiry procedure was that proceedings start with much openness and regularity, resembling a court, and conclude with a decision taken in secret, in so far as the parties are concerned and on grounds that are not revealed. Part of this dissatisfaction cannot be met, because in the final analysis the decision is an administrative one to be made on grounds of policy, even though it may be commenced with judicial trappings. An inquiry may not provide all the necessary material for the administrative decision. Matters for opinion or facts requiring expert interpretation may arise.<sup>39</sup> The Committee accepted the essential nature of the procedure but made certain recommendations as to the application of their three principles of openness, fairness and impartiality. In effect, these recommendations are aimed at permitting a person, who will be affected by a proposal to acquire land by compulsory purchase, to participate effectively at the inquiry, and to provide him after the decision is made with an explanation of the reasons for it, whether it is in his favour or adverse to him.

The recommendations of the committee fall into the following main headings:

- (1) Procedure Antecedent to the Inquiry;
- (2) Procedure At the Inquiry;
- (3) Procedure After the Inquiry.

#### PROCEDURE ANTECEDENT TO THE INQUIRY

##### *Statement of Case*

The Committee recommended that an acquiring or planning authority should be required to make available in good time before the inquiry a written statement giving full particulars of its case and the reasons for the proposal. This

<sup>38</sup>*Ibid.*, para. 246.

<sup>39</sup>H. W. R. Wade, *Administrative Law*, 170 ff.

statement should accompany the statutory notice of the proposal and be given to the owners and others, and a copy should be delivered at once to any other person who lodges a written objection.<sup>40</sup> Objectors should be required to state briefly in writing the main ground of their objection, and any proposal for an alternative site.<sup>41</sup>

### *Statement of Ministerial Policy*

The deciding Minister should wherever possible make available before the inquiry a statement of the policy relevant to the particular case, but should be free to direct that the statement be wholly or partly excluded from the discussion at the inquiry.<sup>42</sup>

## PROCEDURE AT THE INQUIRY

### *Material in Support of the Proposal*

The initiating authority, whether a Minister or a local or other authority, should be required to explain its proposals fully and support them by oral evidence at the inquiry.<sup>43</sup> It is clear that the Committee did not intend that all matters of ministerial policy should be open to the inquiry, for the Minister could direct that any part of the policy was not to be open for discussion.<sup>44</sup>

### *Procedure in General*

A standard code or codes of procedure for inquiries should be formulated by the Council on Tribunals and made statutory; the procedure should be simple and inexpensive but orderly.<sup>45</sup>

### *Public Inquiry*

A public inquiry should be held in preference to a private hearing, unless for special reasons the Minister decides otherwise.<sup>46</sup>

<sup>40</sup>The Franks Report, paras. 280-284; rec. (67).

<sup>41</sup>*Ibid.*, paras. 285, 372.

<sup>42</sup>*Ibid.*, paras. 287, 288; rec. (68).

<sup>43</sup>*Ibid.*, para. 308; rec. (71).

<sup>44</sup>*Ibid.*, para. 309.

<sup>45</sup>*Ibid.*, paras. 310, 312; rec. (72).

<sup>46</sup>*Ibid.*, para. 311; rec. (73).

*Order of Proceeding*

The procedures should be opened by the initiating party.<sup>47</sup>

*Subpoenas*

The inspector (hearing officer) should have power to subpoena witnesses.<sup>48</sup>

*Oaths*

The inspector should have power to administer the oath.<sup>49</sup>

*Official Witnesses*

Officials subordinate to the deciding Minister should be required to give evidence if the inquiry is into a proposal initiated by that Minister, but not otherwise. Officials of other departments should, if required, give factual evidence in support of views by the department, if these views are referred to by a public authority in its explanatory written statement or in the evidence at the inquiry.<sup>50</sup>

*Examination and Cross-Examination*

The parties should be entitled to examine their own witnesses and cross-examine witnesses adverse in interest.<sup>51</sup>

*Evidence*

Strict rules of evidence should not be applied.<sup>52</sup>

## INSPECTORS' REPORTS

*Contents of Report*

Reports should be divided into two parts:

- (1) Summary of evidence, findings of fact and inferences of fact;
- (2) Reasoning from the facts, including the application of policy and (normally) recommendations.<sup>53</sup>

<sup>47</sup>*Ibid.*, paras. 312, 313; rec. (74).

<sup>48</sup>*Ibid.*

<sup>49</sup>*Ibid.*

<sup>50</sup>*Ibid.*, paras. 317-318; rec. (75).

<sup>51</sup>*Ibid.*, paras. 93 and 316.

<sup>52</sup>*Ibid.*, paras. 312, 313; rec. (74).

<sup>53</sup>*Ibid.*, para. 328; rec. (80).

*Corrections of Fact*

If any of the parties, i.e., the promoting authority or persons who have lodged written objections, desires an opportunity to propose corrections of findings of fact, the first part of the report should be sent as soon as possible (before it is tendered to the Minister) to the parties, who should be allowed fourteen days in which to propose corrections. The inspector should decide whether any of these proposed corrections should be accepted.<sup>54</sup>

## PROCEDURE AFTER THE INQUIRY

*The Decision*

The Franks Committee does not discuss the two important points decided in the *Arlidge* case:<sup>55</sup>

- (1) A Minister may delegate the power to make a decision to subordinate officials;
- (2) Parties are not entitled to make representations directly to the deciding officer.

There has been no change in this respect. The decision may emerge as a decision of the Minister himself, even though he may not in fact have taken any part in the immediate process.<sup>56</sup>

As pointed out by Davis,<sup>57</sup> a delegation of the power of decision may involve a very slight exercise of discretion by the subordinates. The policy of a department laid down by the Minister may be expressly defined in many areas or clearly covered by well-understood directions. The senior officials of the department who make the decisions apply this settled policy to particular cases. When novel situations not covered by settled policy principles arise, they are drawn to the Minister's attention for direction. The justification for this procedure is necessity. The Minister cannot personally make all decisions required in a large department, but he must take the responsibility for them.

The failure to accord an opportunity of directly making representation to the deciding officer reflects the fact that the

<sup>54</sup>*Ibid.*, paras. 345, 346; rec. (82).

<sup>55</sup>See pp. 183 ff. *supra*.

<sup>56</sup>H. W. R. Wade, *Towards Administrative Justice*, 81.

<sup>57</sup>Davis, *Administrative Law Treatise*, s. 9.01.



inquiry procedure, although partially judicial in appearance, is in the final analysis administrative. The issues are not "self-contained", as they are in a law suit.

"The fact that has to be faced is that in these cases there is no reason why the final decision should be based on evidence given at the inquiry at all—and often it will not be. . . . [I]t is . . . fundamental that political decisions should be taken by a minister responsible to Parliament, and that the political responsibility should rest entirely upon him and not upon his officials or his advisors. Furthermore, the place where policy should be explained is Parliament, where the responsibility lies. Nothing, therefore, can prevent the real responsibility lying outside the forum of a public inquiry, whereas it must lie inside the forum of a court of law."<sup>58</sup>

### *New Facts*

Although the Franks Committee apparently did not feel that representations should be permitted to be made directly to the deciding officer, it recommended that where new factual evidence, including expert opinions but not advice, is obtained by him after the inquiry and before the decision, the new facts should be submitted to the parties concerned for their observations.

### *Substantial Understanding of Case by Deciding Officer*

The Committee does not advert to this problem and makes no recommendation with respect to it. The traditional position that a Minister responsible for the administration in his department would insist on such understanding on the part of the deciding officer, is relied upon. The present departmental procedure is apparently accepted by the public as the normal procedure under the principle of ministerial responsibility in the Parliamentary system.<sup>59</sup>

### *Notification of Decision*

The Minister's letter of decision should set out in full his findings and inferences of fact, together with the reasons for his decision. If the policy set out in his statement of policy,

<sup>58</sup>H. W. R. Wade, *Administrative Law*, 172, 173.

<sup>59</sup>H. W. R. Wade, *Towards Administrative Justice*, 79-80.

furnished at the beginning of the proceedings, has changed after the inquiry, the letter should explain the change and its relation to the decision.<sup>60</sup>

### *Report to be Disclosed*

The complete text of the inspector's report should accompany the Minister's decision and be available on request both centrally and locally.<sup>61</sup>

## TRIBUNALS AND INQUIRIES ACT, 1958<sup>62</sup>

The general recommendations with respect to procedure for tribunals were in the main accepted, with the exception of the recommendation with regard to legal aid which was rejected. General recommendations with respect to inquiry procedure were accepted, with certain exceptions and reservations. The recommendation that the Minister should wherever possible make available before the inquiry a statement of the policy relevant to the particular case, was not adopted. The matter of whether there should be pre-publication of the factual part of the inspector's report, as recommended by the Committee, was one of the matters reserved for further consideration.

As a result of the Report, Parliament enacted the Tribunals and Inquiries Act, 1958. The Act provided for the constitution and functions of a Council on Tribunals, consisting of not more than fifteen nor less than ten members, and for a Scottish Committee of the Council, consisting of two or three members of the Council and either three or four other persons. For our purposes it is unnecessary to consider the functions of the Scottish Committee separately.

The principal functions of the Council as laid down in the Act are:

"1. (a) to keep under review the constitution and working of the tribunals specified in the First Schedule to this Act (being

<sup>60</sup>The Franks Report, para. 352; rec. (84).

<sup>61</sup>*Ibid.*, para. 344; rec. (81). Other recommendations, specifically referring to the procedure relating to the compulsory purchase of land, will be dealt with in Chapter 66 *infra*.

<sup>62</sup>6 & 7 Eliz. II, c. 66.

the tribunals constituted under or for the purposes of the statutory provisions specified in that Schedule), and, from time to time, to report on their constitution and working;

(b) to consider and report on such particular matters as may be referred to the Council under this Act with respect to tribunals other than the ordinary courts of law, whether or not specified in the first Schedule to this Act, or any such tribunal;

(c) to consider and report on such matters as may be referred as aforesaid, or as the Council may determine to be of special importance, with respect to administrative procedures involving, or which may involve, the holding by or on behalf of a Minister of a statutory inquiry, or any such procedure.”<sup>63</sup>

Although the Franks Committee had recommended that the Council be given power to “formulate” rules of procedure in the light of the general principles enunciated in the Report,<sup>64</sup> the Act does not go further than to provide that, “No power of a Minister or of the Lord President of the Court of Session to make, approve, confirm or concur in procedural rules for any such tribunal as is specified in the First Schedule of this Act shall be exercisable except after consultation with the Council.”<sup>65</sup>

The Council must be consulted before any exemption is given from the requirement to give reasons, as set out in the Act.<sup>66</sup> Views were expressed to us that the Council should have greater authority with respect to rule-making. This we shall discuss later.

The Lord Chancellor and the Secretary of State may by order extend the application of the statute to tribunals, in addition to those that are listed in the First Schedule.

Only one major procedural matter is expressly dealt with in the statute. When a tribunal or a Minister after an inquiry gives a decision, a statement, either written or oral of the reasons for the decision, shall be furnished if requested. To this there are two exceptions: Reasons may be refused on grounds of national security, and to any person not primarily

<sup>63</sup>Tribunals and Inquiries Act (1958), 6 & 7 Eliz. II, c. 66, s. 1.

<sup>64</sup>The Franks Report, paras. 63, 64; rec. (8).

<sup>65</sup>Tribunals and Inquiries Act, s. 8(1).

<sup>66</sup>*Ibid.*, s. 12.

concerned in the matter if the giving of reasons would be contrary to the interests of any person primarily concerned.<sup>67</sup>

After consultation with the Council the Lord Chancellor and Secretary of State may relieve against the obligation to give reasons where the circumstances are such that the giving of reasons would be unnecessary or impracticable.<sup>68</sup> As already mentioned, tribunals' or Ministers' decisions following inquiries may be exempted after consultation with the Council. This has occurred in only one instance.

The Act applies to thirty-two types of tribunals in England and twenty in Scotland by reason of their being listed in the Schedule or added by subsequent order. These include more than two thousand individual tribunals. During 1965 128,453 decisions were made by tribunals in England and Wales, to which the Act applies, and 919 by Scottish tribunals.<sup>69</sup> The Act only applies to those inquiries which are required by statute to be held. It does not apply to inquiries in which a Minister has a discretion as to whether he will direct an inquiry, or to one that he voluntarily directs to be held. There are many statutory powers that do not come within the classes of tribunals and inquiries covered by the Act, either because the decision is not required to be made by one of the tribunals to which the Act is made applicable, or because the Minister is not under a duty to direct an inquiry to be held. For example, the Act would not apply to a power to grant or refuse a licence, for rules of natural justice may or may not apply to the exercise of such powers. The relevant law remains unchanged by the Tribunals and Inquiries Act in this respect.

## OPERATION OF THE COUNCIL ON TRIBUNALS

The Council on Tribunals took office on December 3, 1958. The Chairman is the only member who receives remuneration. The other members receive only out-of-pocket expenses incurred while on the business of the Council. Meetings are held approximately once a month. The Council may

<sup>67</sup>*Ibid.*, s. 12.

<sup>68</sup>*Ibid.*, s. 12(4).

<sup>69</sup>Annual Report, Council on Tribunals (1965).

appoint committees from time to time to consider particular matters. The permanent Secretariat consists of approximately six persons. The Secretariat receives documents, conducts interviews and through correspondence brings matters to the attention of members of the Council in preparation for its meetings. It is expected that as the work of the Council increases, the Secretariat will be expanded and will require the services of expert draftsmen.

## **Tribunals**

The functions of the Council in relation to tribunals fall into three main categories:

- (1) Visits to Tribunals;
- (2) Procedure of Tribunals;
- (3) Consideration of Complaints.

### *Visits to Tribunals*

In order to keep the constitution and working of tribunals under review, the Council has adopted a policy of sending one or more of its members to sit in on the hearings of various individual tribunals. We have been advised that the Council finds such visits instructive and useful. Helpful recommendations, both of general application and of application to particular tribunals, have been made. The Council is concerned with the provision of suitable accommodation for the tribunals and their location in areas where they will best serve the public.

### *Procedure of Tribunals*

When consulted by a rule-making authority, the Council has endeavoured with some exceptions, which we shall discuss presently, to apply the recommendations of the Franks Committee. In the year 1959, it was consulted with respect to fifteen sets of procedural rules or regulations. Some were amendments to existing rules; others initiated new rules. The Annual Reports of the Council, 1960-1965, show that it had been consulted with respect to forty-six additional sets of rules or amendments. The Council reported in 1964 that most of the active tribunals under its supervision now have statutory

rules of procedure although there are still some important exceptions.

In addition, the Council has made recommendations as to many procedural matters dealt with by administrative practice without being incorporated in legal rules or regulations with statutory effect.

The Council places emphasis on the necessity for adequate publicity. It has stressed that the members of the public should be informed not only of the tribunals that are available to them but as far as possible of the procedure followed by these tribunals. To this end departmental circulars are frequently issued on the recommendation of the Council.

Certain recommendations of the Franks Committee have been reconsidered by the Council. It has concluded that it is undesirable to confer on persons participating in proceedings before tribunals an absolute privilege from liability for defamation, as recommended by the Franks Committee.<sup>70</sup>

The Council came to this conclusion because of the informal character of the proceedings of tribunals as compared with the courts. It felt that there was "an obvious danger that extension of privilege might operate as an invitation to people to make malicious statements. It is by no means so easy for tribunals to control witnesses as it is for judges and courts of law who can prevent absolute privilege being abused."

It was felt that the recommendations of the Franks Committee to confer power on tribunals to subpoena witnesses and to give evidence and produce documents was unnecessary and undesirable because adequate power of subpoena was already conferred with respect to tribunals under general rules and orders of the High Court.<sup>71</sup> The 1963 Report of the Council indicates that the former conclusion requires reconsideration.<sup>72</sup>

### *Consideration of Complaints*

The Council receives complaints with respect to hearings by tribunals. Those that come within its purview are investigated by interviewing the complainant, or by other suitable

<sup>70</sup>Annual Report, Council on Tribunals (1960), 14.

<sup>71</sup>*Ibid.*, paras. 76-82.

<sup>72</sup>Annual Report, Council on Tribunals (1963), para. 88.

methods, and where necessary the matter is taken up with the appropriate department.<sup>73</sup> The Council has no power to rectify an error but it may advise or make recommendations.

### Inquiries

At first the Council was primarily concerned with the operation of tribunals but its work in relation to inquiries has tended to increase. This is probably due to the fact that the inquiry procedure is a compromise between judicial and administrative proceedings and inevitably there are frequent misunderstandings. The work of the Council as it relates to inquiries falls into the same three main categories as that relating to tribunals.

#### *Visits*

As with tribunals, a member or members of the Council periodically visit different individual inquiries and recommendations are made as a result of their visits.

#### *Procedure on Inquiries*

The Franks Committee recommended the establishment of a code or codes of procedure for the holding of inquiries. It is probable that a number of codes will be necessary. Rules to govern inquiries that precede compulsory purchase orders (known as expropriation procedure in Ontario), or decisions on planning appeals, were promulgated for England and Wales in 1962 and for Scotland in 1964. Other codes of rules are under consideration. In general the rules are directed towards implementing the recommendations of the Franks Committee, with such variations as are warranted by a closer study.<sup>74</sup>

#### *Complaints*

The number of complaints with respect to inquiries has tended to increase. They are investigated and if in the opinion of the Council it is desirable to do so, appropriate recommendations are made.

<sup>73</sup>Annual Report, Council on Tribunals (1959), para. 25; Annual Report, Council on Tribunals (1963), para. 35.

<sup>74</sup>See p. 200 *supra* for a discussion of the recommendations of the Committee relating to inquiries which were not adopted.

## CHAPTER 14

# Procedural Safeguards for the Exercise of Statutory Powers in Ontario

IT is well recognized that procedural safeguards are essential to insure the fair exercise of statutory powers. In all common law countries and on the continent of Europe, regardless of the legal system, some safeguards are provided. In the development of the rules of natural justice in Ontario this need has been judicially recognized.<sup>1</sup>

Professor Davis and three distinguished judges of the Supreme Court of the United States quoted by him testify with great clarity to a fact that is often obscure to legislators and more often neglected by administrators—that the fundamental protection to the rights of the individual is not so much in the substantive law as in the procedure by which it is administered. He states:

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

<sup>1</sup>See p. 137 *supra*.



essence of liberty.' Mr. Justice Frankfurter: 'The history of liberty has largely been the history of procedural safeguards.'"<sup>2</sup>

It must be recognized, however, that not all governmental decisions that may affect the rights of individuals can be controlled by defined procedure. In certain cases it is essential to the purpose of the statute that prompt action be taken without any antecedent procedural requirements, e.g., the seizure and destruction of food unfit for human consumption,<sup>3</sup> orders to take safety measures such as the directions of an inspector under the Factory, Shop and Office Building Act,<sup>4</sup> or the exercise of emergency powers, e.g., under the Energy Act.<sup>5</sup> In such cases the imposition of normal procedural rules would frustrate immediate necessary governmental action and destroy the protection given to the public by the statute. In other cases, insistence on a procedure that is too elaborate and too formal may unduly impede or delay efficient administration, e.g., the disposal of claims under The Workmen's Compensation Act requires an expeditious procedure if an award of compensation is to be immediately useful to a disabled workman.

The basic problem in establishing a just procedure for the exercise of a statutory power is the reconciliation of procedural justice with effective government. The conflict between these two demands is often less real than it is made to appear.

As we have seen, judicial attempts to reconcile good procedure and efficient government through the application of the rules of natural justice have not proved entirely satisfactory under the present law.<sup>6</sup>

Two major uncertainties are always present:

(1) Do the rules of natural justice apply to the exercise of the power in question?

<sup>2</sup>Davis, *Administrative Law Treatise*, s. 7.20.

<sup>3</sup>The Public Health Act, R.S.O. 1960, c. 321, s. 105, as amended by Ont. 1966, c. 125, s. 20.

<sup>4</sup>R.S.O. 1960, c. 130, s. 53.

<sup>5</sup>Ont. 1964, c. 27, s. 3.

<sup>6</sup>See pp. 138 ff. *supra*.

(2) If they do, what procedural requirements do these rules dictate?

Three types of powers have been judicially recognized:

(1) Judicial powers to be exercised after a hearing in accordance with relatively comprehensive and uniform procedural rules;

(2) Administrative powers to be exercised after a hearing in accordance with procedural rules, which may differ from those required for the exercise of judicial powers and may vary according to the type of administrative power exercised;

(3) Administrative powers which may be exercised without a hearing and without any procedural requirements.

No satisfactory general criteria have been laid down to distinguish between these three classes of powers or the procedural requirements of the first two. Tribunals in the second class, which exercise administrative powers only after a hearing, fall into two categories:

(1) Tribunals where the hearing is conducted by a person who is given the power of decision;

(2) Tribunals where the hearing is conducted by a person who makes a report and the decision is made by another person on the basis of the report.

The second category corresponds with the inquiry system utilized in the United Kingdom which we have recommended for adoption in appropriate cases in Ontario.<sup>7</sup>

### **ALTERNATIVE PROCEDURAL SAFEGUARDS FOR THE EXERCISE OF STATUTORY POWERS**

In seeking to attain greater procedural certainty concerning the exercise of powers of decision requiring fair procedure, six possible courses require consideration:

(1) To leave the development of the law relating to the procedure to the courts;

<sup>7</sup>See pp. 129 ff. *supra*.

- (2) To enact detailed rules in each statute conferring a power;
- (3) To enact general legislation establishing uniform detailed rules applying to all powers;
- (4) To give in each statute conferring a power authority to make procedural rules for the exercise of the power;
- (5) To enact general legislation establishing uniform minimum rules of procedure for the exercise of powers;
- (6) To adopt certain of the foregoing alternatives in whole or in part with respect to certain powers or classes of powers.

Authority to make regulations or rules establishing procedure may be conferred in different ways. The authority may be conferred on the Lieutenant Governor in Council, on the responsible minister, on the tribunal itself, or on a body especially constituted as a rule-making body.

The alternatives we have set out may now be considered.

#### **(1) To Leave the Development of the Law Relating to the Procedure to the Courts**

The experience in Ontario and in other jurisdictions demonstrates that although the development of rules through judicial decisions may tend to decrease uncertainties and reconcile procedural justice and effective government to a certain extent, that development will not be systematic and it will inevitably be a slow process attended by much uncertainty during the process. The courts have not been consistent in determining the application of the rules of natural justice and there will always be areas requiring fair procedure to which the rules of natural justice do not apply.<sup>8</sup>

#### **(2) To Enact Detailed Rules in Each Statute Conferring a Power**

This course would eliminate uncertainties with respect to each statute in which rules were enacted and the rules could be appropriately made to accord with the nature of the power. This course has obvious disadvantages. The enactment of such legislation would occupy the time of the Legislature with

<sup>8</sup>See p. 138 *supra*.

a minutiae of detail that could better be worked out in consultation with those administering the statute. In addition, detailed procedural rules enacted in a statute are inflexible. Unforeseen defects requiring correction and amendment would arise, clogging and delaying the administration of the Act and imposing an unwarranted strain on the legislative time table. This course is neither practical nor desirable.

**(3) To Enact General Legislation Establishing Uniform Detailed Rules Applying to all Powers**

Experience in all jurisdictions shows that the diversity in the character, nature and purpose of statutory powers is such that a uniform statute cannot be drawn so as to cover in detail the procedure to be followed in the exercise of all powers which would be consistent with effective governmental action.<sup>9</sup> For example, we have concluded that the exercise of judicial powers should be based exclusively on evidence in the record, but that there should be no such requirements with respect to the exercise of administrative powers. Even within these two respective classes of powers—judicial and administrative—variation in procedure is required to meet the purposes for which the powers are conferred. We, therefore, reject this course.

**(4) To Give in Each Statute Conferring a Power Authority to Make Procedural Rules for the Exercise of the Power**

Regulations passed under the authority of each statute conferring specific powers for which fair procedure is required, would remove much uncertainty and tend to reconcile justice with governmental efficiency. Both of these factors could be weighed specifically in the preparation of the rules applicable to each power. In addition, reasonable flexibility would be maintained. This is the course that has been adopted, in part, in the United Kingdom.

**(5) To Enact General Legislation Establishing Uniform Minimum Rules of Procedure for the Exercise of Powers**

Minimum rules would establish generally recognized fundamental procedural requirements applying to the exer-

<sup>9</sup>Davis, *Administrative Law Treatise*, s. 8.02.

cise of any statutory power where a fair procedure is required. The minimum standards would be supplemented for each tribunal or class of tribunals by detailed rules made by regulation. Adoption of this course would eliminate many uncertainties as to the application and content of minimum requirements in a just procedure. This is the course that has been followed in the United States. We consider it further in what follows.

**(6) To Adopt Certain of the Foregoing Alternatives in Whole or in Part With Respect to Certain Powers or Classes of Powers**

Our survey of the statutes of Ontario shows that an extensive reappraisal and revision of statutes now conferring powers should be undertaken. The principles discussed in Subsection 1 and Subsection 2 of this Section relating to the nature and scope of powers and the structure and organization of tribunals should be applied. Judicial powers should replace many existing administrative powers and many tribunals should be reconstituted. The inquiry system which we have recommended should be introduced where appropriate.

In view of the extensive changes that should be made we have considered whether it is possible for us to do more concerning procedure than to confine our recommendations to matters of general principle, without recommending specific legislation. If that course were followed the development of procedural requirements in accordance with these principles would be left to the draftsman and the courts. We have concluded that this would not be a satisfactory course.

Minimum and basic procedural standards enacted by legislation have distinct value. They are in the nature of a procedural Bill of Rights, controlling draftsmen and guiding administrators and the courts. The time has come when the Legislature should declare in clear terms those minimum safeguards to which every citizen is entitled in the administrative processes of government. We therefore recommend the enactment of a Statutory Powers Procedure Act with provision for a Statutory Powers Rules Committee.

**A STATUTORY POWERS PROCEDURE ACT**

No attempt should be made to establish comprehensive procedural standards applicable to both judicial and administrative tribunals. These classes of tribunals in their nature require different detailed procedures. Nevertheless, there are certain fundamental and basic rights that are common to both procedures which require definite legislative protection. The recommendations we make for adoption in Ontario are based on the combined experience in the United States of America and in the United Kingdom. In the legislation governing procedures of agencies in the United States, no distinction is drawn between judicial tribunals and administrative tribunals. The great independent agencies of the Federal Government, upon which many state agencies are modelled, may exercise either judicial or administrative powers, or they may exercise both. One uniform minimum code of procedure is enacted to apply to all agencies, regardless of the type of power they exercise. In the United Kingdom, the tribunals exercising judicial powers and those exercising administrative powers are distinguished from one another. Two quite different principles apply to them: the independence of the judiciary and the political responsibility of ministers. Because of this distinction the Franks Committee did not recommend for the United Kingdom a uniform code applying to all tribunals, but did recommend that the Council on Tribunals should draft individual codes of procedure for each particular type of tribunal.

We do not think that is the best course to follow. What we recommend is an adaptation of the best of the systems of the United States and the United Kingdom.

The Statutory Powers Procedure Act which we recommend should establish:

- (a) Minimum rules of procedure applicable to all tribunals, whether judicial or administrative, with certain defined exceptions;
- (b) A Statutory Powers Rules Committee composed as hereinafter indicated with power to make appropriate detailed rules for each tribunal, having regard to the nature and purpose of the powers exercised by it.

The provisions of the Act should apply to all tribunals, bodies or persons exercising judicial or administrative powers where fair procedure is required, unless excluded by express language or necessary implication.

If the inquiry system is adopted in Ontario there may have to be some additional provisions adapting the minimum procedure to inquiries. These cannot be discussed generally.

Much advantage is to be gained from setting out specific rules for the guidance of those exercising statutory powers, even though many of them are a mere codification of the common law. Not only will they know the procedure they must follow, but those who have matters before tribunals will know the controlling procedure.

### **MINIMUM RULES OF PROCEDURE FOR ALL TRIBUNALS, WITH SPECIFIED EXCEPTIONS**

The following minimum basic rules should be enacted by statute to apply to the exercise of all administrative and judicial powers, unless the power is exercised for emergency purposes, the scientific determination of standards, or in circumstances in which the rules would frustrate the object of the statute conferring a power:

#### **1. Notice of Hearing**

The parties who will be affected by a decision should have an opportunity to attend a hearing and be heard. If such opportunity is given and a party fails to avail himself of its provision, the tribunal should have a discretion to proceed with the hearing in the absence of that party. The latter provision is necessary to permit efficient operation of tribunals.

#### **2. Notice of the Case to be Met**

Any party whose rights may be specifically affected by the decision should have reasonable notice of the case against him.

#### **3. Adjournment**

Parties who may be specifically affected by the decision should be permitted such reasonable adjournments asked for in good faith as may be appropriate in the circumstances.

#### 4. Subpoenas

Tribunals should have power to issue subpoenas for the attendance of witnesses and the production of documents. Subpoenas with respect to proceedings before tribunals should not be issued out of the Supreme Court or any other court. They should be signed by an officer of the tribunal.<sup>10</sup>

#### 5. Hearings

Provision should be made that hearings should be held in public except where:<sup>11</sup>

- (a) Public security is involved;
- (b) Intimate financial or personal circumstances may have to be disclosed;
- (c) Hearings are by self-governing professional bodies, involving professional capacity and reputation.

Where discretion is to be vested in certain tribunals to hold closed hearings in special circumstances, such should be provided in the statute conferring the power.<sup>12</sup>

In all cases the decision should be a public decision. The person against whom a charge has been made should have the right to a public hearing if he desires it, except in cases falling under (a) and (b), in which intimate financial or personal circumstances of others may have to be disclosed.

#### 6. Enforcement of the Orders of Tribunals

Express provision should be made that the power to commit for refusal to obey a subpoena, or any other order of a tribunal, should be exercised only on an application to the High Court of Justice for Ontario, made either on behalf of the tribunal or any person having a direct interest in the proceedings. The tribunal should certify to the court the facts on which the allegation of contempt is based.<sup>13</sup>

<sup>10</sup>For a discussion of procedure in the United States, see p. 165 *supra* and for the recommendation of the Franks Committee, p. 197 *supra*.

<sup>11</sup>As to Eng., see p. 196 *supra*; U.S., p. 165 *supra*.

<sup>12</sup>For further discussion see Chapters 49 and 83 *infra*.

<sup>13</sup>See Chapter 12 *supra*. See also Chapter 32 *infra*.



## 7. Oaths

Tribunals should have power to administer oaths, but a discretion should be given to accept evidence not taken under oath so as to permit informality in minor claims.<sup>14</sup>

## 8. Counsel

The parties whose rights are involved should be entitled to be represented by counsel unless there are exceptional circumstances. The right to counsel has been recommended in the United Kingdom,<sup>15</sup> and is recognized in the United States.<sup>16</sup> We do not accept the argument that the presence of counsel at a hearing necessarily creates additional expense and undue formality. In fact, in many cases it may be quite otherwise. To deny a right to counsel is to discriminate against the illiterate or inarticulate person. Every person is entitled to expert assistance in the presentation of his case before a tribunal which is empowered to make decisions affecting his rights. Unless the tribunal is in the nature of a court, we see no reason why the expression "counsel" should be confined to members of the legal profession. Any person skilled in making a presentation on behalf of one whose rights are involved in a proceedings before a tribunal should have the right of audience, but on the other hand tribunals should have power to refuse to hear any person purporting to appear as counsel who is obviously incompetent or unaware of the duties and responsibilities of an advocate.<sup>17</sup>

## 9. Counsel for Witnesses

The general rule in Ontario is that witnesses are not entitled to counsel on the ground that a witness is called to testify to the truth and requires no legal advice for this purpose. The rule is to the contrary in the United States.<sup>18</sup>

<sup>14</sup>See p. 192 *supra*.

<sup>15</sup>*Ibid.*

<sup>16</sup>See pp. 164, 177 *supra*.

<sup>17</sup>As to Eng., see p. 177 *supra*; U.S., p. 164 *supra*.

<sup>18</sup>See p. 177 *supra*.

In Canada the common law rule that a witness is not bound to answer questions that may tend to incriminate him or may tend to establish his liability in civil proceedings, has been modified under both federal and provincial law. Under the Canada Evidence Act<sup>19</sup> and the Ontario Evidence Act,<sup>20</sup> a witness must answer all questions put to him but he may object to the answering of any question on the ground that the answer may tend to incriminate him or establish his liability in civil proceedings. If he does so, the answer may not be used against him in any subsequent proceedings except in a prosecution for perjury in the giving of such evidence.

The provisions of the respective statutes create technical legal rights which in many cases call for the advice of counsel. That being true, witnesses should be permitted to have counsel present if they desire, but such counsel should not have a right to take any part in the proceedings other than to advise the witness and state an objection under the provisions of the relevant law. Where proceedings are not held in public, counsel should not be permitted to be present, except when his client is giving evidence.

#### 10. Examination and Cross-Examination of Witnesses

The parties should be entitled to examine their own witnesses directly and to cross-examine a witness opposed to their interest, where the cross-examination is required for a full disclosure of facts.<sup>21</sup>

#### 11. Evidence

Unless otherwise provided in the statute conferring the power, a tribunal should have a discretion to ascertain relevant facts by such standards of proof commonly relied on by reasonably prudent men in the conduct of their own affairs. The nature of proof should go to the weight of the evidence, not to its admissibility. In other respects the ordinary common law and statutory rules of evidence should apply to proceedings before tribunals, e.g., rules as to privilege. The

<sup>19</sup>R.S.C. 1952, c. 307, s. 5.

<sup>20</sup>R.S.O. 1960, c. 125, s. 9.

<sup>21</sup>As to Eng., see p. 192 *supra*; U.S., p. 167 *supra*.

purpose of this recommendation is to permit wider latitude in the admission of evidence than is the case in ordinary court procedure. The strict hearsay rules of evidence as applied by the courts have been under severe criticism by legal scholars in Canada and other countries in recent years. Obviously strict adherence to the exclusionary hearsay rules of evidence would unduly restrict and hamper the functions of many tribunals. For example, statistical proof of road use, land values, land use, market values of farm products and matters of that sort might not be feasible if strict proof were required in all cases.

It may be that there are certain powers that should only be exercised on proof that would meet the standards required in the ordinary courts. In such cases the statutes conferring the powers should so state.

## 12. Official Notice

Provision should be made that official notice may be taken of generally recognized technical or scientific facts or opinions within the tribunal's specialized knowledge. Parties should be notified either before or during a hearing of material officially noticed, including any memoranda or data prepared for consideration of the tribunal, and the parties should be given an opportunity to contest the material so noticed.<sup>22</sup>

## 13. The Decision

The decision of the tribunal should be in writing and each party should be notified in writing of the decision as soon as it is made. The notice of the decision should inform the parties of their rights of appeal, if any.<sup>23</sup>

## 14. Enforcement of Decision

The decision of the tribunal should be enforceable in the same manner as an order of an ordinary court.

<sup>22</sup>As to U.S., see pp. 168, 178 *supra*; H. W. R. Wade, *Toward Administrative Justice*, 122.

<sup>23</sup>See pp. 173, 199 *supra*.

**15. Reasons**

Written reasons for the decision should be given in all cases if required. The reasons should set out:

- (a) Findings of fact on the evidence or matters officially noticed;
- (b) Conclusions of law based on findings of fact.

This is in accordance with elementary principles of justice recognized in other jurisdictions.<sup>24</sup>

**16. Record**

A tribunal should compile a record consisting of:

- (1) The notice of the hearing;
- (2) Any intermediate rulings or orders made in the course of the proceedings by the tribunal;
- (3) Documentary evidence received or considered;
- (4) A transcript of oral evidence received, where such evidence is reported, or the notes of the tribunal where the evidence is not reported;
- (5) The decision and the reason for it.

The maintenance of a record is obviously important from the point of view of appeals and judicial review.<sup>25</sup>

**17. Right of Appeal**

A right of appeal to the courts, to an appellate tribunal, to a responsible minister or to the Lieutenant Governor in Council, should be provided either by the general Act or by the Act conferring the power.

**18. Privilege in Defamation**

We do not think any greater protection should be extended to those taking part in proceedings before tribunals than is now the case. The law of qualified privilege would appear to be adequate in the circumstances. The Council on Tribunals in the United Kingdom has concluded that because

<sup>24</sup>*Ibid.*

<sup>25</sup>As to U.S., see pp. 171-72 *supra*.

of the informality of the proceedings it is undesirable that the law of absolute privilege should extend to statements made in proceedings before tribunals.<sup>26</sup> We agree with this reasoning.

The matters we have enumerated may be applied uniformly to judicial or administrative tribunals subject to the exceptions we have suggested. The effect of the Statutory Powers Procedure Act would do much to eliminate both the uncertainties that presently exist with respect to the application and operation of the rules of natural justice to which we have already referred.

The first uncertainty—whether the rules apply or not—would be met by what is in effect a presumption that the Act applies, unless a tribunal can be brought within one of the exceptions. Experience in the United States demonstrates that it is virtually impossible to eliminate all uncertainty.

The Act would eliminate the second uncertainty, as to what the procedural requirements of the rules of natural justice are when they do apply. The requirements of the Act would be applicable in all cases.

## ADDITIONAL MINIMUM RULES APPLYING ONLY TO JUDICIAL TRIBUNALS

The Statutory Powers Rules Committee should have power to make rules applicable to judicial tribunals with relation to the following matters, and to specify the tribunals to which they should apply.

### 1. Decision on the Record

Findings of fact of a judicial tribunal should be required to be based exclusively on the evidence put before it at the hearings and on matters officially noticed disclosed to the parties. This recommendation accords with the apparent view of the Donoughmore Committee,<sup>27</sup> and is expressly provided in the Model Act,<sup>28</sup> and the Federal Act.<sup>29</sup>

<sup>26</sup>See p. 192 *supra*; Annual Report, Council on Tribunals (1961), 14.

<sup>27</sup>See p. 193 *supra*.

<sup>28</sup>See p. 171 *supra*.

<sup>29</sup>See p. 179 *supra*.

## 2. Consultation after Hearing

Members of a judicial tribunal should not consult with either party on the matter before them in the absence of the other party or his representative. Where the matter for decision involves a claim of an applicant for a benefit, the tribunal should not consult with interested departmental officials in the absence of the applicant or a representative. The tribunal should, however, be authorized to seek legal advice from an independent adviser, but the nature of the advice should be made known to the parties in order that they may make submissions as to the law. In no case should the members of the tribunal seek advice from or consult with counsel for either side in the absence of the other side. This stipulation includes counsel appearing on behalf of the tribunal in any proceedings before it.<sup>30</sup>

## 3. Deciding Members of Tribunal Must be Present at Hearing

No person should participate in a decision of a judicial tribunal who is not a member of the tribunal, or who has not been present at the hearing and heard and considered the evidence. All persons who have heard and considered the evidence should participate in the decision. This rule ensures that they have a substantial understanding of the evidence upon which the decision is based.<sup>31</sup>

## 4. Reporting Evidence

Wherever practical, all evidence at a hearing should be taken down by a skilled reporter or otherwise recorded. Where, owing to the nature of the hearing, this is not practical, a tribunal should make adequate notes of the evidence.

## DETAILED RULES FOR ALL TRIBUNALS

We feel no useful purpose would be served by attempting to set out detailed rules, in addition to those recommended, which would have to be followed by individual tribunals whether judicial or administrative. Their functions

<sup>30</sup>As to Eng., see p. 187 *supra*; U.S., p. 170 *supra*.

<sup>31</sup>See p. 174 *supra*.

are so diverse that special rules can best be made by the Statutory Powers Rules Committee in consultation with the departments concerned.

## PUBLICATION OF RULES

When rules, in addition to the statutory rules, have been made, they should be published and made available to the public so that those having matters before the respective tribunals may know the procedure to be followed.

## CONSTITUTION OF THE STATUTORY POWERS RULES COMMITTEE

We recommend that the Statutory Powers Rules Committee have at least nine permanent members under the chairmanship of the Attorney-General. The permanent members should be:

The Chief Justice of Ontario and the Chief Justice of the High Court of Justice for Ontario, or their nominees;

The Chief County Court Judge for Ontario, or his nominee;

The Chairman of the Ontario Law Reform Commission, or his nominee;

One or more representatives of the Attorney General's Department nominated by the Attorney General;

A representative of the Law Society of Upper Canada, nominated by the benchers of the Law Society of Upper Canada;

A professor of administrative law from one of the law schools in Ontario, and two lay members appointed by the Lieutenant Governor in Council.

In addition to the permanent members, two *ad hoc* members should be appointed by the minister of the department involved where special rules are being considered applicable to a tribunal exercising powers for which the minister is responsible.

The Committee should have a permanent secretary who should perform substantially the same duties as the secretary of the Council on Tribunals in the United Kingdom including the investigation of complaints regarding procedure.

## EFFECT TO BE GIVEN TO RULES

The rules should be statutory guides to those engaged in the administrative process of government and be binding in law.

Provision should be made however that a party may expressly or by his conduct waive his rights under the Procedural Rules. Informal settlements arrived at by agreement or consent or decisions given on default of a party to assert his rights should be authorized.<sup>32</sup>

Apart from such a waiver of procedural rights by the parties, the court should have power to set aside a decision based on the purported exercise of any power to which the rules apply if there is failure to follow them. It should also have power, whether on a summary application to the court by way of judicial review, or in any action in which the decision of a tribunal is involved or on appeal, to confirm the decision by a validating order if, in the opinion of the court, notwithstanding that the rules have not been followed, there has been no real or substantial miscarriage of justice. This provision should not be given any narrow or technical interpretation. The purpose of definite rules is to create order and not to create technical disorder.

## DECLARATORY RULINGS

As we have seen provision is made in both the Model Act and the Federal Act in the United States for declaratory rulings.<sup>33</sup> The objective of these provisions is to permit an individual who wishes to take some action that may be subject to later consideration by an agency, to obtain a ruling in advance for his guidance.

We have concluded that the difficulties that arise in the operation of such provisions outweigh the possible advantages.

In the original Model Act and in the Federal Act the power to give advance declaratory rulings was permissive and an agency was not required to give such rulings. We are informed that experience indicates that agencies were so reluc-

<sup>32</sup>See pp. 160 ff. *supra*.

<sup>33</sup>See p. 180 *supra*.



tant to issue formal binding declaratory rulings that these provisions were of little use.

Such reluctance is understandable. Where action that has been taken comes before an agency the facts are known and available at a formal hearing and the agency can act pursuant to its findings of fact. Where a declaratory ruling is sought it must be based on proposed or intended action. A declaratory ruling in such case may turn out to be quite inapplicable to the actual facts when the action has been taken. This was so even though the provisions in the original Model Act provided that the declaratory ruling should be given only after argument.

To overcome the reluctance of agencies to give declaratory rulings the provisions in the Revised Model Act were altered to impose a duty to dispose of petitions for declaratory rulings as to the applicability of any statutory provisions or rule. This apparently does not prevent an agency from disposing of the petition by declining to make a ruling.

The rather checkered history in the United States illustrates the difficulty of providing for binding declaratory rulings in advance of action. We do not recommend the enactment of such provisions.<sup>34</sup>

## PUBLICATION OF DECISION

The publication of important decisions and reasons of tribunals would do much to promote uniformity of administrative procedure in the Province. This practice has been usefully followed by the Ontario Labour Relations Board and the Income Tax Appeal Board of Canada. We recommend that provision be made to make decisions of all tribunals in Ontario available not only to the government services but to the public as well.

<sup>34</sup>For discussion see Cooper, *State Administrative Law*, 240 ff.



Subsection 4

**APPEALS FROM DECISIONS MADE IN  
THE EXERCISE OF STATUTORY POWERS**

## INTRODUCTION

In a taxation case, Bowen, L. J. made a statement that applies with equal force to most cases where orders are made affecting the rights of individuals: "In a free country the very essence of such a system must be that there should be an appeal to somebody who can say whether the officers are doing that which is just. If no appeal were possible I have no great hesitation in saying that this would not be a desirable country to live in, where every parochial officer might do as he liked in the matter."<sup>1</sup>

The right of appeal is a purely statutory right. The nature of the appeal and the powers of the appellate body are governed entirely by provisions made by the legislature. These are discussed in this subsection.

In the Province of Ontario appellate jurisdiction cannot be conferred on a tribunal appointed by the Province to exercise all the powers of appeal that may be exercised by the ordinary courts. As we have pointed out elsewhere in this Report,<sup>2</sup> the provincial Legislature cannot confer on a tribunal appointed by the Province power to exercise that jurisdiction which broadly conforms to the type of jurisdiction exercised by the superior, district and county courts. Likewise, the powers exercised on judicial review, which we discuss fully in this Report,<sup>3</sup> cannot be exercised by bodies other than the superior courts.

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<sup>1</sup>*The Queen v. Justices of the County of London*, [1893] 2 Q.B. 476, 492.

<sup>2</sup>p. 33 *supra*.

<sup>3</sup>Subsection 5, particularly Chapter 22 *infra*.

## CHAPTER 15

# Principles Governing Appeals

### MATTERS TO BE CONSIDERED IN CONFERRING RIGHTS OF APPEAL

APPEALS from decisions of the courts have existed in one form or another for many centuries and the nature of appeals in this context has been worked out in great detail. Drawing upon the experience of the courts relating to appeals, but taking into account the diverse nature of the powers of statutory tribunals, the following matters should be considered in relation to what rights of appeal should be conferred and their nature:

- (1) Whether a right of appeal would frustrate the purpose of the statute;
- (2) The nature of the power conferred on the tribunal of first instance—whether it is judicial or administrative;
- (3) Whether an appeal should be as of right, or conditioned upon the obtaining of leave to appeal from the tribunal of first instance or the appellate tribunal;
- (4) The nature of the appeal:
  - (a) The appeal may take the form of a hearing *de novo*, in which case the appellate body starts afresh as if there had been no initial decision.
  - (b) The appeal may be limited to argument based upon the record of proceedings before the inferior tribunal.
  - (c) The appeal may be heard partially on the record, supplemented by further material.

- (d) The appeal may take the form of an appeal by "way of stated case". In such case the tribunal of first instance prepares a statement of the point of law to be considered by the appeal court, together with a statement of the facts upon which it based its decision. The argument is confined to the case stated and the facts as stated are accepted as correct findings of fact.
- (5) The scope of appellate authority.  
Should the appeal,
- (a) relate to all matters of law or fact decided by the tribunal;
  - (b) be confined to decisions on matters of law only;
  - (c) be confined to the question of whether the matters involved fall within the powers of the tribunal to decide—the application of the principle of *ultra vires*; or
  - (d) relate to decisions made by the tribunal in the exercise of discretion?
- (6) The powers of the appellate body.  
Should it be empowered if it concludes that the initial decision was wrong,
- (a) to substitute a new decision for the initial decision; or
  - (b) to annul the initial decision and to remit the case back for reconsideration by the initial tribunal to make a new decision?
- (7) The nature and composition of the appellate body. The appeal may be made to the courts or to a special appeal tribunal;
- (8) The procedure on the appeal.

## CLASSES OF STATUTORY TRIBUNALS MAKING INITIAL DECISIONS

Each of these matters we have enumerated must be considered in relation to the following classes of tribunals discussed in Chapter 10:

- (1) Judicial tribunals;
- (2) Administrative tribunals;

(3) Tribunals exercising both judicial and administrative powers which, for practical governmental purposes, cannot be separated;

(4) Certain classes of tribunals, or specific tribunals, whose functions could be classified as judicial or as administrative, but to which the principles governing tribunals to exercise these powers cannot be generally applicable. These tribunals include:

(a) Officials empowered to take emergency action based on inspections or views, e.g., to protect public health or safety;

(b) Tribunals determining the application of statutory scientific or technical standards, e.g., testing the quality of milk;

(c) Tribunals exercising expert opinion in arriving at their decisions, e.g., determining the physical disability of an injured workman.

The various aspects of appeals which we have outlined must be considered separately in relation to tribunals in each of these classes. The answer to whether there is to be an appeal, the appropriate tribunal to hear the appeal, and the procedure to be followed, must be tailored to the particular tribunal or class of tribunals. Tribunals in the same class should be subject to relatively uniform treatment to provide equal safeguards for equal rights. Our survey of statutory appeals, which we shall discuss in detail later, has indicated that there is no uniformity and that constitutional principles which ought to govern have not been applied.

## **INEXPLICABLE VARIATIONS IN EXISTING APPEALS**

There is an apparently inexplicable variation in the right of appeal from decisions of tribunals in the same class, e.g., appeals from decisions of disciplinary tribunals of the self-governing professions and occupations. In some cases no appeal lies; in other cases the appeal is to the county judge; in others the appeal is to a judge of the Supreme Court; and in others

the appeal is to the Court of Appeal.<sup>1</sup> Not only are there variations in the right of appeal, and in the court to which the appeal lies, but the procedure varies widely, although the procedural steps that should be taken are similar. There appears to be no reason for the variations.

The absence of a uniform approach to the problems of appeals, illustrated in this segment of statute law dealing with a relatively homogeneous class of disciplinary tribunals, applies with even greater force throughout the whole field of statutory tribunals. Fundamental constitutional principles are departed from. Often the basic distinction between judicial tribunals, which should be independently established, and administrative tribunals, whose decisions should be subject to political control, is not applied.

### INAPPROPRIATE RIGHTS OF APPEAL

The Insurance Act provides as follows:

"11. (1) Every decision of the Superintendent upon an application for a licence shall be in writing and notice thereof shall be forthwith given to the insurer."<sup>2</sup>

"12. (1) An applicant for a licence under this Act or any person who deems himself aggrieved by a decision of the Superintendent may appeal therefrom to the Court of Appeal."<sup>3</sup>

By section 41 every insurer is required, before receiving a licence under the Act, to deposit approved securities with the Minister in certain fixed amounts, depending on the category of insurance he undertakes. It is then provided:

"41. (2) The Superintendent may require the deposit referred to in subsection 1 to be increased, either before or after granting the licence, to such amount as he considers necessary."<sup>4</sup>

It would seem that if the Superintendent raised the amount of the securities required to be deposited by an

<sup>1</sup>These rights of appeal will be discussed more fully in Chapter 44 *infra*, in which we discuss appellate courts, and in Chapter 83 *infra*, in which we deal with the self-governing bodies.

<sup>2</sup>R.S.O. 1960, c. 190, s. 11.

<sup>3</sup>*Ibid.*, s. 12.

<sup>4</sup>*Ibid.*, s. 41.



applicant, and refused a licence because this amount has not been deposited, his decision would be subject to appeal to the Court of Appeal. A decision on the amount to be deposited appears to be an administrative decision which the Superintendent might make for a variety of policy reasons. It does not appear to be a decision for review by the courts. On what basis is the Court of Appeal to proceed in considering the merits of the Superintendent's decision?

Again, under the Agricultural Societies Act, it is provided:

"2. The Minister may decide all matters of doubt or dispute arising in the operation or construction of this Act and his decision is final, subject to an appeal to the Lieutenant Governor in Council."<sup>5</sup>

This provision entrusts decisions on all questions of law in the application of the statute, to the Minister, with an appeal to the Lieutenant Governor in Council. These are questions for independent judicial decision, and power to decide them should not be conferred on a political authority.

The Energy Act provides as follows:

"10. (3) The Minister may in his discretion suspend a licence, permit or registration in whole or in part, or, at any time, impose on a licence, permit or registration such terms and conditions as he in his discretion deems proper, but, before so doing, he may, or, after so doing, he shall, refer the matter to the Board, and the Board shall hold a hearing and report to him thereon, and he shall impose, continue or remove the suspension or impose, continue or remove the terms and conditions in whole or in part, to revoke the licence, permit or registration in whole or in part, in accordance with the report."<sup>6</sup>

The effect of this provision requiring the Minister to act "in accordance with the report", is to provide an appeal from a Minister in the exercise of administrative power to an apparently independent board. The appeal is from a policy decision of a political officer to a tribunal not directly responsible to the Legislature.

<sup>5</sup>R.S.O. 1960, c. 11, s. 2.

<sup>6</sup>Ont. 1964, c. 27, s. 10.

The amendment to the Expropriation Procedures Act passed in 1966<sup>7</sup> affords an extraordinary example of the application of wrong constitutional principles, not only in the establishment of an initial tribunal but also in the right of appeal therefrom. This Act governs the procedure to be followed in the expropriation of property by certain public authorities.

Prior to 1966, conservation authorities, hospitals and universities could expropriate property without prior approval from any other authority. The amendment of 1966 provided:

“1a. (1) Notwithstanding any general or special Act, no conservation authority, hospital or university shall expropriate land without the prior authority of a judge.

(2) Where a conservation authority, hospital or university intends to expropriate land, it shall apply to a judge for an order authorizing it so to do.

(5) Where the judge is satisfied that the expropriation of the land in whole or in part is reasonably necessary for the purpose of the applicant, he may make an order authorizing the expropriation of the land in whole or in part.

(6) The expropriating authority or an owner may appeal to the Court of Appeal from an order of a judge under subsection 5 within thirty days from the date of the order, and the practice and procedure as to the appeal and proceedings incidental thereto shall be the same *mutatis mutandis* as upon an appeal from the High Court.”<sup>8</sup>

The exercise of a power of expropriation is an administrative power to make policy decisions affecting the rights of an individual, and should be subject to approval by a political authority. The decision requires the consideration of many factors affecting the public interest; e.g., the need to expand public services or facilities; the suitability of the land in question; the availability of other suitable land; competing public demands for the lands, such as for highways, schools, other public buildings, pipelines and electricity transmission lines. The county judge, an independent judicial officer, is clothed with political power to make policy decisions with respect to

<sup>7</sup>Ont. 1962-63, C. 43, s. 1a, as enacted by Ont. 1966, c. 53 s. 1.

<sup>8</sup>*Ibid.*, s. 1a.

conservation, health and education, or functions of government. In this way the initial tribunal is wrongly constituted.

Under this statute, the Court of Appeal as a judicial appellate body, is clothed with similar political functions—a further breach of constitutional principles.

The provisions for appeal appropriate to classes of tribunals or particular tribunals must be considered in relation to the particular statutes under which they are established. This is done later in this Report. At this stage, only certain general principles may be stated.

### GENERAL PRINCIPLES APPLICABLE TO APPEALS

(1) An appeal should be provided from the decision of every judicial tribunal, except where an appeal would defeat the purpose of the statute establishing the tribunal. The advantages of an appeal far outweigh any disadvantages that may arise through expense and delay. An appeal from a tribunal of first instance to an appellate body should bring a reconsideration of the decision by a more expert body. It promotes a uniformity in jurisprudence and practice. The mere existence of the right of appeal has a strong disciplinary effect on tribunals of first instance. Our conclusions are supported by the recommendations of the Franks Committee in the United Kingdom. In dealing with decisions of judicial tribunals the Committee recommended:

“(25) There should be an appeal on fact, law and merits from a tribunal of first instance to an appellate tribunal, except where the tribunal of first instance is exceptionally strong and well qualified.”<sup>9</sup>

“(27) An appeal on a point of law should lie to the courts from a tribunal decision, except from a decision of the National Insurance Commissioner, the Industrial Injuries Commissioner or National Assistance Appeal Tribunals. The machinery for such appeals should be simple, cheap and expeditious and should be formulated in detail by the appropriate Rule Committees. Decisions of the National Insurance Commissioner, the Industrial Injuries Commissioner or National Assistance Appeal Tribunals should remain subject to review by certiorari.”<sup>10</sup>

<sup>9</sup>See The Franks Report, paras. 105-06.

<sup>10</sup>*Ibid.*, paras. 107-12.

In the United States provision is made for appeals to an agency from decisions of examiners. Further, all decisions of an agency on questions classified as questions of law are subject to review in the courts. This is in effect an appeal on questions of law.

(2) An appeal from a judicial tribunal should be taken to the ordinary courts unless exceptional circumstances render this impractical.

(3) Where exceptional circumstances require that the appeal from a judicial tribunal should not be taken to the ordinary courts, the appeal tribunal should be established with appropriate characteristics as a judicial tribunal to ensure independence and impartiality. An appeal should not lie from the decision of a judicial tribunal to the Lieutenant Governor in Council or to a minister.<sup>11</sup>

(4) No appeal should be provided from an administrative decision made by a minister, except in appropriate cases to the Lieutenant Governor in Council.

(5) There should be no appeal from an administrative decision to the courts, since an administrative decision is a policy decision for which a minister should take full responsibility.

(6) Administrative decisions made by persons other than a minister should be subject to appeal, preferably to a minister, but at least to senior administrative officers who are close to the minister and have a knowledge of his policy views or can consult him. In local government the appeals should be to the political authority.

(7) The decisions of tribunals which issue certificates of convenience or necessity or fix rates or tolls should be subject to appeal to the courts on questions of law or *ultra vires*, and subject to appeal on the merits of the certificate or the quantitative rates or tolls to a minister or to a committee of the Lieutenant Governor in Council.

<sup>11</sup>For permissible departure from this principle in a hierarchy of tribunals, see p. 124 *supra*.

(8) Where officials are empowered to take emergency action based on inspections or views, provision should be made for a summary form of appeal to senior officials for a further inspection.

(9) Where a tribunal consists of expert personnel who apply statutory, technical or scientific standards by objective tests, provision should be made for an appeal by way of a second test by different experts.



Subsection 5

**CONTROL BY THE COURTS OF  
THE EXERCISE OF STATUTORY POWERS:  
JUDICIAL REVIEW**

## INTRODUCTION

In this Section we have considered the principles governing the nature and scope of judicial and administrative powers of decision (Subsection 1), the structure and organization of appropriate tribunals to exercise such powers, (Subsection 2), the procedure that should be followed in their exercise (Subsection 3), and the general principles governing appeals from decisions made pursuant to such powers, (Subsection 4).

We come now to discuss safeguards other than appeals, for the protection of the rights of individuals against proposed or purported wrongful exercise of a statutory power, or against the failure to exercise it when required. These safeguards are provided by the law of "judicial review" of the exercise of statutory powers.

In its ordinary meaning the expression "judicial review" is broad enough to include any scrutiny by the courts of the exercise of a statutory power. In our terminology "judicial review" has a more restricted meaning. The expression "judicial control" might be more apt since the purpose of judicial review is merely to control, but not to supplant, statutory tribunals.<sup>1</sup> On judicial review the relief that may be sought from the courts is restricted to instances where a statutory tribunal:

- (1) proposes to act or has acted without power; or
- (2) has refused to exercise a power which it is under a duty to exercise.

With one qualification to be discussed later, judicial review does not, like an appeal, provide a safeguard against erroneous decisions which have been made by a tribunal within the area or scope of the power conferred on it by statute.

The remedies by which judicial review is obtained are derived from a variety of proceedings known mainly by historical names for old writs. The principle remedies are proceedings by way of prohibition, *certiorari*, declaratory judgment, injunction or *mandamus*.

<sup>1</sup>For use in this sense, see Jaffe, *Judicial Control of Administrative Action*, 153ff.



Reference to the writ of *quo warranto* is omitted as this writ is of comparative unimportance in modern times and to a large extent has been supplanted, e.g., by statutory provisions in municipal law.

We also omit extensive discussion of judicial review obtainable through the writ of *habeas corpus*. We make no recommendations for changes in the law relating to this great bulwark of liberty. The extent of the review under our law by way of writ of *habeas corpus* by itself is extremely limited. When a writ of *habeas corpus* has been issued to a person holding another in custody, that person is required to make a return to the writ showing the authority under which he detains the other in custody. If, as his justification for the detention, he returns a warrant of committal or other similar document that is regular on its face and authorizes the custody, the courts will not, in proceedings by way of *habeas corpus* at common law, go behind the warrant of committal or other document authorizing the detention, with two exceptions.<sup>2</sup> The exceptions are restricted to the detention of the mentally incompetent and the custody of children.

In general, therefore, the writ of *habeas corpus* by itself does not afford a broad review. A full review is usually obtained by bringing simultaneous proceedings by way of *certiorari*, which we discuss. In addition, in Ontario special statutory writs of *certiorari* in aid of *habeas corpus* proceedings, and special statutory applications for review of convictions, are authorized with a wider review than under the normal common law writ of *certiorari*.<sup>3</sup> We do not propose any variation in these laws and further discussion is unnecessary. In saying this we do not wish it to be implied that we do not think there should be a right of appeal in *habeas corpus* matters under the federal law.

The procedure to obtain the remedies we discuss may be provided by statutes or rules of court. It is useful here to state briefly the nature of these remedies.

*Prohibition* is a procedure whereby an application may be made to a superior court to restrain an inferior tribunal

<sup>2</sup>*Re Vaaro*, [1933] S.C.R. 640; *Re Schumiatcher*, [1963] S.C.R. 38.

<sup>3</sup>*Habeas Corpus Act*, R.S.O. 1960, c. 169, s. 5; *Judicature Act*, R.S.O. 1960, c. 197, s. 66.

from acting without power conferred on it, i.e., beyond its powers.

*Certiorari* is a proceeding whereby an application is made to a superior court after action has been taken by an inferior tribunal, to require the record and decision of the tribunal to be brought before the court, so that its legality may be examined to determine whether the tribunal has acted within its powers, and for an order quashing the decision where it has been made without power.

A *declaratory action* in this context is a proceeding to obtain a judgment declaring whether action proposed to be taken by a tribunal, or action already taken by it, is beyond its powers.

An action for an *injunction* in this context is a proceeding to obtain an order from the court restraining an inferior tribunal from acting, or carrying into effect action already taken, beyond its power.

An application by way of *mandamus* is a proceeding in a superior court to obtain an order compelling an inferior tribunal to carry out a legal duty to exercise powers conferred on it.

These remedies will be considered in detail later.

The substantive law of Ontario on the scope of judicial review—the grounds upon which courts will restrain or hold invalid, or compel action of a statutory tribunal—is derived from and substantially adopts the English law. Similarly, the procedure by which matters are brought before the courts for judicial review follows English law, with minor variations.

Representations have been made that both the substantive law and the procedure for judicial review in the United States is to be preferred to that of Ontario.

We propose, therefore, first to consider the substantive rules governing the scope of judicial review in Ontario, then to examine, in so far as is relevant, the substantive law on the scope of judicial review in the United States, and thereafter to deal with criticisms of our present substantive law, with recommendations for proposed changes where desirable. Thereafter we shall follow the same order in discussing the

procedure by which matters are brought before the courts for judicial review.

We confine our comparative discussion at this time to the law of the United States, under which judicial review is conducted by the ordinary courts. To that extent it is comparable to judicial review in Ontario. But the substantive law and procedure has developed along lines significantly different from those in England, Ontario, and other Commonwealth countries. The law of France which corresponds to our law of judicial review will be discussed in our next Report. There review is conducted by tribunals other than the ordinary courts. For reasons which will be given we reject proposals for the removal of judicial review from the ordinary courts.

This Subsection is divided into the following chapters:

- Chapter 16 The substantive law of Ontario on the scope of judicial review.
- Chapter 17 Statutory restrictions on judicial review.
- Chapter 18 Relevant aspects of judicial review in the United States.
- Chapter 19 Conclusions and recommendations on the substantive law of judicial review in Ontario.
- Chapter 20 The present procedural law of judicial review in Ontario.
- Chapter 21 The procedural law of judicial review in England and the United States.
- Chapter 22 Conclusions and recommendations on the procedural law of review in Ontario.

## CHAPTER 16

# Substantive Law of Ontario on the Scope of Judicial Review

As we have indicated, relief may be sought from the courts on judicial review where a statutory tribunal:

- (1) Proposes to act or has acted without power; or
- (2) Has refused to exercise a power which it is under a duty to exercise.

The extent of the powers of a tribunal arises under the second as well as the first branch of review. A tribunal may fail to perform a statutory duty where it expressly refuses to take the required action or where it purports to take the required action but, in fact, takes some action not required or authorized by the Statute. In either case the duty has not been performed. The basic question is: What is the tribunal empowered to decide?

### **REVIEW TO DETERMINE WHETHER ACTION BY A TRIBUNAL IS WITHIN ITS POWERS**

When the courts exercise their power of review to determine whether action by a tribunal exercising a statutory power is within its powers, they are controlled by five basic principles:

- (1) The Legislature has full sovereignty within its constitutional powers to make any laws it considers advisable and to establish tribunals and to confer on them such powers as it

considers advisable. We have already mentioned the constitutional limitations with respect to the conferral of power, analogous to the powers of superior, district or county courts.<sup>1</sup>

(2) The courts under our federal system have overriding power to determine whether a statute enacted by the Legislature is within the constitutional powers of the Legislature, and if not, to hold the statute to be *ultra vires* and consequently any powers it purports to confer to be of no legal effect.

(3) The powers of the courts are subordinate to the legislative sovereignty of the Legislature within its constitutional powers. Where the Legislature enacts a valid statute, the courts are bound by it and it is their duty to give effect to it. We emphasize again that the Canadian courts are as the English courts “. . . powerless in the face of a [constitutional] Act of Parliament”.<sup>2</sup> As we have seen, however, in the performance of their function the courts do not act purely mechanically. They are required to exercise judgment in interpreting Acts of the Legislature, but the range of choices open for their judgment is limited and must be made in accordance with established canons of construction.

(4) The superior courts have residual powers in our legal system to interpret statutes and to determine whether their provisions have been complied with. By “residual” we mean that the courts have such powers, unless the Legislature has conferred them exclusively on some other tribunal.

(5) There is no appeal from the decision of a tribunal acting within its statutory powers, to the courts or any other body, unless the appeal is expressly provided by the Legislature.

In accordance with these general principles the scope of review by the courts is governed by the terms of the statute conferring power on a tribunal. Where a statute confers power on a tribunal to make decisions or to take action, subject to what we shall say later as to errors of law on the face

<sup>1</sup>See p. 33 *supra*.

<sup>2</sup>H. W. R. Wade, *Towards Administrative Justice*, 61-2.

of the record, the courts are limited in the exercise of their powers of judicial review to determining whether the decision or action of the tribunal is within the power conferred on it by the statute. If it is within such power, the courts will not reconsider the decision or action unless a right of appeal is expressly provided.

The scope of the powers conferred on a statutory tribunal may give rise to questions of interpretation of the statute conferring the power. This power may be conferred on the tribunal itself, or no special provision may be made. Where the power of interpretation is not conferred on the tribunal, it falls to the courts in the exercise of their residual functions to determine the scope of the power.

The principle that a tribunal cannot make a valid decision or take valid action unless it is authorized to do so is a general one running through many branches of our law. It is referred to as the doctrine of *ultra vires*—that is, action must not be outside the power conferred. It is only in comparatively recent times that this has been recognized as the method of expressing the general principle upon which judicial review is based, but it now appears to be generally accepted.<sup>3</sup>

Formerly the basis of judicial review was not expressed to be related to the single principle of *ultra vires*, but as embodying a combination of the concept of “jurisdiction” and of *ultra vires*.

“Jurisdiction” is one of the most baffling and confusing terms in this whole area of discussion. In its widest sense jurisdiction is defined as meaning an “authority or power which a man has to do justice in causes of complaint brought before him”.<sup>4</sup> Originally it referred to the authority of judicial bodies such as courts. Later the term was extended to apply to statutory tribunals exercising judicial or administra-

<sup>3</sup>H. W. R. Wade, *Administrative Law*, 40 ff., 127; de Smith, *Judicial Review of Administrative Action*, 7-8, 55 ff., 92-100; Garner, *Administrative Law*, 96 ff.; Brett, *Cases in Constitutional and Administrative Law*, 182; Orr, *Report on Administrative Justice in New Zealand*, 107; and see a qualified adoption of the principle in Yardley, *A Source Book of Administrative Law*, 92.

<sup>4</sup>Mozley and Whiteley's *Law Dictionary*.

tive powers which are termed "quasi-judicial"—those that must be exercised by acting judicially in accordance with procedural rules of natural justice. More recently still, the term has been loosely extended to apply to all statutory powers of decision, whether judicial, quasi-judicial or purely administrative.

In Canada the term is used even more loosely as applying to the authority of Parliament and the Legislature to make laws, which is frequently referred to as their legislative jurisdiction. "Jurisdiction" is sometimes used in an entirely different sense to describe the geographical or territorial area within which power may be exercised. In these usages the term has ceased to have any clear meaning.

In contrast to the wide meanings given to it, the term jurisdiction is used in our law in a number of narrower and specialized senses referring to particular elements of jurisdiction in the wider sense. For example, a magistrate is said to have jurisdiction to try certain offences such as theft not over the sum of fifty dollars. Here the term jurisdiction is used to refer only to a single element of the magistrate's power, namely the nature of the charge that he may hear. In this context if such a charge is before him he is said to have "jurisdiction at the outset" or "jurisdiction to embark upon the inquiry". Again, it is sometimes said that a magistrate, having had jurisdiction at the outset, subsequently "lost jurisdiction" or "declined jurisdiction". An example of the use of the expression in this sense is the case where a magistrate, who is authorized to try the charge before him, has failed to adhere to a prescribed mandatory procedure. He had "jurisdiction at the outset" but through failure to follow the required procedure he "lost jurisdiction". Again, a magistrate who has "jurisdiction at the outset" and who follows the prescribed procedure may wrongly decide some "collateral" matter.<sup>5</sup> He is then said to have "exceeded his jurisdiction". This meaning is loosely applied in practice to a magistrate who purports to try an offence for which he has no "jurisdiction at the outset". Each of these satellite terms relates to some particular aspect

<sup>5</sup>See pp. 81 ff, *supra*.

of the conditions on or limitations to his power to reach an authorized decision. These terms are applied generally to statutory tribunals.

Even when jurisdiction is used in the widest sense attributed to it, there are some ingredients of a statutory power limiting the exercise of the power which do not appear to fall within any of the meanings of jurisdiction. For example, it is doubtful whether requirements that a tribunal take certain action after reaching a decision to make its decision legally effective—such as the filing of a plan and description in expropriation proceedings—can be considered to be limits on jurisdiction in any of the senses discussed, although failure to comply with them would be grounds for treating the action of the tribunal on judicial review as ineffective.

Reflection will show, and we shall illustrate it shortly, that the true position is that the term “jurisdiction” is now used as a partial synonym for “authority”, and that the statement that action taken by a tribunal is within or outside its jurisdiction merely means that the action is taken within or outside certain aspects of its authority. If action is taken outside its jurisdiction, the action is merely outside its authority or is *ultra vires*. Although the word jurisdiction has a long recognized usage, the word “power” is a more all-inclusive and precise word, comprehending all that is meant by the use of the words jurisdiction and authority. Where a decision or action is within the jurisdiction or authority of the tribunal, it is within its powers. Where it is not within such jurisdiction or authority, it is beyond its powers or is *ultra vires*. We shall hereafter use the words power or powers in this sense.

Judicial review has been extended beyond the doctrine of *ultra vires* by one ground for review: error of law on the face of the record, considered only in applications for *certiorari*, which we shall discuss later. Other grounds for review, e.g., fraud and bias, have not always been linked to the principle of *ultra vires*. For this reason it has been suggested that the principle of review is not the doctrine of *ultra vires* but jurisdiction, using this term as meaning a device developed by the courts as a basis for exercising a wider review than is per-



missible under the doctrine of *ultra vires*, wherever the courts consider a wider review to be socially beneficial.<sup>6</sup>

We reject this view as representing neither an accurate nor a desirable principle. Any basis other than the principle of *ultra vires* appears to conflict with the doctrine of the sovereignty of the Legislature and subordination of the power of our courts to legislative control. The principle of *ultra vires* comprehends all powers of judicial review, except review for error of law on the face of the record. This ground is explicable as an historical anomaly.<sup>7</sup>

We turn now to consider specific grounds on which the doctrine of *ultra vires* has been applied.

### GROUNDS FOR HOLDING A DECISION OR ACTION BY A STATUTORY TRIBUNAL TO BE INVALID ON JUDICIAL REVIEW

The following are grounds on which the courts have held decisions or actions by tribunals exercising judicial or administrative power to be invalid:

- (1) Unconstitutionality of the statute purporting to confer the power;
- (2) Invalidity of the appointments of the members of the tribunal;
- (3) Absence of preliminary matters of fact, law or mixed law and fact;
- (4) Bias or the absence of impartiality of members of the tribunal;

<sup>6</sup>D. M. Gordon, *Certiorari and the Revival of Error in Fact*, 42 L.Q. Rev. 521 (1926); *The Relation of Facts to Jurisdiction*, 45 L.Q. Rev. 459 (1929); *The Observance of Law as a Condition of Jurisdiction*, 47 L.Q. Rev. 386, 557 (1931); *Administrative Tribunals and the Courts*, 49 L.Q. Rev. 94, 419 (1933).

<sup>7</sup>A general doctrine that the decision of a tribunal might be quashed for any error of law, could be treated as an application of the principle of *ultra vires* on the view that the Legislature is to be presumed to authorize the tribunal to act only in accordance with law. If its decision or action is wrong in law, it is not authorized. But the English law has gone no further than to permit review for errors of law on the face of the record in *certiorari* proceedings.

- (5) Failure to comply with mandatory procedural requirements;
- (6) Exceeding scope or area of matters that may be decided: absence of collateral matters of fact, law or mixed law and fact;
- (7) Use of the power for an improper purpose, or the taking into account of extraneous or wrong considerations;
- (8) Failure to comply with the method required by the statute to make a decision;
- (9) Failure to comply with statutory requirements to render the decision legally effective;
- (10) Fraud of a party, misleading the tribunal; and
- (11) Any error of law on the face of the record of the proceedings before the tribunal, whether within its powers or not, on an application in the nature of *certiorari*.

The first nine of these grounds for holding decisions or actions by a tribunal in the purported or proposed exercise of a power to be unauthorized or invalid, are the absence of, or failure to comply with, one of the ingredients of statutory powers discussed in Chapters 4, 5 and 6. As we there indicated, the existence, nature and scope of administrative or judicial powers and requirements for carrying them into effect are dependent on the presence of or compliance with these ingredients. Where, on judicial review, the court finds that a particular prescribed ingredient is missing or is not complied with, the court will hold that a purported or proposed exercise of the power is beyond the power of the tribunal; it will apply the doctrine of *ultra vires*.

The last two grounds for holding action by a tribunal to be invalid—fraud of a party and error of law on the face of the record in *certiorari* proceedings—have not usually been stated to give rise to lack of power or the application of the principle of *ultra vires*.

In our view the effect of fraudulent action by one of the parties misleading the tribunal is in reality another instance of the application of the principle of *ultra vires*. The tribunal is misled by the fraudulent acts so that it is prevented from

directing its mind to the proper questions to be decided and the proper considerations. It does not therefore act within the power conferred on it. The effect is the same as if it had misdirected itself by taking into account extraneous considerations which render its decision *ultra vires*.

Error of law on the face of the record to the extent that, as a ground for quashing decisions, it extends to errors of law within the power of decision conferred on a tribunal, cannot be reconciled with the doctrine of *ultra vires*. It is error within the powers of the tribunal. With this single exception, in our view, all grounds for invalidity represent an application of the doctrine of *ultra vires*.

The various grounds upon which the courts will hold the proposed or purported exercise of a power to be beyond the power of a tribunal fall under two headings:

- (1) Absence of or non-compliance with objective ingredients or requirements; or
- (2) Absence of or non-compliance with subjective ingredients.

We shall include under the first heading a discussion of the effect of fraud of a party and error of law on the face of the record, as they are objective grounds for review.

## **ABSENCE OF OR NON-COMPLIANCE WITH OBJECTIVE INGREDIENTS OR REQUIREMENTS**

### **Unconstitutionality of the Statute Purporting to Confer the Power**

Where a statute purporting to confer powers on a statutory tribunal is constitutionally invalid on the ground that it was not within the powers of the Legislature or is otherwise constitutionally inoperative, it will not be effective to confer any statutory power on the tribunal. It necessarily follows that if a tribunal purports to exercise the non-existent power, it will be acting without power. A conviction under a provincial statute rendered inoperative by overriding federal legislation was quashed by the courts as unauthorized.<sup>8</sup>

<sup>8</sup>*R. v. Dodd*, [1957] O.R. 5.

## Invalidity of the Appointments of the Members of the Tribunal

Where a statute provides the manner in which the members of a tribunal are to be appointed, persons purportedly appointed in any other way do not become members of the tribunal.<sup>9</sup>

## The Absence of Preliminary Matters of Fact, Law, or Mixed Law and Fact

### ABSENCE OF PRELIMINARY FACTS

The nature of preliminary facts has been discussed.<sup>10</sup> The effect of their absence under the English law was stated by Lord Esher<sup>11</sup> and adopted in Ontario by Roach, J. A. for the Court of Appeal as follows:

“When an inferior Court or tribunal or body, which has to exercise the power of deciding facts, is first established by Act of Parliament, the legislature has to consider what powers it will give that tribunal or body. It may in effect say that, if a certain state of facts exists and is shewn to such tribunal or body before it proceeds to do certain things, it shall have jurisdiction to do such things, but not otherwise. There it is not for them conclusively to decide whether that state of facts exists, and, if they exercise the jurisdiction without its existence, what they do may be questioned, and it will be held that they have acted without jurisdiction . . .”<sup>12</sup>

Where a statute provides that a tribunal has power to make a decision, if facts A, B and C exist, and the tribunal is not given power to decide whether the facts exist, a court, on judicial review of a purported exercise of the power by the tribunal, may determine whether the facts existed or not. If the court finds that the facts existed, the decision of the tribunal will be upheld as authorized. If the court finds that the

<sup>9</sup>Where the Board of Examiners of a profession exercising disciplinary powers under a statute was not appointed in the manner provided by the statute, a decision of the so-called Board disciplining a member of the profession was held to be of no legal effect: *Hollenberg v. B.C. Optometric Association* (1967), 61 D.L.R. (2d) 295.

<sup>10</sup>See pp. 71 ff. *supra*.

<sup>11</sup>*R. v. Commissioners for Special Purposes of Income Tax* (1888), 21 Q.B.D. 313.

<sup>12</sup>*Re The Ont. Lab. Rel. Bd. and Bradley*, [1957] O.R. 316, 326.

facts did not exist, the decision will be quashed. The power of the tribunal to decide never arose and its purported exercise was unauthorized.

#### ABSENCE OF PRELIMINARY MATTERS OF LAW, OR MIXED LAW AND FACT

The nature of preliminary matters of law or mixed law and fact has been discussed.<sup>13</sup> The Supreme Court of Canada quashed a decision of a tribunal on the ground of the absence of such requirements in the case of *In re McEwen*.<sup>14</sup> The principles involved in this category are clearly illustrated in this case.

The Farmers' Creditors Arrangement Act<sup>15</sup> provided: "A farmer who is unable to meet his liabilities as they become due may make a proposal for a composition, extension of time or scheme of arrangement. . . ." The proposal was to be filed with the Official Receiver and, failing approval by the creditors, a Board of Review was authorized to formulate a proposal which could be made "binding on all the creditors". A proposal, confirmed by the Board, was attacked on three grounds: (1) the person filing it was not a farmer; (2) he was not unable to meet his liabilities as they became due; and (3) there was no debt, so that the alleged creditor was not a "creditor" within the meaning of the Act. The Supreme Court of Canada held that the proposal was unauthorized. Mr. Justice Rinfret stated:

"Of course, the status of a farmer, and whether he is able to meet his liabilities as they become due, and whether there exists between the interested parties the relation of debtor and creditor, are largely questions of fact; but whether these facts are covered by the Act, and whether they bring the matter within the meaning of the Act and under the jurisdiction of the Receiver and the Board are questions of law. The whole subject is one of mixed law and fact. Neither the Receiver nor the Board, has been given by the Act the power to determine these questions in their legal aspect. . . .

. . . [T]he existence of the status of farmer, or of his insolvency, or of the relation of debtor and creditor, is a condition

<sup>13</sup>See pp. 71 ff. *supra*.

<sup>14</sup>[1941] S.C.R. 542.

<sup>15</sup>Can. 1934, c. 53, s. 6 (1).

precedent to the validity of the proceedings before the Official Receiver or before the Board; it is a prerequisite of their competency in the premises. Unless these conditions exist, the Official Receiver and the Board cannot enter into the matter at all."<sup>16</sup>

In this case the court had the authority to decide these questions since the power to do so was not given to the Board. None of the conditions precedent having been met, the proposal was quashed.

A precise understanding of the relative functions of tribunals and the courts with respect to preliminary matters is important for the purpose of later discussion. Where a statute establishes certain requirements of fact, law, or mixed law and fact with respect to a power conferred by it, the question whether the requirements are objective conditions precedent that the tribunal is not authorized to decide—whether they are “preliminary matters”—is a question of interpretation of the statute to be decided by the court. If the courts interpret the requirements as preliminary matters, the question whether they are complied with is also a question to be decided exclusively by the courts. Although a tribunal upon which a statutory power is conferred, subject to objective preliminary conditions precedent, must form some opinion on whether they are complied with in order to proceed, the formation of this opinion is merely a “lay judgment” or “a preliminary decision” and is not a legally binding decision.<sup>17</sup> A “decision” in the sense of an authoritative finding of the facts or conclusion of law must authoritatively be made by the courts.

### **Bias or Absence of Impartiality of the Members of the Tribunal**

The principle of disqualification for bias<sup>18</sup> has been applied to the Ontario Labour Relations Board. That Board consists of a chairman and an equal number of representatives of employers and employees. These representatives are ap-

<sup>16</sup>[1941] S.C.R. 542, 559.

<sup>17</sup>*Municipal District of Sugar City v. Bennett and White Limited and Att'y. Gen. Can.*, [1950] S.C.R. 450, 465.

<sup>18</sup>See pp. 76 ff. *supra*.

pointed because of their knowledge of labour management relations from the two different points of view. They may not, however, have a personal interest in the dispute before them, contrasted with their general representative interest. A representative of a labour organization who was a member of the Board was also an executive officer in an organization affiliated with one of the parties to a dispute before the Board. He was required by the terms of his executive office to promote the interests of its affiliated organizations. It was held by the courts that he was disqualified by bias in law from reaching an impartial decision. The Board in which he participated was prohibited from proceeding.<sup>19</sup>

### Failure to Comply with Mandatory Procedural Requirements

Where a statute expressly required that notice should be given to the person to be affected before a tribunal could reach a decision, and the tribunal failed to give the notice but purported to make a decision, the failure to meet the procedural condition precedent to the making of the decision rendered the decision unauthorized.<sup>20</sup>

Similarly, although notice and hearing were not expressly required by statute for the making of an order by a municipal council to close a dwelling house, the courts held that the council was required under the rules of natural justice to give notice and to hold a hearing. The failure to do so was a failure to meet a required condition precedent.<sup>21</sup>

The principle has been succinctly stated by Mr. Justice Roach:

“ . . . the giving of notice and an opportunity to be heard in a judicial proceeding affecting substantive rights, even where notice is not specifically required by statute, is a condition precedent to any tribunal exercising jurisdiction which it would otherwise have. . . . ”<sup>22</sup>

The application and operation of the procedural rules of natural justice are discussed in Chapter 11.

<sup>19</sup>*Re Ont. Lab. Rel. Bd.; Ex. parte Hall*, [1963] 2 O.R. 239.

<sup>20</sup>*R. v. Ont. Fuel Board; Ex parte LaRocque*, [1959] O.W.N. 91.

<sup>21</sup>*Bd. of Health Saltfleet Twp. v. Knapman*, [1956] S.C.R. 877.

<sup>22</sup>*Re Brown and Brock and Rentals Administrator*, [1945] O.R. 554, 562.

On judicial review of the proceedings of a tribunal, the courts decide two questions: do the procedural rules of natural justice apply? and what procedure do they require with respect to the particular proceedings before the tribunal? Although we have seen that uncertainties exist in determining these questions, once the courts have decided that the rules apply to the particular proceedings and that they impose specific procedural requirements which have not been met, the principle stated by Roach, J. A. applies. Any proposed or purported decision of the tribunal will be beyond its powers.

**Exceeding Scope or Area of Matters that may be Decided:  
Absence of Collateral Matters of Fact, Law, or Mixed Law  
and Fact**

The simplest example of a tribunal's exceeding its jurisdiction or authority by deciding matters which it is not authorized to decide, arises where the tribunal is limited to deciding matters that arise within a particular territory or area. For example, a conviction by a magistrate for an offence committed outside the area for which he is a magistrate is beyond his powers.<sup>23</sup>

Where the statute clearly imposes limitations of this kind, little difficulty occurs on judicial review in determining whether the decision was within the powers conferred on a tribunal.

Statutes conferring powers are, however, frequently not clear as to whether the tribunal is authorized to decide a particular matter, whether of fact, law, or mixed law and fact, or, to use the terminology usually employed, whether the matter is within its powers or is "collateral" to them, so that the tribunal is not authorized to decide it.

The nature of "collateral" matters and the difficulties of interpretation of a statute for the purpose of classifying a matter as either "collateral" or not have already been discussed.<sup>24</sup>

The relative functions of tribunals and the courts with respect to collateral matters are similar to those with respect

<sup>23</sup>*R. v. Dowling* (1889), 17 O.R. 698.

<sup>24</sup>See p. 81 *supra*.



to preliminary matters.<sup>25</sup> The courts interpret a statute conferring power on a tribunal to determine whether it confers power on the tribunal to decide any particular matter of fact, law, or mixed law and fact—whether the matter is within the powers of the tribunal or is collateral to them. If the courts decide that the particular matter is collateral, they will determine the matter themselves. In performing its functions a tribunal may, however, find it necessary to form a view on a collateral matter in order for it to proceed. Such a view is not a “decision” of the tribunal in a legal sense, but merely a “lay judgment” or “a preliminary decision” similar to the opinions formed by a tribunal on preliminary matters.

### Using the Power for an Improper Purpose or Taking into Account Extraneous or Wrong Considerations

An illustration of the principle that a tribunal exceeds its powers if it takes into account improper purposes is afforded by *In Re Henry's Drive-In and the Hamilton Police Board*.<sup>26</sup> The Licensing Board was empowered to grant licenses to restaurants; the purpose of the regulation was to ensure proper standards for handling foodstuffs. The licensing tribunal refused a licence, having regard to certain traffic problems, and in effect established a new zoning requirement. The decision was held to be unauthorized as beyond the powers of the Board.

Mr. Justice Rand has stated the principle with respect to licensing power in the following terms:

“In public regulation of this sort there is no such thing as absolute and untrammelled ‘discretion’, that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator; no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute.”<sup>27</sup>

A disregard of this principle will render action of a tribunal beyond its powers.

<sup>25</sup>See p. 252 *supra*.

<sup>26</sup>[1960] O.W.N. 468.

<sup>27</sup>*Roncarelli v. Duplessis*, [1959] S.C.R. 121, 140.

### **Failure to Comply with the Method Required by the Statute to Make a Decision**

The most common example of the failure of a tribunal to arrive at a valid decision because of non-compliance with statutory requirements as to the method by which the decision is to be reached,<sup>28</sup> arises where the tribunal purports to delegate the power of decision to some person other than the tribunal. In such case, unless a power of delegation is expressly given or can be implied from the terms of the statute and the nature of the power, the purported decision is not a decision of the tribunal at all. It will be held to be unauthorized. Thus, where power is given to a Labour Relations Board to determine the membership of a union and it purports to authorize its executive officer to do so, the decision is unauthorized. It is in fact not a decision of the Board. It is beyond its powers to delegate the power of decision.<sup>29</sup>

Where a tribunal is required to reach its decision in a prescribed manner, e.g., by a majority of a quorum fixed expressly by the statute, a failure to comply with such a requirement will render the decision unauthorized.

### **Failure to Comply with Statutory Requirements Necessary to Render the Decision Legally Effective**

As we have explained earlier, the central element common to all judicial or administrative powers is the making of a mental decision. But the exercise of a power may require not only a decision but in addition, action, as prescribed by the statute.

The power to expropriate property is not effectively exercised merely by the decision of a minister to expropriate. To become effective the statutory requirements of filing a plan and description of the property in the appropriate registry office must be complied with. If the plan and description are insufficient to identify the property, the purported expropriation will have no validity.<sup>30</sup>

<sup>28</sup>See pp. 85 ff. *supra*.

<sup>29</sup>*Lab. Rel. Bd. for Sask. v. Speers*, [1947] 2 W.W.R. 927.

<sup>30</sup>*R. v. Lee* (1917), 16 Ex. C.R. 424, affirmed without reasons by Sup. Ct. Can.

## Fraud by a Party

Where a party to a proceedings before a tribunal obtains a decision through fraud, a superior court has power on an application for *certiorari* to quash the decision.<sup>31</sup> For example, perjury by a witness called by the party obtaining the decision is a ground on which an order can be made, where it is shown that the perjured evidence was given in collusion with a party to the proceedings.<sup>32</sup>

The ground for setting aside decisions of tribunals, obtained by fraud, has not been expressed by the courts to be the lack of power to make a decision, although this is its effect. As we said earlier, in such cases the fraudulent conduct of the party has prevented the tribunal from directing its mind to one of its statutory functions, i.e., to find the facts. It is analogous to a case where the tribunal refuses to consider the facts. It has, therefore, acted beyond its powers.

## Any Error of Law on the Face of the Record

Since ancient times the courts have, in *certiorari* proceedings, set aside decisions of tribunals for any error of law on the face of the record. The courts will exercise this power, even though the question of law upon which the tribunal has erred is within its powers of decision conferred by statute.<sup>33</sup>

## ABSENCE OF OR NON-COMPLIANCE WITH SUBJECTIVE INGREDIENTS

Subjective ingredients fall into three classes:

- (1) Subjective conditions precedent to the existence of a power of decision;<sup>34</sup>
- (2) Subjective provisions governing the scope or area of matters to be decided;<sup>35</sup>
- (3) Subjective considerations to be taken into account in making a decision.<sup>36</sup>

<sup>31</sup>*Rex v. Recorder of Leicester, Ex parte Wood*, [1947] 1 All E.R. 928.

<sup>32</sup>*R. v. Ashford (Kent) Justices, Ex parte Richley*, [1955] 3 All E.R. 604.

<sup>33</sup>*R. v. Northumberland Compensation Appeal; Ex Parte Shaw*, [1952] 1 K.B. 338; *John East Iron Works v. Lab Rel. Bd. of Sask.*, [1949] 3 D.L.R. 51.

<sup>34</sup>See pp. ff. *supra*.

<sup>35</sup>See p. 93 *supra*.

<sup>36</sup>See p. 94 *supra*.

Where a statutory power is conferred with subjective ingredients, the role of the courts on judicial review is radically changed from that in which the ingredients are objective.

Objective ingredients are factual or legal conditions or requirements to the existence or exercise of a power. Determination as to whether they are complied with is beyond the powers of decision of the tribunal and may be made by the courts.

The salient feature of subjective ingredients is that the conditions or requirements are not expressed factually but are opinions or judgments of the tribunal as to the existence of factual, legal or policy matters. The function of the courts on judicial review is to decide whether the opinion or judgment was formed or made by the tribunal within the scheme and purposes of the statute. If so, the condition or requirement imposed by the ingredient is met and the courts cannot interfere, for to do so would be to entertain an appeal from the opinion or judgment.

The grounds upon which the courts may review the opinion or judgment to ensure that it is within the scheme and purpose of the statute cannot be precisely tabulated. Extracts from judgments in three cases broadly illustrate the functions of the courts in such cases:

(1) The Special War Revenue Act, imposing a sales tax on the price of goods, provided in section 98 that where goods "are sold at a price which in the judgment of the Minister is less than the fair price . . . the Minister shall have power to determine the fair price. . . ."<sup>37</sup> A ground of attack on a determination by the Minister was that the reasons for his decision were inadequate. In upholding the Minister's decision, Mr. Justice Kerwin (as he then was) stated:

" . . . [W]e cannot be aware of all the reasons that moved the Minister and, in any event, his jurisdiction under section 98 was dependent only upon his judgment that the goods were sold at a price which was less,—not, be it noted, less than what would be a fair price commercially or in view of competition or the lack of it,—but less than what he considered was the fair price on which the taxes should be imposed. The legis-

<sup>37</sup>R.S.C. 1927, c. 179, s. 98, as enacted by Can. 1932-33, c. 50, s. 20.

lature has left the determination of that matter and also of the fair prices on which the taxes should be imposed to the Minister and not to the court. In my view, section 98 confers upon the Minister an administrative duty which he exercised and as to which there is no appeal. In such a case the language of the Earl of Selborne in *Spackman v. Plumstead District Board of Works* [(1885) 10 App. Cas. 229, at 235] appears to be particularly appropriate:—

‘And if the legislature says that a certain authority is to decide, and makes no provision for a repetition of the inquiry into the same matter, or for a review of the decision by another tribunal, *prima facie*, especially when it forms, as here, part of the definition of the case provided for, that would be binding’.”<sup>38</sup>

(2) Regulations made by the Governor General in Council under the War Measures Act<sup>39</sup>—which authorized the Governor in Council to make such regulations “as he deems necessary or advisable by reason of . . . war . . . for the security, defence, peace, order and welfare of Canada. . . .” were attacked on the grounds that they were in fact not necessary or advisable. Chief Justice Duff stated:

“. . . I cannot agree that it is competent to any court to canvass the considerations which have, or may have, led him to deem such Regulations necessary or advisable for the transcendent objects set forth. The authority and the duty of passing on that question are committed to those who are responsible for the security of the country—the Executive Government itself, under, I repeat, its responsibility to Parliament. The words are too plain for dispute: the measures authorized are such as the Governor General in Council (not the courts) deems necessary or advisable.

True, it is perhaps theoretically conceivable that the Court might be required to conclude from the plain terms of the order in council itself that the Governor General in Council had not deemed the measure to be necessary or advisable, or necessary or advisable by reason of the existence of war. In such a case I agree with Clauson L.J. (as he then was) that the order in council would be invalid as showing on its face that the essential conditions of jurisdiction were not present (*Rex v. Comptroller General of Patents*, [1941] 2 K.B. 306, 316); but such theoretical speculations cannot affect the question we have to decide.

<sup>38</sup>*R. v. Noxzema Chemical Co. of Canada Ltd.*, [1942] S.C.R. 178, 185-86.

<sup>39</sup>R.S.C. 1927, c. 206, s. 3.

It is perhaps advisable to observe also that subordinate agencies appointed by the Governor General in Council are not, by the *War Measures Act*, outside the settled rule that all statutory powers must be employed in good faith for the purposes for which they are given, although here again, as regards the present Reference, that rule has only a theoretical interest."<sup>40</sup>

(3) Lord Greene, M. R. dealt comprehensively with the grounds for review, when dealing with a power to impose "such conditions as it [a municipal corporation] deems fit" in granting a licence, in this way:

"What, then, is the power of the courts? They can only interfere with an act of executive authority if it be shown that the authority has contravened the law. . . . When discretion of this kind is granted the law recognizes certain principles upon which that discretion must be exercised, but within the four corners of those principles the discretion, in my opinion, is an absolute one and cannot be questioned in any court of law. What then are those principles? . . . Bad faith, dishonesty—those of course, stand by themselves—unreasonableness, attention given to extraneous circumstances, disregard of public policy and things like that have all been referred to, according to the facts of individual cases, as being matters which are relevant to the question. If they cannot all be confined under one head, they at any rate, I think, overlap to a very great extent. For instance, we have heard in this case a great deal about the meaning of the word 'unreasonable'.

It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word 'unreasonable' in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting 'unreasonably'. Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington L. J. in *Short v. Poole Corporation* gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable

<sup>40</sup>Reference re *Chemical Regulations*, [1943] S.C.R. 1, 12-3.

in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another.

It appears to me quite clear that the matter dealt with by this condition was a matter which a reasonable authority would be justified in considering when they were making up their mind what condition should be attached to the grant of this license. Nobody, at this time of day, could say that the well-being and the physical and moral health of children is not a matter which a local authority, in exercising their powers, can properly have in mind when those questions are germane to what they have to consider. . . . I think [counsel] in the end agreed that his proposition that the decision of the local authority can be upset if it is proved to be unreasonable, really meant that it must be proved to be unreasonable in the sense that the court considers it to be a decision that no reasonable body could have come to. It is not what the court considers unreasonable, a different thing altogether. . . ."<sup>41</sup>

## MATTERS NOT CONSIDERED BY THE COURTS ON JUDICIAL REVIEW

The principle that there is no appeal from the decision of a statutory tribunal unless expressly conferred restricts the court on judicial review in three ways.

### Error of Fact

Although a court, in reviewing a decision of a tribunal, might reach the conclusion that the tribunal made an erroneous finding of fact which it was within its power to decide, the court will not set aside the decision merely on this ground. This principle has been carried to extreme lengths in Canada. The law seems to be authoritatively laid down that not only is the tribunal the exclusive judge of the weight which should attach to particular testimony or other evidence, but that the tribunal can make an effective decision notwithstanding that there is no evidence whatsoever to support some factual ingredient essential to the decision. This, as part of the law in

<sup>41</sup>*Associated Provincial Picture Houses Limited v. Wednesbury Corporation*, [1948] 1 K.B. 223, 228-30.

Ontario, has come under severe criticism, and has far-reaching importance when considered in relation to the safeguarding of civil rights. The rule rests on the authority of *R. v. Nat. Bell Liquors Limited*.<sup>42</sup> That was a *certiorari* case. Although it required consideration of certain applicable statutory provisions, the reasoning of Lord Sumner, on the effect of the presence or absence of evidence on the jurisdiction of the magistrate, appears to be of general application in any proceedings to review decisions of statutory tribunals on matters of fact:

“On *certiorari*, so far as the presence or absence of evidence becomes material, the question can at most be whether any evidence at all was given on the essential point referred to. Its weight is entirely for the inferior Court. . . . Passing from considerations of the weight of the evidence, we come to the questions whether there was any evidence and what materials are to be looked at in order to answer that question, and further what effect a decision that on some essential point evidence was completely lacking would have on the jurisdiction respectively of the magistrates and the Superior Court . . .”<sup>43</sup>

“It is evident that this exact point must be one of rare occurrence. It assumes complete jurisdiction, complete absence of any testimony on a definite and essential point, and complete presentation to the superior court of this omission in the Court below. Only if the whole evidence given can be got before the superior Court can this difficulty be raised. Only when it appears that no witness whatever has said a thing that must be said by some one will it fail to be discussed. . . .”<sup>44</sup>

“It has been said that the matter may be regarded as a question of jurisdiction, and that a justice who convicts without evidence is acting without jurisdiction to do so. Accordingly, want of essential evidence, if ascertained somehow, is on the same footing as want of qualification in the magistrate, and goes to the question of his right to enter on the case at all. Want of evidence on which to convict is the same as want of jurisdiction to take evidence at all. This, clearly, is erroneous. A justice who convicts without evidence is doing something that he ought not to do, but he is doing it as a Judge, and if his jurisdiction to entertain the charge is not open to impeachment, his subsequent error, however grave, is a wrong exercise

<sup>42</sup>[1922] 2 A.C. 128.

<sup>43</sup>*Ibid.*, 144.

<sup>44</sup>*Ibid.*, 160.



of a jurisdiction which he has, and not a usurpation of a jurisdiction which he has not. . . ."<sup>45</sup>

"... it is not competent to the superior Court, under the guise of examining whether such jurisdiction was established, to consider whether or not some evidence was forthcoming before the magistrate of every fact which had to be sworn to in order to render a conviction a right exercise of his jurisdiction."<sup>46</sup>

That this is the law in Ontario, where no statutory right of appeal is provided, cannot now be challenged. That it ought not to continue to be the law is clear. As we shall see, a significantly different rule has been developed in the United States. We shall discuss proposals for changes in Ontario more fully later.

### Error of Law

The courts, when interpreting a statute conferring a power, will decide whether any legal requirement is a condition precedent or is collateral to the powers conferred, and if they find the requirement to be a condition or to be collateral, the courts will determine whether the legal requirement is complied with in accordance with their own views and without regard to any view taken by the tribunal. On the other hand, if the courts decide that the fulfilment of the legal requirement is a matter which falls within the powers of the tribunal to decide, subject to the exception in the case of error of law on the face of the record on *certiorari* proceedings, the courts will not look at the decision to see whether in their view it was right or wrong. To do so would be to entertain an appeal.

### Wisdom or Reasonableness of the Decision

On judicial review the courts have no concern with whether the decision of a tribunal is in their view a reasonable or wise one. To consider it from this point of view would be to entertain an appeal. This principle is subject to the same qualification as that expressed with respect to review by the courts of subjective ingredients.<sup>47</sup> If the decision is so

<sup>45</sup>*Ibid.*, 151.

<sup>46</sup>*Ibid.*, 165.

<sup>47</sup>See pp. 257 ff. *supra*.

unreasonable or so unrelated to the social purpose of the statute that no person acting reasonably could have arrived at the decision, the court may hold the decision to be beyond the powers of the tribunal. Where the decision is a decision that a reasonable person "might" have made, a court will not set it aside, even though it may feel that it would have arrived at a different decision.<sup>48</sup>

## ENFORCEMENT OF PUBLIC DUTIES

We now consider the right of the individual to compel the tribunal to exercise its statutory powers. This right is not to be confused with a right to damages in proper cases for the non-performance of a duty, or liability to punishment for failure to perform a duty where failure is made an offence. In such cases the duty is not performed and the individual does not enjoy the benefit of its performance.

Two kinds of duties fall to be considered under this heading. The nature of the duty determines the nature of order that the court may make with respect to its performance:

(1) The duty may be a ministerial one, i.e., to do some definite act in defined circumstances.<sup>49</sup> The following is an illustration of a hypothetical statutory provision imposing such duty:

"Where a British subject applies and pays a fee of \$1.00, a fisheries officer shall issue a licence to him in Form A."

If the conditions precedent—application by a British subject and the payment of one dollar—are present, the fisheries officer is under a duty to do a defined act: to issue the prescribed licence.

(2) The duty may be, in defined circumstances, to exercise a judicial or an administrative power of decision, involving the exercise of judgment in making a choice. The following is a hypothetical illustration:

"Where a person applies for a licence to a fisheries officer, the fisheries officer shall decide whether the applicant is entitled

<sup>48</sup>*Cooperative Committee on Japanese Canadians v. Att. Gen. of Can.*, [1947] A.C. 87, 108.

<sup>49</sup>See p. 30 *supra*.

to a licence under this Act and if so entitled shall issue a licence to him.”

On an application, the duty of the fisheries officer is to “decide whether the applicant is entitled” to a licence.

Under the first illustration, if the conditions precedent are fulfilled (something the courts will decide) and the officer refuses to issue the licence, the court will order him to do the act that he is empowered and required to perform: to issue the licence. Under the second illustration, the fisheries officer is given power to decide whether an applicant is entitled to a licence. This is a power that is not conferred on the courts. The officer is, however, under a duty to make the decision. If he refuses to do so the courts will order him to give consideration to the application and make a decision. But they will not direct the kind of decision he is to make.<sup>50</sup>

A duty may be imposed expressly by a statute. The usual language employed to impose a duty, as illustrated by the foregoing examples, is that a person “shall” do the required act or make the required decision. Such a duty may, however, be implicit even though the language is purely enabling, in the sense that it merely says that a fisheries officer “may” issue a licence. If the scheme of the statute is such that it is to be implied that, where the circumstances arise, the act is to be performed or the decision made, the courts will interpret the statute as coupling a duty with the power to act or to make the decision. In such case the courts will issue an order directing the officer or tribunal to perform the duty to do the required act or make the required decision.<sup>51</sup>

The law of Ontario is reasonably clear as to circumstances in which the courts may order performance of a duty. It is useful to set out briefly some of the main considerations:

- (1) A mere member of the public, having no special interest in the performance of the duty, cannot enforce its performance in favour of another. Generally speaking, before the courts will order performance of a public duty of the kind illustrated in the examples given, the person applying to the

<sup>50</sup>*R. v. Leong Ba Chai*, [1954] S.C.R. 10.

<sup>51</sup>*Labour Relations Board of Saskatchewan v. R.*, [1956] S.C.R. 82.

courts must show that he has some direct and immediate interest.

(2) Where conditions precedent to the duty are expressed in the statute imposing it, they must be satisfied; otherwise, the duty to act has not arisen.

(3) A clear failure to perform the duty must be shown. This may be done in three ways:

(a) by showing a demand by a person entitled to have the duty performed, and a refusal by the tribunal authorized or required to perform it;

(b) by showing conduct of the tribunal of such a nature that a refusal is to be implied; or

(c) by showing a purported decision of the tribunal which is *ultra vires* or ineffective.

In such cases the courts will order the tribunal to make an effective decision.<sup>52</sup>

(4) Even if the requirements we have discussed are all met, enforcement of the duty will not be ordered where its performance has become illegal, or legally or practically impossible, or where in the circumstances the order will be ineffectual. (It may be more accurate to say that a duty cannot continue to exist if its performance has become illegal.)

(5) In proper cases the courts have power to exercise a discretion to refuse to order performance of the duty, e.g., where the court considers that the conduct of the applicant disqualifies him from claiming its performance.<sup>53</sup>

(6) The court cannot order the Crown to perform a duty expressly imposed on the Crown, although it may order servants of the Crown to perform a duty that is directly imposed upon them.<sup>54</sup>

This outline of the main principles underlying direct enforcement of public duties is sufficient to indicate the scope of this aspect of judicial review. The forms of remedy are discussed elsewhere in this Report.

<sup>52</sup>*Kipp v. Att. Gen. of Ont.*, [1965] S.C.R. 57.

<sup>53</sup>*Seabee Homes Ltd. v. Georgetown*, [1962] O.R. 286.

<sup>54</sup>*R. v. Leong Ba Chai*, [1954] S.C.R. 10.

## CHAPTER 17

# Statutory Restrictions on Judicial Review

SINCE very early times Parliament has attempted to place restrictions on the limited power of the courts to review decisions of statutory tribunals.

These attempts have been based on the contention that the courts frequently intermeddled with inferior or special tribunals, so as to frustrate their operations by raising technicalities as a basis for quashing decisions that were otherwise meritorious. It was laid down as early as 1670 that the jurisdiction of the courts could not be ousted except by clear and unambiguous language. Chief Justice Kelynge stated the principle in language that applies with equal force three centuries later:

“. . . this Court cannot be ousted of its jurisdiction without special words; here is the last appeal, the King himself sits here, and that in person if he pleases, and his predecessors have so done; and the King ought to have an account of what is done below in inferior jurisdictions. 'Tis for avoiding of oppressions, and other mischiefs. To deny and oppose this, and to set up uncontrollable jurisdictions below, tends manifestly to a commonwealth; and we ought, and we shall take care that there be no such thing in our days. I know there is a great clamour, so soon as an inferior jurisdiction is touched; and 'tis thought we deal hardly with them: but unless we will suffer this Court to be dissolved, and the prerogative of the King to be encroached upon, we must oppose ourselves to these proceedings.”<sup>1</sup>

<sup>1</sup>*Smith's Case* (1670), 1 Vent. 65, 68; 86 E.R. 46, 47-8.

There is a reflection today of the "great clamour so soon as an inferior jurisdiction is touched", in some of the arguments put forward in support of statutory clauses restricting the courts' common law powers of review.

We now discuss the different devices that have been resorted to in an attempt to restrict the power of the courts to review decisions of inferior tribunals.

## FINALITY CLAUSES

Attempts to limit the power of the courts on review by finality clauses take many different forms. Some are expressed in more subtle language than others as the following illustrations show:

(1) *The Horticultural Societies Act*

"2. The Minister may decide all matters of doubt or dispute arising in the operation or construction of this Act and his decision is final."<sup>2</sup>

(2) *The Schools Administration Act*

"83. (2) A board may suspend a municipal inspector, appointed by the board, for neglect of duty, misconduct, inefficiency or physical infirmity, and the secretary of the board shall forthwith report the suspension to the Minister in writing, with a statement of the reasons therefor, and the Minister may remove the person from office and the decision of the Minister is final."<sup>3</sup>

(3) *The Power Commission Act*

"84. (3) The adjustment and apportionment made by the Commission is final and binding upon the municipal corporations."<sup>4</sup>

(4) *The Public Lands Act*

"24. The Minister has authority to determine all questions that arise as to the rights of persons claiming to be entitled to letters patent of land located or sold under this Act and his decision is final and conclusive."<sup>5</sup>

(5) *The Lakes and Rivers Improvement Act*

"80. The award and directions in writing of the arbitrator are final and binding and are not subject to appeal."<sup>6</sup>

<sup>2</sup>R.S.O. 1960, c. 175, s. 2.

<sup>3</sup>R.S.O. 1960, c. 361, s. 83 (2).

<sup>4</sup>R.S.O. 1960, c. 300, s. 84 (3).

<sup>5</sup>R.S.O. 1960, c. 324, s. 24.

<sup>6</sup>R.S.O. 1960, c. 203, s. 80.

(6) *The Railway Fire Charge Act*

"5. Where the owner or tenant of any railway lands furnishes proof to the satisfaction of the Minister on or before the 1st day of January in any year in which the charge imposed by this Act is payable that such railway lands or any part thereof were during the preceding calendar year actually and in good faith in use for agricultural purposes, the owner or tenant is entitled to a reduction of the charge payable by him to the extent to which such railway lands were so used, and the decision of the Minister as to such right to exemption is final and is not open to appeal or to be questioned in any manner whatsoever."<sup>7</sup>

The courts have interpreted such clauses as having little effect on the right of review, but merely emphasizing that there is no right of appeal, i.e., that the decision is final since no express right of appeal is given. The use of such words as "final", "binding", "conclusive", "not subject to appeal" or "not subject to be questioned", do not interfere with the courts' jurisdiction on review, as that jurisdiction rests on the concept of *ultra vires*. It recognizes that there is no appeal unless expressly given by statute.

## STATUTORY PROVISIONS BARRING REMEDIES FOR REVIEW

Attempts are frequently made to restrict or eliminate review by the courts through the enactment of so-called privative clauses. This is a device that appears to have been adopted even prior to 1686.<sup>8</sup> The following are examples of types of privative clauses contained in Ontario statutes:

(1) *The Labour Relations Act*

"80. No decision, order, direction, declaration or ruling of the Board shall be questioned or reviewed in any court, and no order shall be made or process entered, or proceedings taken in any court, whether by way of injunction, declaratory judgment, certiorari, mandamus, prohibition, quo warranto, or otherwise, to question, review, prohibit or restrain the Board or any of its proceedings."<sup>9</sup>

(2) *The Workmen's Compensation Act*

"72. (1) The Board has exclusive jurisdiction to examine into,

<sup>7</sup>R.S.O. 1960, c. 343, s. 5.

<sup>8</sup>*R. v. Plowright* (1686), 3 Mod. 94; 87 E.R. 60.

<sup>9</sup>R.S.O. 1960, c. 202, s. 80.

hear and determine all matters and questions arising under this Part and as to any matter or thing in respect of which any power, authority or discretion is conferred upon the Board, and the action or decision of the Board thereon is final and conclusive and is not open to question or review in any court and no proceedings by or before the Board shall be restrained by injunction, prohibition or other process or proceeding in any court or be removable by *certiorari* or otherwise into any court.”<sup>10</sup>

(3) *The Mining Act*

“157. Except as provided in this Part, proceedings under this Act are not removable into any court by *certiorari* or otherwise, and no injunction, *mandamus* or prohibition shall be granted or issued out of any court in respect of anything required or permitted to be done by any officer appointed under this Act.”<sup>11</sup>

(4) *The Liquor Control Act*

“26. (2) Every action, order or decision of the Board as to any matter or thing in respect of which any power, authority or discretion is conferred on the Board under this Act or the regulations is final and shall not be questioned, reviewed or restrained by injunction, prohibition or *mandamus* or other process or proceeding in any court or be removed by *certiorari* or otherwise in any court, but the Board may state a case on a point of law only as provided from time to time in the *Criminal Code* (Canada).”<sup>12</sup>

Provisions of this type are found in the following statutes:

The Judicature Act,<sup>13</sup>

The Labour Relations Act,<sup>14</sup>

The Lakes and Rivers Improvement Act,<sup>15</sup>

The Liquor Control Act,<sup>16</sup>

The Liquor Licence Act,<sup>17</sup>

The Mental Hospitals Act,<sup>18</sup>

The Mining Act,<sup>19</sup>

<sup>10</sup>R.S.O. 1960, c. 437, s. 72 (1).

<sup>11</sup>R.S.O. 1960, c. 241, s. 157.

<sup>12</sup>R.S.O. 1960, c. 217, s. 26 (2), as amended by Ont. 1965, c. 58, s. 13 (2).

<sup>13</sup>R.S.O. 1960, c. 197, s. 34.

<sup>14</sup>R.S.O. 1960, c. 202, ss. 18, 66, 80.

<sup>15</sup>R.S.O. 1960, c. 203, s. 24.

<sup>16</sup>R.S.O. 1960, c. 217, ss. 12, 26, 38.

<sup>17</sup>R.S.O. 1960, c. 218, s. 20.

<sup>18</sup>R.S.O. 1960, c. 236, s. 15, as repealed by Ont. 1967, c. 52, s. 8, not yet proclaimed.

<sup>19</sup>R.S.O. 1960, c. 241, s. 157.



- The Ontario Municipal Board Act,<sup>20</sup>  
 The Power Commission Act,<sup>21</sup>  
 The Public Health Act,<sup>22</sup>  
 The Real Estate and Business Brokers Act,<sup>23</sup>  
 The Securities Act,<sup>24</sup>  
 The Stockyards Act,<sup>25</sup>  
 The Workmen's Compensation Act,<sup>26</sup>  
 The Provincial Land Tax Act,<sup>27</sup>  
 The Railway Fire Charge Act,<sup>28</sup>  
 The Hospital Subsidy Disputes Arbitration Act.<sup>29</sup>

The privative clauses contained in these statutes do not restrict the powers of the court to review the decisions of the respective tribunals on the grounds of *ultra vires*. Where the decision of a tribunal is beyond its powers, the courts hold that it is not acting within the statute containing the privative clause. In other words, a tribunal cannot act outside the powers conferred by the statute and claim that what it does is protected from attack by something contained in the statute.

However, where a tribunal has been given power to decide questions of law, such privative clauses do limit the power of the court to review its decisions on the ground of error of law on the face of the record.<sup>30</sup>

Language stronger and more objectionable than that employed in any of the statutes we have discussed is used in the Judicature Act. It is an attempt to provide the widest possible restrictions on the rights of the individual to resort to the courts as a safeguard against oppressive and unwarranted action by those administering the Succession Duty Act. It reads:

“34. No action and no proceeding by way of injunction, mandamus, prohibition or other extraordinary remedy lies or shall

<sup>20</sup>R.S.O. 1960, c. 274, s. 95.

<sup>21</sup>R.S.O. 1960, c. 300, s. 24.

<sup>22</sup>R.S.O. 1960, c. 321, s. 133.

<sup>23</sup>R.S.O. 1960, c. 344, s. 57.

<sup>24</sup>R.S.O. 1960, c. 363, s. 70.

<sup>25</sup>R.S.O. 1960, c. 385, s. 5.

<sup>26</sup>R.S.O. 1960, c. 437, s. 72.

<sup>27</sup>Ont. 1961-62, c. 11, s. 18.

<sup>28</sup>R.S.O. 1960, c. 343, s. 5.

<sup>29</sup>Ont. 1965, c. 48, s. 5.

<sup>30</sup>*Re Ont. Lab. Rel. Bd. and Bradley*, [1957] O.R. 316.

be instituted against the Treasurer of Ontario, his representative or appointee, whether in any such person's public or private capacity, for anything done or omitted or proposed or purported to be done or omitted in connection with the administration or carrying out of *The Succession Duty Act*."<sup>31</sup>

This legislation was first introduced in 1937.<sup>32</sup> It was a companion to legislation introduced at the same time conferring extraordinarily broad powers in the Treasurer of Ontario and others appointed by him including the power to commit for contempt of court. All of these powers remain in the Succession Duty Act as it is today.<sup>33</sup> This privative clause is particularly objectionable as it applies:

- (1) To decisions of the Treasurer of Ontario, his representatives or appointees;
- (2) To these persons, whether acting in their public or private capacity;
- (3) Not only to anything done, but anything purported to be done; and
- (4) To anything omitted.

The fact that this legislation was originally enacted as an amendment to the Judicature Act, and remains in the Judicature Act at the present time instead of in the Succession Duty Act, leads one to think that the legislators thought that it was necessary to give it some apparent cloak of respectability. The section is an attempt to confer absolute power where the individual ought to be absolutely protected from wrongful exercise of the power.

In the United Kingdom a limited form of privative clause has been devised which has been held to be wholly effective. The Acquisition of Land (Authorization Procedure) Act, 1946, provides that any person aggrieved by a compulsory purchase order may, within six weeks, apply to the High Court on the ground that the order is not authorized by the statute, but after the six weeks the order "shall not . . . be questioned in any legal proceedings whatsoever". This is in essence a statute of limitations. It has been held that the

<sup>31</sup>R.S.O. 1960, c. 197, s. 34.

<sup>32</sup>Ont. 1937, 2nd Session, c. 2, s. 2.

<sup>33</sup>R.S.O. 1960, c. 386, ss. 27, 28.

words must be given their literal meaning and that after the six weeks' period has elapsed no proceedings of any kind may be brought to attack a compulsory purchase order.<sup>34</sup>

## CONCLUSIVE CERTIFICATES

Another device that has been employed to restrict judicial review is the enactment of provisions giving finality to certificates certifying certain facts. The following are examples:

### (1) *The Labour Relations Act*

"18. (1) When the members of the conciliation board have been appointed, the Minister shall forthwith give notice of their names to the parties and thereupon the board shall be deemed to have been established.

(2) When notice under subsection 1 has been given, it shall be presumed conclusively that the conciliation board has been established in accordance with this Act, and no order shall be made or process entered or proceedings taken in any court, whether by way of injunction, declaratory judgment, certiorari, mandamus, prohibition, quo warranto, or otherwise, to question the establishment of the conciliation board or the appointment of any of its members, or to review, prohibit or restrain any of its proceedings."<sup>35</sup>

### (2) *The Loan and Trust Corporations Act*

"102. (1) Upon proof that the foregoing requirements have been duly complied with, the Minister shall issue a certificate under his hand and seal certifying the assent of the Lieutenant Governor in Council and the date thereof, and declaring the names of the corporations parties thereto, or, in the case of amalgamation, declaring the amalgamation of the corporations, naming them, and the name of the new or of the continuing corporation, together with such other matters, if any, as appear to him necessary or desirable in the public interest.

(2) The certificate of the Minister is for all purposes and in all courts conclusive evidence of all matters therein certified or declared."<sup>36</sup>

It may well be argued that even a certificate issued under these provisions as "conclusive evidence" is subject to a limited application. The notice referred to in subsection 2 of section 18 of the Labour Relations Act is a "notice under

<sup>34</sup>*Smith v. East Elloe Rural District Council*, [1956] A.C. 736.

<sup>35</sup>R.S.O. 1960, c. 202, s. 18.

<sup>36</sup>R.S.O. 1960, c. 222, s. 102.

subsection 1". The notice under subsection 1 may be issued only "when the members of the conciliation board have been appointed". It could well be argued that no effective notice can be given unless proper appointments have been made. Such a provision has in one case been interpreted as raising a conclusive presumption only with respect to procedural requirements of the statute, and that it would not protect against a failure to comply with substantive requirements.

Again, under section 102 of the Loan and Trust Corporations Act, the certificate is to be issued "upon proof that the foregoing requirements have been duly complied with". It might well be open to a court to take the view in a particular case that such "proof" was not forthcoming. It has been held that substantially similar provisions in the Dominion Companies Act were limited in their operation as "conclusive evidence" to evidence for the purpose of the particular statute.<sup>37</sup>

## RESTRICTION OF THE RECORD

Since the courts have power on *certiorari* applications to review decisions of inferior tribunals for errors of law on the face of the record, it follows that the more complete the record, the greater the scope of the power of review. A device adopted to limit the power of review is to provide in the statute for a skeleton record with the result that "the effect was not to make that which had been error, error no longer, but to remove merely all opportunity for its detection. The face of the record 'spoke' no longer: it was the 'inscrutable face of the sphinx'."<sup>38</sup>

## DECISION NOT TO BE QUASHED IF NO SUBSTANTIAL WRONG OR INJUSTICE

A reasonable limitation on the power of the courts to quash a tribunal's decision on judicial review is made by the enactment of provisions prohibiting the quashing of a meritorious decision on purely technical grounds. For example the Mining Act provides:

"158. No proceeding before the Commissioner or a recorder shall be invalidated by reason of any defect in form or sub-

<sup>37</sup>*Letain v. Conwest Exploration Co.*, [1961] S.C.R. 98.

<sup>38</sup>*R. v. Nat. Bell Liquors Ltd.*, [1922] 2 A.C. 128, 159.

stance or failure to comply with this Act, if no substantial wrong or injustice has been thereby done or occasioned."<sup>39</sup>

The object of provisions of this character is commendable. The form of the provision is questionable. If a decision is beyond the powers of the tribunal, there is no legal decision. It would seem that it is wrong to have parties bound by an illegal decision. The objection can be met by giving power to the court to validate a purported decision, notwithstanding technical irregularities.

## **SUBJECTIVE INGREDIENTS**

The most effective and commonly used device for limiting judicial review of action taken by a tribunal is to include subjective ingredients in the powers conferred on the tribunal. These we have discussed in Chapter 6. Subjective ingredients may be conditions precedent to the existence of the power, or limitations on its scope or prescribed considerations to be taken into account.

In either case, since the determination of the subjective ingredients is a matter within the powers of the tribunal, judicial review is effectively excluded.

We have recommended that subjective ingredients ought not to be included in a statutory power unless they are necessary to carry out the scheme of the statute. In no case should they be included merely as a device to exclude judicial review.

## **UNDESIRABILITY OF RESTRICTING JUDICIAL REVIEW**

There is considerable controversy as to whether judicial review should be eliminated or restricted.

### **Arguments for Restricting Judicial Review**

Extreme advocates of placing limitations on the powers of the courts on judicial review take the view that, for certain tribunals at least, there should be no review by the courts, not even the limited review as to whether the tribunals have acted

<sup>39</sup>R.S.O. 1960, c. 241, s. 158.

within their powers. The arguments may be summarized as follows:

(1) Where power is conferred on a tribunal, subject to conditions or requirements of fact and law or mixed law and fact, these conditions or limitations relate to the field of activity in which the tribunal is empowered to act. In this field the tribunal is selected as the expert body to make decisions.

(2) In matters relating to conditions or requirements under the statute which are clear, the tribunal obviously can decide them quite as well as the courts.

(3) Where matters of doubt arise, the tribunal is in a better position than the courts to reach an appropriate decision, for it acquires a specialized experience and familiarity with the field of activity in which it is empowered to act. For example, the courts may hold the question of whether a person is an "employee" for the purposes of a particular statute to be a collateral matter outside the jurisdiction or authority of a tribunal and one to be decided by the courts. Proponents of the limiting of judicial review argue that the expert tribunal is in a better position to interpret the term "employee" for the purposes of its statute, and this question should be left to the tribunal and the court should be excluded.

(4) The tribunal can be expected to be as responsible as the courts in reaching a decision.

(5) Not only are the courts less expert and less familiar with the social policy of the statute to be interpreted, but it is contended they have shown hostility towards the exercise of powers by other tribunals, by restrictive interpretation of privative clauses.

(6) Judicial review by the courts of special tribunals, either judicial or administrative, causes delay, expense and formality, which may frustrate the social objects of the statute establishing the tribunal.

Proponents of eliminating or cutting down on the scope of judicial review argue that on balance it is better to accept the risk of some wrong decisions by special tribunals, or some

action taken beyond the powers conferred by the Legislature, than to have the disadvantages of judicial review.

### Arguments for Preserving Judicial Review

Views criticizing privative clauses may be summarized in this way:

(1) Where the Legislature enacts a statute conferring on a tribunal limited powers of decision to affect the rights of individuals, it should be open to an individual so affected to have it determined, by a body other than the tribunal itself, whether the action taken falls within the powers conferred by the Legislature. "It is manifest that the sole object of these clauses [privative clauses] is to legalize illegalities and exempt them from judicial control."<sup>40</sup> A person affected by an illegal order is entitled to have the illegality determined and controlled.

(2) The courts are pre-eminently suited for this purpose. They have the required independence, impartiality, expertness in law and familiarity with just procedure. The review does not now extend to the special matters actually entrusted to the tribunal, but only to the limits of its powers and patent errors of law which the courts are better able to determine than the tribunal.

(3) A tribunal charged with the advancement of the social programme embodied in the statutory scheme is not a suitable body to determine the limits of its own power. Such a tribunal is capable of arbitrary action. Even if its action is not arbitrary, it is inevitable and demonstrable from experience that a tribunal is inclined to favour the policy of the statute as it understands it, leading the tribunal to take an expanded view of its powers. Tribunals are not inclined to take the same objective view of the Rule of Law as that taken by courts.

### CONCLUSIONS

In our view, clauses restricting judicial review ought not to be enacted unless it can be demonstrated that most exceptional circumstances demand it. There may have been a time

<sup>40</sup>H. W. R. Wade, *Administrative Law*, 115.

when the courts took a hostile attitude towards the development of tribunals exercising powers somewhat akin to those exercised by the courts, but that time has passed away with the general acceptance of modern social programming. We think that if there is any ground for complaint that the courts lack familiarity with the administrative process, the remedy does not lie in depriving the individual of his right of access to the courts as a safeguard against the unlawful exercise of power. We think the remedy should be constructive, creating within the judicial system means of developing expertise in all the social and administrative processes of government. This we shall discuss later in this Report.<sup>41</sup>

We think that the power of judicial review ought not to be restricted but that it should be expanded for the following reasons:

(1) The disciplinary effect of a right of review gives to the individual, whose rights may be affected, a very real status before a tribunal. He is not one who is subject to the caprice of the tribunal.

(2) Tribunals are not independent. They are creatures of the government.

(3) Departmental tribunals are likely to acquire a degree of departmental bias. The position is well expressed in a passage from the Report of the Donoughmore Committee, dealing with the undesirability of imposing judicial powers on ministers:

“It is unfair to impose on a practical administrator the duty of adjudicating in any matter in which it could fairly be argued that his impartiality would be in inverse ratio to his strength and ability as a Minister. An easy-going and cynical Minister, rather bored with his office and sceptical of the value of his Department, would find it far easier to apply a judicial mind to purely judicial problems connected with the Department’s administration than a Minister whose head and heart were in his work. It is for these reasons and not because we entertain the slightest suspicion of the good faith or the intellectual honesty of Ministers and their advisers that we are of opinion that Parliament should be chary of imposing

<sup>41</sup>Chapters 22 and 44 *infra*.



on Ministers the ungrateful task of giving judicial decisions in matters in which their very zeal for the public service can scarcely fail to bias them unconsciously.”<sup>42</sup>

(4) The most secure safeguard for the civil right of the individual to have his rights determined according to the Rule of Law lies in the independence of review by the courts.

We accept without any reservation the conclusions of the Franks Committee, expressed as follows:

“Whatever may be decided as to the scope and method of appeals to the courts from tribunals we are convinced that the remedies by way of orders of *certiorari*, prohibition and *mandamus* should remain. They are clearly necessary in cases where questions of jurisdiction are involved and in cases where no provision is made for appeals on points of law. Accordingly, no statute should contain words purporting to oust these remedies. . . .”<sup>43</sup>

This recommendation was adopted by repealing privative clauses restricting review by way of *certiorari* and *mandamus*.<sup>44</sup>

We do make recommendations later with respect to simplification of procedure.

<sup>42</sup>The Donoughmore Report, 78.

<sup>43</sup>The Franks Report, para. 117.

<sup>44</sup>Tribunals and Inquiries Act, 1958, 6 & 7 Eliz. II, c. 66, s. 8.

## CHAPTER 18

# Relevant Aspects of Judicial Review in the United States

THE objective of judicial review in the United States is the same as that in Ontario. It is to provide safeguards against unjustified encroachment on the rights of the individual by the exercise of statutory powers, to the extent that this can be done without unduly interfering with essential administrative action. Notwithstanding the similarity in objective, a comparative discussion of the law on the subject presents great difficulty.

The structure of the relevant law and many of the underlying concepts in the United States differ from the structure and concepts of the law of Ontario. The law has not developed on lines which permit any easy comparison of corresponding doctrines and the law in the United States is not uniform. Historically it has developed in relation to administrative activities in the Federal Government and in the governments of each of the fifty States. The areas of difference are not confined to detail but extend to substantial matters. There are areas of uncertainty and controversy where the law is still in the process of development. In addition, the terminology in the United States differs considerably from that of Ontario, and even where the same terms are used they are frequently used in a different sense. It follows that a discussion for purposes of a comparison with our law requires the translation of the ideas embodied in American law into our terminology.

A further factor that causes difficulty in a comparison of the development of administrative law in the United States with that in Ontario is a difference in technique in the interpretation of statutes. In so far as administrative law rests on statutes, different techniques in interpretation may lead to quite substantial differences in the law. In the United States the courts appear to exercise much greater latitude in interpretation and operate more in the nature of an equal and sometimes even senior partner with the legislature in giving effect to statutes. It is difficult for those brought up in the tradition of legislative supremacy to assess the scope of the latitude exercised or the practical effect of the different doctrines in the United States. The difference in technique is illustrated by the following passage:

“Occasionally the Supreme Court even acknowledges its violation of clear statutory language. Thus, in *Chicago & Southern Air Lines v. Waterman Steamship Co.*, the order of the Civil Aeronautics Board concerned a domestic air carrier. The statute provided that ‘Any order . . . except any order in respect of any foreign air carrier subject to the approval of the President . . . shall be subject to review.’ In holding that an order was not reviewable, even though the Act called for review, the Court said: ‘It may be conceded that a literal reading of [the Act] subjects this order to re-examination by the courts. It also appears that the language was deliberately employed by Congress. . . .’ But the clarity of the statutory language and the evidence that Congress meant what it said did not prevent the Court from holding that the order was ‘not susceptible of judicial review.’”<sup>1</sup>

For these reasons we do not attempt a detailed comparison of rules of administrative law and propose to limit our discussion to certain general concepts, in our own terminology, of judicial review in the United States, where these differ significantly from ours.

It is useful first to state in broad outline, in our terms, the basic differences between the law on judicial review in Ontario and in the United States. At the risk of over-simplification and criticism we omit at this stage numerous important qualifications.

<sup>1</sup>Davis, *Administrative Law Treatise*, s. 28.01.

The basic differences spring from different presumptions applied in Ontario and in the United States to the interpretation of statutes which establish tribunals or agencies to exercise powers. Under our law the presumption of interpretation is that only such powers are conferred as are expressly given by the statute. Under the law in the United States the presumption of interpretation appears to be that within certain extreme limits full powers are conferred on the agency to determine all questions of law or fact necessary for the performance of its functions.<sup>2</sup>

The doctrine of *ultra vires* as the basis for judicial review under our law applies our basic presumption. With the exception of review for error of law on the face of the record in *certiorari* proceedings, the only inquiry is: What does the statute authorize the tribunal to decide? Our courts review, or look at, a decision or action of a tribunal only to see whether it is within the powers of the tribunal. No distinction is made between questions of law or fact. If the decision is authorized, the courts are excluded from considering the matter further. The concept underlying our whole law of judicial review is that of "exercise of power" as we have explained it.<sup>3</sup>

Under the law of the United States, the principle of *ultra vires* is not applied as the main basis for judicial review for agencies are presumed to have power to decide all necessary questions. The general principle applicable to review stated in our terms, appears to be that the courts exercise a power of an appellate nature to override decisions of agencies, even though they would be treated as "authorized" decisions under our law. In the concept of review in the United States, a distinction is drawn between "conclusions of law" and "findings of fact". The courts, as the experts in law will review all conclusions of law, but the agencies are deemed to be the experts on matters of fact and the courts will not review "findings of fact" unless they are "clearly erroneous" or there is no "substantial evidence" to support them.

<sup>2</sup>Jaffe, *Judicial Control of Administrative Action*, ch. 16.

<sup>3</sup>See Chapter 16 *supra*.

## DISTINCTION IN THE UNITED STATES BETWEEN CONCLUSIONS OF LAW AND FINDINGS OF FACT

The difficulty in distinguishing between matters of law and matters of fact has already been discussed.<sup>4</sup> As pointed out, no clearcut distinction can be drawn.

Nevertheless, the principle that questions of law are for the courts and questions of fact are for the agencies has required that some tests be adopted for distinguishing the type of question to be reconsidered afresh by the courts, from the type of question to be left to agencies subject only to a limited review. The appropriate guide to be adopted in a particular case appears to be a matter of uncertainty under the cases in the United States, and is one of controversy among legal commentators. We propose to include only some approaches outlined by some commentators in the United States, which appear to be sufficient for the purpose of considering proposals for changes in the law of Ontario.

According to Professor Davis,<sup>5</sup> in the Federal field the courts may apply a number of tests. They may adopt an "analytical" approach whereby they divide the questions into those which require findings of fact in the sense of phenomena apart from legal significance, and those which require conclusions of law to be drawn from the facts. On this strict analytical approach, mixed questions of fact and law would be questions of law, as well as those that are recognizable as questions of law in the strict sense. All such conclusions of law would be reviewed for error.

Another approach, which he calls the "practical" approach, is to make no attempt to apply an analytical distinction but to classify matters as findings of fact or conclusions of law on the basis of a number of factors bearing on the question: whether the issue is one which should be allocated to the courts for review and ultimate decision, or should be left to the decision of the agency, subject only to limited review; whether a particular question should be considered to

<sup>4</sup>See p. 23 *supra*.

<sup>5</sup>Davis, *Administrative Law Treatise*, ch. 30.

be primarily for judicial or administrative decision. If, on application of this practical approach, a particular question is treated as giving rise to a conclusion of "law", the courts will reconsider the whole question afresh to determine whether in their judgment the conclusion of the agency was right in law. If they hold that the conclusion was in error, they will substitute their own judgment. If they hold the conclusion to be a finding of fact, their review is limited.

Another way of accomplishing the objective of limiting the substitution of a court's judgment for an agency's decisions, on questions that analytically might be classified as questions of law, is called by Professor Davis the "rational basis" test. Here the court avoids the law-fact distinction and simply refuses to reopen a conclusion made by an agency which might appear to be a conclusion of law, where in the view of the court there is "warrant in the record" and "a reasonable basis in law". In such a case the court does not substitute its judgment on the conclusion of law.

In the view of Professor Davis the courts often reject the analytical approach and adopt the practical approach. However, in his view the Supreme Court has never attempted a systematic explanation of what guides it in choosing between the substitution of judgment or the application of the rational basis test in deciding any particular case. He states:

"The exercise of the reviewing court's discretion in choosing between substitution of judgment and use of the rational basis test in any particular case is influenced by many factors that usually remain inarticulate, including the court's attitude toward the agency, the degree of thoroughness and impartiality in the agency's performance, the extent of the court's agreement or disagreement with the administrative determination, the court's interest in and its appraisal of the importance of the subject matter, alternative demands upon time and attention of the judges at the particular time, need or lack of need for judicial bolstering of administrative policy, need for stability of particular law or policy compared with need for continued fluidity, manner of presentation of cases through briefs and oral arguments, and fortuities of writing opinions explaining scope of review in particular cases.

In addition to these inarticulate discretionary elements, three major factors which guide the exercise of judicial discretion are identifiable. Of these, far the most important is the comparative qualification of court and agency to decide the particular issue. Courts are the experts in such areas as constitutional law, common law, ethics, overall philosophy of law and government, judge-made law developed through statutory interpretation, most analysis of legislative history, and problems transcending the agency's field. Courts often deem agencies and their staffs to be expert within their own specialized fields. Even though agency expertness has been often over-emphasized, and even though on many questions neither judicial nor administrative expertness is a special factor, the fundamental effort to allocate functions on the basis of comparative qualifications is unquestionably sound.

The other two of the three major factors are the extent to which the legislative body has committed particular problems to administrative or to judicial determination, and the tendency of the courts to substitute judgment on broad generalizations, especially important ones, and to avoid such substitution of judgment on narrow or unique applications of law."<sup>6</sup>

Under this practical approach to the classification of questions, matters for decision in the exercise of an administrative power (in the sense we employ the term of reaching a decision on policy considerations) are classified as "questions of fact".

"Of course, not all questions need be classified as either law or fact. But the judicial tendency to write opinions in terms of the simple dichotomy is very strong and, if one may believe the opinions, judicial thinking which puts all questions into one or the other of the two categories is probably dominant. The Supreme Court thus readily makes such a statement as: 'Under this Act the appropriateness of the formula . . . raises questions of fact, not of law.' If the Court had sought to please the literalists, it might better have said that the appropriateness of the formula was for administrative discretion. But that is what the Court means by the phrase 'questions of fact, not of law'."<sup>7</sup>

Professor Jaffe offers a different explanation of the development of the law in the United States.<sup>8</sup> He adopts the analytical distinction between questions of fact viewed as the

<sup>6</sup>*Ibid.*, s. 30.14.

<sup>7</sup>*Ibid.*, s. 30.04.

<sup>8</sup>Jaffe, *Judicial Control of Administrative Action*, ch. 14.

determination of phenomena, without adverting to their legal significance on the one hand, and mixed questions of fact and law and questions of law in the strict sense on the other hand. In his view both of the latter questions are treated as leading to conclusions of law. He does not, however, accept the principle that all conclusions of law in this sense must be decided by the courts on review, but considers the courts and agencies to be in partnership. In allocating the roles of the two partners, he emphasizes the element of "discretion", or what we have called policy, in the exercise of a statutory power of adjudication. Discretion he defines to mean "the power of the administrator to make a choice from among two or more legally valid solutions". In "discretion" he appears to include not only powers of decision on policy grounds, which we call "administrative", but also the element of policy decision inherent in judicial powers.

The extent of the discretion conferred on an agency is determined by the courts which interpret the statute conferring the power, to determine the scope and limits of the discretion. He then suggests as a principle that the question of whether the courts should intervene to override a decision of an agency, where it has a discretion, should be answered primarily in terms of "clear statutory purpose" or the intention of the statute—what we would probably call the scheme of the statute or the intention of the Legislature in enacting it. Where, after considering the statutory purpose

"... the *judges* are themselves *convinced* that [a] certain reading, or application, of the statute is the *correct*—or the only *faithful*—reading or application, they should intervene and so declare. Where the result of their study leaves them without a definite preference, they can and often should abstain if the agency's preference is 'reasonable'."<sup>9</sup>

Professor Jaffe emphasizes that the judges are responsible for scrutinizing action in terms of statutory purpose; he thinks that undue emphasis has been placed on expertness as a sole or separate basis for determining review. In his view it is one element in appraising the statutory purpose. Further, he

<sup>9</sup>*Ibid.*, 572. Author's italics.



states with respect to the object of his test of clear statutory purpose:

“It is intended to suggest a presumptive *limit* of judicial power and in terms of that limit to offer an analysis in which the cases can be discussed in terms of a rational and consistent attitude. When we say ‘discussed in terms of’ statutory purpose, we have in mind a concept of statutory purpose which takes account of the fact that the legislature in realizing its purpose has chosen to work through an administrative agency, and so (presumptively, as we have said) to confer on it some policy-making function. This discretion should normally be permitted to function short of the point where the court is *convinced* that the purpose of the statute is contradicted. The court, we have said, should test each exercise of power in terms of statutory purpose. But in a great many cases the court will grant that any one or two or more proposed answers is consistent with the statute. In such a situation its function is complete when it decides that the administrative answer is reasonable, unless the presumption yields to certain considerations considered below. The agency is in as good and, because of its specialization, presumptively in a better position to make the choice. There is furthermore, a value in this recognition of administrative autonomy; it may invigorate the sense of responsibility, stimulate initiative, and encourage resourcefulness.”<sup>10</sup>

Other considerations may also be taken into account, but the primary one is statutory purpose and it is sufficient for us to refer to it.

The discussions of Professors Davis and Jaffe tend to concentrate on judicial review of the action of Federal agencies, although reference is also made to State agencies.

Dealing specifically with judicial review of decisions of State agencies, Cooper states:

“The classical dichotomy (asserting that courts should review questions of law decided by administrative agencies, but should not review their determinations of fact, beyond ascertaining whether the determinations are supported by substantial evidence on the record considered as a whole) is of little use as a working tool. One cannot predict the scope of review which will be accorded by ascertaining whether the

<sup>10</sup>*Ibid.*, 573. Author’s italics.

question is, from the viewpoint of logical analysis, one of law or of fact."<sup>11</sup>

"The decision whether a particular question should be subject to de novo consideration and determination by the court (and hence to be labelled a question of law) or subject only to restricted review (and hence to be labelled a question of fact) depends in the last analysis whether the court considers the question one appropriate for judicial determination. . . .

". . . if the court conceives that the agency is comparatively better qualified to make a wise determination of the question, it is classified as a question of fact; but if the court feels a superior competence in the premises, the question is classified as one of law. This distinction . . . is followed by the state courts as well as by the federal courts. . . ."<sup>12</sup>

Factors referred to by Cooper that may influence the courts are:

- (1) Where the purpose of the administrative functions is related solely to the conduct of public business and not the regulation of private business, the courts are more likely to classify questions of law as questions of fact for determination by the agency.
- (2) Where the power of the agency is primarily judicial, the courts will tend to expand the category of questions of law to a greater extent than where the powers are legislative or administrative.
- (3) Where an administrative discretion is conferred, the courts will generally confine questions of law for review to the determination of the limits of the discretion, and to whether or not improper or extraneous considerations were taken into account.
- (4) Where the procedure of the agency in reaching a decision meets high standards of propriety, the courts tend to exercise restraint in classifying matters as questions of law.
- (5) The courts will pay greater respect to an agency of good reputation and experience and will leave it greater authority to decide matters as questions of fact.<sup>13</sup>

<sup>11</sup>Cooper, *State Administrative Law*, 665.

<sup>12</sup>*Ibid.*, 666-67.

<sup>13</sup>*Ibid.*, ch. XIX, s. 1.

With these broad considerations in mind, Cooper says that State courts approach the classification of a matter for decision as a matter of fact or law, generally in the following way. They distinguish:

- (a) findings of basic fact;
- (b) inferences of ultimate facts;
- (c) conclusions of law.

Basic facts are the facts on which evidence is given as facts relevant to the issues. Findings of basic facts are in general considered to be findings of fact in the strict sense. Ultimate facts are the facts in issue—those from which the legal conclusions will flow—and are often arrived at by inference from the basic facts. In general the State courts will consider the reasonableness of an inference of ultimate facts from basic facts to be a question of law. If only one inference could reasonably be drawn, the courts will quash a decision for error of law if a different inference has been drawn. If the agency's findings as to basic fact and its inference of ultimate facts are accepted by the court, the court then determines as a question of law whether the agency correctly applied the provisions of the statute to the ultimate facts. Practice in the application of this basic approach varies from State to State and agency to agency.

Cooper treats the category of review, in which the court simply satisfies itself that there is "warrant in the record and a reasonable basis in law", as applying to questions considered to be questions of fact. He states:

"During the two decades from 1940 to 1960 (there are some indications that in more recent years the pendulum may have started to swing in the opposite direction) the federal courts showed a noteworthy tendency to treat as questions of fact—and hence not subject to judicial review beyond ascertaining whether the administrative determination had substantial evidentiary support (or, as it was sometimes phrased, whether the determination had 'warrant in the record and a reasonable basis in law')—issues which from the viewpoint of traditional analysis would have been classified as questions of law. By and large, the state courts have exhibited a greater willingness than have the federal courts to classify as questions of law, and hence subject to reconsideration by the courts,

agency determinations which involve what are commonly called 'mixed questions of law and fact,' where the precise issue to be determined does not involve an interpretation of ambiguous statutory language but involves rather the application of fairly clear statutory language to a particular factual situation."<sup>14</sup>

## SCOPE OF REVIEW ON QUESTIONS OF LAW

The general proposition under the law of the United States is often stated to be that if a question is a question of law, (i.e., is classified as such in the manner we have discussed), the courts will on judicial review reopen the decision of an agency on the question and decide it afresh, as if it were arising for the first time. But this statement is too general, since the courts may substitute their judgment on the question of law for that of the agency, or they may determine merely that there is "warrant in the record and a reasonable basis in law".

Three explanations for these two apparently different standards of review have been discussed.

The first explanation is simply that the courts maintain two standards of review of questions of law applied on a yet undefined basis. In some instances they substitute their own judgment, and in others they review merely in the limited sense indicated.<sup>15</sup>

A second explanation offered is that the courts classify certain questions, which analytically would be questions of law, as questions of fact, and review only in the limited way that they review a question of fact.<sup>16</sup>

A third explanation is that the courts divide conclusions that are analytically conclusions of law into two categories: those within the discretion of the agency, (in our terms within its power to decide), and those not within its discretion. The court will substitute its judgment on those conclusions of law that on its interpretation of the statutory purpose are not

<sup>14</sup>*Ibid.*, 707.

<sup>15</sup>Davis, *Administrative Law Treatise*. Discussed in this Report on pp. 283 ff. *supra*.

<sup>16</sup>Cooper, *State Administrative Law*. Discussed in this Report on pp. 287 ff. *supra*.

within the agency's discretion to decide. Courts will only review conclusions of law that are within the agency's discretion to decide in the limited way we have discussed.<sup>17</sup>

## SCOPE OF REVIEW ON FINDINGS OF FACT

The general rule in the United States is stated to be that an agency is the primary "fact-finder", and that the courts will review findings classified as findings of fact only in a limited way. Where a question has been classified as a question of fact, controversy exists as to the most suitable type of limitation to be imposed on the scope of review. The main controversy is whether the scope of review should be limited to reviewing the decision of the tribunal and the evidence before it, to ensure that the findings of fact are supported by "substantial evidence", or whether the court should after such a review override findings of fact which are "clearly erroneous".

The "substantial evidence" rule was developed by the Federal courts and some State courts before the enactment of the Federal Administrative Procedure Act, and it was adopted by that Act. The Act provides that the courts may hold unlawful and set aside agency action, findings and conclusions found to be "... unsupported by substantial evidence. . . . In making the foregoing determination the courts shall review the whole record. . . ." "Substantial evidence" means evidence which is substantial, that is, affording a substantial basis of fact from which the fact in issue can be reasonably inferred. . . . [I]t must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury."<sup>18</sup>

Another statement is: "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion".<sup>19</sup> Professor Jaffe suggests that the rule may be expressed more precisely by stating that it requires such

<sup>17</sup>Jaffe, *Judicial Control of Administrative Action*. Discussed in this Report on pp. 285 ff. *supra*.

<sup>18</sup>*NLRB v. Columbian Enameling and Stamping Company*, 306 U.S. 292 (1939). Quoted with approval by Davis, *Administrative Law Treatise*, pp. 285 ff.

<sup>19</sup>*Consolidated Edison Company v. NLRB*, 305 U.S. 197, 229 (1938).

evidence as could support the conclusion "by reasoning from the evidence".<sup>20</sup>

In our terminology, "substantial evidence" would appear to be more than "any" evidence, but evidence from which the finding of fact could be reasoned, although the court itself might have reached a different finding of fact.

Criticisms of the "substantial evidence" rule are based on uncertainty, variability, and on the desirability of adopting the long-established and familiar test of "clearly erroneous" applied by the appellate courts in the United States in reviewing findings of lower courts made by judges sitting without a jury. It is also argued that the test can apply only to the determination of basic facts and not to inferences drawn from them in reaching conclusions as to the ultimate facts.

The Model Act adopts a different test from "substantial evidence". It provides:

"The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. . . . the court may reverse or modify the decision (of the agency) if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are; . . .

(5) clearly erroneous in view of the reliable probative and substantial evidence on the whole record. . . ."<sup>21</sup>

The "clearly erroneous" rule was developed for appellate courts in reviewing the findings of judges sitting without a jury. "A finding of fact is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."<sup>22</sup> Its extension to judicial review of agency action was first proposed by the Hoover Commission Task Force on Legal Services and Procedure (1955). It was subsequently adopted by the American Bar Association in 1957 and incorporated in the Revised Model State Admin-

<sup>20</sup>Jaffe, *Judicial Control of Administrative Action*, 596.

<sup>21</sup>Revised Model State Administrative Procedure Act. See Cooper, *State Administrative Law*, 803ff.

<sup>22</sup>*United States v. United States Gypsum Company*, 333 U.S. 364 (1948); Davis, *Administrative Law Treatise*, s. 29.02; Cooper, *State Administrative Law*, 726.

istrative Procedure Act by the National Conference of Commissioners on Uniform State Laws.<sup>23</sup>

Both principles contemplate a limited review. In general it is considered that the "substantial evidence" rule provides a more limited review than the "clearly erroneous" test.

Under the "substantial evidence" rule a reviewing court will not override the finding of fact of an agency if its finding could have been reached by "reasoning from the evidence", even though the court might think the finding was wrong. Under the "clearly erroneous" rule, the court may override a finding of fact of an agency if, even though the decision could have been arrived at by reasoning from the evidence, the court is nevertheless of the opinion that the decision is plainly wrong.

Although these are the two main tests that may be applied by courts in reviewing the findings of fact of agencies, state legislation is not uniform and frequently provides more extensive review than either the "substantial evidence" rule or "clearly erroneous" rule. Sometimes a trial *de novo* on all questions of law and fact is provided, and sometimes authority is conferred on the courts to override an agency decision, if it is found to be against the weight of the evidence.<sup>24</sup>

## JURISDICTIONAL FACTS UNDER UNITED STATES LAW

Among the grounds discussed in Chapter 16 on which the courts in Ontario will review a decision of a tribunal to determine whether it was made within the powers conferred on the tribunal, were:

- (1) Preliminary matters of fact, law, or mixed law and fact that are conditions precedent to the coming into existence of the power of decision conferred on a tribunal;<sup>25</sup> and
- (2) "Collateral" matters of fact, law, or mixed law and fact which, although the power of decision has come into existence, are outside the scope or area of the matters to be decided by the tribunal.<sup>26</sup>

<sup>23</sup>See p. 150 *supra*.

<sup>24</sup>Cooper, *State Administrative Law*, 730, 731.

<sup>25</sup>See pp. 250 ff. *supra*.

<sup>26</sup>See pp. 254 ff. *supra*.

In accordance with our concept of powers, these matters are not decided by the tribunal: there is no binding "decision" on them by the tribunal, although as we have said it must make a "lay judgment" or "a preliminary decision" in order to proceed.<sup>27</sup> The authoritative or legally effective "decision" must ultimately be made by the courts.

No similar distinction between preliminary and collateral matters is drawn in administrative law in the United States. The underlying concept receives some recognition in discussions in the United States of "jurisdictional facts", those that would be classified as preliminary or collateral in Ontario. Matters that would be classified as preliminary or collateral matters of law and hence subject to full review in Ontario, are not separately discussed in the United States since all conclusions of law of an agency are already reviewed by the courts.

The general view of the commentators we have referred to is that the concept of "jurisdictional facts" as conditions to or limitations on the powers of agencies, should be rejected as the basis for making a full review of the agency's findings by the courts, in favour of the law-fact basis for review which carries with it only a limited review. It is said that allocation of the relative functions of the courts and of the agencies in terms of jurisdiction or power leads to interpretative hair splitting with little regard for the determination of what is the true question according to administrative law in the United States: Are the courts or the agencies more competent to decide a particular question?

Professor Jaffe justifies the general doctrine of the allocation to agencies for decision of matters of fact, which would be classified in Ontario as preliminary or collateral matters to be decided by the courts, by the following reasoning. "Facts" as such have no absolute existence. For the purposes of the application of law in any particular instance, "facts" are those matters found to be facts by an authorized tribunal. The proper question therefore is not whether "facts" exist in any absolute

<sup>27</sup>*Municipal District of Sugar City v. Bennet and White Limited and Att. Gen. of Can.*, [1950] S.C.R. 450, 465. See p. 252 *supra*.



sense but whether their existence has been determined by an authorized tribunal. So long as an agency affords hearings at which material bearing on the facts is fully and fairly considered, since the facts are generally within the agency's area of expertness, it is likely that the agency will be competent to make a better finding of the facts than would be made by the courts in later proceedings, which often might not be as thorough as the agency's hearing. The review by the courts therefore should be limited merely to ensuring that the agency had appropriate evidence. Professor Jaffe puts it this way:

"The concept of jurisdictional fact was devised originally to justify a fairly limited judicial review of orders otherwise immune. When American courts came to require adequate evidence of 'jurisdictional facts' and finally of all relevant facts, the doctrine became *functus officio*. But it has sometimes been answered that the reviewing court must itself determine whether a 'jurisdictional fact' 'exists,' for if it does not the agency has no 'power' to act. This formulation is naive, since it implies a human competence to establish absolutely the existence of a fact. In our earlier analysis of finding of fact we have made the point that a finding is an assertion that a phenomenon has existed, does exist, or will exist. The finding stands for the fact. It is not the fact itself. Its function is to provide an acceptable basis for the exercise of power. It is based upon a reasoned inference from evidence. A court cannot, any more than any other human agency, break down the barrier between appearance and reality. In short, the court can be wrong. If the validity of an exercise of power is to depend on the absolute existence of a fact there can be no exercise of power. However, it does not follow that a court should never ascertain for itself the existence of a fact which is crucial to the exercise of power. Some procedures for finding facts are better than others. The administrative agency may have no hearings, no orderly procedure for the presentation of evidence; the agency may be peculiarly biased or untrustworthy. It is only in recent years that we have evolved an adequate system of administrative procedure. In the absence of such a procedure a court not only may, but should, have a method of determining the existence of pivotal facts, if not of all relevant facts. In cases where trespass or mandamus are the usual remedies there often has been no administrative hearing. If the plaintiff is to have a formal opportunity to demonstrate the nonexistence of crucial facts it must be at the judicial trial.

Our ultimate aim is to provide a reasoned assurance of the existence of the crucial facts upon which the exercise of power is to be conditioned. The now-standard scope of review applied to a finding based on decent administrative procedure will ordinarily provide that assurance. This conclusion does not exclude a judgment that in a given case we may want even greater assurance. In a criminal case, for example, we are not satisfied with the ordinary degree of proof. The drive for uniformity in administrative law should not force it into a strait jacket. If ineluctable theory does not demand that certain facts be given exceptional procedural handling, neither does it exclude it; and when we want extra assurance we should not forfeit it for doctrinal purity. It will be noted, too, that our conclusion in favor of the now-standard scope of review assumes an administrative hearing. When there has been none there is a special problem, though the problem reaches not only to jurisdictional but to all facts."<sup>28</sup>

Several cases in the Supreme Court of the United States, and decisions in the State courts, suggest that the general doctrine on review of findings of fact by agencies is, however, subject to qualification in the case of certain "jurisdictional facts". These jurisdictional facts would appear to correspond closely to our concept of "preliminary facts".<sup>29</sup> In the case of *Crowell v. Benson*,<sup>30</sup> the court held that it would review in full findings of fact that are "fundamental" or "jurisdictional" in the sense that their ". . . existence is a condition precedent to the operation of the statutory scheme", and the court justifies this conclusion among other grounds, "because the Congress has so provided explicitly. . . ."<sup>31</sup>

The effect of this decision and other related decisions is the subject of controversy in the United States. In general, the view of the commentators appears to be that although the decisions have not been overruled by the Supreme Court of the United States, they do not now represent any general principle; but, if they are still to be given any effect, they should be confined in their operation.<sup>32</sup>

<sup>28</sup>Jaffe, *Judicial Control of Administrative Action*, 634-35.

<sup>29</sup>We omit discussion of "constitutional facts" as we would not appear to have any significant corresponding classification in Ontario.

<sup>30</sup>285 U.S. 22 (1932).

<sup>31</sup>For reference to decisions of State courts apparently reaching the same conclusion, see Cooper, *State Administrative Law*, 692, 698.

<sup>32</sup>Davis, *Administrative Law Treatise*, s. 29.08, 29.09; Jaffe, *Judicial Control of Administrative Action*, 648 ff.; Cooper, *State Administrative Law*, 675 ff.

Professor Jaffe suggests, however, that there may be a role for the concept of jurisdictional facts in judicial review. His discussion appears primarily to be directed at matters that would be classified as collateral in Ontario. He refers to the case of *R. v. Bradford*<sup>33</sup> to illustrate the discussion.

Professor Jaffe points out that the concept of jurisdictional fact in this context is not a completely arbitrary concept.

“. . . Typically a grant of power is focused, is made explicit at some points and blurred at others. In defining power the legislature's attention has been alerted to certain questions in regard to which conflicts of interest are sharp. In such a situation grants of power may be explicitly defined or cut down by exception. A good example is our gravel case: road authorities may take gravel from 'enclosed lands' but not from a private park. The degree of need for taking the gravel is left indeterminate subject to a range of administrative choice, but one choice is excluded: gravel must not be taken from a park. . . . Yet viewed from this standpoint of function the doctrine's justification has been clear even from its early beginnings. A tribunal of limited jurisdiction should not be the final judge of its exercise of power; it should be subject to the control of the courts of more general jurisdiction. This is so because a tribunal preoccupied with special problems or staffed by individuals of lesser ability is likely to develop distorted positions. In its concern for its administrative task it may strain just those limits with which the legislature was most concerned. Thus, road-maintenance authorities sorely pressed to find gravel within the parish will not place a high value on the amenities of the gentry's parks. When there has been an exceptional need for control and no statutory mode of review, the English courts justified their intercession by labelling the issue jurisdictional. When Parliament has provided a method of review, certiorari is unnecessary and the court is unlikely to hold that the debated issue is jurisdictional. In short, the concept is almost entirely functional: it is used to validate review when review is felt to be necessary. Even though review of all errors of law may be more easily rationalized and be preferable, the somewhat lesser review provided by the jurisdictional-fact concept is better than nothing.

Furthermore, we cannot altogether dispense with the jurisdictional concept. There will be situations in which the apparent or stated intention of the legislature is to limit

<sup>33</sup>[1908] 1 K.B. 365. See p. 81 *supra*.

review to certain gross errors, and in which the notion of jurisdiction, familiar as it is to judges and lawyers, will be as good as any to express the scope of review. There are other situations, too—organizational or procedural mistakes—in which the lapse is so serious that judges will want a concept which enables them to declare the order ‘void’. *If it is understood that the word ‘jurisdiction’ is not a metaphysical absolute but simply expresses the character or the gravity of the error, it would seem that it is a concept for which we must have a word and for which use of the hallowed word is justified.*”<sup>34</sup>

## STATUTORY PROVISIONS IN THE UNITED STATES ON SCOPE OF JUDICIAL REVIEW

It has been represented to us that it is desirable to enact legislation in Ontario similar to the legislation in the United States establishing a code for judicial review. Our consideration of such legislation in the United States, in the light of the basic concepts of the law in the United States which differ materially from our basic concepts, has led us to the conclusion that a different approach is required in Ontario. It is, however, helpful to set out certain of the statutory provisions in the United States governing judicial review in order to assess proposed changes in the law of Ontario, and as a basis for our discussion of a different approach.

Prior to the enactment of the Federal Administrative Procedure Act in 1946,<sup>35</sup> the law on judicial review, and particularly on the review of conclusions of law or findings of fact, had been generally settled. The provisions of the Federal Act have therefore been interpreted in the light of these pre-existing doctrines. The Federal Act provides:

- “10. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—  
 (e) Scope of Review. — So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action,

<sup>34</sup>Jaffe, *Judicial Control of Administrative Action*, 631-33. Author's italics.

<sup>35</sup>60 Stat. 237 (1946), 5 U.S.C.A. §1001 et seq. (1946).

findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial *de novo* by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.”

Legislation governing the scope of judicial review has now been adopted in many States, but with variations in the various State statutes. We are informed that the Model Act may be taken as representing a fairly typical State Act.<sup>36</sup> It provides as follows:

“Section 15. (Judicial Review of Contested Cases)

(g) The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of facts. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (1) in violation of constitutional or statutory provisions;
- (2) in excess of the statutory authority of the agency;
- (3) made upon unlawful procedure;
- (4) affected by other error of law;
- (5) clearly erroneous in view of the reliable probative, and substantial evidence on the whole record; or
- (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.”

Both statutes contain provisions for review for constitutional grounds, for failure to adhere to procedure required by law, and for arbitrary or capricious action or abuse of discretion.<sup>37</sup>

<sup>36</sup>Cooper, *State Administrative Law*, 681.

<sup>37</sup>Federal Act, s. 10(e) (B) (1) (2) (4): 60 Stat. 237 (1946), 5 U.S.C.A. §1001 et seq. (1946); Model Act, s. 15(g) (1) (3) (6). Cooper, *State Administrative Law*, 821.

Violation of constitutional or statutory provisions is a ground for review in Ontario, with appropriate adjustments for the different (from that of the United States) constitutional framework. Failure to adhere to procedure required by the law is also a ground for review. Under the law of Ontario the failure of a tribunal to take into account proper considerations or action by giving effect to extraneous or improper considerations, appears to correspond broadly to the provisions relating to arbitrary or capricious action or abuse of discretion.

The provision in both the Federal and Model Acts<sup>38</sup> for review on the ground of "excess of statutory authority of the agency" (somewhat more broadly worded in the Federal Act), would in our terminology appear to embrace virtually all grounds for review in Ontario under the guiding principle of *ultra vires*. These provisions appear to be interpreted in the United States in the light of a concept of statutory authority entirely different from that in Ontario. With the doubtful exception of "jurisdictional facts", it would seem that within our concepts of power, agencies are treated as having power to determine all questions of fact or questions of law that are required to be determined in order to perform their function. These questions fall within their "statutory authority". These provisions of the Federal and Model Acts referring to "excess of statutory authority" are therefore interpreted largely as applying to action by an agency that is wholly outside the functions it is established to perform, for example, a purported expropriation where no power of expropriation of any kind is conferred.

The provision in the Federal Act<sup>39</sup> that findings of fact may be reviewed where they are subject to trial *de novo* by the reviewing court, would be considered in our terminology to be an appeal and not a ground of review.

In the result, broadly speaking, under the law of the United States the scope of review is determined by the consideration of questions of law and questions of fact. Under our law the scope of review is determined by an examination of the powers conferred on the tribunal.

<sup>38</sup>Federal Act, s. 10(e) (B) (3); Model Act, s. 15(g) (2).

<sup>39</sup>*Ibid.*

## THE DOCTRINE OF PREJUDICIAL ERROR IN THE UNITED STATES

Both the Federal Act and the Model Act recognize the doctrine that a court will not reverse or modify a decision of an agency on purely technical grounds where substantial rights are not prejudiced.

The Federal Act, in providing for review, states:

“. . . In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party and due account shall be taken of the rule of prejudicial error.”<sup>40</sup>

The Model Act provides:

“. . . the court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because. . . .”

and thereafter sets out the grounds for review.

The doctrine of prejudicial error may be stated briefly as follows. It is a general principle applied in the exercise of appellate jurisdiction that a party cannot claim as a reversible error a matter which is not prejudicial to him. Harmless error, that is, error unaccompanied by prejudice or injury, is not ground for reversal of a judgment. Whether a particular error is prejudicial or harmless depends on the circumstances in each case. The central element in a “prejudicial error” would appear to be that the error may have influenced the ultimate disposition of the case adversely to the appellant. Error having no bearing on the ultimate disposition of the case is immaterial. An illustration of harmless error is an irregularity in procedure which did not hinder or affect the appellant’s conduct of his case or change the merits of the controversy.

<sup>40</sup>*Ibid.*

## CHAPTER 19

# Conclusions and Recommendations on the Substantive Law of Judicial Review in Ontario

MANY basic grounds for judicial review are common to the laws of Ontario and the United States but notwithstanding the common grounds there are two quite different underlying principles in the respective jurisdictions. The underlying principle in Ontario is that an individual should be protected from the purported but the unauthorized exercise of statutory powers. No safeguard is provided against error of law or fact made by a tribunal within its powers except in *certiorari* proceedings and then for error of law only on the face of the record.

The underlying principle in the United States is that the courts, as the most competent bodies to do so, exercise powers of full review on all questions of law determined by agencies, but that the agencies, as experts in their particular field, determine all questions of fact if supported by proper evidence. The objective is to protect the individual from all errors of law made by an agency and from unsupported findings of fact.



As safeguards to the rights of individuals, the review under the two systems may be contrasted as follows:

(1) On matters of fact, law, or mixed law and fact that would be classified in Ontario as being outside the powers of a tribunal:

(a) In Ontario—full review;

(b) In the United States—full review on questions classified as questions of law, and limited review on questions classified as questions of fact, solely to ensure that the findings are supported by evidence;

(2) On matters of fact, law, or mixed law and fact that would be classified in Ontario as being within the powers of a tribunal:

(a) In Ontario—no review except in *certiorari* proceedings for errors of law on the face of the record;

(b) In the United States—full review on questions classified as questions of law, and limited review on questions classified as questions of fact to ensure that the findings are supported by evidence.

A comparison of the relative value of these safeguards is made difficult by the manner of classification in the United States. Broadly speaking the classification is a device for allocating matters for decision between the courts and agencies, and in many instances has an effect not unlike the concept of *ultra vires*. The apparently wider review on all questions of law is often limited by classifying such questions as questions of fact. Professor Jaffe's test of "clear statutory purpose" in interpreting a statute to distinguish questions of law that are to be decided by the courts from questions of fact that are to be decided by agencies, does not differ greatly from the canons of interpretation applied by our courts to distinguish matters that are outside the powers of decision of a tribunal from those that are inside its powers of decision. Review on findings of fact in the United States to determine that there is evidence to support them is an improvement on our system.

Because of many variable factors, no useful comparison can be made between the extent to which judicial review under the law of Ontario and under the law of the United

States may or may not interfere with effective governmental action. Both systems recognize that review should not be extended to interfere unduly with governmental operations which tribunals or agencies are established to carry on. Nevertheless, review should be adequate to give reasonable protection to the rights of the individual.

## CONCLUSIONS

We have concluded that judicial review in Ontario should be based on two principles:

(1) Retention of the doctrine of *ultra vires* providing for full review by the courts of a decision of any tribunal, whether judicial or administrative, to determine whether the decision is within the powers conferred on the tribunal;

(2) Extension of the powers of the courts to review decisions of certain classes of tribunals, made within their powers, to safeguard against errors of law on the face of the record or findings of fact unsupported by evidence.

### Conclusion Number One: Retention of Full Judicial Review on Matters of *Ultra Vires*

We accept as sound the principle that an individual whose rights are affected by decisions or actions of a tribunal, whether judicial or administrative, should have a remedy through application to the courts to safeguard him from unlawful decisions or actions—those outside the powers of the tribunal.

Experience does not indicate that the application of the doctrine of *ultra vires* unduly interferes with effective governmental action. Legitimate governmental purposes are not served by unauthorized and therefore unlawful action.

Review by the courts based on the doctrine of *ultra vires* conforms with our basic constitutional doctrines. The Legislature determines as a matter of policy the proper powers to be conferred on the tribunal. The ordinary courts determine whether the conditions, limitations or requirements prescribed by the Legislature are complied with.

It is not a sound general principle to entrust to tribunals

the power to determine the limits of their own powers. Experience shows that some statutory tribunals develop a governmental interest in extending legislative schemes beyond the provisions of the governing statute and its underlying principles. From the point of view of safeguarding the civil rights of an individual, the right of recourse to the independent and impartial judgment of the courts to determine the statutory powers of a tribunal far outweighs any argument based on efficiency in giving to tribunals the authority to determine their own powers, and it reinforces confidence in the Rule of Law. The special purposes for which the Legislature establishes a tribunal to decide matters within its powers are not interfered with.

Three principal arguments have been advanced against judicial review based on the doctrine of *ultra vires*. These are similar to those advanced against all judicial review.\*

- (1) The desirable principle to be adopted is the one which selects the most competent body to decide any particular question. It is argued that the principle of *ultra vires* does not do this. It is said that tribunals have greater expertise than the courts on matters of law, and more particularly on matters of fact, affecting the scope of their authority.
- (2) The courts are unsympathetic to and unfamiliar with the statutory programmes involved, and they unduly restrict the scope of the programme.
- (3) The concept of "jurisdiction" has in the past led to confusion, and the retention of the principle of *ultra vires* perpetuates this confusion.

The first question that presents itself is this: Are tribunals in Ontario more competent than the courts to decide matters of law, fact, or mixed law and fact, which bear on the limitation of their own powers?

The contention is directed more specifically to matters of fact on which it is said that the tribunals have expertise greater than the courts.

From our survey of the wide variety of tribunals established under the Statutes of Ontario, we are not convinced

\*See p. 276 *supra*.

that tribunals in general possess more expertise than the courts for deciding those matters of law or fact that govern the extent of their powers. In most cases such findings are not matters requiring expert competence at all. If, in some cases expert competence is a factor, independence of judgment divorced from departmental atmosphere is of much greater importance as a safeguard of rights than any benefits that might be derived from expertise. The power of decision on matters of fact otherwise coming within the powers conferred on tribunals is not affected by leaving to the courts the power to determine the facts which limit the jurisdiction of the tribunal.

Whatever justification there may have been in the past for the contention that the courts restrict statutory programmes through lack of sympathy for their objectives, there is little current justification for this contention; and if the recommendations contained in this Report are adopted, whatever ground for complaint there may be should be removed. It is thirty-five years since Lord Hewart wrote *The New Despotism*. Since then there has been a wide development of welfare legislation and state supervision in which judges when practising lawyers have had considerable experience.

We discussed the matter of supervision by the courts with the chairmen or members of all the major boards and commissions operating under the laws of Ontario. With one exception, they endorsed the value of review by the courts and expressed a desire that it be retained. In cases where it was limited, views were expressed that there should be an expansion of the right of access to the courts for decision on questions of law. It was agreed that a greater use of the procedure by way of stated case on questions of law would be an advantage.

The main if not the only argument based on the lack of sympathy for or unfamiliarity with statutory programmes for which tribunals have been set up, involved the operation of the Ontario Labour Relations Board.

The results of the decisions of courts reviewing the decisions of the Labour Relations Board do not demonstrate any trend that would support the criticism or the contention

that the courts lack sympathy for the statutory programme which the Board was established to carry out.

We are informed that throughout the last twenty-one years, twenty-eight decisions of the Board have been reviewed by the courts. In twenty cases the decision of the Board was not disturbed. Whatever conclusions may be drawn from these facts, they do not disclose circumstances that would support the contention that the right of judicial review in Ontario has hampered the Board in the performance of its intended functions. The results of the cases do disclose, however, that in almost a quarter of the cases reviewed, if there had been no power of review in the courts, individuals would have been bound by orders which the courts found had no legal foundation.

The Board of Trade of Metropolitan Toronto in its submission made an attempt to analyze in tabulated form all cases reported in Canada on judicial review of decisions of all the labour relations boards in Canada for the years 1945 to 1964. An attempt was made to determine through the analysis whether a trend could be detected with respect to overruling decisions of the boards, and whether they were overruled more frequently in favour of employers or employees. In a slightly larger proportion of cases the decisions of the boards were sustained, and more cases were decided in favour of the employees than in favour of the employers. We place no great weight on this analysis beyond pointing out that it affords no support for a suggestion that the courts are out of harmony with the statutory purposes of administrative tribunals.

The third argument advanced against the application of the doctrine of *ultra vires* as a basis for review is that it perpetuates the confusion that the concept of "jurisdiction" has created in the past. Two main factors have contributed specifically to the difficulties and confusion that have been experienced in relation to the concept of "jurisdiction".

(a) The availability of several of the historical remedies, depending in part on jurisdictional boundaries, has confused the discussion of jurisdiction with the discussion of remedies. The term "jurisdiction" has been given a variety of meanings in a number of different contexts, with no clear recognition

of the differences in meaning. We think that a simplification of the procedure (which we recommend in Chapter 22), and a clear recognition of the nature of the doctrine of *ultra vires* in judicial review, will go far towards reducing future difficulties and confusion, both in the courts and in the form of legislation. If our recommendations are adopted, a draftsman should have more clearly defined principles to follow in the preparation of legislation.

(b) Criticism on grounds of uncertainty has been directed at the concepts of "preliminary" matters and "collateral" matters and the difficulties of interpretation that arise. However, where the Legislature has explicitly enacted that certain preliminary matters constituting conditions precedent must be met before a statutory power comes into existence, we can see no other course open to the courts under the Rule of Law but to give effect to the legislation. The greatest difficulties arise in connection with collateral matters. That concept cannot be entirely eliminated and difficulties of interpretation must be faced.

Both concepts, preliminary matters and collateral matters, are deeply embedded in our law and afford safeguards to an individual against unlawful encroachment on his rights. They should be retained.<sup>1</sup> In so far as the arguments against these concepts are based on uncertainty in their application, we do not feel that uncertainties would be eliminated even if a fresh start was made and our law of judicial review was based on the distinction of findings of fact and conclusions of law. The difficulties of interpretation should diminish if more precise understanding of these concepts, as they have been developed and refined in recent years, is taken into account by draftsmen in the preparation of legislation.

### **Conclusion Number Two: Extension of the Powers of the Courts to Review Conclusions of Law or Findings of Fact of Certain Classes of Tribunals Made Within Their Powers**

The lack in the law of Ontario of any comprehensive principle for review of conclusions of law or findings of

<sup>1</sup>See pp. 76, 81 *supra*.

fact within the powers conferred on a tribunal deprives the individual whose rights may be affected of an essential safeguard against unjustified encroachment on his civil rights.

It is unjust that decisions that are plainly wrong should be allowed to have legal effect to change or take away rights. Limited review need not interfere with effective governmental action.

We have therefore given consideration to the appropriate rules that should be adopted to give effect to a proper principle of review. We have considered the possibility of adopting generally the rules governing judicial review in the United States. Our conclusion is that the constitution and operation of tribunals in Ontario are so different from those of agencies in the United States that different principles of review are required. In the United States primarily judicial and primarily administrative tribunals are not distinguished. Agencies of either type that are subject to the procedural requirements of the Federal Administrative Procedure Act, or similar acts, are required to base their decisions upon evidence in a record before them, or on matters judicially or officially noticed and recorded.

We have recommended that in Ontario a distinction be drawn between three types of tribunals:<sup>2</sup>

(1) Primarily judicial tribunals required to comply with minimum procedural requirements of a provincial Statutory Powers Procedure Act, and additional procedural requirements imposed by the Statutory Powers Rules Committee, including a requirement that their decisions be based on a record of evidence or other factual material considered;

(2) Primarily administrative tribunals required only to comply with minimum procedural requirements of the provincial Statutory Powers Procedure Act, but not required to base their decision exclusively on evidence in a record, although they are required to give reasons for the decision; and

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<sup>2</sup>See Chapter 10 *supra*.

(3) Tribunals or officers required to make decisions and take such immediate action for emergency reasons, e.g., adherence to minimum standards of procedure is not practical.

The underlying doctrine of judicial review in the United States—that the courts will review all conclusions of law, and review in a more limited way all findings of fact—depends for its application in large measure on the requirement that the decision be based solely on the existence of a record of the proceedings before an agency. If our recommendations are adopted no such requirement will apply to tribunals in Ontario, falling within the second and third categories we have just enumerated.

Hence the principles of review to be applied under this heading to each of the three categories of tribunals must be considered separately. No difficulty should arise in distinguishing them. The primarily judicial tribunals in the first category will be identified as such by the rules passed under the Statutory Powers Procedure Act requiring them to base their decisions on the record. Tribunals in the second category include all remaining statutory tribunals other than those falling within category three.

#### JUDICIAL TRIBUNALS THAT MAKE DECISIONS BASED ON A RECORD

We recommend as a general principle for judicial review of decisions of judicial tribunals based on a record, that the courts be empowered to quash decisions for error of law on the face of the record, or for lack of such relevant evidence as a reasoning mind might accept to support a conclusion based upon the findings of fact made by tribunals. In Chapter 22<sup>3</sup> we recommend the adoption of a single comprehensive procedure for judicial review, and that the relief available on judicial review should be available in proceedings which attack decisions of tribunals collaterally.

The changes we recommend in the substantive law on review may be summarized as follows:

<sup>3</sup>See p. 325 *infra*.



- (1) Review for error of law on the face of the record, now limited to *certiorari* proceedings, should be applied in all proceedings where decisions of judicial tribunals based on a record are called in question;
- (2) Decisions of judicial tribunals based on a record must be supported by such relevant evidence as a reasoning mind might accept to support a conclusion.<sup>4</sup>

In coming to these conclusions we have rejected the principle stated in broad general terms in the United States that the courts review decisions for all errors of law, but the practical result is the same as in the United States as far as judicial tribunals are concerned. We have recommended that, generally, judicial tribunals should decide on a record and give reasons for their decisions.

The restriction of review for errors of law in the exercise of the powers conferred on a tribunal to those that are apparent on the record prevents wide-ranging inquests whose purpose would merely be to delay governmental action; in addition, it simplifies the process of judicial review and renders it less expensive. Much criticism of our present law, based on uncertainty, will be met if our recommendation that the form of the record be prescribed by rules is adopted.

Review of matters of law or fact within the powers of a tribunal on the grounds we have suggested does not, we think, require fine distinctions to be drawn between them as in the United States. There the distinction is made for the purpose of determining whether the courts will review the decision. Our proposal assumes that any decision within the powers of a judicial tribunal will be reviewed and the two grounds interwoven. If the court finds error of law or absence of evidence as discussed above, it may quash the decision.

We have referred to statements made that the courts are often unduly restrictive in their review of decisions of law made by tribunals, although we have found little to support these statements. We are satisfied that our canons of statutory construction are sufficiently broad to permit the courts to

<sup>4</sup>This would change the effect of the rule in *R. v. Nat. Bell Liquors Ltd.*, [1922] 2 A.C. 128, i.e., that the lack of any evidence to support a decision of a tribunal is not a ground of review. For a discussion see pp. 261 ff. *supra*.

apply tests analogous to the "rational basis" test used in the United States in determining whether a conclusion of law of a tribunal should be reviewed. Such an approach can be taken where two or more alternative views on a conclusion of law can be justified within the language and scheme of the Act. It is open to our courts, within our principles of interpretation, to adopt the interpretation most consistent with the objectives of the statute. In so doing the experience of the tribunal in its statutory field should be given some weight. Professor Jaffe<sup>5</sup> makes a statement that may apply with equal force in Ontario:

"... where the *judges* are themselves convinced that a certain reading or application of the statute is the correct — or the only *faithful* reading or application they should intervene and so declare. Where the result of their study leaves them without a definite preference, they can and often should abstain if the agency's decision is 'reasonable'."<sup>6</sup>

We think that review of findings of fact, to ensure that there is some evidence to support the findings, promotes the cause of justice in the exercise of governmental powers. No tribunal should have power to make a final decision affecting the rights of individuals without any evidence to support it.

We have recommended the test of the "reasoning mind" as being more precise than the much discussed test of the "reasonable man".

Professor Jaffe lucidly discusses the difference between these tests:

"It has now become customary to state that a finding must be supported by 'substantial evidence'. Chief Justice Hughes in an oft-quoted statement in *Consolidated Edison Co. v. NLRB* has said that 'substantial evidence' means 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion'. This formula would appear to have been derived from the test for sustaining a jury verdict. But there is some ground to believe that in recent years the intended meaning of that test has become subtly blurred, and that the blurring has spread to administrative law. One feels at times that the notion of 'reasonableness' is torn from context: the question is felt to be not whether a reasonable man would

<sup>5</sup>Jaffe, *Judicial Control of Administrative Action*.

<sup>6</sup>*Ibid.*, 572. Author's italics.

consider the evidence of record sufficient under the *law* to support the verdict, but whether the verdict is reasonable as measured by a yardstick outside the law. The blurring is perhaps carried further by still one more subtle shift. Reasonableness may be felt to characterize the juror as a man rather than as a reasoner. These transpositions shift attention from the adequacy of the process of *reasoning* on the evidence in terms of the legal standard to the character of the verdict as the social judgment of a decent layman. The resulting criterion is a vague sense of justice rather than justice as expressed in the applicable rules of law. If a verdict satisfies this former sense it will go against the grain to brand it and the juror who has rendered it as 'unreasonable' with its implication of personal irrationality. This shift of meanings is particularly applicable to a negligence verdict which though based on slim evidence may be socially approved. The substantive law of negligence may thus have had the effect indirectly of modifying the standard of jury control.

How then might we state the 'rationality' test in what I would call its classic sense? I suggest that for *reasonable* mind we might substitute *reasoning* mind. The law demands evidence sufficient to enable a mind to find the legally required fact by reasoning from that evidence. The juror may be ever so reasonable as a man and his verdict ever so just in a colloquial sense, but the law requires or purports to require that he arrive at the verdict not by consulting his moral predisposition or his general sense of *justice*, but by *reasoning from the evidence.*"<sup>7</sup>

#### ADMINISTRATIVE TRIBUNALS REQUIRED TO COMPLY WITH MINIMUM PROCEDURAL RULES — DECISIONS NOT BASED SOLELY ON THE RECORD

We recommend that decisions of these tribunals, within their powers, be subject to review for error of law on the face of the record.

We have recommended that written reasons be given for administrative decisions in proper cases. If this recommendation is adopted, errors of law appearing in the reasons should be subject to review. What we have said in favour of review for errors of law on the face of the record of decisions made by judicial tribunals, applies with equal force to administrative decisions where errors of law are disclosed in the reasons.

<sup>7</sup>*Ibid.*, 596. Author's italics.

Decisions on questions of fact or opinion should not be subject to review. Although a hearing may be required to inform a Minister or other tribunal, and to afford opportunity for persons who will be affected by proposed action to influence the decision to be made, the decision remains a political one. It is founded on opinion or judgment and may take into account facts or matters not contained in the record of the hearing. It follows that all material upon which the decision is based cannot be placed before a court on review.

The responsibility for political decisions of this kind under our constitution should be left to the Minister who is responsible to the Legislature. The responsibility should not be placed on the courts. They are not tribunals to make political decisions and are not responsible to the Legislature. To ask the courts to decide political matters is to abandon governmental responsibility.

It is not to be overlooked that the exercise of these administrative powers is subject to full review on all grounds of *ultra vires*.

#### IMMEDIATE ACTION TAKEN TO MEET EMERGENCIES, E.G., PUBLIC HEALTH OR SAFETY

The power to take immediate action must in most cases be subject only to subjective conditions or limitations. As we have said,<sup>8</sup> the function of the courts on judicial review is to decide whether the opinion or judgment was formed or made by the tribunal within the scheme or purpose of the statute. We have, however, recommended that in all cases where such powers are conferred, there should be an objective condition precedent that the tribunal or official on whom the power is conferred should be authorized to act only if "he believes on reasonable and probable grounds" that action is called for.<sup>9</sup> In such cases the courts would have power to determine whether there were reasonable and probable grounds upon which a belief could be founded. The total absence of any grounds that could be considered to be reasonable and probable would render the action unauthorized.

<sup>8</sup>See pp. 258 ff. *supra*.

<sup>9</sup>See pp. 131-32 *supra*.

## LIMITATION OF REVIEW WHERE THERE IS NO SUBSTANTIAL INJUSTICE

We recommend that there should always be a discretion in the court on judicial review to refuse to quash a decision of a tribunal where it appears that no substantial wrong or injustice has been caused to the applicant by the decision. Mere technicality ought not to be allowed to defeat the statutory scheme.<sup>10</sup>

Where a defect in the proceedings before a tribunal, particularly relating to procedure, would render a decision *ultra vires*, the court in its discretion should have power in proper cases to make an order validating the decision as if it were within the powers of the tribunal.

## SCOPE OF LEGISLATION TO GIVE EFFECT TO RECOMMENDATIONS

We do not recommend statutory codification of the grounds for judicial review based on the doctrine of *ultra vires*. In our second report we discuss review by the *Conseil d'Etat* in France under the procedure technically known as the *recours en annulation pour excès de pouvoir*. This doctrine is analogous to, but broader in application than, our doctrine of *ultra vires*. Although not purporting to entertain an appeal on the merits a more intense review is made of administrative decisions which proponents of the *Conseil d'Etat* advocate for our system. Our law should be left free to develop refinements where appropriate.

However, we do recommend that legislation necessary to change the law be enacted to give effect to our recommendation that judicial review should be extended to include all cases where error of law is disclosed on the face of the record of a tribunal which is acting within its powers, and in the case of judicial tribunals, where there is no such relevant evidence as a reasoning mind might accept to support a conclusion.

<sup>10</sup>For a corresponding rule in the United States see p. 301 *supra*.

## CHAPTER 20

# Present Procedural Law of Judicial Review in Ontario

WE shall discuss briefly the forms of remedies and the procedure to be followed in the courts to obtain judicial review, together with some of the difficulties they present, under the same headings as we discussed the substantive law:<sup>1</sup>

- (1) Where a statutory tribunal proposes to act or has acted without power, and
- (2) Where a statutory tribunal has refused to exercise a power which it is under a duty to exercise.

### **WHERE A STATUTORY TRIBUNAL PROPOSES TO ACT OR HAS ACTED WITHOUT POWER**

Where a judicial tribunal, or an administrative tribunal that is required to exercise its powers by acting judicially, proposes to act without power, review may be by way of prohibition, declaratory action or injunction. Where the tribunal has purported to exercise a power it did not have, review may be by way of *certiorari*, declaratory action or injunction. In addition, an order of a tribunal may be collaterally attacked in an ordinary action where a party claims rights under the order.

If the order of the tribunal is a purely administrative one, the only available procedure is by way of an action for a declaration, injunction or collateral attack.

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<sup>1</sup>See p. 242 *supra*.

The multiplicity of common law forms of remedy and their historical origin has created great difficulties, many anomalies and much injustice in the administration of the law of judicial review. Justice is often defeated because the litigant has selected the wrong remedy.

Since there is no clear-cut analytical distinction between powers that are judicial and powers that are administrative, the selection of the right remedy presents even experienced counsel with serious problems, and is something on which judges not infrequently differ. On this branch of the law we are still adhering to archaic anachronisms of a century ago when forms of action that had nothing to do with the merits of the case played such a prominent part in forensic debate.

The unfortunate litigant is still often subjected to the injustice of having his application for relief dismissed with costs, with words of little consolation added, that the judgment is without prejudice to his right "to pursue such further other remedy as he may be advised".<sup>2</sup> We are sure all judges will agree with the comment made by Laskin, J.A. when he used words to the effect that he did not relish the task of denying litigants judgment on the merits of the case because the wrong form of remedy had been selected.<sup>3</sup>

The task of selecting a form of remedy is aggravated by the fact that the remedies are discretionary in character and the court is not bound to grant relief under any of the forms of remedy if, in the opinion of the court, there is another more convenient, beneficial and effective remedy available.

To all these difficulties are added the problems that arise out of the rules of court making it impossible to make alternative claims in one application. For example, in practice, proceedings by way of prohibition, *mandamus* and *certiorari* are commenced by an application by way of originating notice, which is heard summarily, while a claim for an injunction or a declaration must be asserted in an action commenced by writ of summons. While an application for prohibition or

<sup>2</sup>See *Re Low and Minister of National Revenue*, [1967] 1 O.R. 135 per Schroeder, J. A. at 137.

<sup>3</sup>See *R. v. Ontario Lab. Rel. Bd., Ex parte Kitchener Food Market Ltd.*, [1966] 2 O.R. 513, 523.

*mandamus* may be heard in chambers,<sup>4</sup> an application for *certiorari* must be heard by a judge sitting in court.<sup>5</sup>

The technicalities of procedure do not end with the rules of procedure. *Certiorari*, prohibition and *mandamus* will lie to supervise a non-incorporated tribunal, but an action will not lie against a board unless it is created a body corporate by statute. *Certiorari* proceedings may not be brought to question a decision made "by the Crown". This rule is sometimes extended to officers of the Crown making decisions under statutory powers.

The courts have refused to quash decisions of the Lieutenant Governor in Council in *certiorari* proceedings,<sup>6</sup> but a collateral attack on the validity of an order of the Lieutenant Governor in Council was permitted in an action.<sup>7</sup> On the other hand, it is doubtful that the courts will entertain a collateral attack on the decision of a tribunal based on bias, fraud of a party, or error of law on the face of the record. Separate proceedings in the appropriate form must first be brought to quash the decision before the action can succeed.

### WHERE A STATUTORY TRIBUNAL HAS REFUSED TO EXERCISE A POWER WHICH IT IS UNDER A DUTY TO EXERCISE

An order by way of *mandamus* is the most common remedy to compel a statutory tribunal to exercise the powers conferred on it. *Mandamus* may be obtained either by way of a summary application to a judge in chambers, or in an ordinary action. The technicalities that surround relief by way of *mandamus* are, therefore, less formidable than is the case with other common law remedies. However, some difficulties do exist. In those cases where a tribunal has purported to take authorized and required action, but the action taken has been *ultra vires*, the tribunal has not performed its duty. Frequently in such cases it is desirable to bring proceedings by way of *certiorari* to quash the purported action of the tri-

<sup>4</sup>Rules of Practice and Procedure of the Supreme Court of Ontario, Rule 209, para. 12.

<sup>5</sup>*Ibid.*, Rule 207.

<sup>6</sup>*Border Cities Press Club v. Attorney Gen'l for Ont.*, [1955] O.R. 14.

<sup>7</sup>*Esquimault and Nanaimo R. Co. v. Wilson*, [1920] A.C. 358.



bunal, together with proceedings by way of *mandamus* to order the tribunal to perform its duty properly. Since the application for *mandamus* is made in chambers and the application for *certiorari* can be made only in court, a confusion exists.

## CONCLUSIONS ON THE PRESENT PROCEDURE FOR JUDICIAL REVIEW

A review of the jurisprudence relating to the present procedure to obtain judicial review in Ontario and the injustices attendant thereon conclusively demonstrates that if the civil rights of the individual are to be adequately protected, the procedure must be simplified and stripped of its vexatious technicalities. This is an area of law reform that goes to the heart of the processes of law designed to provide discipline of tribunals and safeguards for the rights of individuals. We paraphrase and adopt the language of Professor Davis, given in full in the next chapter. It is an area of administrative law that most seriously needs reform and one that is singularly easy to reform.

In coming to this conclusion we are supported by a formidable body of authority.<sup>8</sup>

The Donoughmore Committee referred to the procedure by way of *certiorari*, prohibition and *mandamus* as "archaic and in some ways cumbrous and inelastic". They said, ". . . we would suggest the expediency of introducing a simpler, cheaper and more expeditious procedure".<sup>9</sup>

Following the report of the Donoughmore Committee certain minor procedural changes in the practice in England

<sup>8</sup>The Donoughmore Committee Report, 1932, Cmd. 4060, 62, 99, 117; Griffith and Street, *Principles of Administrative Law* (3rd ed., 1963), 240; Resolution of Canadian Bar Association (1955); S. A. de Smith, *Judicial Review of Administrative Action* (1957), 17, 29; Submission of Ontario Bar Association Subsection on Civil Liberties to the Gordon Commission on Organization of Government in Ontario (1958); Yardley, *Introduction to British Constitutional Law* (1960); Lawson and Bentley, *Constitutional and Administrative Law* (1961), 338; H. W. R. Wade, *Administrative Law* (1961), 111; Yardley, *A Source Book of English Administrative Law* (1963), 236; Brett, *Cases and Material on Constitutional Administrative Law* (Australia, 1962), 497; Orr, Report on Administrative Justice in New Zealand (1964), 110; Davis, *Administrative Law Treatise* (1958), s. 24.01.

<sup>9</sup>The Donoughmore Report, 62.

were made. These confirm in substance the practice which has been in force in Ontario for many years, but they did not go to the root of the fundamental deficiencies in the law which we have been discussing.

The Franks Committee did not deal with the basic procedural problems. It was concerned with appeals and said:

“Whatever may be decided as to the scope and method of appeals to the courts from tribunals we are convinced that the remedies by way of orders of certiorari, prohibition and mandamus should continue. . . . It is sometimes asserted that the procedure involved in seeking these remedies is unduly complex but we think that this criticism is unfounded. Following the recommendations of the Donoughmore Committee, what were known as the prerogative writs of certiorari, prohibition and mandamus, were replaced by orders of certiorari, prohibition and mandamus and the procedure for seeking such orders is quite simple.”<sup>10</sup>

This is true with respect to some of the formalities of the procedure, but we cannot agree that it is entirely true.

The Gordon Committee, without discussing the procedural difficulties that we have canvassed, merely referred to the conclusion of the Franks Committee and did not deal with the fundamental problems that concern this Commission.

Professor Wade makes this comment on the findings of the Franks Committee:

“In 1932 the Committee on Ministers’ Powers recommended reform of the ‘archaic, cumbrous and too inelastic’ procedure of the prerogative remedies. Minor improvements were made by statute in 1933 and 1938, but the core of the problem was left untouched. It seems paradoxical that drastic changes should have been proposed in 1932, when certiorari was in better working order than it is now, but that the Franks Committee in 1957 should have had nothing to say about it except that it should be given a wider operation — as has since been done . . .”<sup>11</sup>

Recognizing the need for reform in the “core” of the procedural problem governing judicial review, we consider in the next chapter some developments in England and in the United States of America.

<sup>10</sup>The Franks Report, para. 117.

<sup>11</sup>H. W. R. Wade, *Administrative Law*, 111.

## CHAPTER 21

# Procedural Law of Judicial Review in England and the United States

### ENGLAND

THE disadvantages and anomalies of the multiplicity of remedies have given rise to much the same difficulties in England as in Ontario. The efficiency of the remedies has been somewhat increased by the adoption of procedural recommendations made by the Franks Committee. In particular, the obligation to give reasons for decisions of tribunals has rendered review in *certiorari* proceedings, for error of law on the face of the record, more effective. There has been an expansion of the use of actions for declarations, but we are not convinced that this is the most desirable development. No procedure has been devised to replace applications for orders which have replaced the prerogative writs.

In apparent recognition of the inadequacies of the present remedies, provision is made in some statutes for specific forms of review; for example, the Acquisition of Land (Authorization Procedure) Act<sup>1</sup> provides that where any person aggrieved by a compulsory purchase order desires to question its validity on the ground that the order is beyond the powers of the tribunal, or that there was a failure to comply with procedural requirements, he may make an application to the High Court, and on any such application the

<sup>1</sup>1946, 9 & 10 Geo. VI, c. 49.

court may make an interim order of suspension of the order of the tribunal, or quash the order generally or any provision thereof.

Generally the former remedies have been retained with some provision in particular statutes for special remedies.

## THE UNITED STATES

### Federal Administrative Remedies

In the federal system the extraordinary remedies afforded by the prerogative writs have played a lesser part in the development of judicial review than in the Province of Ontario. In at least twenty-one statutes, applying to ten major agencies, specific provisions are made for judicial review. The review provisions of the Federal Trade Commission Act are a prototype of other statutory provisions. The Act provides for obtaining review in the Circuit Court of Appeals by the filing of a written petition. Upon service of the petition on the tribunal, the entire record is certified and filed in the court. On the hearing of the petition, the court has jurisdiction to affirm, modify or set aside the order. The decision is final, except that it is subject to review by the Supreme Court upon *certiorari*.<sup>2</sup>

In the result the remedies for judicial review are generally provided by statute, with the remedies of injunction, declaratory action and, to a minor extent, prerogative writs as residual remedies.

### State Administrative Remedies

As has been the case in Ontario, the prerogative writs play a large part in the procedural laws of the States of the Union, although in some States some specific statutory remedies have been provided. In forceful and clear language, Professor Davis condemns the state procedure of review; almost every line applies to the procedure in Ontario:

“No branch of administrative law is more seriously in need of reform than the common law of the state courts concerning methods of judicial review. No other branch is so easy to reform.

<sup>2</sup>Davis, *Administrative Law Treatise*, s. 29.03.

An imaginary system cunningly planned for the evil purpose of thwarting justice and maximizing fruitless litigation would copy the major features of the extraordinary remedies. For the purpose of creating treacherous procedural snares and preventing or delaying the decision of cases on their merits, such a scheme would insist upon a plurality of remedies, no remedy would lie when another is available, the lines between remedies would be complex and shifting, the principal concepts confusing the boundaries of each remedy would be undefined and undefinable, judicial opinions would be filled with misleading generalities, and courts would studiously avoid discussing or even mentioning the lack of practical reasons behind the complexities of the system.

The system of extraordinary remedies is brimming over with these qualities. For no practical reason, the remedies are plural. A cardinal principle, now and then erratically ignored, denies one method of review when another is adequate. The lines are moved about through discussions of such concepts as judicial, nonjudicial, discretionary, and ministerial. These concepts are acutely unfortunate not only because they defy definition but because of the complete folly of using any concepts whatever to divide one remedy from another. Nothing is accomplished by holding that certiorari is the wrong method of reviewing non judicial action, that mandamus will not reach discretionary action, and that since neither certiorari nor mandamus is good for action which is both non judicial and discretionary, such as public utility rate fixing, the remedy is equitable, so that concepts such as irreparable injury fortuitously come to life and may be decisive, even though those concepts would not affect certiorari or mandamus. The theory varies, and departures from the theory are commonplace. Thousands of cases try to draw lines. The more the cases the more the lines. The more the lines the more the confusion. Yet the litigant must label his pleading at his peril.

The most serious consequence of the system is the myriad of cases which fail to reach the merits. Almost as grievous a fault is the concentration of effort of counsel and of courts on the solution of false problems. Even if miserable failure to clarify could be replaced by shining success, nothing would be gained by constructing bodies of law defining such concepts as judicial, non judicial, discretionary, and ministerial. Attention should be directed to problems having practical significance — whether particular action should be reviewable, whether the time is ripe for review, what the scope of judicial inquiry ought to be. Furthermore, the extraordinary remedies too often compel unsound results. For instance, when

mandamus is held to be the only correct remedy, many courts hold that administrative discretion may not be reviewed; yet one major purpose of judicial review should be to keep agencies' action within the limits of reasonableness as conceived by the courts. To make the scope of review depend upon fortuities about technical remedies is obviously unsound.

The cure is easy. Establish a single, simple form of proceeding for all review of administrative action. Call it 'petition for review.' Get rid of extraordinary remedies as means of review. Focus attention then on the problems having significance—whether, when, and how much to review."<sup>3</sup>

The Revised Model State Administrative Procedure Act provides for a uniform procedure for judicial review by way of a petition. The uniform procedure is intended to be alternative to any other remedies.

In New York State in 1937 proceedings by way of *certiorari*, *mandamus* and prohibition were abolished. A single form of proceeding was substituted under which an applicant could obtain appropriate relief. Although the form of proceedings was changed, the substantive law was not changed.

We do not feel that it is necessary to do more than refer to many doctrines that have been developed in the United States affecting judicial review, such as the doctrines of primary jurisdiction, exhaustion and ripeness. These will not apply to judicial review in Ontario if our recommendations are adopted.

We emphasize again that if justice in the courts is not to be defeated by unnecessary technicality and forms of procedure, reform in this branch of judicial review can no longer be delayed.

<sup>3</sup>Ibid., s. 24.01.

## CHAPTER 22

# Conclusions and Recommendations on The Procedural Law of Judicial Review in Ontario

IN seeking a solution of the problems besetting judicial review in Ontario, four objectives should be borne in mind: adequate protection of the rights of the individual, simple and inexpensive procedure, early finality of decision, and a minimum of interference with the processes of government. To reach these objectives, changes will be required both in the procedure to be followed and the court to conduct the review.

### PROCEDURE

Instead of a multiplicity of forms of applications to compel, prohibit or set aside the exercise of statutory powers, there should be a single application to the court in which all the relief obtainable under any of the existing remedies would be available without the technical complexities, provoking much legalistic debate, which often obstruct, delay and sometimes defeat a decision on the merits.

The simplification of procedure can only be satisfactorily accomplished by providing a court in which prompt finality of decision will be achieved.

## RECOMMENDATIONS

1. Statutory provision should be made for a procedure by way of a single form of summary application to the Supreme Court, for review of the refusal to exercise, or of the proposed or purported exercise of, a statutory power under which any relief may be granted which would be available under any of the present remedies, i.e., by way of an order in the nature of *mandamus*, prohibition, *certiorari*, a declaratory judgment, or an injunction relating to the exercise of such a power.

This would eliminate the problem of choosing the appropriate remedy.

We have made recommendations intended to promote uniformity in the substantive law for the review of the exercise of statutory powers. In addition to grounds for holding the proposed or purported exercise of a power to be unauthorized or invalid on the principle of *ultra vires*, we have recommended that there be review in certain cases on grounds of error of law on the face of the record, or absence of substantial evidence.

The issues in any form of proceedings for judicial review, therefore, would be the same and a single form of application would be practicable.

We reject any suggestion that as a general policy specific remedies be provided in each individual statute conferring powers. To leave the form of remedy to be established by individual statutes would result in either unnecessary repetition of similar provisions in individual statutes, or undesirable diversity, promoting and continuing objectionable complexities. If any variations in the general procedure should be required in specific statutes conferring powers, they should receive special consideration. We think this would seldom be necessary.

Experience in other jurisdictions reinforces the view that a single uniform application is not only desirable but feasible.<sup>1</sup> Proposals for such a remedy are

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<sup>1</sup>See p. 322 *supra*.



adopted in the Model State Act.<sup>2</sup> Similar proposals have been made for New Zealand.<sup>3</sup>

2. Provision should be made, pending review, for an interim stay of action in relation to a proposed or purported exercise of a power where the protection of the interests of the individual affected requires it.

The tribunal or the reviewing court should have power to grant the stay.

3. The time within which a purported exercise of a statutory power is subject to review—on all grounds except the constitutionality of the statute conferring it—should be limited.

The appropriate time limitations will vary, depending on the nature of the statutory power. In some instances, for example those contesting the validity of a purported expropriation, the limitation period should be short so that the property may be dealt with on the basis of a valid title after the limitation period has expired. In other cases there may be less urgency and the limitation period may be longer.

Prior to the expiration of the limitation period, the purported exercise of a power should be subject to review on all the grounds that we have recommended. After the expiration of the limitation period, the purported exercise of the power should be conclusively presumed to be a valid exercise.

A general provision, however, should be made that a limitation period may in all cases be extended by the reviewing court, either before or after it has expired, where it is established that there are *prima facie* grounds for review, and that no prejudice or hardship will result to any party affected by reason of the delay.

4. Proceedings for review should be available either before the exercise of the power has commenced or during the course of its exercise, or after it has been exercised.

Obviously, in practice, review before or during the

<sup>2</sup>See Cooper, *State Administrative Law*, ch. XVIII.

<sup>3</sup>Orr, Report on Administrative Justice in New Zealand (1964), Part V.

exercise of a power can only apply to review on grounds of *ultra vires*. Review for error of law on the face of the record, or absence of substantial evidence, can only be had after the exercise of the power. We reject any doctrine requiring the tribunal always to complete the purported exercise of its power before judicial review is available on grounds of *ultra vires*.

5. The application for judicial review should be commenced by originating notice under the Rules of Practice and Procedure of the Supreme Court of Ontario.

The existing procedure for summary application has the advantages of familiarity, uniformity and expedition. (Time for return of an originating notice of motion is seven days. This time may be shortened by leave of the Court.) We reject suggestions that actions for a declaration or an injunction be made the appropriate remedy in all cases. Such actions are long, expensive and may be used as a delaying tactic, interfering with governmental action. The present Rules of Practice are adequate to provide for the trial of issues of fact in the exceptional cases where this may be necessary.

6. Provision should be made for the production of documents where necessary and for discovery by leave of the reviewing court. The usual practice now is to dispose of applications for review on evidence furnished by affidavit. We are satisfied that this will continue to be the case if our recommendations are adopted. Interlocutory proceedings should be reduced to a minimum and unnecessary proceedings should be penalized in costs.
7. In the case of review for error of law on the face of the record, or absence of substantial evidence, the evidence supporting an application for review should be confined to the record, and in all other cases the evidence should include the record of the proceedings before the tribunal where a record is available, and other evidence relevant to the issue of *ultra vires*.
8. Apart from the ground that there is another equally convenient, effective and beneficial remedy, the reviewing court should continue to have the same discretionary

- power to refuse applications as is now exercised; e.g., the conduct of a party may disentitle him to relief.
9. Relief should be refused where the grounds for attack on the exercise of a statutory power are merely technical in their nature and no substantial injustice or prejudice to a party has occurred; in such cases, where the ground of attack is based on *ultra vires*, e.g., failure to comply with mandatory procedural requirements, the courts should have power to validate the decision of the tribunal.
  10. Rules of court should be made governing persons to be served with the proceedings.
  11. Provision should be made that tribunals exercising statutory powers should be suable entities for the purpose of judicial review. This recommendation is made to avoid technicalities arising as to who are the proper parties.
  12. It should be imperative that the Attorney General should be served with notice of all proceedings for judicial review, even though he may not be a party thereto. Such a practice would give the Attorney General an opportunity to fulfil his function as the guardian of the public interest and to bring the legal proceedings of administrative tribunals under the supervision of the Attorney General, which should be a safeguard to the rights of the individual and give guidance to tribunals in the exercise of the powers conferred on them.
  13. The standing of a person to apply for review should be governed by the present principles, e.g., interest, etc.
  14. The right of judicial review should be available notwithstanding that a right of appeal may exist.
  15. The proposed procedure should be available in aid of applications for writs of *habeas corpus* in the same way that proceedings for an order in the nature of *certiorari* are now available.
  16. Wherever an action for a declaration or an injunction is brought for relief which could be obtained on summary application, the offending party should be subject to penalization in costs.

## THE COURT TO WHICH APPLICATIONS FOR JUDICIAL REVIEW SHOULD BE MADE

Since judicial review has some characteristics of an appeal, the application for review we recommend in this chapter should be heard by the Appellate Division of the High Court of Justice for Ontario (the establishment of which is recommended in Chapter 44). The decision in the first instance would then be that of at least three judges, whereas at present the decision on judicial review is made by one judge.

The decision of the Appellate Division should be final, unless leave to appeal is granted by the Court of Appeal. This would facilitate prompt termination of proceedings affecting the processes of government. Such a system would lend itself to the development of special expertise in the administration of this branch of the law by the judges presiding in the Appellate Division. This development is quite impossible when applications may be made for review to any one of the twenty-five judges of the High Court of Justice for Ontario.

Where an action is brought, either for a declaration or for consequential relief, in which the validity of the exercise of a statutory power is in issue, a judge of the Supreme Court should have power, either on his own initiative or on the application of any of the parties, to direct that a summary application be made to the Appellate Division of the High Court for a determination of the validity of the exercise of the power. If consequential relief is sought when the issue of the validity of the exercise of the power is determined, the matter may be referred back to the trial court if further proceedings are necessary.

## VOID AND VOIDABLE DECISIONS

In reviewing decisions of statutory tribunals a distinction has been drawn in the courts between decisions that are said to be void and those that are said to be voidable. In the former case the decision is held to be without legal effect *ab initio*. A voidable decision is legally effective until it is set aside by the courts.

On the surface the distinction would seem logically to rest on whether the decision was wholly outside the powers of the tribunal, or was within its powers but subject to be quashed,

e.g., for error of law on the face of the record. The law is not, however, that simple. Some decisions that would appear to be beyond the powers of a tribunal have been held to be merely voidable.

The concept of voidability permits the courts in proper cases to give effect to waiver, to render certain decisions immune from collateral attack and to give security to rights of third parties based on the decision.

This doctrine is very uncertain and difficult to apply.<sup>4</sup> The uncertainties stem in part from the concept of jurisdiction that we have discussed previously in this Report.<sup>5</sup>

We do not think any legislative action should be undertaken at this time with respect to the doctrine of "void" and "voidable" as applied to administrative law. We have made specific recommendations with regard to procedural reform and the extension of review to all cases for error of law on the face of the record and a limited review for lack of substantial evidence. We think these recommendations should be put into effect at once, and that the law should be allowed to develop under the new procedure before any attempt is made to legislate on the subject of the "void" and "voidable" concepts. If, in the light of developments under the new procedure further clarification of the law becomes necessary and desirable, legislation may be then considered.

We make the following suggestions for the attention of those who may have to deal with this area of the administrative law reform at some time in the future. In doing so, we make it clear that they are suggestions for consideration only.

- (1) Any decision of a tribunal purporting to exercise statutory powers should be presumed on all grounds, other than grounds of the unconstitutionality of the statute conferring the power, to be a valid decision until it is held to be invalid by a court.
- (2) The validity of such a decision should be subject to question and review under the single form of application we have recommended, or in proceedings collaterally attacking it.

<sup>4</sup>See H. W. R. Wade, *Unlawful Administrative Action: Void or Voidable?* Part I, 83 L.Q. Rev. 499 (1967).

<sup>5</sup>See p. 244 *supra*.

- (3) There should always be a time limit (subject to power in the court to extend the time) for proceedings for judicial review (on all grounds other than grounds of unconstitutionality) of a decision of a tribunal, and after the expiration of the time limit the decision should for all purposes be presumed to be valid and effective and not subject to being questioned in any proceedings whatsoever.
- (4) Failure to comply with procedural requirements for the exercise of the power should be subject to waiver by the parties.
- (5) No other grounds for judicial review should be subject to waiver, except known bias accepted by a party.

## Section 3

**STATUTORY POWERS:  
SUBORDINATE LEGISLATIVE POWERS**

F. B. ROBERTS

RESEARCH REPORT  
ON THE HISTORY OF THE  
CITY OF BOSTON



## INTRODUCTION

In an ideal legal system, all rights and liabilities of the individual in relation to others and to government would be established by stated rules of law applied by the ordinary courts of law. New rules would be made by the legislature, which is representative of and responsible to the people, with constitutional and political safeguards for the exercise of its power. There would be no arbitrary or discretionary powers vested in bodies or persons other than the legislature, or those directly responsible to it.

It must be recognized and accepted that the practical demands of modern government could not be met under such an ideal system. The Legislature cannot state in complete detail all the rules to apply under new statutes. Nor is it desirable that it should attempt to do so where flexibility of their application in administrative matters is necessary. The Legislature should enact statutes in as much detail as is practicable and confer power to complete the statutory schemes by making regulations which have the force of law.

Where it is not possible to state in a statute the detail of all the law required to carry out its scheme, or where flexibility is needed, definite advantages are gained if powers to make regulations to supplement the statute are conferred on the proper body. The only alternative would be to confer wide administrative powers to make decisions in particular cases. In that case the detailed operation of a statute would be developed by a case-by-case method. It is generally agreed that the individuals affected are better protected, and may more intelligently govern their conduct, where rules are promulgated as regulations, rather than where rights are left to be determined in individual cases. Even where powers of administrative decision must be conferred, regulations will contribute to a consistent and uniform application of principles and avoid the burden of considering each question anew

whenever it arises. Where a broad administrative power of decision is conferred the extent to which guiding regulations can be made should always be considered. If at the outset such regulations cannot be made, the results of the decisions of the administrative tribunal should be embodied in regulations as soon as possible.<sup>1</sup>

A subordinate legislative power to make regulations under every Act of the Legislature of Ontario is conferred by the Interpretation Act, which provides as follows:

“22. The Lieutenant Governor in Council may make regulations for the due enforcement and carrying into effect of any Act of the Legislature and, where there is no provision in the Act, may prescribe forms and may fix fees to be charged by all officers and persons by whom anything is required to be done.”<sup>2</sup>

In addition, it is common practice to confer specific power to make regulations under statutes, whether or not the power is necessary. Often where it is conferred it is never exercised. No useful purpose can be served in attempting to set out exhaustively or discuss all the powers to make regulations.

New and amending regulations are published in the *Ontario Gazette* as they are made. Periodically, a consolidation and revision of existing regulations is prepared and published. The last revision — The Revised Regulations of Ontario (R.R.O. 1960) — contains 572 separate regulations running to 3,153 pages in double columns of relatively small type. The following table shows the annual volume of regulations, new and amending, made in Ontario:

<i>Year</i>	<i>Number</i>	<i>Pages</i>
1961	384	339
1962	343	420
1963	352	590
1964	346	265
1965	355	503
1966	399	815
Total	2,179	2,932

<sup>1</sup>For discussion and references, see Cooper, *State Administrative Law*, 177ff.

<sup>2</sup>R.S.O. 1960, c. 191, s. 22.

The term "regulation" may include rules of substantive law, by-laws for the internal management of a statutory body, and rules of procedure to be followed by tribunals, made in the exercise of a subordinate legislative power.

In Chapter 4 we enumerated six matters to be considered in the establishment of appropriate standards as safeguards against unjustified encroachments on civil rights. The first five have application to an examination of subordinate legislative power. We deal with them under the following headings:<sup>3</sup>

- (1) Limitations on and scope of subordinate legislative power;
- (2) The persons on whom a subordinate legislative power may be properly conferred;
- (3) The procedure that should govern the exercise of subordinate legislative power;
- (4) Review of subordinate legislation by the Legislature; and
- (5) The supervision by the courts of the exercise of subordinate legislative power.

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<sup>3</sup>For general information respecting the use and exercise of subordinate legislative power and its supervision in the United Kingdom, Australia, New Zealand, United States and Canada, see John E. Kersell, *Parliamentary Supervision of Delegated Legislation* (1960); H. W. R. Wade, *Administrative Law* (1961); Yardley, *A Source Book of English Administrative Law*; Davis, *Administrative Law Treatise*; Cooper, *State Administrative Law*.

We are indebted to the Legislative Counsels of Ontario and Manitoba for most useful material compiled by them.

## CHAPTER 23

# Limitations on and Scope of Subordinate Legislative Power

THE main element of subordinate legislative power—like administrative power—is the power to make a decision on grounds of policy when deciding upon and stating rules that shall have the force of law. Theoretically, a subordinate legislative power can be analyzed and shown to include similar ingredients to other statutory powers.<sup>1</sup> In practice, some of the ingredients are missing, and others may be dealt with very briefly.

### CONSTITUTIONALITY OF THE ACT AND VALIDITY OF THE APPOINTMENT OF THE SUBORDINATE LEGISLATIVE BODY

It is elementary that a subordinate legislative power can only be exercised effectively if the statute conferring the power is constitutionally valid and the persons purporting to make the regulations are the persons authorized by statute to do so.

### PRELIMINARY MATTERS

Seldom are there preliminary facts, or matters of law or mixed law and fact that must exist as conditions precedent to the existence of subordinate legislative power. The terms under which such powers are conferred may provide that “the Lieutenant Governor in Council may make regulations . . .”,

<sup>1</sup>See pp. 63ff *supra*.

or that "the Council (of the College of Physicians and Surgeons of Ontario) may make regulations. . . ." In general there are no required conditions precedent. Such conditions may be required, e.g., the requirement in the Highway Improvement Act that the Lieutenant Governor designate a highway to be a controlled access highway before the Minister may make regulations regulating the use of the highway.<sup>2</sup> Where they exist, preliminary matters may be objective or subjective conditions precedent, as in the case of administrative powers.<sup>3</sup> If they are not complied with, the subordinate legislative power does not come into existence and any rules purportedly made will be *ultra vires*.

### IMPARTIALITY

The Rules of Natural Justice designed to ensure impartiality in the exercise of a power, i.e., presumed bias where a tribunal has a pecuniary interest or likely bias where the tribunal has some other direct personal interest,<sup>4</sup> have not yet been applied to a subordinate legislative power.

### MANNER OF MAKING REGULATIONS AND BRINGING THEM INTO EFFECT

The requirements governing the manner in which the decision is to be made, and the requirements governing procedure to make the regulations effective, may be conveniently discussed later in relation to the procedure to be followed in the exercise of subordinate legislative power.

### OBJECTIVE LIMITATIONS ON SCOPE OF REGULATIONS TO BE MADE OR MATTERS TO BE CONSIDERED IN MAKING THEM

Power to make regulations subject to objective limitations may be very narrow in scope, e.g., the establishment of administrative details such as forms or fees, or it may be very wide and authorize the enactment of substantive provisions to complete the scheme of the parent Act. The following are

<sup>2</sup>The Highway Improvement Act, R.S.O. 1960, c. 171, s. 36.

<sup>3</sup>See pp. 79, 90ff *supra*.

<sup>4</sup>See p. 77 *supra*.

typical examples, starting with narrow and ending with wide powers:

The Investment Contracts Act:

"25. The Lieutenant Governor in Council may make regulations,

- (a) prescribing the fees payable upon applications for registration and renewal of registration;
- (b) prescribing forms and providing for their use;
- (c) designating investments or securities as qualified assets within the meaning of this Act;
- (d) respecting any matter necessary or advisable to carry out effectively the intent and purpose of this Act."<sup>5</sup>

The Lightning Rods Act:

"15. The Lieutenant Governor in Council may make regulations,

- (a) prescribing minimum standards for lightning rods; . . ."<sup>6</sup>

The Dead Animal Disposal Act:

"11. The Lieutenant Governor in Council may make regulations,

- (a) providing for the issue, renewal, suspension or revocation of or refusal to issue or renew licences and prescribing the fees payable for licences or the renewal thereof; . . ."<sup>7</sup>

The Lakes and Rivers Improvement Act:

"2. (1) The Lieutenant Governor in Council may make regulations,

- (a) for the safe and orderly floating of timber down lakes and rivers, and for preventing the use of lakes and rivers for navigation by vessels and boats being unnecessarily impeded or interfered with by timber;
- (b) respecting generally the use under this Act of lakes and rivers and waters therein;
- (c) prescribing penalties for contravention of the regulations.

(2) The regulations may be general in their application, or be applicable to any particular Part of this Act or to any particular lake or river or to any particular dam or work."<sup>8</sup>

<sup>5</sup>R.S.O. 1960, c. 194, s. 25.

<sup>6</sup>R.S.O. 1960, c. 213, s. 15.

<sup>7</sup>R.S.O. 1960, c. 88, s. 11, as amended by Ont. 1961-62, c. 28, s. 6.

<sup>8</sup>R.S.O. 1960, c. 203, s. 2.

## The Plant Diseases Act:

"10. The Lieutenant Governor in Council may make regulations,

- (a) designating plant diseases within the meaning of this Act;
- (b) prescribing the duties of the Provincial Entomologist and of inspectors;
- (c) providing for the issue of licences to operate nurseries and to dealers in nursery stock, and prescribing the term thereof, and the fees to be paid therefor;
- (d) providing for the establishment of plant disease control areas;
- (e) providing for the control or eradication of any plant disease in any plant disease control area or in any other area;
- (f) providing for the issue of certificates as to the freedom from any plant disease of any plants grown in any nursery, farm, garden, orchard or other place or kept on any premises of a dealer in nursery stock;
- (g) providing for the making of grants by the Minister out of the moneys that are appropriated therefor by the Legislature so as to reimburse any municipality to such extent as is designated for any expense it has been put to under this Act;
- (h) prescribing forms and providing for their use;
- (i) respecting any matter necessary or advisable to carry out effectively the intent and purpose of this Act."<sup>9</sup>

In all these statutes the delegated legislative powers, although in some cases broad, are expressed objectively. If the subordinate legislator purported to make rules dealing with other matters his action would be *ultra vires* and the courts would so hold. The Legislature has determined the limits within which the power may be exercised. The power of the court to interfere even extends to the usual broad powers given in many statutes to make regulations "respecting any matter necessary or advisable to carry out effectively the intent and purpose of this Act". If the courts determine that a regulation passed in the purported exercise of such a power was not "necessary or advisable", they will hold the regulation to be *ultra vires*.

<sup>9</sup>R.S.O. 1960, c. 297, s. 10.

An objective limitation was applied in *Metropolitan Toronto v. The Village of Forest Hill*.<sup>10</sup> The Municipality of Metropolitan Toronto Act<sup>11</sup> provided:

“41. The Metropolitan Council may pass by-laws for regulating the time, manner, extent and nature of the supply of water from its waterworks system, and every other matter or thing related to or connected therewith which it may be necessary and proper to regulate in order to secure to the inhabitants of the Metropolitan Area a continued and abundant supply of pure and wholesome water, and to prevent the practising of frauds on the Metropolitan Corporation with regard to the water so supplied.”<sup>12</sup>

A majority of the court held that Metropolitan Toronto was not empowered to pass by-laws providing for the fluoridation of water. The underlying purpose of fluoridation was not the provision of “pure and wholesome water”, but a special health purpose for which a water supply was used as a means. Metropolitan Toronto was limited to supplying pure and wholesome water as interpreted by the court and could not use the powers to supply water to provide for the compulsory preventive medication of the inhabitants of the Municipality.

### **SUBJECTIVE LIMITATIONS ON THE SCOPE OF REGULATIONS TO BE MADE OR MATTERS TO BE CONSIDERED IN MAKING THEM**

The following are examples of subjective ingredients:

The Emergency Measures Act:

“6a. The Attorney General may make such regulations as he deems necessary for the purposes of this Act.”<sup>13</sup>

The Farm Loans Adjustment Act:

“6. Subject to the approval of the Lieutenant Governor in Council, the Treasurer [of Ontario] may,

(a) prescribe the form of application for relief and such other forms as he deems necessary; . . .

<sup>10</sup>[1957] S.C.R. 569.

<sup>11</sup>Ont. 1953, c. 73.

<sup>12</sup>*Ibid.*, s. 41.

<sup>13</sup>Ont. 1962-63, c. 41, s. 6a, as enacted by Ont. 1965, c. 36, s. 4.



(c) make such regulations as he deems necessary respecting any matter necessary or advisable to carry out effectively the intent and purpose of this Act.”<sup>14</sup>

#### The Industrial Standards Act:

“12. The Lieutenant Governor in Council may make such regulations as he deems necessary for carrying out this Act and for its efficient administration.”<sup>15</sup>

Provisions of this type restrict the power of the court to find that a regulation is *ultra vires*. The court has no power to determine whether the regulation is necessary but only whether the subordinate legislator did in fact deem it necessary to make the regulation for the purposes of the Act. It is immaterial whether the court concludes that in its opinion the regulation is not necessary, but if it is apparent on the face of the regulation that it is for a wrong purpose or wrong considerations have been taken into account, the court can intervene.<sup>16</sup> In our opinion powers with subjective limitations should not be conferred except in legislation of an emergency nature.

## OBJECTIONABLE PROVISIONS CONFERRING SUBORDINATE LEGISLATIVE POWER

### Power to Amend Another Act or Regulations Passed Under Another Act

The general rule in Ontario appears to be that regulations made under the authority of one statute cannot affect the provisions of another statute. The same rule is applied to regulations. Regulations made under one statute cannot directly repeal regulations made under another statute. Although there is no authority, the rule would appear to be that regulations made under a special Act relating to a particular subject matter would override regulations made under a general Act, although its general field might embrace the particular subject matter of the special Act.

<sup>14</sup>R.S.O. 1960, c. 134, s. 6.

<sup>15</sup>R.S.O. 1960, c. 186, s. 12.

<sup>16</sup>See *Reference re Chemical Regulations*, [1943] S.C.R. 1. See pp. 259-60 *supra*.

These rules may be varied by express provisions in a statute, as shown by the following illustrations:

The Crown Timber Act:

"50. (1) Notwithstanding anything in any general or special Act or in any order in council or regulation made pursuant thereto or in any licence, the Lieutenant Governor in Council may make regulations increasing or decreasing the Crown dues payable in respect of any kind or class of timber or increasing or decreasing the annual ground rent and fire protection charge payable in respect of licensed areas, and such regulations shall take effect on the 1st day of April immediately preceding or at such subsequent time as is specified in such regulations."<sup>17</sup>

The Gasoline Handling Act:

"5. (2) Where conflict exists between any regulation made under this Act and any by-law passed by a municipality in the exercise of its powers the regulation prevails."<sup>18</sup>

The Milk Act:

"7. (1) Notwithstanding section 6, the Lieutenant Governor in Council may make regulations,

- (f) notwithstanding any other Act, providing for,
  - (i) the carrying out by the Commission or a trustee of any or all of the powers of a marketing board,
  - (ii) the vesting of the assets of a marketing board in the Commission or a trustee, and
  - (iii) the disposing of any or all of the assets of a marketing board in such manner as is prescribed,

and where any regulation made under this clause is in conflict with any by-law of the marketing board, the regulation prevails;

8. (1) The Commission may make regulations with respect to regulated products generally or to any regulated product, and, without limiting the generality of the foregoing, may make regulations, . . .

21. notwithstanding any other Act, providing that no marketing board shall make grants or other like payments of money to any person or association or body of persons without the approval of the Commission."<sup>19</sup>

<sup>17</sup>R.S.O. 1960, c. 83, s. 50 (1).

<sup>18</sup>Ont. 1966, c. 61, s. 5 (2).

<sup>19</sup>Ont. 1965, c. 72, ss. 7, 8.

In all these cases a body subordinate to the Legislature is given power to override specific legislation.

On the other hand it may be expressly provided that the regulations shall not affect provisions authorized under other enactments, for example:

#### The Hotel Fire Safety Act:

"27. Nothing in this Act or the regulations affects any by-law relating to the matters mentioned in this Act, or the regulations and lawfully passed by a municipal council, or the authority of a municipal council to pass any such by-law, in so far as such by-law imposes additional or more stringent requirements than those contained in this Act or the regulations."<sup>20</sup>

Power should not be given under any statute to amend other statutes by regulations, except to meet the most exceptional circumstances, as in the Emergency Measures Act. If any amendment to other statutes is necessary to give effect to the scheme of an Act, the amendment should be made by the Legislature and not by regulations.

#### Amendment of the Parent Act

The general rule is that regulations made under a statute cannot amend the parent Act unless express authority is given to do so.<sup>21</sup> We have found no example in Ontario where power is expressly given to amend the authorizing statute. Such a power is sometimes conferred in the United Kingdom where a general statute enacting a new and far-reaching scheme extends over an area in which numerous special or private acts have already been passed. In such case power is sometimes given for a limited time to adapt the provisions of the new general act to take into account the private and special acts—the so-called Henry VIII clause. This practice was considered undesirable by the Donoughmore Committee.<sup>22</sup> It should not be adopted in Ontario where statutes are not as complicated and do not go back so far in time as they do in the United Kingdom.

<sup>20</sup>R.S.O. 1960, c. 179, s. 27.

<sup>21</sup>*Reference re Chemical Regulations*, [1943] S.C.R. 1.

<sup>22</sup>The Donoughmore Report, 36, 65.

Powers akin to powers of direct amendment are conferred in many statutes, for example:

The Apprenticeship and Tradesmen's Qualification Act:

"18. The Lieutenant Governor in Council may make regulations,

(o) defining any expression used in this Act for the purposes of this Act; . . ." <sup>23</sup>

The Construction Safety Act:

"24. (1) The Lieutenant Governor in Council may make such regulations as are considered necessary or advisable to ensure the safety of workmen on projects.

(2) Without limiting the generality of subsection 1, the Lieutenant Governor in Council may make regulations,

(a) defining any expression used in this Act or the regulations;" <sup>24</sup>

The Hours of Work and Vacations with Pay Act:

"10. Subject to the approval of the Lieutenant Governor in Council, the Board [Industry and Labour Board] may make regulations,

(a) prescribing any establishment, undertaking or work in or about any business, trade or occupation that shall be deemed to be an industrial undertaking for the purposes of this Act; . . ." <sup>25</sup>

The Mining Act:

"647. (1) The Lieutenant Governor in Council may make regulations for,

(b) to meet cases that may arise for which no provision is made in the Act, or when he deems the provision made to be ambiguous or doubtful; . . ." <sup>26</sup>

The Workmen's Compensation Act:

"86. (1) Subject to the approval of the Lieutenant Governor in Council, the Board may by regulation,

(a) rearrange any of the classes for the time being included in Schedule 1, and withdraw from any class any industry included in it and transfer it wholly or partly to any other class or form it into a separate class, or exclude it from the operation of this Part;

<sup>23</sup>Ont. 1964, c. 3, s. 18.

<sup>24</sup>Ont. 1961-62, c. 18, s. 24.

<sup>25</sup>R.S.O. 1960, c. 181, s. 10.

<sup>26</sup>R.S.O. 1960, c. 241, s. 647.

(b) establish other classes including any of the industries that are for the time being included in Schedule 2, or are not included in any of the classes in Schedule 1;

(c) add to any of the classes for the time being included in Schedule 1 any industry that is not included in any of such classes;

(d) exclude any trade, employment, occupation, calling, avocation or service from any industry for the time being included under this Part or at any time brought under this Part."<sup>27</sup>

#### The Deposits Regulations Act:

"8. The Lieutenant Governor in Council may make regulations,

(a) exempting persons or corporations or any class thereof from the application of this Act; . . ."<sup>28</sup>

#### The Insurance Act:

"88. (3) The Lieutenant Governor in Council may make regulations,

(b) extending the provisions of this Act or any of them to a system or class of insurance not particularly mentioned in this Act; . . ."<sup>29</sup>

#### The Minimum Wage Act:

"7a. (1) The Board may hold an inquiry into the facts respecting any persons engaged or working in or about an undertaking as members or alleged members of a partnership or association, or in the execution of any agreement or scheme of profit-sharing or co-operative or joint contract or undertaking, including the investigation of the contractual and other relationships of the persons so engaged or working, as between themselves or as between them and their master or employer and if the Board is of the opinion that the partnership, association, agreement or scheme is intended to defeat, or has the effect, either directly or indirectly, of defeating, the true intent and object of this Act, the Board may make such order as it deems proper declaring any of such persons or any class or group thereof to be employers and any of such persons or any class or group thereof to be employees for the purposes of this Act."<sup>30</sup>

<sup>27</sup>R.S.O. 1960, c. 437, s. 86.

<sup>28</sup>Ont. 1962-63, c. 36, s. 8.

<sup>29</sup>R.S.O. 1960, c. 190, s. 88.

<sup>30</sup>R.S.O. 1960, c. 240, s. 7a, as enacted by Ont. 1962-63, c. 83, s. 4.

Provisions giving power to define by regulation the meaning of terms used in an Act obviously give the Lieutenant Governor in Council, or other subordinate legislator, wide power to determine the scope and operation of the Act. Such delegation of legislative power provokes the comment that the Legislature was not sure what it meant so to avoid making up its mind it delegated the power to decide to another body.

Powers to designate industries or subject matters to which an Act applies by extending the operation of the Act to them, or by exempting them from the application of the Act, are really powers to amend the Act. Provisions such as those contained in the Workmen's Compensation Act enable the entire scheme of the enactment to be rearranged in its application.

Powers of definition or amendment should not be conferred unless they are required for urgent and immediate action. Such exercise of power to alter the scope or operation of an Act may vitally affect rights of individuals or classes of individuals coming within its purview.

The rule should be that the normal constitutional process of amending the parent Act should be followed so that the amendment may be publicly debated in the Legislature.

## Penalties

The general rule is that power to make regulations does not include power to impose penalties or create offences, unless such power is expressly given. It is usual for the statute authorizing the regulations to include a provision that a breach of the regulations constitutes an offence, and to fix the penalty, as in:

The Agricultural Societies Act:

"33. Every person who contravenes any of the provisions of this Act or the regulations is guilty of an offence and on summary conviction, where no other penalty is provided, is liable to a fine of not more than \$50."<sup>31</sup>

The Artificial Insemination of Cattle Act, 1962-63:

"11. Every person who contravenes any of the provisions of this Act or the regulations is guilty of an offence and on sum-

<sup>31</sup>R.S.O. 1960, c. 11, s. 33.

mary conviction is liable to a fine of not less than \$50 and not more than \$200 for a first offence and to a fine of not less than \$200 and not more than \$500 for a subsequent offence.”<sup>32</sup>

The Brucellosis Act, 1965:

“11. Every person who contravenes any of the provisions of this Act or the regulations or the terms or conditions of any permit issued under this Act is guilty of an offence and on summary conviction is liable to a fine of not more than \$100 for a first offence and to a fine of not more than \$200 or to imprisonment for a term of not less than 30 days or both for any subsequent offence.”<sup>33</sup>

The Ontario Energy Board Act, 1964:

“34. (1) Every person who contravenes any provision of this Act or the regulations or any order of the Board is guilty of an offence and on summary conviction is liable to a fine of not less than \$200 and not more than \$2,000 for each day over which the offence continues or to imprisonment for a term of not more than two years less a day, or to both.”<sup>34</sup>

There are similar provisions in many statutes.

In some instances the creation of an offence and the provision for penalties by regulation is expressly authorized:

The Conservation Authorities Act:

“20a. (1) Subject to the approval of the Lieutenant Governor in Council, an authority may make regulations applicable to lands owned by the authority,

- (1) imposing fines not exceeding \$100 for a contravention of any regulation.”<sup>35</sup>

The Mining Act:

“647. (1) The Lieutenant Governor in Council may make regulations for,

- (c) the imposition of penalties of not more than \$200 or of not more than three months imprisonment for the contravention of any such regulations; . . .”<sup>36</sup>

<sup>32</sup>Ont. 1962-63, c. 5, s. 11.

<sup>33</sup>Ont. 1965, c. 10, s. 11.

<sup>34</sup>Ont. 1964, c. 74, s. 34.

<sup>35</sup>R.S.O. 1960, c. 62, s. 20a, as enacted by Ont. 1960-61, c. 10, s. 1.

<sup>36</sup>R.S.O. 1960, c. 241, s. 647.

The Lakes and Rivers Improvement Act:

“2. The Lieutenant Governor in Council may make regulations,

(c) prescribing penalties for contravention of the regulations.”<sup>37</sup>

Some sanctions for breach of prohibitory regulations is necessary, but in our view the penalty should be fixed or at least limited by the statute authorizing the regulations. It should not be left to the subordinate legislator to fix penalties according to his or its will.

### Sub-Delegation

The general rule is that the person authorized to make regulations cannot sub-delegate this power to any other person. The power to sub-delegate may be and often is expressly conferred by the statute:

The Farm Products Marketing Act:

“9. (1) The Board [Farm Products Marketing Board] may make regulations vesting in any local board any powers that the Board deems necessary or advisable to enable such local board effectively to promote, regulate and control the marketing of the regulated product, and, without limiting the generality of the foregoing, may make regulations,

(a) vesting in any local board any or all of the following powers:

(i) to direct and control, by order or direction, either as principal or agent, the marketing of the regulated product, including the times and places at which the regulated product may be marketed. . . .”<sup>38</sup>

The power to sub-delegate, although not expressly referred to, may be conferred by general language such as that contained in the Emergency Measures Act:<sup>39</sup> “The Attorney General may make such regulations as he deems necessary for the purposes of this Act.”<sup>40</sup> If the Attorney General deemed it necessary to confer upon other persons subordinate power to make rules, it might be within his authority to do so.<sup>41</sup>

<sup>37</sup>R.S.O. 1960, c. 203, s. 2.

<sup>38</sup>R.S.O. 1960, c. 137, s. 9.

<sup>39</sup>Ont. 1962-63, c. 41.

<sup>40</sup>*Ibid.*, s. 6.

<sup>41</sup>*Reference Re Chemical Regulations*, [1943] S.C.R. 1.



The authority to sub-delegate power to make regulations should not be conferred, except in relation to the exercise of emergency powers. It does not appear that the scheme of the parent Act would be frustrated or impaired in those cases where there is sub-delegation of regulation-making powers if the regulations were subject to the approval of a political authority.

## Taxation

The general rule is that the Legislature is presumed not to confer power to impose taxes or other levies or charges on a subordinate legislator, even by general language such as is contained in the Emergency Measures Act.<sup>42</sup> By the Bill of Rights of 1689 it is provided that no money may be levied to the use of the Crown without the consent of Parliament. The Legislature is presumed not to intend to override this statute by a later statute by the use of general words. The power to impose levies or affect existing levies may be expressly conferred. In some cases the power to impose taxation by legislation is delegated by delegating the power to define the subject matter of the taxation scheme, as in the Gasoline Tax Act.<sup>43</sup> It provides that "every purchaser of gasoline shall pay . . . a charge or tax at the rate of 16¢ per imperial gallon on all gasoline purchased. . . ." "Gasoline" is defined to include "any gas or liquid that is sold to be used or is used to create power to propel an aircraft and any product that is designated to be aviation fuel by the regulations". By Section 3:

"The Lieutenant Governor in Council may make regulations. . . .

(g) designating products to be aviation fuel."

The effect is that the Lieutenant Governor in Council may enlarge the definition of aviation fuel so as to impose taxes where they have not been imposed directly by the Legislature.

Wide powers of taxation by regulation were given indirectly to the Lieutenant Governor in Council under the

<sup>42</sup>*Attorney General v. Wilts United Dairies Ltd.* (1921), 38 T.L.R. 781.

<sup>43</sup>R.S.O. 1960, c. 162, s. 2, as amended by Ont. 1964, c. 36, s. 1.

Retail Sales Tax Act through the power to supply deficiencies in the Act and to define expressions used in the Act, together with powers of exemption from taxation under the Act:

“39. (1) For the purpose of carrying into effect the provisions of this Act according to their true intent and of supplying any deficiency therein, the Lieutenant Governor in Council may make such regulations as are considered necessary and advisable.

(2) Without limiting the generality of subsection 1, the Lieutenant Governor in Council may make regulations, . . .

(d) defining any expression used in this Act or the regulations;

(f) providing for relaxing the strictness of this Act relative to the incidence or collection of tax hereunder in special circumstances where, without relaxation, inconvenience or hardship might result, including cases involving the purchase of tangible personal property at bazaars and rummage sales.”<sup>44</sup>

The powers conferred under this section have been exercised to pass regulations designed to impose taxes where taxes might not otherwise have been imposed under the parent Act, and to exempt from taxation where taxes might have been imposed under the parent Act. When a new taxation scheme such as the Retail Sales Tax Act is first introduced it may be necessary for some delegation of such powers as we have been discussing, but the exercise of these should be for a limited period only, and the regulations so enacted should expire unless confirmed at the next session of the Legislature. Confirmation and review by the Legislature will be discussed later.

Direct power of taxation by regulation is given in the Athletics Control Act:

“4. (1) Every person conducting a professional boxing or wrestling contest or exhibition shall pay to the Minister an amount not less than 1% and not more than 5% of the gross receipts in respect of such contest or exhibition as shall be determined by the Minister with the approval of the Lieutenant Governor in Council.”<sup>45</sup>

<sup>44</sup> Ont. 1960-61, c. 91, s. 39.

<sup>45</sup>R.S.O. 1960, c. 26, s. 4.

Where charges or levies are authorized, the amount should be fixed in the statute. General provisions for exemptions or relief by regulation are undesirable and permit arbitrary discrimination. Where such provisions are unavoidable, any exemptions, or exceptions granted by way of relief, should be reported specially to the Legislature, as reports are required to be made to Parliament under the Financial Administration Act,<sup>46</sup> where they may be scrutinized by the members of the Legislature.

### **Licensing Fees**

Statutes providing for licensing or issuing permits usually authorize the Lieutenant Governor in Council to fix the fees. Similarly, power is conferred on the governing body of self-governing professions or occupations to fix membership fees. These powers are subject to the general implied limitation that they cannot be exercised for a purpose other than that intended by the statute. Where the statute does not expressly state the purpose, e.g., "to cover the costs of administration of this Act", or make some similar provision, the limitation implied from the purpose of the statute may be vague and hard to determine.

We recommend that where the power to charge fees is conferred the purpose for which the fees are to be charged should be clearly expressed.

### **Retrospective Regulations**

Generally statutes are not interpreted to have a retrospective operation unless they contain clear and express words to that effect, or the subject matter or context show such an intention. (Changes in mere procedure are an exception to this general rule.) The same rule applies to subordinate legislation. The parent Act will not be interpreted to authorize retrospective regulations, nor will regulations be interpreted to have retrospective operation unless both the statute and the regulations make it clear that they are intended to have retrospective effect.

<sup>46</sup>R.S.C. 1952, c. 116, s. 22(8).

Retrospective legislation is such an encroachment on civil rights that if it is to be enacted it should only be by the Legislature. The power should not be delegated to any other body.

### **Onus of Proof**

We have not found regulations that in themselves purport to shift the onus of proof to a person charged with a breach of the regulations. Provisions shifting the onus of proof are contained in several statutes, and where the statute makes a breach of the regulations an offence, the onus of proof may be shifted accordingly. Statutory provisions shifting the onus of proof ought not to apply to offences created by subordinate legislation.

### **Provisions Excluding the Jurisdiction of the Courts to Review Regulations**

Direct provisions in Ontario limiting review by the courts of the validity of regulations have not come to our attention. Such provisions are found in other jurisdictions, taking the form that a certificate of the Minister or some other body shall be "conclusive evidence" of the validity of the regulations, or that the regulation shall have effect "as if enacted in this Act". It may be that these provisions would not be interpreted to exclude review by the courts on grounds of *ultra vires*, but in any event we recommend that no such practice should be adopted in Ontario.

A common method of limiting the power of review by the courts in Ontario is to confer subordinate legislative power with subjective limitations or considerations, e.g., that the Lieutenant Governor may make such regulations "as he deems necessary" for the purposes of the Act. We have recommended against this type of administrative power. Delegation of legislative power should be expressed objectively. A delegation of power to make regulations "respecting any matter necessary or advisable to carry out effectively the intent and purpose of this Act" is a form commonly used, and although objective may be unnecessarily broad.

## **Regulations Establishing Judicial or Administrative Tribunals**

The rule should be that judicial tribunals or administrative tribunals with powers of decision on policy grounds should not be established by regulations. The constitution and scope of the powers of such tribunals are matters that should be considered by the Legislature.

## CHAPTER 24

# Persons on Whom a Subordinate Legislative Power May be Properly Conferred

SUBORDINATE legislative power is a law-making power exercised by persons or bodies subordinate to the Legislature. In its exercise rules having the force of law are formulated as a result of a decision or decisions made on grounds of policy. In accordance with constitutional principles discussed earlier,<sup>1</sup> the exercise of powers to make decisions affecting rights of individuals on grounds of policy by persons or bodies other than the Legislature should be subject to political control. As in the case of administrative powers, political control of subordinate legislative power should be maintained by conferment of power on ministers, either singly or collectively, who are responsible to the Legislature, or on persons subject to the supervision and control of ministers.

The examples we have discussed show that in general this principle is followed in Ontario. The most common provision empowers the "Lieutenant Governor in Council", i.e., in political terms, the cabinet consisting of all the ministers acting together, to make regulations. In other less frequent instances the power is conferred on a minister. The conferment of subordinate legislative power in this way is in accord-

<sup>1</sup>See p. 44 *supra*.

ance with correct constitutional principles, but we have some relevant recommendations to make which we shall discuss later.

Some statutes confer subordinate legislative power on bodies other than the Lieutenant Governor in Council or a minister, which may be exercised without the supervision of ministers. This is a breach of sound constitutional principles and gives rise to unjustified encroachments on civil rights. This type of provision will be considered in relation to particular statutes or groups of statutes dealt with later in this Report and in our next Report. Consideration here is limited to a few illustrations.

A common provision in statutes establishing self-governing professions and occupations confers power on the governing body of the profession or occupation to make regulations controlling admission to the profession or occupation and governing the suspension or expulsion of its members. Frequently these powers are not subject to the approval of either the Lieutenant Governor in Council or a minister.<sup>2</sup> For reasons set out later, we recommend that any such regulations should be subject to the approval of the Lieutenant Governor in Council or a minister.

The Minimum Wage Act confers wide powers on the Industry and Labour Board established under the Department of Labour Act.<sup>3</sup> The former Act contains the following provisions:

“3. The Board may establish minimum rates of wages for all employees and generally enact such provisions with respect to conditions of employment as may be deemed necessary for the betterment of the physical, moral and intellectual well-being of employees, and, without restricting the generality of the foregoing, the Board may make orders and by means of such orders may,

- (a) designate or define any business, trade, work or undertaking or the part or parts thereof to which the order is applicable;
- (b) designate or define the zone or zones within Ontario in which any order or part thereof is applicable;

<sup>2</sup>This matter is discussed fully in Part III, Section 4 *infra*.

<sup>3</sup>R.S.O. 1960, c. 97, s. 8.

- (c) classify employees and separately provide for any one or more classifications with respect to any matter over which the Board has authority;
- (d) establish a minimum wage for the prevailing weekly work period in the business of any employer or for any other working period that the Board may establish;
- (da) establish minimum hourly rates of wages for regular working periods;
- (e) establish the regular working period and the maximum number of hours of labour that may be worked regularly in any industry, business, trade, work or undertaking, or the part or parts thereof to which the order is applicable;
- (f) establish minimum hourly rates of wages for overtime work;
- (g) establish minimum hourly rates of wages for employees who regularly work less than forty hours per week;
- (h) define any term used in any order;
- (i) establish a special method of payment for any classification of employees;
- (j) specify when and under what conditions deductions may be made from the minimum wage established for time lost by employees through illness, holidays, absence from duty or for any other reason and also for special privileges or perquisites resulting from the nature of the work performed.”<sup>4</sup>

“4. The Board, without order, may grant written permission to an employer to pay to any employee who is handicapped a wage fixed by it lower than the minimum wage.”<sup>5</sup>

Such extensive powers should not be conferred on an independent board.

Occasionally power to make regulations is conferred on a body constituted to represent interested persons without the exercise of the power being made subject to approval of the Lieutenant Governor in Council or of a minister. Presumably this is done because of the representative character of the body.

The powers of the Farm Products Marketing Board under the Farm Products Marketing Act,<sup>6</sup> to delegate to local

<sup>4</sup>R.S.O. 1960, c. 240, s. 3, as amended by Ont. 1962-63, c. 83, s. 2.

<sup>5</sup>*Ibid.*, s. 4.

<sup>6</sup>R.S.O. 1960, c. 137.



boards powers to regulate the marketing of products of the producers from whom the members of the local boards are selected are very wide. Consumers also have a direct interest in marketing plans. As a safeguard of the rights of persons other than producers who have a special interest, such regulations should not be effective until approved by the Minister of Agriculture or the Lieutenant Governor in Council. This particular statute will be discussed in detail in our next Report.

These illustrations are sufficient to indicate the importance of the general constitutional principle that the ultimate decision on policy affecting civil rights should rest with the political authorities.

### **FORM IN WHICH THE POWER TO MAKE REGULATIONS IS CONFERRED**

The language used to confer power on the Lieutenant Governor in Council or on a minister to make regulations is not uniform. It is sometimes provided that:

“the Lieutenant Governor in Council may make regulations”;

or

“subject to the approval of the Lieutenant Governor in Council the Minister may make regulations”;

“the Minister may, with the approval of the Lieutenant Governor in Council, make regulations”;

“the Lieutenant Governor in Council, on the recommendation of the Minister, may make regulations”.

Where power is conferred on boards or commissions to make regulations subject to political approval, it is desirable that uniform language be used where possible.

In many instances where power to make rules or regulations is conferred on a person or board apparently independent of a minister or the Lieutenant Governor in Council<sup>7</sup> the person or board is not in fact independent. As a practical matter, the person or board is subject to the direction and control of a minister. In such cases the lack of independence of the subordinate legislator should be recognized and the power should be conferred on the Lieutenant Governor in

<sup>7</sup>See p. 357 *supra*, concerning the Minimum Wage Act.

Council, or on a minister with the board acting in an advisory capacity. If effective administration requires that legislative powers be conferred directly on a person or body other than the Lieutenant Governor in Council or a minister, political control can be and should be maintained by making the exercise of the power subject to the approval or disallowance of the Lieutenant Governor in Council or a minister. For example, the Mining Act provides:

“170. (3) The manager of a mine may make rules not inconsistent with any provision of this Part or any special direction made by an engineer as herein provided for the maintenance of order and discipline and the prevention of accidents in the mine, and may submit any rule so made to the chief engineer, who shall lay the rules before the Minister for his approval, and, upon such approval being given, the rules take effect after they have been posted up in a conspicuous place at the mine for at least fourteen days, but the Minister may disallow any of such rules or direct such changes to be made in them as he deems proper.

(4) Every such rule, after approval and when and so long as it is posted up and is legible, has the same force and effect as the provisions of this Act and any such person who contravenes any such rule is liable to the penalty provided for a breach of the provisions of this Act.”<sup>8</sup>

In any case all regulations made by an independent person or body should be reported to a minister, who should have power to disallow them. So-called independent boards or bodies should never be given legislative powers free from political control as a subterfuge, or to relieve the political authorities from embarrassing duties.

We shall discuss later methods of direct control by the Legislature over the exercise of subordinate legislative power.

<sup>8</sup>R.S.O. 1960, c. 241, s. 170, as re-enacted by Ont. 1961-62, c. 81, s. 1.

## CHAPTER 25

# Procedure That Should Govern the Exercise of Subordinate Legislative Power

THE normal legislative process ensures that advance publicity is given to proposals to change the law and that there is opportunity for public discussion and for persons whose rights may be affected to make themselves heard. It is essential that when new laws are passed and made effective that those governed by them should know what they are. Subordinate legislative power may be exercised and often is exercised without meeting these requirements. In this chapter we use the term regulations to include the product of all rule-making bodies.

Two main safeguards have been suggested:

- (1) Before regulations are made, persons whose interests will be affected by them should be given an opportunity to make representations on their own behalf.
- (2) Regulations when made should be brought into effect in a fair manner and with proper publicity. Persons bound by them should have an opportunity to acquire knowledge of them before they can be penalized for failure to comply with them.

## PROCEDURE ANTECEDENT TO THE MAKING OF REGULATIONS

The common law procedural rules of natural justice have never been applied to the exercise of subordinate legislative powers. No notice is required to be given to persons who may be affected by regulations, nor is there any requirement that they should have an opportunity to make representations. Neither is there any common law requirement that publicity should be given to regulations before they are made.

The practical procedure followed in Ontario may be summarized as follows. Where regulations are to be made or approved by the Lieutenant Governor in Council, they may be drafted by the Registrar of Regulations, or the departmental solicitor, if there is one, on instructions from the minister of the department concerned. In all cases they are reviewed by the Registrar of Regulations before submission to the Executive Council. The minister then presents the draft to the Council. If the Council recommends them to the Lieutenant Governor in Council and he approves of them, they become effective in the absence of any statutory provisions to the contrary.

Where regulations are made by a minister or a board and are not subject to the approval of the Lieutenant Governor in Council, they may or may not be prepared or reviewed by the Registrar of Regulations before they are made, e.g., regulations of a local board made under the Farm Products Marketing Act. They may be prepared by a solicitor to the board, who is not on the staff of the government or associated with the Legislative Counsel or the Registrar of Regulations and whose experience in the preparation of regulations may be limited. The minister, or the board in accordance with its procedure, may then promulgate the regulations and, apart from express statutory limitations, they will come into force.

Although there is no legal requirement for consultation with persons who will be affected, extensive consultations usually take place. In general only matters of high government policy which must be kept confidential are not subject to some consultation. Provision is frequently made for con-

sultation with an advisory board representative of the interests that will be most closely affected. It is not common practice in Ontario to make it a requirement that the minister consult an advisory board, although this is done in some instances in the United Kingdom.

## PRIOR PUBLICATION

Requirements with respect to prior publicity vary in other jurisdictions.

In the United Kingdom, the Rules Publication Act of 1893 required publication of certain regulations more than forty days before they were made, with information as to where copies could be obtained, and provided for representations by public bodies. This provision was repealed by the Statutory Instruments Act of 1946. The repeal was justified on the ground that the provision had never worked satisfactorily and that informal consultation had become virtually a constitutional convention rendering a formal requirement redundant. Although delegated legislation was one of the two major matters considered and referred to by the Donoughmore Committee in 1932, Professor Wade informed us that no pressures existed for reconsideration of the problem by the Franks Committee, and that there appears to be little demand for any change in the present practice.

Similar publication was formerly required in Australia, but the practice was abolished in the emergency of the First World War and has never been re-established.

In the United States, under both Federal and State legislation, notice is generally required to be given of the intention to make regulations, containing either the terms or substance of the proposed regulations. This notice must be given either personally or by publication in an appropriate manner. The agency proposing to make the regulations is required to afford all interested parties reasonable opportunity to make representations and may, and in some cases must, hold an oral hearing before the regulations are made. Provision is made for shortening the period or omitting the notice where imminent peril or the public interest requires the rules to be made immediately.

We have concluded that advance publication of regulations before they are made is not required in Ontario as a necessary safeguard of the rights of individuals who may be affected. Compulsory antecedent publication and consultation would cause unnecessary delay and merely duplicate the time already spent in informal consultation. The publication of regulations immediately after they are made would appear to ensure adequate publicity. This we shall discuss presently.

Where it is desired that consultation should be mandatory, provision should be made for an advisory board representative of the interests of the persons or classes who may be affected, with which the Minister recommending, approving or making the regulations is required to consult before so doing. In other cases it may be sufficient to provide merely for an advisory board available to the Minister.

### PROCEDURE SUBSEQUENT TO THE MAKING OF REGULATIONS

Provision is now made by the Regulations Act<sup>1</sup> for the filing of regulations with the Registrar, except where otherwise provided by the parent Act. A regulation does not have effect until filed, but all subordinate legislation does not come within the definition of regulations as contained in the Act. A regulation is defined to mean "a regulation, rule, order or by-law of a legislative nature made or approved under an Act of the Legislature by the Lieutenant Governor in Council, a minister of the Crown, an official of the government or a board or commission, all members of which are appointed by the Lieutenant Governor in Council",<sup>2</sup> but does not include municipal by-laws, regulations made by bodies such as the governing bodies of professions or occupations, and regulations under certain specific statutes.<sup>3</sup> Regulations coming within the Regulations Act are required to be published in the *Ontario Gazette* within one month of being filed, or after such extended time as the Minister charged with administering the Act orders.<sup>4</sup> A regulation required to be published that has

<sup>1</sup>R.S.O. 1960, c. 349, s. 2.

<sup>2</sup>*Ibid.*, s. 1(d).

<sup>3</sup>*Ibid.*, s. 1 (d) (i) (v).

<sup>4</sup>*Ibid.*, s. 5 (1).

not been published is not effective against a person who has not had actual notice of it.<sup>5</sup> Detailed provisions are made for the numbering of regulations and the method of publication.

In the result most regulations come within the Act and are required to be published and are therefore immediately available.

Provisions somewhat similar to those contained in the Regulations Act are contained in corresponding statutes of Canada, Manitoba, United Kingdom, New Zealand and Australia. There are variations in matters of detail. In Britain, New Zealand and Canada regulations may be brought into effect before publication. In Australia they do not come into effect until published. In the United Kingdom, and under the Canadian and Manitoba Acts, no one can be convicted of an offence under a regulation before its publication if he did not have knowledge of it. In New Zealand this protection does not exist. The Federal Administrative procedure Act of the United States, the Revised Model State Act, and statutes in different states contain similar provisions on publication.

We do not recommend any change in the law of Ontario concerning the manner of publication of regulations. The only possible improvement would be to require publication before regulations come into force. The present provisions of the Regulations Act that, in the absence of a contrary intention expressed in the parent statute, the regulations do not come into force until filed with the Registrar of Regulations, has distinct advantages. It ensures that the Registrar of Regulations has an opportunity to see them when tendered for filing and before they become effective. He is in a position to offer suggestions and make criticisms, which he could not do if departments were permitted to arrange publication directly. The result is that in practice departments consult with and take advice from the Registrar of Regulations before the form of the legislation is officially settled. Frequently the Registrar eventually drafts the regulations. When regulations are filed an orderly standard procedure for numbering and publication is followed. Any delay between the filing of the regulation and its publication is usually very short—not more than a week.

<sup>5</sup>*Ibid.*, s. 5 (3).

The provision that a regulation which is not published is not effective against a person who has not had actual notice of it gives adequate protection in the meantime.

### **SUBORDINATE LEGISLATION NOT COMING WITHIN THE DEFINITION "REGULATION"**

The real difficulty with respect to publication does not arise from subordinate legislation that comes within the definition of "regulations" as contained in the statute, but with respect to legislation that does not come within the definition. The definition of "regulations" should be expanded to include as far as possible all regulations, rules or by-laws that make law affecting the public, except municipal by-laws; e.g., regulations covering the admission to, and the suspension or expulsion from, self-governing professions or bodies should come within the Act. The expanded definition should include all rules made in the exercise of sub-delegated power. It is an unjustified encroachment on the rights of the individual to be bound by an unpublished law.

### **LAYING REGULATIONS BEFORE THE LEGISLATURE**

In the United Kingdom individual statutes contain different provisions requiring that regulations, when made, be laid before Parliament. Where a statute provides that regulations passed under it be laid before Parliament, the procedure to be followed varies:

- (1) Some are laid before Parliament in draft form and are subject to an affirmative resolution before becoming effective or to a negative resolution that they not be put into effect.
- (2) Some have immediate effect but are subject to annulment by resolution of either House.
- (3) Some require affirmation by Parliament to continue to be effective.
- (4) Some are laid before Parliament without any provision for annulment or affirmation.



These various procedures in Parliament involve all phases of the process of making regulations. In some instances—affirmative resolutions—Parliament takes part in the regulation-making processes. In other instances—negative resolutions—it has a power of nullification after they are made. In further instances the purpose of tabling appears to be simply to inform Parliament. The variations in the procedure follow no recognized principle, although in general the importance of the regulations has a bearing.

In Australia all “regulations” are required to be laid before Parliament within fifteen days of being put into force, and most other statutory rules are required to be laid before Parliament under their authorizing Acts. The majority are subject to disallowance within fifteen days by one of the Houses. To afford a guarantee that the government will find time for debate on motions for disallowance, if a motion for disallowance is set down within the fifteen-day period, but not disposed of or withdrawn, the instrument in question is considered to be disallowed.

In New Zealand and Canada, although there are provisions in individual statutes for laying regulations before Parliament, there is no such general procedure and few statutes make provision for subsequent parliamentary action.

In Manitoba all statutory regulations and orders filed under the Regulations Act are required to be tabled in the Legislative Assembly.

If all regulations were required to be laid before the Legislature in Ontario for approval before becoming effective, or to be subject to a resolution of the Legislature which could disapprove of them after their becoming effective, the exercise of subordinate legislative power would be destroyed for practical purposes. Frequently periods of six months or more elapse between sessions of the Legislature. Regulations passed between sessions of the Legislature would either have no effect until affirmed, or would be temporarily effective but subject to disapproval. In the former case prompt action under regulations would be impossible, and in the latter case the risks of disapproval would attend any action taken under the regulations.

The tabling of regulations in the House, when made without any provision for proceedings in the Legislature and solely for the purpose of information, appears to be unnecessary and illusory in its effect. Tabling is not needed to inform the members of the Legislature as all regulations are published in the *Ontario Gazette* and can be obtained through the Office of the Registrar of Regulations. The tabling of the vast volume of subordinate legislation, which cannot be scrutinized in detail by individual members, does not really inform the members.

If the recommendation that regulations be automatically referred to a Scrutiny Committee of the Legislature, which we shall make in the next chapter, is adopted, the committee will be immediately informed of all regulations and with the assistance of counsel these regulations will be reviewed within the terms of reference of the Committee. The Legislature will then be informed of those requiring its attention.

## CHAPTER 26

# Review of Subordinate Legislation by the Legislature

No provision is made in Ontario for systematic review of subordinate legislation by or on behalf of the Legislature. If a private member wishes to bring a regulation before the Legislature he may:

- (1) Ask a question concerning the regulation. There can be no debate on the question or its answer and no vote.
- (2) Discuss the regulation in the general debates on the Reply to the Speech from the Throne or on the Budget. These are formal debates in the Legislature and the member can speak only once. The debates are far-ranging and the regulation would only become an issue to be voted on if some question on it were actually incorporated in amendments moved to the Reply or to the Budget.
- (3) Discuss the regulation in the general debate in committee on the estimates for the department concerned. Here the debate permits members to speak more than once and would permit wider discussion of the regulation. It could be made an issue upon which the Legislature votes.
- (4) Move a resolution concerning the regulation. At the present time private members bills and resolutions are limited by agreement. By agreement there is no vote after a debate. Towards the end of the session, the hours for debate of private members bills or resolutions are discontinued to permit the conclusion of government business.

A private member's opportunity to have a regulation considered by the Legislature is very limited.

It is imperative that some effective form of review by or on behalf of the Legislature should be established. The volume of subordinate legislation is very great; it is frequently of more practical importance to the individual than the general framework of statutes under which regulations are passed. It is a primary function of the Legislature to make the laws, and it is responsible for all laws it makes or authorizes to be made. A failure by the Legislature to find some specific place in the legislative calendar for supervision of subordinate legislation is, in our view, a dereliction of duty on its part and a failure to protect the fundamental civil rights of the individual.

Various devices for review or supervision by Parliament or the Legislature have been adopted in different jurisdictions.

### UNITED KINGDOM

As early as 1924 the House of Lords established a special Orders Committee with restricted terms of reference, requiring it to consider and report to the House all orders and regulations laid before it which required an affirmative resolution of the House before coming into effect.

In 1932 the Donoughmore Committee recommended that standing committees of both Houses of Parliament be established to review bills proposing new powers to pass regulations, and all rules and regulations as they are made:

“The Committee would not report on the merits of the regulations but would report:

- (1) whether any matter of principle was involved:
- (2) whether the regulation or rule imposed a tax:
- (3) whether the regulation or rule was (a) permanently challengeable; or (b) never challengeable, i.e., unchallengeable from the commencement; or (c) challengeable for a specified period of time and thereafter unchallengeable and, if so, what was the specified period:
- (4) whether it consisted wholly or partly of consolidation:
- (5) whether there was any special feature of the regulation or rule meriting the attention of the House:
- (6) whether there were any circumstances connected with the making of the regulation or rule meriting such attention:

(7) whether the regulation or rule should be starred, on the grounds that it was exceptional, and subjected to the procedure described below.

The report of the Committee would be laid on the Table of the House as soon as it had been printed.

As soon as the Report had been tabled, the regulation or rule would be brought before the House in the Orders of the Day and taken immediately after Questions under a limit of time analogous to the present ten minutes rule . . .<sup>1</sup>

It was not proposed that the Committee should act as a critic or censor of the substantive proposals, but its proposed function was to supply the private members with information and to comment on certain features of the regulations. It was not to relieve the minister of the relevant department of responsibility for the substantive law.

In 1944 a Select Committee on Statutory Rules and Orders was established by sessional order of the House of Commons, with power to review every statutory rule or order (broadly equivalent to our regulations) required by individual statutes to be laid before the House. By its terms of reference, in so far as relevant to Ontario, this Committee is required to report on any statutory instrument which:

- (1) proposes a tax or charge on public revenues;
- (2) restricts challenge to validity in the courts;
- (3) makes unusual or unexpected use of the powers conferred;
- (4) is retrospective in operation; or
- (5) is not clear in meaning.

In the period from 1944 to 1959 the Committee examined 10,232 instruments. It made reports with respect to 120 of them. The major grounds of report concerned unusual or unexpected uses of powers, or the need for elucidation.

The Committee is assisted by the Parliamentary Counsel and has acted in a non-partisan way. In fact it is becoming a convention that the Chairman is a member of the Opposition. The Committee makes special reports relating to sub-

<sup>1</sup>The Donoughmore Report, 69.

ordinate legislative power. It has dealt with a wide area of subjects, e.g., criticism of the form of the regulations, the use of explanatory notes and sub-delegation of legislative powers.

In accordance with recommendations of the Donoughmore Committee, a practice is growing for each statutory instrument to be accompanied by explanatory notes. This practice, which is followed in Ontario with respect to statutes, is desirable with respect to regulations, and particularly so in the case of amendments to regulations which may be fragmentary and not in any way self-explanatory.

Certain procedure in the British House of Commons gives a private member an opportunity to debate the merits of statutory instruments. The requirement of affirmative approval guarantees that time for debate will be made available. The recommendations of the Donoughmore Committee that bills conferring subordinate legislative power be referred to the Standing Committee has not been adopted.

## AUSTRALIA

In Australia a Standing Committee on Regulations and Ordinances was established by the Senate in 1931 to examine regulations and ordinances (hereafter referred to as regulations). The basis adopted for its examination is:

“ . . . to scrutinize regulations to ascertain

- (1) that they are in accord with the statute;
- (2) that they do not trespass unduly on personal rights and liberties;
- (3) that they do not make rights and liberties of citizens dependent on administrative and not judicial decisions;
- (4) that they are concerned with administrative detail and do not amount to substantive legislation which should be a matter for Parliamentary enactment.”

By a standing order of the Senate “all regulations and ordinances laid on the table of the Senate shall stand referred to such committee for consideration, and if necessary, report thereon”. The committee has power to sit during recess. It is assisted by a permanent secretary and has a legal adviser.

By 1960 the committee had scrutinized over 4800 regulations. Sometimes it calls for a written explanation of the regulations, or it may call witnesses from the department concerned. Its reports are not confined to specific regulations but on occasion special reports have been made with general recommendations. The work of the committee has resulted in useful debates and in the securing of immediate and prompt changes to some regulations.

The Rules of the Australian House of Commons permit a member to bring about debate on regulations in much the same way as in the House of Commons in the United Kingdom.

The experience in both the United Kingdom and Australia shows that much improvement in the form and operation of regulations is attained by the mere existence of the committee. Ministers and officials are sensitive to its possible criticisms.

## NEW ZEALAND

There is no scrutiny committee in New Zealand. The practice is for the Attorney General to review all draft regulations from the point of view of both form and content. It is reported that this practice seems to work fairly well.

## SOUTH AFRICA

In 1949 a Select Committee of the House of Assembly of the Parliament of the Union of South Africa recommended that the principles of the sovereignty of Parliament and the supremacy of law would be safeguarded by the appointment of "an officer vested with the necessary authority and responsible to Parliament who would be charged with the duty of scrutinizing all statutory instruments framed under powers conferred by statute and to report whether, in his opinion, any of the said instruments merit the special attention of the House on any of the following grounds:

- (a) That they appear to make any unusual or unexpected use of the powers conferred by the statute under which they are framed.

- (b) That they tend to usurp control of the House over expenditure and taxation.
- (c) That they tend to exclude the jurisdiction of the courts of law without explicit enactment.
- (d) That for any reason their form or purport calls for elucidation or special attention."

It was recommended that the scrutineer so appointed should report to a Select Committee appointed at each session.

## INDIA

In 1952 a Committee on Subordinate Legislation was set up under rules of procedure of the House of the People:

"... to scrutinize and report to the House whether the powers to make regulations, rules, sub-rules, by-laws, etc., conferred by the Constitution or delegated by Parliament are being properly exercised within such delegation."

The Committee examines bills and all subordinate legislative law-making in much the same way as committees in the United Kingdom. It also examines bills. It may suggest amendment or annulment of regulations examined by it. The chairman may be a member of the opposition.

## CANADA

No scrutiny committee has been established by the Parliament of Canada. In practice the Opposition has adopted various systems for review of regulations. Opportunities for debate are limited to the general debates.

## MANITOBA

In 1960 a Standing Committee on Statutory Regulations and Orders was established by the Legislative Assembly of the Province of Manitoba to examine regulations referred to it under the Regulations Act.

The Regulations Act<sup>2</sup> was amended to:

- (1) Require every regulation filed under the Act to be referred permanently to the Standing Committee;

<sup>2</sup>Man. 1960, c. 62.



- (2) Require all regulations to be tabled in the House;
- (3) Require any regulation-making authority to revoke or amend any regulation in compliance with a resolution of the Assembly.

By Rule 68 of the Rules of the Legislative Assembly, it is provided that all regulations "that under the Regulations Act, stand permanently referred to the Standing Committee on Statutory Regulations and Orders shall be examined by that committee". The Rule contains no terms of reference for the examination.

The first Standing Committee adopted the following principles to apply in assessing regulations:

- (a) The regulations should not contain substantive legislation which should be enacted by the Legislature, but should be confined to administrative matters.
- (b) The regulations should be in strict accord with the statute conferring the power, and, unless so authorized by the statute, should not have any retroactive effect.
- (c) The regulations should not exclude the jurisdiction of the courts.
- (d) The regulations should not impose a fine, imprisonment, or other penalty, or shift the onus of proof of innocence onto a person accused of an offence.
- (e) A regulation in respect of personal liberties should be strictly confined to things authorized by statute.
- (f) The regulations should not impose anything in the way of a tax (as distinct from the fixing of the amount of a licence fee, or the like).
- (g) The regulations should not make any unusual or unexpected use of the delegated power.
- (h) The regulations should be precise and unambiguous in all parts.

The Attorney General of Manitoba has directed that the Legislative Counsel assist the Committee and that a report from him should accompany all the regulations laid before

the Committee. In his report he comments on regulations that he thinks require special consideration. At the beginning of each session of the Legislature the Legislative Counsel reports on all regulations referred to the Committee since his last report. The Committee examines them with particular reference to those upon which the Legislative Counsel has commented. If it cannot review them all during the session, it may ask the House for authority to sit during the recess. Its report is then made at the next session. Technically, the Committee appointed at the next session is a different Committee, but as the members are largely the same it adopts the conclusions of its predecessor. Usually most of the members of the Committee are lawyers. The review has been conducted in a non-partisan manner and has been confined to the matters which we have listed. Reports of the Committee have been unanimous and have been invariably adopted by the House. No changes in regulations have been recommended.

If a change in a regulation was recommended and the House concurred, the concurrence would become a resolution with which the regulation-making authority would be required to comply.

## RECOMMENDATIONS

1. A Committee of the Legislative Assembly should be established under an appropriate name to scrutinize subordinate legislation. It should consist of a small number of members. A small committee tends to eliminate political partisanship from its deliberations. In the United Kingdom the Committee consists of eleven members with a quorum of three. We suggest a committee of seven with a quorum of three.

We reject the suggestion that a single person, either the Attorney General or any specified official, be charged with the review of regulations. The supervision of subordinate legislation is a function of the Legislature. The non-partisan views of a Committee of the Legislature

should carry great weight with any department of government. The proposed Committee, with power to sit during recess and report periodically, should serve three purposes:

- x (a) More care will be given to the form and contents of regulations. This has been the experience in other jurisdictions.
- x (b) The requirement that the Committee consult with the department before making an adverse report should lead to the immediate rectification of any ill-considered provisions.
- 7 (c) When the Committee reports, debate on the report should have a salutary effect on the process of legislation by regulation.

- x 2. Provision should be made in the Regulations Act corresponding to that in the Manitoba Regulations Act requiring all regulations filed with the Registrar of Regulations to be permanently referred to the Committee.

The significance of a permanent referral is that at any time the Committee may consider a regulation, even though it has been previously scrutinized.

- x 3. The terms of reference for the Committee should exclude from review any consideration of the policy of the parent Act or of the merits of the regulations.

The policy of the Act, having been settled by the Legislature after full debate and discussion, ought not to be re-opened for discussion in the Committee. The merits of the regulations, i.e., an evaluation of the need for them and their efficacy within the framework of the policy approved and provided for by the Act, are matters for which the government is responsible to the Legislature. It is not proposed that the functions of the Committee should be to supervise the operations of departments of government. Elimination of the consideration of policy or merits should permit the Committee to proceed in a non-partisan way as it has done in the United Kingdom and Manitoba.

4. The following principles should be laid down to guide the Committee in its examination of the regulations:
  - (a) They should not contain provisions initiating new policy, but should be confined to details to give effect to the policy established by the statute.
  - (b) They should be in strict accord with the statute conferring the power, particularly concerning personal liberties.
  - (c) They should be expressed in precise and unambiguous language.
  - (d) They should not have retrospective effect unless clearly authorized by statute.
  - (e) They should not exclude the jurisdiction of the courts.
  - (f) They should not impose a fine, imprisonment, or other penalty.
  - (g) They should not shift the onus of proof of innocence to a person accused of an offence.
  - (h) They should not impose anything in the way of a tax (as distinct from fixing the amount of a licence fee, or the like).
  - (i) They should not make any unusual or unexpected use of delegated power.
  - (j) General powers should not be exercised to establish a judicial tribunal or administrative tribunal.
- \*5. The Committee should be assisted by counsel. The Legislative Counsel or Registrar of Regulations should not act as counsel to the Committee. These officials may have been involved in drafting the regulations and may have received confidential information or instruction which they should not be asked to divulge.
6. The Committee should have power to sit during recess. Such a power is essential since the Legislature is frequently not in session during periods of six months or more.
7. The Committee should have power to ask for explanations, written or oral, from the department concerned,

and should do so in any event before making an adverse report.

8. The Committee should not have power to make changes in regulations. It should not be a drafting body but a reporting body. If changes are to be made they should be made by the appropriate authority under the power conferred by the relevant statute.
9. The rules of the Legislative Assembly should be amended to provide specifically for the reception of the report by the Committee and for its approval or disapproval.
10. The rules of the Legislative Assembly should be amended to provide some specific procedure under which a private member can initiate a debate on the merits of any particular regulation. This procedure should be subject to appropriate safeguards and time limits.

We do not attempt to suggest the appropriate amendments to the Rules of the Legislative Assembly, but do suggest the objectives to be achieved.

## CHAPTER 27

# Supervision by the Courts of the Exercise of Subordinate Legislative Power

THE principle of *ultra vires* always applies to purported regulations. If they have not been authorized by the parent statute they have no effect and are null and void.

As a rule regulations are not held to be *ultra vires* by reason of bias, fraud or error of law on the face of the regulation. However, these grounds tend to merge with the requirement that regulations be made for proper purposes and not take into account improper considerations. In the absence of express statutory provisions there are no procedural requirements to be followed in making regulations.

The validity of regulations generally comes into question in proceedings to enforce them where they are prohibitory, or in proceedings in which an individual claims rights conferred on him by the regulations. These proceedings correspond broadly to collateral attacks on administrative powers. But the validity of regulations may be raised in proceedings by way of *mandamus*, *certiorari*, prohibition, or in an action for an injunction or for a declaratory judgment, and particularly in an action against the Attorney General for a declaratory judgment.

We have recommended that all the relief that may be obtained on these several applications should be available in

a single application to the Appellate Division of the High Court. The recommended procedure should provide means to determine the validity of regulations purportedly made under a statute.

For the reasons we have given in Chapter 22 in relation to collateral attack on administrative decisions we recommend that, where the validity of regulations comes into question in proceedings, the court before which the matter arises should have power, either on its own initiative or on the application of one of the parties, to direct that a summary application be made to the Appellate Division of the High Court to determine the question.





## Section 4

### **STATUTORY POWERS: POWERS OF INVESTIGATION**



## INTRODUCTION

Since many statutory powers of investigation are conferred by reference to the Public Inquiries Act, it is useful to preface this discussion by setting out three sections of the Act:

"1. Whenever the Lieutenant Governor in Council deems it expedient to cause inquiry to be made concerning any matter connected with or affecting the good government of Ontario or the conduct of any part of the public business thereof or of the administration of justice therein and such inquiry is not regulated by any special law, he may, by commission, appoint one or more persons to conduct such inquiry and may confer the power of summoning any person and requiring him to give evidence on oath and to produce such documents and things as the commissioner or commissioners deem requisite for the full investigation of the matters into which he or they are appointed to examine.

2. A commissioner has the same power to enforce the attendance of witnesses and to compel them to give evidence and produce documents and things as is vested in any court in civil cases.

5. (1) Where the validity of the commission or the jurisdiction of a commissioner or the validity of any decision, order, direction or other act of a commissioner is called into question by any person affected, the commissioner, upon the request of such person, shall state a case in writing to the Court of Appeal setting forth the material facts and the decision of the court thereon is final and binding.

(2) If the commissioner refuses to state a case, any person affected may apply to the Court of Appeal for an order directing the commissioner to state a case.

(3) Pending the decision of the stated case, no further proceedings shall be taken by the commissioner.

(4) No action shall be brought or other proceeding taken with respect to anything done or sought to be done by the commissioner or to restrain or interfere with or otherwise direct or affect the conduct of any such commissioner."<sup>1</sup>

<sup>1</sup>R.S.O. 1960, c. 323, ss. 1, 2, 5.

In this Section of the Report we use the words "investigation" and "inquiry" interchangeably. For our purposes, in the Province of Ontario little legal significance is attached to the nomenclature. In some countries the words have different connotations.

For the purposes of this Section the statutory power of investigation may be defined as a legal process to secure information from individuals, with or without their consent.

We shall discuss in some detail several of the common types of powers incidental to the conduct of a statutory investigation. They include power to:

Require that information be furnished, on oath or otherwise, within a stipulated period of time;

Subpoena or summons persons to attend at a particular place and time;

Question persons in private or in public—in some cases under oath;

Enter private property, sometimes with force, for the purpose of examining things thereon;

Seize, carry away and detain things found on private property;

Take samples from property;

Take extracts from or make copies of records, etc.; and

In many cases, commit persons to jail for failure to answer questions or failure to obey the orders of the investigating officer.

The scope and extent of the powers that may be, and have been, granted under legislation in force in Ontario is some indication of the types of activities involved in the investigatory process, and emphasizes the difficulty of formulating adequate safeguards against the misuse of statutory powers of investigation.

## **THE INDIVIDUAL RIGHTS AFFECTED BY POWERS OF INVESTIGATION**

The main individual rights affected by the exercise of investigatory powers are the right to privacy, the right to the

enjoyment of one's property, the right to be left alone and the right to keep one's information and ideas to oneself. In other words, the freedom not to speak. The right to the enjoyment of one's property involves freedom from trespass to one's lands, buildings and personal property. The wide ambit of the tort of trespass is well known and "legalized trespass" is readily recognized in any statute.

These rights are not absolute. They may be interfered with or qualified but they are, nevertheless, the personal rights affected when power to investigate is given and they are contracted as investigatory power is expanded. They are rights and interests that are fundamental and should be safeguarded against any unjustified encroachment. Their protection requires vigilance.

## CHAPTER 28

# Conditions Precedent to the Exercise of a Power of Investigation

**B**ROADLY speaking, there are two types of conditions precedent found in Ontario legislation. The first defines the authority under which investigating bodies or persons commence the investigation, that is, under the direction of or with the authority of a superior governmental body, such as the Lieutenant Governor in Council or a minister. The second prescribes the conditions under which the person who is to conduct the investigation may act on his own volition and without the direction or guidance of any superior body or authority.

The Police Act affords an example of the first type of condition precedent:

“48a. (1) The Lieutenant Governor in Council may direct the Commission to inquire into and report to him upon any matter relating to,

- (a) the extent, investigation or control of crime; or
- (b) the enforcement of law,

and he shall define the scope of the inquiry in the direction.”<sup>1</sup>

The Commission has no general or continuing authority to conduct the type of investigation referred to in this section. It requires a direction of the Lieutenant Governor in Council before it may act.

<sup>1</sup>R.S.O. 1960, c. 298, s. 48a, as enacted by Ont. 1964, c. 92, s. 17.

The Collection Agencies Act provides an example of the second type of condition precedent:

“19a. (1) Where the registrar receives a complaint in respect of the carrying on of the business of a collection agency and so requests in writing, the person carrying on the business of a collection agency shall furnish the registrar with such information respecting the matter complained of as the registrar requires.”<sup>2</sup>

In this case the Registrar of Collection Agencies may investigate without the authorization or direction of any superior body, but only after he has received a complaint.

The power to authorize an investigation or to commence an investigation may itself be subject to a condition precedent, such as that contained in another section of the Collection Agencies Act:

“23a. (1) Where upon a statement made under oath it appears probable to the Director that any person has,

(a) contravened any of the provisions of this Act or the regulations; . . .

the Director may by order appoint one or more persons to make such investigation as the Director deems expedient for the due administration of this Act, and in the order shall determine and prescribe the scope of the investigation.”<sup>3</sup>

and in the Hospitals and Charitable Institutions Inquiries Act:

“1. Whenever the Lieutenant Governor in Council deems it expedient to cause inquiry to be made . . . he may . . . appoint one or more persons to conduct such inquiry. . . .”<sup>4</sup>

## OBJECTIVE AND SUBJECTIVE CONDITIONS PRECEDENT

Conditions precedent relating to powers of investigation may be categorized into objective conditions precedent and subjective conditions precedent, just as those relating to statutory powers of decision are categorized.

The condition precedent requiring that a complaint be received by the registrar under section 19a of the Collection

<sup>2</sup>R.S.O. 1960, c. 58, s. 19a, as enacted by Ont. 1964, c. 7, s. 7.

<sup>3</sup>*Ibid.*, s. 23a, as enacted by Ont. 1964, c. 7, s. 9.

<sup>4</sup>R.S.O. 1960, c. 177, s. 1.

Agencies Act is objective, while the provision in the Game and Fish Act<sup>5</sup> that “where the justice [of the peace] is satisfied that there is . . . in the building, . . . anything upon or in respect of which an offence against this Act or the regulations has been or is suspected to have been committed . . . he may at any time issue a search warrant”, is a subjective condition precedent. Likewise, the “deeming” of expediency within the meaning of the Hospitals and Charitable Institutions Inquiries Act is a subjective condition precedent.

Wherever possible, conditions precedent should be drawn in the objective form. This is dictated by two considerations. The first is that the validity of the investigation would be based on facts capable of objective verification, and the second, which is related to the first, is that the existence or non-existence of the condition precedent would be open to judicial review, while a condition precedent stated in subjective terms would be subject only to limited review, e.g., for bias or bad faith.

## RECOMMENDATIONS

1. Arbitrary powers of investigation ought not to be conferred in any statute.
2. Where powers of investigation are conferred, these should be subject to conditions precedent which must be satisfied before an investigation can be validly commenced.
3. Conditions precedent should be expressed with precision.
4. Wherever possible they should be drawn in objective form.
5. If it is considered that a condition precedent in objective form would seriously frustrate the implementation of the policy of the statute, the person who is to form the unreviewable opinion, i.e., who is to be “satisfied”, should be in a responsible position in the government hierarchy. In the order of responsibility, the Lieutenant Governor in Council—as in the Hospitals and Charitable Institu-

<sup>5</sup>Ont. 1961-62, c. 48, s. 8(2).



tions Inquiries Act<sup>6</sup>—stands first, followed by the appropriate minister. For example, the power of investigation conferred by the Succession Duty Act is dependent on the following condition:

“27. (2) Where the Treasurer for any reason is not satisfied that he is in possession of all facts necessary to ascertain whether any duty, interest or penalties are or may be due or payable. . . .”<sup>7</sup>

Since the proper fulfillment of the condition precedent is not subject to review by the court, it is preferable to provide that the Treasurer of Ontario, a member of the provincial cabinet, be the person who is “not satisfied” before an investigation is set in motion, rather than to confer the power on an inspector or other person. We shall discuss the scope of the inquiry provided by this section later.

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<sup>6</sup>R.S.O. 1960, c. 177, s. 1.

<sup>7</sup>R.S.O. 1960, c. 386, s. 27(2).

## CHAPTER 29

# The Scope of Investigatory Powers

IF personal rights, privacy and the enjoyment of property are to be infringed by the exercise of statutory powers of investigation, the infringement should be within an area prescribed by the statute and for the purpose prescribed by the statute.

### DELINEATION OF AREA

The scope of an investigation is usually provided for in two ways: by the use of words in the legislation limiting the area of the investigation, or by the delegation of the power to determine the scope to some body or person. An illustration of the former is provided by the Used Car Dealers Act:

"11. (2) . . . [T]he Minister [of Financial and Commercial Affairs] may by order appoint one or more persons to make an investigation into *any matter relating to the used car business or for the due administration of this Act. . .*"<sup>1</sup>

The italicized words indicate the area of the investigation to be undertaken.

<sup>1</sup>Ont. 1964, c. 121, s. 11(2), as amended by Ont. 1967, c. 104, s. 5(1). Italics added.

An illustration of the delegation of the power to define the scope of the investigation is provided by the Securities Act, 1966:

“21. (1) The [Ontario Securities] Commission may by order appoint any person to make such investigation as it deems expedient for the due administration of this Act *and in the order shall determine and prescribe the scope of the investigation.*”<sup>2</sup>

## DEFINITION OF THE PURPOSE OF THE INVESTIGATION

The scope of an investigation may be clearly indicated by expressions in the statute indicating the purpose for which the inquiry is to be undertaken. The expression of the purpose has the effect of confining the area of investigation to that necessary to satisfy the prescribed purpose. The Apprenticeship and Tradesmen’s Qualification Act, 1964<sup>3</sup> provides a common example. It confers a power of investigation on the Director of Apprenticeship, or any person authorized by the Minister of Labour “[f]or the purpose of carrying out this Act”.<sup>4</sup> An investigation under this section, which could not be shown to implement some provision of the Act, would be unauthorized. Where the statute defines the scope of the investigation, the court will review the exercise of administrative powers to determine whether they are exercised within the “prescribed scope”, but no further. This is well illustrated in the case of *Canadian Bank of Commerce v. Attorney General of Canada*<sup>5</sup> where the relevant statutory provision was section 126 (2) of the Income Tax Act which read:

“126. (2) The Minister may, for any purpose related to the administration or enforcement of this Act, by registered letter or by a demand served personally, require from any person

- (a) any information or additional information, including a return of income or a supplementary return, or
- (b) production, or production on oath, of any books,

<sup>2</sup>Ont. 1966, c. 142, s. 21 (1). Italics added.

<sup>3</sup>Ont. 1964, c. 3.

<sup>4</sup>*Ibid.*, s 7(1).

<sup>5</sup>[1962] S.C.R. 729.

letters, accounts, invoices, statements (financial or otherwise) or other documents,  
within such reasonable time as may be stipulated therein.”<sup>6</sup>

The majority of the Supreme Court of Canada, at page 739, adopted the following portion of the judgment of the Ontario Court of Appeal:

“. . . In the present case the condition is objective, and the question whether he [the Minister] is acting for the purpose specified in the Act, is subject to review, even though he may be acting in an administrative capacity. This question involves an interpretation of the Act and its application to the circumstances disclosed. However, once it is established as in this case that the Minister is acting for the purposes specified in the Act, his acts within this scope are administrative and not judicial, and as such are not subject to review . . .”<sup>7</sup>

In the Court of Appeal, Porter, C. J. O. said: “There is a difference, I think, between the cases where an official is empowered to act when it appears to him, or he is satisfied, or has reasonable grounds to believe, that certain conditions exist, and this case where it must be shown that his purpose relates to administration or enforcement of the Act.”<sup>8</sup>

There can be no dissent from the proposition that the express scope of an investigation should not be wider than is necessary to implement the policy of the Act conferring the power. The expression, “for the purpose of carrying out this Act”, is very comprehensive and in many cases too comprehensive. Care should be exercised not to use such broad language if more restrictive language would be sufficient. When the phrase “for the purpose of carrying out this Act” is used, potentially it authorizes an inquiry with respect to every provision of the statute, whether relevant to the object of the inquiry or not. It may be that some provisions expressing a policy are not clearly expressed, and the authority for the investigation itself may be doubtful or it may be broader than intended. Ambiguity could be avoided by defining with as much precision as possible the scope or purpose of the investigation in the language conferring the investigatory power. It should be no broader than necessary.

<sup>6</sup>R.S.C. 1952, c. 148, s. 126(2).

<sup>7</sup>[1962] O.R. 253, 263-64.

<sup>8</sup>*Ibid.*, 263.

The following are examples of statutory powers of investigation that are too broad, and some of them are absurdly broad. Under the Hospital Tax Act, the Comptroller of Revenue may demand certain information "in order for him to make an accounting of the tax collectable by the owner under this Act *or for any other purpose*".<sup>9</sup> The Motor Vehicle Fuel Tax Act<sup>10</sup> contains identical language. Taken literally, the words "for any other purpose" might enable the Comptroller to demand information for purposes quite unrelated to the policy of either of these Acts. It may be that a court would construe the language to confine the investigation to the purposes of the respective Acts, but such phraseology ought not to be used in a statute providing investigatory powers.

Some statutes confer power on the person authorizing the investigation to exercise a discretion as to whether the area of the investigation is relevant to the purposes of the statute. For example, the Succession Duty Act provides:

"27. (1) The Treasurer may make any examination, investigation or inquiry concerning any fact, practice, transaction or matter, that he in his absolute discretion may consider necessary for the purpose of obtaining information to ascertain whether any duty, interest or penalties are or may be due or payable, and if so the amount thereof."

and:

"29. The powers conferred on the Treasurer, any special investigator or any commissioner shall not be restricted in any manner either as to person, as to subject matter of inquiry or otherwise and such powers may be exercised whether or not any duty has been paid and whether or not any duty, interest and penalties are or may be due or payable under this or any Act in force at the date of death of the deceased and no person shall be excused from giving any evidence, answering any question, furnishing any information or producing any document, record or thing on any such examination, investigation or inquiry on the ground that such evidence, question, information, document, record or thing may not be relevant thereto."<sup>11</sup>

<sup>9</sup>R.S.O. 1960, c. 178, s. 13(1). Italics added.

<sup>10</sup>R.S.O. 1960, c. 248, s. 10(1).

<sup>11</sup>R.S.O. 1960, c. 386, ss. 27(1), 29.

There are several expressions in section 29 which appear to be deliberately worded so as to broaden the powers of the investigator which would otherwise be restricted by the provisions of the sections conferring the power of investigation. Sections 27 and 28 are the sections conferring the power to investigate. They are designed to enable investigations to be conducted to obtain information "in order that the Treasurer may ascertain whether any duty, interest or penalties are or may be due or payable and if so the amount thereof". The investigations under these provisions are intended to be for the purpose of ascertaining whether any duty, etc., is due or payable, but section 29 extends the provisions of the previous two sections—which confine the examinations or investigations thereunder to purposes related to the Succession Duty Act. Section 29 would appear to remove any restrictions on the scope of the investigation. It expressly allows inquiry into areas that may not be relevant. This section may not have been used as authority for improper investigations, but it is capable of such use and as such it is an unjustified encroachment on civil rights. No power of investigation should be expressed in the unlimited terms used in the Succession Duty Act.

### DESIRABILITY OF PRECISION

Not only should the scope of investigatory powers be no wider than necessary, but it also should be expressed in precise language. The person conducting the investigation and the subject of the investigation should be able to look to the relevant statutory provisions to ascertain readily the prescribed areas of the investigation in question. The standard "scope" provision in a statute, "for the purposes of carrying out this Act", can be no more precise than the provisions of the Act to be implemented.

The following is an example of unclear definition of the scope of the investigation. In the Hospitals Tax Act we find:

"13. (6) Any officer authorized by the Treasurer may make such inquiry as he deems necessary to ascertain the amount of any tax collectable by an owner under this Act. . . ."<sup>12</sup>

<sup>12</sup>R.S.O. 1960, c. 178, s. 13(6).

Who is to "deem necessary" under this provision, the officer or the Treasurer? It is not clear who is to determine the scope or nature of the investigation. The section is deficient in this respect. In any case, if the Treasurer is to determine the scope of the inquiry, he should do so in the authority given to the officer. Other Ontario tax statutes contain identical provisions.

### SCOPE EXPRESSED IN SUBJECTIVE OR OBJECTIVE TERMS

The determination of the scope or purpose of an inquiry may be expressed in subjective or objective terms in a manner similar to the expression of conditions precedent to investigations, already discussed. There are many examples of the scope of an investigation being expressed in subjective terms. The Charitable Gifts Act provides:

"7. (1) The Treasurer of Ontario may appoint any person to make such investigation as he deems expedient respecting any interest in any business that has been given to or vested in any person for any religious, charitable, educational or public purpose or respecting any person to or in whom any such interest has been given or vested."<sup>13</sup>

The scope of the investigation provided by this section has a potential outer boundary which is dictated by the words "respecting any interest in any business that has been given to or vested in any person for any religious, charitable, educational or public purpose. . . ." and, with respect to any particular investigation, an inner boundary which is determined by the person who "deems"—based upon the criterion of expediency. This may be contrasted with the statement of the scope or purpose of an investigation in objective terms, such as in the Corporations Tax Act<sup>14</sup> which provides for investigations "for any purpose related to the administration or enforcement of this Act".<sup>15</sup> An identical provision appears in other Ontario taxation statutes. The language is also identical to that in section 126(2) of the Income Tax Act<sup>16</sup> considered in the

<sup>13</sup>R.S.O. 1960, c. 50, s. 7(1).

<sup>14</sup>R.S.O. 1960, c. 73.

<sup>15</sup>*Ibid.*, s. 86(3).

<sup>16</sup>R.S.C. 1952, c. 148.

*Canadian Bank of Commerce* case referred to in this chapter. As has been stated, where the scope of the investigation is expressed in objective terms, "the question whether he [the Minister] is acting for the purpose specified in the Act is subject to review [by the Courts], even though he may be acting in an administrative capacity".<sup>17</sup>

As in the case of the proper framing of conditions precedent, it is preferable, where possible, that the scope or purpose of an investigation should be expressed in objective terms. If for any reason it is considered that the scope of an investigation should be expressed in subjective terms then the person who determines the scope should be in a responsible position in the government hierarchy—preferably the Lieutenant Governor in Council or the appropriate Minister.

The discretion to determine the scope of an investigation should be exercisable only by the person who initiates the investigation, and it should not be delegated as in the Succession Duty Act. That Act enables the Treasurer of Ontario to "appoint a special investigator to make on his behalf any examination, investigation or inquiry that the special investigator in his absolute discretion may consider necessary. . . ."<sup>18</sup>

In this area, as in so many of the other areas respecting civil rights, the form and procedure for determining the scope of an investigation are important, and it is likewise important who determines the area. If a wide power of investigation into a person's private affairs is to be conferred, the legislation authorizing such an investigation invariably should provide that the decision to commence the inquiry should be made by a person who is politically responsible, so that he may be called to account for any needless invasion of personal rights. As a matter of constitutional convention it is the minister, not the civil servant, who is accountable.

## PERMISSIBLE AREAS OF INVESTIGATION

Some question has been raised as to whether there are areas of human activity that should not be open to investigation at the instance of the government. We do not think that

<sup>17</sup>*Canadian Bank of Commerce v. A.G. of Canada*, [1962] O.R. 253, 263-64.

<sup>18</sup>R.S.O. 1960, c. 386, s. 27(2).



areas within which the powers of investigation may be exercised can be discussed in the abstract or dissociated from the purpose of the investigation. It may be that there are some areas from which investigators should be excluded, e.g., religious beliefs and domestic relations. But one cannot make dogmatic statements about even these. The latter and even the former might be very relevant to an investigation being carried out for the purpose of determining what assessment should be made under a taxation statute. It is in the public interest and in the interest of all taxpayers that assessments should be made on facts. Religious beliefs might be very relevant to a determination of liability for military service. On the other hand, the public should be safeguarded against vexatious investigations prolonged by the selfish interests of the investigator.

It is important that in all statutes conferring powers of investigation and in all commissions authorizing inquiries, the areas to be covered should be delineated as clearly as possible, and no wider powers should be conferred than those necessary to implement the policy of the statute conferring them.

## RECOMMENDATIONS

As far as the scope or purpose of investigations of the character discussed in this chapter are concerned, we recommend that:

1. Each provision conferring a power of investigation should contain language prescribing the purpose and permissible scope of the investigation.
2. The prescribed scope for any given power of investigation should be no broader than is necessary to accomplish the purposes of the Act in question.
3. The provision defining the scope of an investigation should be stated in precise language.
4. Where possible, the scope of an investigation should be stated in the objective rather than the subjective form.

5. Where it is considered that the scope of an investigation should be expressed in the subjective form, the person who decides the scope should be in a politically responsible position.
6. Where the scope of an investigation is expressed in the subjective form, it should be defined by the person who initiates the investigation.
7. The power to determine the scope of an investigation should not be subject to delegation.

## CHAPTER 30

# Summonses to Witnesses and Production

CONSIDERATION of the conditions precedent to the exercise of a power of investigation, the person exercising the particular power, and the scope of the investigation, leads to a consideration of the acts which may be authorized to carry out the investigation within its prescribed scope. It is by these acts that the statutory powers are exercised and they are, in fact, the investigation. They may be very minor infringements of civil rights or they may be unjustified encroachments on civil rights, freedoms and liberties within the Terms of Reference of this Commission. For example, a demand to answer a questionnaire under the Statistics Act<sup>1</sup> may be a minor infringement of civil rights, but an unwarranted power of search and seizure would be a quite unjustified encroachment on civil rights. A power of investigation can only be properly assessed in the context of the policy of the statute conferring the power. Sweeping generalizations are to be avoided, but a critical examination of certain categories of the usual investigative acts authorized is useful.

### **SUMMONSES OR SUBPOENAS TO APPEAR AT A SPECIFIED PLACE AND TIME FOR THE PURPOSE OF FURNISHING INFORMATION OR EVIDENCE**

We will discuss later in this chapter the propriety of conferring on a body other than a court the power to issue a document in the nature of a court subpoena to be served on persons with a view to compelling them to give evidence or furnish information. We shall assume for present purposes

<sup>1</sup>Ont. 1962-63, c. 133.

the existence of the power and discuss the details of its implementation. Many such powers are conferred by legislation in Ontario. They may be divided into three main categories. Powers conferred by:

- (a) Reference to the Public Inquiries Act;
- (b) Reference to the power of courts;
- (c) Powers directly conferred.

### **Reference to the Public Inquiries Act**

For convenience we repeat here section 1 of the Public Inquiries Act:

"1. Whenever the Lieutenant Governor in Council deems it expedient to cause inquiry to be made concerning any matter connected with or affecting the good government of Ontario or the conduct of any part of the public business thereof or of the administration of justice therein and such inquiry is not regulated by any special law, he may, by commission, appoint one or more persons to conduct such inquiry and may confer the power of summoning any person and requiring him to give evidence on oath and to produce such documents and things as the commissioner or commissioners deem requisite for the full investigation of the matters into which he or they are appointed to examine."<sup>2</sup>

Sixty-one statutory provisions, set out in Appendix A to this Section,<sup>3</sup> confer powers of investigation by referring to the provisions of the Public Inquiries Act.

### **The Powers of a Court in Civil Cases**

Twenty-seven statutory provisions, set out in Appendix B to this Section,<sup>4</sup> confer on administrative bodies the power of courts to compel witnesses to attend, give evidence and produce documents. The language used in different statutes varies but the effect is substantially the same. For example, the Fire Marshals Act provides:

"13. The Fire Marshal, the Deputy Fire Marshal, district deputy fire marshals and inspectors have the same power to enforce the attendance of witnesses and to compel them to give evidence and produce documents and things as is vested in any court in civil cases."<sup>5</sup>

<sup>2</sup>R.S.O. 1960, c. 323, s. 1.

<sup>3</sup>See pp. 466ff. *infra*.

<sup>4</sup>See pp. 477ff. *infra*.

<sup>5</sup>R.S.O. 1960, c. 148, s. 13.

## Powers Directly Conferred

The Agricultural Societies Act provides an example of powers directly conferred:

“31. The Minister may appoint a person to inspect the books and accounts of any society receiving legislative grants under this Act, and may empower such person to summon witnesses and enforce the production of documents before him and to take evidence upon oath in regard to the matters under inspection, and every officer of a society shall, when required, submit the books and accounts thereof to such inspection.”<sup>6</sup>

Other examples of this general type of power will be discussed later.

There are two marked deficiencies in the legislation governing the implementation of these different types of powers. These have to do with the form of the summons or subpoena and with witness fees.

## Form of Summons or Subpoena

Regardless of how the power is conferred, generally there is no specific form of summons or subpoena provided. The failure to make such a provision may be contrasted with the detailed provisions governing subpoenas in use in the courts. Rule 272 of the Rules of Practice and Procedure of the Supreme Court of Ontario provides for the issuance of a subpoena, “from any office of the court”, and Form 57 (subpoena *duces tecum*, general form) and Form 58 (subpoena, at trial) of the Rules are the basic forms for the subpoenas. A person served with a regular court subpoena has the means at his disposal to ascertain the authority for the service of the particular document which is given to him; on the other hand, generally speaking, a witness served with the document purporting to be a subpoena from a Royal Commission under the Public Inquiries Act, or from the Workmen’s Compensation Board, can consult no law which is authority for the form of the document served on him. It appears that tribunals which have authority to issue summonses or subpoenas prepare these documents as best they can in the absence of any statutory prescription.

<sup>6</sup>R.S.O. 1960, c. 11, s. 31.

A form of subpoena or summons which can be verified against a statutory form should set forth a certain minimum amount of information for the witness, such as the name or style of the proceeding in question and, in some cases, the name of the person or party on behalf of whom the witness is to give evidence or produce documents.

The regulations passed under the Ontario Highway Transport Board Act<sup>7</sup> serve as an example of regulations passed under a statute making provision for forms of summonses or subpoenas. The form reads:

*The Ontario Highway Transport Board Act*

SUMMONS TO A WITNESS BEFORE THE ONTARIO  
HIGHWAY TRANSPORT BOARD

RE:

To:

You are summonsed and required to attend before the Ontario Highway Transport Board at a hearing to be held at ..... in the ..... of ..... on ..... day, the ..... day of ..... 19..... at the hour of ..... o'clock in the ..... noon, and so from day to day until the hearing is concluded, to give evidence on oath touching the matters in question in the proceedings and to bring with you and produce at the time and place

Dated this ..... day of ..... 19.....

ONTARIO HIGHWAY TRANSPORT BOARD:

.....  
Chairman or Vice-Chairman<sup>8</sup>

<sup>7</sup>R.S.O. 1960, c. 273.

<sup>8</sup>R.R.O. 1960, Reg. 464, Form 1.

Similar prescriptions can be found in regulations passed under some statutes which confer powers of adjudication upon administrative bodies, but such provisions are the exception rather than the rule.

### Witness Fees

Generally, the relevant statutes make no provision for the payment of a witness fee when a person is summonsed or subpoenaed. The type of power to subpoena witnesses conferred by the use of the "same power . . . as is vested in any court in civil cases" formula, may, by inference, confer the right on the persons subpoenaed to be paid a witness fee similar to that which they would receive if subpoenaed for a case in court, but the matter is not clear. The draftsman of the Fire Marshals Act and the Ontario Highway Transport Board Act appears to have thought express words were necessary to confer a right on a witness to receive witness fees. The Fire Marshals Act provides:

"14. Every person, upon being served with a summons under the hand of the Fire Marshal, Deputy Fire Marshal, a district deputy fire marshal or inspector to attend for the purpose of giving evidence shall attend in pursuance of the summons, and is entitled to be paid such fees and expenses as are prescribed by the regulations."<sup>9</sup>

And the provision of the Ontario Highway Transport Board Act is:

"9. (2) Every person summoned to attend before the Board shall, in the discretion of the Board, receive the like fees and allowances for so doing as if summoned to attend before the Supreme Court."<sup>10</sup>

The regulations<sup>11</sup> passed under the Fire Marshals Act provide a scale of fees for a person attending to give evidence which is slightly more generous than that provided by Tariff B to the Rules of Practice and Procedure of the Supreme Court of Ontario.

<sup>9</sup>R.S.O. 1960, c. 148, s. 14.

<sup>10</sup>R.S.O. 1960, c. 273, s. 9(2).

<sup>11</sup>R.R.O. 1960, Reg. 183, s. 8.

There is no reason why a witness summonsed to give evidence before an investigatory tribunal should be called upon to appear at his own expense. This applies equally to witnesses who have no interest in the investigation and those who may be considered to be directly involved in it. If a party to an action in the courts desires to call an opposite party as a witness, he is obliged to subpoena him and pay him conduct money in the ordinary manner. It is an unjustified encroachment on the civil rights of witnesses to require them to attend at investigations or inquiries without reasonable compensation.

## DEMAND FOR THE PRODUCTION OF DOCUMENTS AND OTHER INFORMATION

The Corporations Tax Act provides an example of the type of power falling under this heading:

“86. (2) The Treasurer may, for any purpose relating to the administration or enforcement of this Act, by registered letter or by a demand served personally, require from any corporation or from the president, manager, secretary, or any director, agent or representative thereof,

(a) any information or additional information or a return as required by section 71 or a supplementary return; or

(b) production, or production on oath, of any books, letters, accounts, invoices, statements, financial or otherwise, or other documents,

within such reasonable time as is stipulated therein.”<sup>12</sup>

This type of provision is found not only in most taxation statutes but also in other regulatory statutes.

The statute authorizing the demand for the documents or information does not require that the purpose relating to the administration or enforcement of the Act—the nature or purpose of the inquiry—be stated therein. The demand under this statute, served on a corporation, should have a title indicating the immediate matter being inquired into, e.g., “ABC Company Limited—Taxation Years 1964 and 1965”—so as to enable the person upon whom the demand is served to de-

<sup>12</sup>R.S.O. 1960, c. 73, s. 86(2).



termine the relevance of the documents and information requested, having regard to the particular inquiry involved.

The limits for determining the relevance of the demand are fixed by the words "for any purpose relating to the administration or enforcement of this Act", but the specific area within such a limit should be set out in the demand. A proper test is that imposed in the United States. This test, although based on the Fourth Amendment to the American Constitution enjoining "unreasonable searches and seizures", is none the less a fair general test. It is laid down in *United States v. Morton Salt Company* in this language:

"Of course a governmental investigation into corporate matters may be of such a sweeping nature and so unrelated to the matter properly under inquiry as to exceed the investigatory power. . . . But it is sufficient if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant."<sup>13</sup>

We think that demands for information and documents should be required to state in general terms "the matter properly under inquiry", and the information sought in terms that are not too indefinite—so that the test of relevancy may be applied.

## THE RIGHT TO THE RETURN OF DOCUMENTS SEIZED

Most legislation requiring the production of documents contains no provision conferring on the owner of the documents the right to their return or their repossession when they have served the purpose for which they were seized or furnished. We can see no reason why the individual should not have the same protection under the investigatory statutes as he has under other statutes conferring like powers of investigation. For example, the Summary Convictions Act contains the following provision relative to things seized under a search warrant:

"14. (3) Where any such thing is seized and brought before a justice, he may detain it, taking reasonable care to preserve it until the conclusion of the investigation, and, if no one is

<sup>13</sup>338 U.S. 632, 652 (1950).

convicted, the justice shall direct the thing to be restored to the person from whom it was taken unless he is authorized or required by law to dispose of it otherwise."<sup>14</sup>

The provisions of the Criminal Code<sup>15</sup> for the return of things seized under a search warrant are more elaborate. In the Combines Investigation Act<sup>16</sup> the time within which documents seized must be returned is stipulated.

Provisions in investigatory statutes to the effect that copies properly certified may be received in evidence, such as those contained in the Corporations Tax Act, would materially assist in the prompt return of documents produced:

"86. (7) Where a book, record or other document has been seized, examined or produced under this section, the person by whom it is seized or examined or to whom it is produced or any officer of the Office of Comptroller of Revenue may make, or cause to be made, one or more copies thereof and a document purporting to be certified by the Treasurer or a person thereunto authorized by the Treasurer to be a copy made pursuant to this section is admissible in evidence and has the same probative force as the original document would have had if it had been proven in the ordinary way."<sup>17</sup>

## RECOMMENDATIONS

1. Powers of investigation should not be conferred by regulation.
2. In all cases where a person or body has the power to summons or subpoena persons to attend to give evidence or furnish information, the form of the summons or subpoena should be prescribed by legislation or regulation. As far as reasonably practical a standard form should be prescribed, giving sufficient information to acquaint the witness with the general nature of the proceedings.
3. A person summonsed or subpoenaed should be paid a witness fee. The right to such payment should be provided by statute and the amount should approximate the amount required to be paid to a witness in the Supreme Court of

<sup>14</sup>R.S.O. 1960, c. 387, s. 14(3).

<sup>15</sup>Crim. Code, s. 432.

<sup>16</sup>R.S.C. 1952, c. 314, ss. 17(4), 18(2).

<sup>17</sup>R.S.O. 1960, c. 73, s. 86(7).

Ontario. There should be no provision disentitling a witness to payment of a witness fee, such as was contained in the Securities Act<sup>18</sup> prior to the amendment of 1966.

4. Demands for information should be in writing and should indicate the general nature of the inquiry involved and the nature of the documents and information required.
5. Persons from whom documents are taken should be given a statutory right to the return of the documents within a reasonable time.
6. Provision should be made for the admission as *prima facie* evidence of properly certified copies of documents obtained under a statute and returned to the owner.

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<sup>18</sup>R.S.O. 1960, c. 363, s. 21(3)(a).

## CHAPTER 31

# Powers of Search and Seizure

HERE we are concerned with three separate investigative acts: the entry onto the premises, the inspection of the premises, articles or documents, etc., and the seizing and carrying away of personal property. Although physically separate, these acts are functionally related. Entry usually precedes inspection and seizure. Civil rights cannot be considered apart from the reason for entry in any given case. The basic right of the individual is to be free from physical trespass to his property and to be free from interference with his privacy.

These three investigative acts should be considered in their relation to one another.

### ENTRY ONTO PREMISES

The power of entry may be conferred in express words or by implication. Not infrequently the power is conferred in quite vague language or in terms of indirect application.

#### Express Power

Express power to enter property is given in the Grain Elevator Storage Act.<sup>1</sup> "The chief inspector or an inspector may at any time enter any grain elevator and inspect the grain stored and the books and records pertaining thereto."<sup>2</sup> This type of provision, which is very common in regulatory

<sup>1</sup>R.S.O. 1960, c. 167.

<sup>2</sup>*Ibid.*, s. 17(1).

statutes, confers the power to enter at any time without the necessity of obtaining permission (as in the case of obtaining a search warrant), or without any other condition precedent, such as a requirement of belief that the statute is not being complied with.

### Implied Power

The Hospital Services Commission Act provides an illustration of an implied power of entry:

“14. (1) In addition to the functions enumerated elsewhere in this Act, it is the function of the Commission and it has power, . . .

(i) to appoint inspectors with duty and power to inspect and examine books, accounts and records of employers and collectors for the purpose of obtaining information related to the hospital insurance plan. . . ”.<sup>3</sup>

It is obvious that inspectors cannot examine documents unless they have entered the premises, but the Act does not confer any express power on inspectors to enter premises. There is no express provision authorizing an act which would otherwise be a trespass. In this case the inspectors are forced to rely on the provisions of the Interpretation Act:

“27. In every Act, unless the contrary intention appears,

(b) where power is given to a person, officer or functionary to do or to enforce the doing of an act or thing, all such powers shall be understood to be also given as are necessary to enable the person, officer or functionary to do or enforce the doing of the act or thing . . . ”.<sup>4</sup>

When legislation is drawn which is intended to give the power of entry to premises, the power should be stated in clear terms so that when it comes before the members of the Legislature they will know what they are voting on. They ought not to be left to examine the Interpretation Act, or the law applicable to implied powers, when they are required to vote for or against legislation purporting to authorize rights of entry to private property.

<sup>3</sup>R.S.O. 1960, c. 176, s. 14(1)(i).

<sup>4</sup>R.S.O. 1960, c. 191, s. 27(6).

### Entry Only With Permission of the Court

This type of limitation on the power of entry is illustrated by the Corporations Tax Act:

"86. (4) The Treasurer may, for any purpose related to the administration or enforcement of this Act, with the approval of a judge of the Supreme Court, which approval the judge is hereby empowered to give upon *ex parte* application, authorize in writing any officer of the Office of the Comptroller of Revenue, together with such members of the provincial police or other peace officers as he calls on to assist him and such other persons as are named therein, to enter and search, if necessary by force, any building, receptacle or place for documents, books, records, papers or things that may afford evidence as to the violation of any provision of this Act or the regulations and to seize and take away any such documents, books, records, papers or things and retain them until they are produced in any court proceedings."<sup>5</sup>

Similar provisions for entry appear in different Ontario taxation statutes. They are almost identical to the provisions of section 126(3) of the Income Tax Act.<sup>6</sup> The jurisprudence relating to this provision establishes that the "approval" which the judge is empowered to give is unreviewable on any subsequent application,<sup>7</sup> and that the type of power of entry and seizure conferred by the section is much wider, in several respects, than the power of a police officer acting under a search warrant issued by a justice of the peace.<sup>8</sup> The cases noted do not deal expressly with what facts must be shown to the judge before he gives his approval of the authorization. If the purpose of the approval of the Supreme Court judge is to safeguard the rights of the individual, and we assume that it is, the basis on which an approval may be given should be set out in the statute, e.g., that there are reasonable grounds for an order of approval. The statute leaves the matter of approval, without any guidance, for the judge.

A comparison of powers of entry conferred in Ontario legislation with the substantial protection given by the com-

<sup>5</sup>R.S.O. 1960, c. 73, s. 86(4).

<sup>6</sup>R.S.C. 1952, c. 148.

<sup>7</sup>*Biggs v. M.N.R.*, [1954] Ex. C.R. 702.

<sup>8</sup>*Bathville Corporation Ltd. et al v. Atkinson et al*, [1964] 2 O.R. 17 (High Ct.), affirmed, [1965] 1 O.R. 340 (C.A.).

mon law against invasion of property rights by the executive, shows that the individual is now much more vulnerable to invasions of his rights than at any time in the past. Conditions here are not significantly different from those in the United Kingdom. Speaking of the latter, Sir Alfred Denning, as he then was, said:

“Enforcement officers of the Minister of Food may enter shop premises, inspect all the goods in it, require the shopkeeper to produce his books and so forth. Factory Inspectors, Sanitary Inspectors, Town Planning Officers may all enter all kinds of premises for their various purposes. Officials of the Ministry of Supply may enter your house to see if you are doing research into atomic energy. Officials of the Agricultural Executive Committee may come on your land to see if you are farming it properly.

The granting of these powers of entry is a complete departure from the principles hitherto in force in England. The powers conferred on these officers are greater than those conferred on the police. It is not necessary for these officers, as it is for the police, to go to a magistrate and satisfy him that a search should be allowed. It is not necessary for them to show reasonable grounds for thinking that an offence has been committed. It is not necessary for them to hold a specific authority in respect of specified premises.”<sup>9</sup>

While powers of entry are a necessary part of many types of modern legislation, they ought to be sparingly dispensed by the Legislature and always with proper safeguards. The powers of entry conferred on police officers afford a useful yardstick for measuring the extent to which such provincial powers unjustifiably encroach on traditional individual rights.

Under the general law, a law enforcement officer cannot lawfully enter and search premises without a search warrant. In the field of provincial legislative authority, this law is set out in the Summary Convictions Act:

“14. (1) Where a justice is satisfied by information upon oath (Form 1) that there is reasonable ground for believing that there is in any building, receptacle or place,

(a) anything upon or in respect of which an offence against a statute of Ontario has been or is suspected to have been committed; or

<sup>9</sup>*Freedom Under the Law* (1949), 107.

(b) anything which there is reasonable ground to believe will afford evidence as to the commission of any such offence,

he may at any time issue a warrant (Form 2) under his hand authorizing a constable or other person named therein to search such building, receptacle or place for any such thing, and to seize and carry it before the justice issuing the warrant or some other justice for the same territorial division to be by him dealt with according to law.

(2) Every search warrant shall be executed between sunrise and sunset, unless the justice by the warrant authorizes the constable or other person to execute it at night.

(3) Where any such thing is seized and brought before a justice, he may detain it, taking reasonable care to preserve it until the conclusion of the investigation, and, if no one is convicted, the justice shall direct the thing to be restored to the person from whom it was taken unless he is authorized or required by law to dispose of it otherwise."<sup>10</sup>

This follows substantially section 429 of the Criminal Code.

There are four significant safeguards to civil rights in this legislation:

(1) There can be no lawful entry or search by anyone unless it is authorized by a judicial decision of a justice of the peace.

(2) The justice of the peace must be satisfied on evidence under oath that there are reasonable grounds for believing that the place to be searched contains an article in respect of which an offence has been committed, or which will afford evidence as to the commission of an offence. The salient feature here is that there must have been a violation of Ontario law, or a reasonable belief that such violation has occurred, before a search warrant can be issued.

(3) The warrant issued by the justice specifies both the place to be searched and generally the property to be seized.

(4) Unless the justice otherwise orders, every search warrant must be executed during the day. The form of the search warrant (Form 2) issued under the Summary Convic-

<sup>10</sup>R.S.O. 1960, c. 387, s. 14.



tions Act, requires the justice to direct in the search warrant the hours between which the search is to be conducted.

How far all these safeguards should apply to powers of entry and seizure conferred by Ontario statutes depends on the purpose of the governing statute and the purpose of the power. Where a statute is regulatory and its purpose is to safeguard the public, inspectors engaged in the enforcement of the statute must have powers of entry and, in some cases, of seizure, without judicial authority in either case as a condition precedent. The purpose of a whole catalogue of statutes such as the Elevators and Lifts Act,<sup>11</sup> the Meat Inspection Act,<sup>12</sup> and the Public Health Act,<sup>13</sup> would be frustrated if inspectors were required to secure judicial authority to enter premises for the purpose of carrying out their duties under the respective Acts.<sup>14</sup>

Such inspections are not primarily for the purpose of detecting offenders in order that prosecutions may be launched, nor for securing evidence to support prosecutions. Their primary purpose is educative and disciplinary in character, to secure compliance with the statutes. Likewise, it is not unreasonable that those who carry on business under a licence required in the public interest should be required to submit to reasonable inspection to assure that the terms of the licence are being complied with, as, for example, under the Children's Institutions Act<sup>15</sup> and the Private Hospitals Act.<sup>16</sup>

On the other hand, there is a class of statutes which provides for rights of entry, search and seizure, where the inspection is neither educative nor disciplinary but for the purpose of detecting offences and securing evidence on which to base

<sup>11</sup>R.S.O. 1960, c. 119.

<sup>12</sup>Ont. 1962-63, c. 78.

<sup>13</sup>R.S.O. 1960, c. 321.

<sup>14</sup>See the decisions of the Supreme Court of the United States in *Camara v. Municipal Court of the City and County of San Francisco*, 87 Sup. Ct. 1727 (1967), and *See v. City of Seattle*, 87 Sup. Ct. 1737 (1967), holding that the Fourth Amendment to the Constitution requires the issuance of warrants before routine inspections of homes or business premises, under fire, health or other regulatory statutes, can be lawfully conducted. We are more impressed with the reasoning of the dissenting minority of the Court in these cases. The minority reasoned that the decisions degraded the Fourth Amendment and would lead to the mass rubber-stamping of area warrants.

<sup>15</sup>Ont. 1962-63, c. 14.

<sup>16</sup>R.S.O. 1960, c. 305.

either a prosecution or a civil action. In such cases the exercise of the power should be conditioned on judicial approval, as it is in the Workmen's Compensation Act.<sup>17</sup> We point out here that a clear distinction should be drawn between the right to search a private dwelling and the right to search other premises. This we shall discuss later.

**Satisfaction on Evidence Under Oath that the Place to be Searched Likely Contains Something in Respect of Which an Offence Has Been Committed, or Which May Afford Evidence as to the Commission of an Offence**

Where a statute is penal in its nature, rather than regulatory, the strict rules applicable to the criminal law should be required. "Fishing" searches should not be permitted. The requirements of the Summary Convictions Act and the Criminal Code that there must be proof under oath that the premises or place to be searched are likely to contain something in respect of which a specified offence has been committed, or which may afford evidence as to the commission of an offence, cannot be strictly applied to taxation statutes or regulatory statutes. Investigations to ascertain if the proper taxes have been paid are essential to the administration of all taxing statutes. A proper assessment of real property could not be made without a right of entry. In such cases no question of offence arises. Likewise, a right of audit of books is necessary in the administration of a sales tax statute. The search may disclose an offence but it would be quite improper to condition all rights of search on an accusation of an offence.

Where judicial approval is required before the power of search and seizure may be exercised, as in the Corporations Tax Act,<sup>18</sup> the applicant should be required to show some facts to justify the use of wide powers before approval is given. The place to be searched should be shown in the evidence put before the judicial officer.

The Summary Convictions Act<sup>19</sup> requires this fact to be shown before the justice of the peace issues a search warrant. It is not clear from section 86 (4) of the Corporations Tax

<sup>17</sup>R.S.O. 1960, c. 437, s. 94(2).

<sup>18</sup>R.S.O. 1960, c. 73, s. 86(4).

<sup>19</sup>R.S.O. 1960, c. 387, s. 14(1).

Act that such a fact must be put before the judge approving of the search under that subsection. If the Treasurer has cause to resort to this subsection, it is reasonable to assume that the authorities have in mind particular premises to be entered and searched. We do not think it is reasonable that the property or documents to be inspected should be required to be particularized in the application for approval. The applicant is not likely to know the precise nature of the books or documents. It is sufficient if some reason for the belief that relevant documents exist at a particular place is set out in the application to the judicial officer authorizing the search.

### **Specification in the Judicial Approval of the Place to be Searched**

The form of search warrant authorized under the Summary Convictions Act specifies the place to be searched. This is reasonable. Without such specification, a general and roving power to enter and search any premises would be conferred on the investigator. This would lead to the same abuses which occurred with the writs of assistance issued during the eighteenth century in the American colonies. These writs enabled menial officers to search private premises at will for smuggled goods. The adoption of the Fourth Amendment to the United States Constitution was directed to curb the abuses that arose out of the exercise of these powers.<sup>20</sup>

For the reasons we have stated we do not think it necessary or advisable to require that the personal property to be searched for or seized be specified in the approval. The language "for any purpose related to the administration or enforcement of the Act" where properly used defines the permissible area of that which may be searched and seized.

### **Every Search Warrant to be Exercised During the Day, Unless Otherwise Ordered**

We can see no reason why this requirement should not be inserted in the provisions of such statutes as the Corporations Tax Act.<sup>21</sup> If reason can be shown for a night search,

<sup>20</sup>See Davis, *Administrative Law Treatise*, s. 3.05.

<sup>21</sup>R.S.O. 1960, c. 73, s. 86(4).

then express authority should be given for it. This would seem to be a minimum safeguard for the right to privacy and a safeguard against breaches of the peace.

### Private Dwellings

The power of entry and search of a private dwelling, be it a room, apartment or house, should be conditioned on judicial approval. A person's home both traditionally and in some current legislation has been given a larger measure of protection than other types of premises. Sir Alfred Denning said:

"[The power to enter a man's house against his will] is a power which we must watch with care, because, next to our personal freedom, we value most the freedom of our homes."

And, quoting the Earl of Chatham:

"The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail—its roof may shake—the wind may blow through it—the storm may enter—the rain may enter—but the King of England cannot enter—all his force dares not cross the threshold of the ruined tenement."<sup>22</sup>

This traditional respect for the sanctity of a man's home is currently reflected in such provisions as section 8 of the Industrial Safety Act:

- "8. (1) An inspector may, for the purpose of this Act,  
 (a) subject to subsection 3, enter in or upon, take up or use any property, real or personal, at any time without warrant;  
 (3) An inspector shall not enter any room or place actually used as a dwelling without the consent of the occupier except under the authority of a search warrant issued under section 14 of *The Summary Convictions Act*."<sup>23</sup>

The unrestricted power to enter premises and search, for the purpose of the Act, stops short of the entrance of "any room or place actually used as a dwelling" without judicial permission.

The principle of the special privacy of a person's home is also recognized in the Forest Fires Prevention Act,<sup>24</sup> the

<sup>22</sup>*Freedom Under the Law* (1949), 103.

<sup>23</sup>Ont. 1964, c. 45, s. 8.

<sup>24</sup>R.S.O. 1960, c. 152, s. 23.

Lakes and Rivers Improvement Act,<sup>25</sup> and the Weed Control Act.<sup>26</sup> These Acts authorize entries into any lands or buildings, with the specific exception of dwelling houses. The result of this type of legislation is that if inspectors, under these statutes desire to enter private homes, they are obliged to obtain a search warrant under section 14 of the Summary Convictions Act and to comply with the requirements of its provisions.

The method by which judicial permission is provided for by the incorporation of section 14 of the Summary Convictions Act, has the additional benefit of incorporating all the safeguards of that section. This is a simple provision and one that should be incorporated in every statute requiring judicial approval or authority to enter and search.

## SEIZURE

Many of the safeguards which we have discussed respecting the power of entry relate to the exercise of the power of seizure. In some respects the exercise of this power is a greater interference with the civil rights of an individual than the exercise of the power of entry onto his real property. Seizure is a dispossession of property, either permanently or temporarily, while entrance onto premises is usually a temporary interference, not entailing dispossession.

The conditions authorizing seizure should be more stringent than those empowering an investigator or inspector to enter property or inspect documents. We can see no valid reason for departing from the principles applicable to search warrants where seizure is anticipated. The power to seize property should be conditioned on there being reasonable grounds for believing that the property is something upon or in respect of which an offence against the statute in question has been or is suspected to have been committed, or that it will afford evidence as to the commission of such an offence. The power arbitrarily to dispossess a person of his property ought not to be given. The administration of most regulatory statutes is adequately advanced if property and documents are

<sup>25</sup>R.S.O. 1960, c. 203, s. 22a, as enacted by Ont. 1962-63, c. 71, s. 3.

<sup>26</sup>R.S.O. 1960, c. 427, s. 9.

examined or inspected in their usual locations. That is why the power to enter premises and inspect documents is conferred.

The application of these principles demonstrates the objectionable character of statutory provisions such as those contained in the Collection Agencies Act:

“23a. (5) Any person making such investigation may seize and take possession of any documents, records, securities or other property belonging to the person whose affairs are being investigated and that relate to the subject-matter of the investigation.”<sup>27</sup>

Two types of investigation are provided for under section 23a. The first, under subsection 1, is put in motion by the Director of the Registration and Examination Branch of the Department of the Attorney General (now the Minister of Financial and Commercial Affairs),<sup>27a</sup> where it appears probable to him on a statement made under oath that a contravention of the Act or the regulations or the Criminal Code of Canada has been committed. These provisions involve matters to be considered which are relevant to a person's fitness to carry on the business of a collection agency. However, seizures under subsection 5 are not confined to property which relates to offences.

The second type of investigation provided for is under subsection 2. It is one instituted by the Attorney General (now Minister of Financial and Commercial Affairs) “into any matter relating to the business of collection agencies or for the due administration of this Act”. The broad powers of seizure given under subsection 5 equally apply to an investigation under subsection 1 and subsection 2. It is wrong that these powers of seizure should extend to investigations unrelated to offences.<sup>28</sup>

<sup>27</sup>R.S.O. 1960, c. 58, s. 23a, as enacted by Ont. 1964, c. 7, s. 9.

<sup>27a</sup>Ont. 1966, c. 41, s. 5.

<sup>28</sup>For provisions virtually identical to those contained in the Collection Agencies Act see: the Mortgage Brokers Registration Act, R.S.O. 1960, c. 244, s. 8(5), as amended by Ont. 1964, c. 63, s. 5; the Real Estate and Business Brokers Act, R.S.O. 1960, c. 344, s. 24(4), as amended by Ont. 1964, c. 99, s. 8(4); the Securities Act, 1966, Ont. 1966, c. 142, s. 21(4); and the Used Car Dealers Act, Ont. 1964, c. 121, s. 11(5).

The unbounded powers of investigation conferred on the Liquor Licence Board of Ontario under the Liquor Licence Act provide an extreme example of reckless legislative indifference to the rights of the individual:

“17. (1) The Board may make such investigation as it deems expedient for the due administration of this Act into or respecting,

(a) the affairs of any person holding a licence or any of his servants, agents or employees; . . .”<sup>29</sup>

(2) Where an investigation is or is about to be undertaken under this section, the Board may by order,

(a) authorize an inspector of the Board to seize and take possession of any documents, records or other property belonging to, in the possession or under the control of any person that the Board considers may be relevant to the investigation; . . .”<sup>30</sup>

In the first place, there is no condition precedent to the Board’s power to investigate, other than it “deems it expedient for the due administration of the Act”. The word “expedient” was no doubt selected to give the broadest powers to the Board. The Board is not required to deem the investigation necessary.

The affairs or conduct not only of every person holding a licence but of all his servants, agents or employees, are subject to investigation by the Liquor Licence Board. The investigation is limited only by what the Board thinks is expedient. In addition, every person is liable to have his documents, etc., seized if the Board considers them to be relevant to the investigation. Recourse to the courts to review the Board’s idea of expediency is denied. All concept of civil rights is abandoned. Whether the Board exercises these broad and arbitrary powers wisely is not relevant to this inquiry. No tribunal should be invested with the powers that are conferred on the Liquor Licence Board.

In place of seizure, several entry provisions enable inspectors to take extracts from documents; others authorize copies to be made. In our opinion, the latter type of provision is

<sup>29</sup>R.S.O. 1960, c. 218, s. 17(1), as amended by Ont. 1965, c. 59, s. 4(1).

<sup>30</sup>*Ibid.*, s. 17(2), as amended by Ont. 1965, c. 59, s. 4(2).

preferable. It takes little imagination to appreciate the undue interference with any business which would fall on the extraction, either temporarily or permanently, of parts of its records.

The Ontario Energy Board Act confers a power of entry on the Energy Returns Officer and any other person authorized by the chairman of the Ontario Energy Board.<sup>31</sup> It concludes with a reasonable provision respecting the inspection of documents:

"51. . . . [the inspector] may, upon giving a receipt therefor, remove any such document or record from such premises or place for the purpose of photocopying such document or record, provided that such photocopying is carried out with reasonable dispatch and such document or record is immediately thereafter returned to such gas transmitter, distributor, storage company or associate and the return thereof is acknowledged in writing."

This provision should serve as a useful precedent to be used in those cases where it is necessary for documents to be examined away from their usual location. As we have recommended, a provision rendering certified copies admissible in evidence, such as that contained in the Corporations Tax Act,<sup>32</sup> would safeguard against loss of evidence by destruction of documents which may have been examined.

## RECOMMENDATIONS

1. Legislation which is intended to give power to enter, search and seize property should so state in clear and unambiguous language.
2. Unless the purpose of the statute would be frustrated, judicial authority should be a condition precedent to the exercise of the power of entry and search.
3. Judicial authority should always be a condition precedent to the right of entry and search of a private dwelling.
4. Where a statute is penal as opposed to regulatory, strict rules with regard to search and seizure should be followed.

<sup>31</sup>Ont. 1964, c. 74, s. 51.

<sup>32</sup>R.S.O. 1960, c. 73, s. 86(7).



5. Where judicial authority to search and seize is required, guidelines should be laid down to direct the judicial authority; e.g., "reasonable grounds to believe. . . ." Individuals should not be exposed to capricious and vexatious searches without recourse to the civil courts.
6. Where the power of search and seizure requires judicial authority, the applicant should be required to show:
  - (a) some facts to justify the exercise of the power;
  - (b) the place to be searched; and
  - (c) some reason to believe that the relevant material may be found in the place to be searched.
7. Every statute authorizing a right of search should provide that the search be exercised during the day, unless otherwise ordered by judicial authority.
8. Every statute requiring judicial approval or authority to enter and search should incorporate the provisions of section 14 of the Summary Convictions Act. The power to seize property should be conditioned on there being reasonable grounds for believing that it is something in respect of which an offence against the statute in question has been, or is suspected to have been committed, or that it will afford evidence as to the commission of an offence.
9. Where it is necessary for documents to be examined away from their usual locations, statutory provisions should be made that certified copies be admitted as *prima facie* evidence in any prosecution or matter arising under the relevant statute.
10. No power should be given to any tribunal to investigate where it "deems it expedient" or to any person to seize property where "he deems it expedient."

## POWER TO STOP AND DETAIN

Some statutory provisions enable inspectors or other investigators, to stop vehicles, etc., for the purpose of conducting

a search, and to detain property; for example, the Farm Products Grades and Sales Act:

“6. (1) Every Inspector, for the purpose of enforcing this Act and the regulations, may . . .

(b) stop any conveyance that he believes to contain any farm product and inspect such conveyance and any farm product found therein; . . .

(2) For the purpose of inspecting a farm product, the inspector may detain it at the risk of its owner and, after detaining it, the inspector shall forthwith notify the owner or person who had possession of it of the detention by prepaid telegram or such other means as in the circumstances he deems proper.”<sup>33</sup>

The Act further provides that a farm product in respect of which, in the opinion of an inspector, an offence against the Act or regulations has been committed, may be detained at the risk and expense of the owner by the inspector until such time as the owner of the farm product complies with the Act and regulations. If the right of stoppage is to be given, the officer should at least have “reasonable grounds to believe that the vehicle contains a farm product”. It is an unreasonable trespass on the rights of an owner that the detention should be “at the risk of the owner”. There seems no reason why the ordinary rights of bailee and bailor should not apply. The owner has no means by which to protect the products that are detained, in so far as the detention may be continued until the owner of the farm product complies with the Act and regulations. This is an extraordinarily vague section of a penal nature. No one appears to have authority to determine when the owner has complied with the Act and the regulations. Examples of similar legislation may be found in the Live Stock and Live Stock Products Act<sup>34</sup> and the Milk Act.<sup>35</sup> The powers conferred under these statutes are somewhat akin to a power of arrest in that they involve an infringement of personal liberty to come and go as one pleases. They are powers which could be abused and used for improper purposes. A

<sup>33</sup>R.S.O. 1960, c. 136, s. 6.

<sup>34</sup>R.S.O. 1960, c. 219, s. 4(1)(b).

<sup>35</sup>Ont. 1965, c. 72, s. 5(b).

more acceptable type of stoppage provision is found in the Game and Fish Act:

"8. (1) An officer may, without a search warrant,  
 (a) stop, enter and search any aircraft, vehicle or vessel; . . .  
 if he has reasonable grounds to believe that any of them  
 contains any game or fish killed, taken, shipped or had in  
 possession in contravention of this Act or the regulations."<sup>36</sup>

## RECOMMENDATIONS

1. Discretionary powers to stop and detain should be abolished, except in cases involving public safety or public health. In all other cases they should be conditioned on reasonable grounds for belief that the statute in question is being violated.
2. Where the rights of stoppage and detention are given, the detention should not be "at the risk of the owner".

## POWER TO SEARCH THE PERSON

Power of this nature is contained in section 110 of the Liquor Control Act:

"110. (1) A constable or other police officer may at any time,  
 (a) without a warrant, enter and search any vehicle or other  
 conveyance in which he has reasonable grounds to believe  
 that liquor is unlawfully kept or had, or kept or had for  
 unlawful purposes, and search any person found in such  
 vehicle or other conveyance; . . ."<sup>37</sup>

The exercise of this type of power is a definite infringement of civil rights. In *Leigh v. Cole*, Vaughan Williams, J. referred to the "degradation of being searched".<sup>38</sup> Power to search the person should be conferred only with great reluctance and in circumstances where its absence would significantly impede the effective administration of the relevant law. It may be observed that in the enforcement of the criminal law a police officer has no power to search a person except for offensive weapons until a person has been arrested, and even then only in certain circumstances. The Criminal Code

<sup>36</sup>Ont. 1961-62, c. 48, s. 8(1), as amended by Ont. 1966, c. 60, s. 1.

<sup>37</sup>R.S.O. 1960, c. 217, s. 110(1), as re-enacted by Ont. 1965, c. 58, s. 68.

<sup>38</sup>(1853), 6 Cox C.C. 329, 332.

authorizes a police officer to search the person for offensive weapons, but only where he believes on reasonable grounds that an offence has been committed with respect thereto.<sup>39</sup> Another provision in federal law authorizing a search of the person is contained in the Narcotic Control Act.<sup>40</sup> Even here the power of search is restricted.

It is hard to see why the provisions as to personal search contained in section 110 (1) of the Liquor Control Act are necessary.

## RECOMMENDATION

Power to search the person ought not to be conferred under provincial law. The power is out of all proportion to the seriousness of provincial offences.

<sup>39</sup>Crim. Code, s. 96.

<sup>40</sup>Can. 1960-61, c. 35, s. 10(1)(b).

## CHAPTER 32

# Power to Require Witnesses to Testify

### FORM OF EXERCISE OF THE POWER

STATUTES provide four main modes by which the power to *require* witnesses to attend to give evidence before investigating bodies may be exercised:

(1) By conferring on the investigating body "all the powers that may be conferred on a commissioner under the Public Inquiries Act", or "the powers of a commissioner appointed under the Public Inquiries Act". A table of statutes adopting these formulae is set out in Appendix A to this Section.<sup>1</sup> The powers that may be conferred on a commissioner under the Public Inquiries Act are ". . . the power of summoning any person and requiring him to give evidence on oath and produce such documents and things as the commissioner or commissioners deem requisite for the full investigation of the matters into which he or they are appointed to examine".<sup>1a</sup>

(2) By conferring on the investigating body the powers to enforce the attendance of witnesses and to compel them to give evidence as are vested in "any court in civil cases" or "in the Supreme Court". A table of statutes adopting such formulae is set out in Appendix B to this Section.<sup>1b</sup> Powers so expressed carry with them the implication of power to summon witnesses.

<sup>1</sup>See pp. 466 ff. *infra*.

<sup>1a</sup>R.S.O. 1960, c. 323, s. 1.

<sup>1b</sup>See pp. 477 ff. *infra*.

(3) By directly conferring the power to summon witnesses. This is done in different ways without reference to any accompanying Public Inquiries Act powers or court powers. For example, the investigating body is empowered in some statutes "by notice in writing [to] require the attendance before him of any person at the time and place named in the notice. . . ."<sup>2</sup>

On the other hand, some statutes confer the power "to summon witnesses";<sup>3</sup> to "by summons . . . (Form 8) require any person to appear before him or them to testify on oath. . . .";<sup>4</sup> and to "send for and examine on oath all persons as he deems necessary. . . ."<sup>5</sup>

(4) By provisions which incorporate, in different degrees, the incidence of a subpoena issued out of a court, e.g., the Collection Agencies Act:

"23a. (4) For the purposes of any such investigation, any person making the investigation, . . .

(b) may require to have issued out of the Supreme Court a writ of subpoena *ad testificandum* or a writ of subpoena *duces tecum*, which the court may issue, but no person shall be compelled under any such writ to produce any document that he would not be compellable to produce on trial of an action."<sup>6</sup>

Similar provisions are found in the Used Car Dealers Act,<sup>7</sup> the Mortgage Brokers Registration Act,<sup>8</sup> and the Real Estate and Business Brokers Act.<sup>9</sup> Presumably, the use of a subpoena issued out of the Supreme Court, and the powers of a judge of the Supreme Court conferred under these statutes are intended to give to the investigating officers the support of compulsive and penal powers that they would not otherwise have.

<sup>2</sup>See Boilers and Pressure Vessels Act, 1962-63, Ont. 1962-63, c. 8, s. 7; Construction Hoists Act, 1960-61, Ont. 1960-61, c. 11, s. 6, as amended by Ont. 1961-62, c. 17, s. 1; Elevators and Lifts Act, R.S.O. 1960, c. 119, s. 9, as amended by Ont. 1961-62, c. 38, s. 2.

<sup>3</sup>Agricultural Societies Act, R.S.O. 1960, c. 11, s. 31.

<sup>4</sup>Private Sanitaria Act, R.S.O. 1960, c. 307, s. 45.

<sup>5</sup>Public Works Act, R.S.O. 1960, c. 338, s. 5(5).

<sup>6</sup>R.S.O. 1960, c. 58, s. 23a(4), as enacted by Ont. 1964, c. 7, s. 9.

<sup>7</sup>Ont. 1964, s. 121, s. 11(4).

<sup>8</sup>R.S.O. 1960, c. 244, s. 8(3), as amended by Ont. 1964, c. 63, s. 5.

<sup>9</sup>R.S.O. 1960, c. 344, s. 24(3), as amended by Ont. 1964, c. 99, s. 8(3).

A variant of these formulae has been adopted in the Pharmacy Act:

“29a. (1) The Council and a member who is the subject of disciplinary proceedings may, without leave or order, obtain from the Supreme Court a subpoena commanding the attendance and examination of any witness and also the production of any document, the production of which could be compelled at the trial of an action, to and before the discipline committee at the time and place mentioned in the subpoena, and disobedience to the subpoena shall be deemed a contempt of court, but the person whose attendance is required is entitled to the like conduct money and payment for expenses and loss of time as upon attendance at a trial in the Supreme Court.”<sup>10</sup>

This legislation goes one step further than the statutory provisions we have been dealing with. It expressly states that disobedience to a subpoena shall be deemed to be contempt of court. This is harsh, unnecessary and unreasonable. The unfortunate person may have just cause, such as sickness, to disobey the subpoena. In no case do the courts regard mere disobedience to a subpoena as a contempt of court. It depends on the circumstances whether a disobedience is a contempt.

The Drainage Act provides:

“68. (5) Subpoenas for the attendance of witnesses at the hearing, tested in the name of the referee, may be issued by the clerk of the county court of the county in which the case is to be heard.”<sup>11</sup>

This is a hybrid sort of subpoena issued by the clerk of the county court but in the name of the referee. Under the Act,<sup>12</sup> the referee has “in respect of all proceedings before him . . . the powers of a judge of the Supreme Court”, but the subpoena is issued out of the county court.

This review of the legislation which confers power to require the attendance of witnesses before investigating bodies, created by provincial legislation, demonstrates a disregard for principle in the creation of the powers, and a like disregard for

<sup>10</sup>R.S.O. 1960, c. 295, s. 29a(1), as enacted by Ont. 1965, c. 97, s. 1.

<sup>11</sup>Ont. 1962-63, c. 39, s. 68(5).

<sup>12</sup>*Ibid.*, s. 67(1).

basic rights of the individual. In no case should subpoenas be issued out of a court for the attendance of witnesses before tribunals that are not courts. Such subpoenas are confusing to witnesses and create legal confusion with respect to powers of enforcement. It would appear that the mere conferment of the power to require attendance by "notice in writing" or "by summons" or "by sending for", would not carry with it the power in the investigating body to enforce sanctions for disobedience by committal for contempt. On the other hand, the conferment of the powers which may be conferred on a commissioner under the Public Inquiries Act (some think this is debatable), of the powers of a court in civil cases or the power to have a subpoena issued out of the court, do involve the liability of the summoned person to committal for contempt for violation of the command in the summons. Against this background of the law we make recommendations involving basic principles.

## RECOMMENDATIONS

1. Where it is not intended that the person is to be liable to committal for non-attendance, the tribunal should be empowered to issue documents which for convenience may be called Notices to Attend. The word "Notice" would distinguish these documents from summonses carrying the sanctions of committal. These notices should contain basic information such as the date, time and place for attendance, and the nature of the hearing. If the relevant statute makes non-attendance an offence for which the witness may be prosecuted, then this should be clearly stated in the notice.
2. Where it is intended that the proposed witness should be liable to committal for failure to attend, the tribunal itself should be empowered to issue a document called "Summons to Witness". In this document all necessary information should be set out, such as the date, time and place of the hearing, and the fact that failure to obey would render the proposed witness liable to committal to prison



on an application to the Supreme Court of Ontario. The word "Summons", although in some sense is the same as "subpoena" (both being, at least originally, royal commands), is not used as much as "subpoena" for the title of the document commanding a witness to appear before a court of law. It would, therefore, be preferable that "summonses to witnesses" be issued by tribunals, even though such summonses may be enforced in the courts and that subpoenas be issued solely by courts.

3. Investigating bodies should not have power to commit witnesses for disobedience of a summons. This power should rest only in the Supreme Court. This we shall discuss later.
4. No statute should state that the disobedience of a subpoena "shall be deemed a contempt of court".

In making these recommendations, we realize that some think there is a safeguard for individual privacy or personal interest in the giving to the courts of the sole authority to issue summonses for the purpose of requiring persons to attend before all types of tribunals. This view is expressed in a dissenting judgment of Mr. Justice Murphy in *Oklahoma Press Publishing Company v. Walling*: ". . . I am unable to approve the use of non-judicial subpoenas issued by administrative agents. . . . Only by confining the subpoena power exclusively to the judiciary can there be any insurance against . . . corrosion of liberty."<sup>13</sup> We do not think that it is a "corrosion of liberty" to allow tribunals other than courts to issue summonses to witnesses, as long as the imposition of sanctions for disobedience is controlled by the courts.

If tribunals were not allowed to issue their own summonses they would be unduly hampered in conducting their proceedings with reasonable dispatch. In addition, we think that it is confusing to witnesses, and improper, for subpoenas to be issued out of courts directing the attendance of witnesses before tribunals that are not courts. This we discuss in another aspect later.

<sup>13</sup>327 U.S. 186, 218-19 (1946).

## POWER TO COMPEL WITNESSES TO GIVE EVIDENCE UNDER OATH OR ON AFFIRMATION AND TO PRODUCE RELEVANT DOCUMENTS

Where a witness has been properly summoned to appear before an investigating body, the question arises as to what his legal position is if he,

- (a) fails or refuses to attend;
- (b) refuses to swear or affirm to tell the truth; or
- (c) refuses to answer relevant questions or produce relevant documents.

In a court a witness is liable to be committed to jail for contempt of court if he refuses to obey the order of the court. The powers of an administrative tribunal turn on the provisions of the governing statute.

We now examine specifically the main formulae, to which we have already referred, used to confer powers of compulsion on tribunals under Ontario legislation.

### Legislation Conferring "All the Powers that may be Conferred on a Commissioner Under the Public Inquiries Act"

The statutes adopting this formula are set out in Appendix A to this Section.<sup>13a</sup> The powers that *may be* conferred on a commissioner under the Public Inquiries Act are set out in section 1 of the Act.<sup>14</sup> The powers which may be conferred under the Act do not in themselves include the power to impose sanctions, or commit for contempt, for violating a testimonial duty. It is section 2 that confers such powers on a commissioner when he is appointed under the Act. Section 2 provides that "a commissioner has the same power to enforce the attendance of witnesses and to compel them to give evidence and produce documents and things as is vested in any court in civil cases".

Some argue that this is a power conferred on a commissioner *by* the Public Inquiries Act, and not by the Lieutenant Governor in Council *under* the Public Inquiries Act. On the other hand, it is argued that the conferment of the power which may be conferred on a commissioner under section 1

<sup>13a</sup>See pp. 466 ff. *infra*.

<sup>14</sup>See p. 385 *supra*.

carries with it a power to commit for contempt of a violation of the testimonial duty. In support of this position, reliance is placed on the Interpretation Act, which provides:

“27. In every Act, unless the contrary intention appears, . . .  
 (b) where power is given to a person, officer or functionary to do or to enforce the doing of an act or thing, all such powers shall be understood to be also given as are necessary to enable the person, officer or functionary to do or *enforce* the doing of the act or thing . . .”<sup>15</sup>

We think that where the Legislature has conferred on a tribunal the powers that may be conferred on a commissioner under the Public Inquiries Act, it intends that those powers are to be effective to produce results by the exercise of compulsion where necessary.

For our purposes and the conclusions we have come to the debate is somewhat academic, other than to say that, from the point of view of the requirements of proper drafting of legislation affecting civil rights, uncertainty is not desirable. Where the Legislature has decided to confer a power, the exercise of which involves a definite encroachment on the rights of the individual, it should do so in clear and unmistakable language. Whether or not the power to imprison has been conferred should not be left open to debate.

All statutes conferring powers of investigation by reference to the Public Inquiries Act do not use the same formula, i.e., “all the powers that may be conferred on a commissioner under the Public Inquiries Act”. In some statutes the formula used is “the same powers as a commissioner under the Public Inquiries Act”. The powers of a commissioner under the Public Inquiries Act would undoubtedly include the power to commit for contempt included in section 2. The Professional Engineers Act provides an example of the use of this formula:

“28. (3) The council [the Council of the Association of Professional Engineers of the Province of Ontario] has the same powers as commissioners under *The Public Inquiries Act* to compel witnesses to appear and give evidence under oath in the manner and under penalties prescribed by such Act, and all such evidence shall be taken in writing or by a duly qualified stenographer.”<sup>16</sup>

<sup>15</sup>R.S.O. 1960, c. 191, s. 27(b). Italics added.

<sup>16</sup>R.S.O. 1960, c. 309, s. 28(3).

This is loose language. The Public Inquiries Act does not expressly prescribe any penalties.

The Water Powers Regulation Act provides an extraordinary example of legislative disregard of elementary civil rights:

“12. The Lieutenant Governor in Council may make regulations respecting,

(a) the procedure to be followed by the inspector and for conferring on him the powers of a commissioner under *The Public Inquiries Act*; . . .”<sup>17</sup>

This section empowers the Lieutenant Governor in Council to confer on a lay person the power to commit for contempt. At the time of writing the Lieutenant Governor in Council has not seen fit to pass any such regulations.

However, the Lieutenant Governor in Council did pass such regulations under the Gasoline Tax Act,<sup>18</sup> giving to a minister the power to appoint any person to hold an inquiry, and accordingly conferring on such person a statutory power to commit to prison. The regulation reads:

“7. Where there is a charge or complaint that any person has violated or failed to observe any of the provisions of the Act or the regulations, . . . the Minister may appoint some person to hold an inquiry into the matter, and that person has all the powers of a Commissioner appointed under *The Public Inquiries Act*, including the power to take evidence under oath.”<sup>19</sup>

This regulation was passed ostensibly under section 3(k) of the Gasoline Tax Act, which enables the Lieutenant Governor in Council to make regulations “providing for the holding of inquiries into the operation of this Act . . . and providing that the person holding such inquiry shall have all the powers that *may* be conferred on a commissioner under the Public Inquiries Act including the power to take evidence under oath. . . .” (Italics added.) To the extent that the powers of a commissioner under the Public Inquiries Act may be wider than those that “may be conferred on a commissioner under the Public Inquiries Act”, the regulation in part may be *ultra vires*. Whether or not the regulation is a valid one,

<sup>17</sup>R.S.O. 1960, c. 426, s. 12(a).

<sup>18</sup>R.S.O. 1960, c. 162, s. 3 (k).

<sup>19</sup>R.R.O. 1960, Reg. 206, s. 7.

it is an exercise of legislative power with little regard for civil rights.<sup>20</sup>

A different formula is used in section 13 of the Water Powers Regulation Act.<sup>21</sup> This Act definitely confers the power to commit, since the terms of the Act incorporate all the provisions of the Public Inquiries Act. The relevant section reads:

"13. (1) Where the inspector reports that the owner of a water power,

(a) is diverting or using more water than the owner is entitled to divert or use; . . .

the Lieutenant Governor in Council may appoint three commissioners, who shall be judges of the Supreme Court, to hold an inquiry under *The Public Inquiries Act*, and to report to the Lieutenant Governor in Council. . . ."<sup>22</sup>

The variations of statutory language in referring to the Public Inquiries Act may carry with them differences as to the extent of the power conferred—in particular as to whether or not the power to commit for contempt has been conferred. But when one has regard to certain factors, such as the nature and identity of the persons or bodies on whom the powers are conferred, one doubts that these differences have been the expression of any real legislative intention.

### Legislation Conferring All the Powers of a Court in Civil Cases

The Fire Marshals Act provides an example of the use of this formula:

"13. The Fire Marshal, the Deputy Fire Marshal, district deputy fire marshals and inspectors have the same power to

<sup>20</sup>In Alberta the Public Inquiries Act (R.S.A. 1955, c. 258) was amended (Alberta 1960, c. 80) to effect amendments to some twenty-seven statutes to bring about a standardization of references, in individual statutes, to the Public Inquiries Act. Prior to these amendments it appears that most of these statutes used the Ontario formula of conferring "all the powers that may be conferred on a commissioner under the Public Inquiries Act". By the amendments, the bodies or persons who are to have Public Inquiries Act powers are given "all the powers of a commissioner appointed under the Public Inquiries Act." Most of the statutory provisions were amended by striking out the words "that may be conferred upon" and by substituting the word "of".

<sup>21</sup>R.S.O. 1960, c. 426.

<sup>22</sup>*Ibid.*, s. 13(1).

enforce the attendance of witnesses and to compel them to give evidence and produce documents and things as is vested in any court in civil cases.”<sup>23</sup>

It would appear that provisions such as these are intended to impose on witnesses before the investigating body the same testimonial duty, with attendant consequences for breach of that duty, as is imposed on witnesses in courts of law.

Two decisions in Ontario illustrate the extent of the power conferred and how it may be exercised with arbitrary severity without any right of relief.

In *Re Singer*<sup>24</sup> Jeffrey, J. refused to grant an order of discharge upon a *habeas corpus* application, following committal to prison of the applicant, a prominent solicitor in the City of Toronto, by a commissioner appointed under the Combines Investigation Act.<sup>25</sup> The commissioner had attended at Mr. Singer’s office for the purpose of inspecting certain books. Production was refused and Mr. Singer declined to be sworn and answer questions. The commissioner thereupon summarily committed him to the York County Jail until he purged his contempt. The Act enabled the commissioner “to make such orders as seem to the . . . commissioner to be proper for securing the attendance of [a witness] and his examination, and the production by him of books, papers, records or articles, and the use of the evidence so obtained and may otherwise exercise, for the enforcement of such orders or punishment for disobedience thereof, all powers that are exercised by any superior court in Canada for the enforcement of subpoenas to witnesses or punishment of disobedience thereof”.<sup>26</sup> The learned judge held that the commissioner had jurisdiction to commit summarily for contempt of court and that he had exercised that power within his authority. This decision was sustained on appeal.<sup>27</sup> Notwithstanding that following the dismissal of the appeal Mr. Singer submitted to full examination and produced all the books and records and made full apology, the commissioner ordered him to be

<sup>23</sup>R.S.O. 1960, c. 148, s. 13.

<sup>24</sup>(1929), 37 O.W.N. 3.

<sup>25</sup>R.S.C. 1927, c. 26.

<sup>26</sup>*Ibid.*, s. 22.

<sup>27</sup>(1930), 52 C.C.C. 243.

detained. Upon a further application by way of *habeas corpus* proceeding, he was released by Meredith, C.J.C.P.

The power of the Ontario Municipal Board to commit for contempt where a witness refused to answer questions was considered in *Re Diamond and the Ontario Municipal Board*.<sup>28</sup> There the court held that the board had such power under sections 33 and 37 of the Ontario Municipal Board Act.<sup>29</sup>

We agree that some form of coercive power is necessary if a tribunal like the Ontario Municipal Board is to function efficiently, but in our opinion it does not follow that this power must be or should be vested in the tribunal itself. This will be discussed later in this chapter.

### **Power to Commit for a Contempt Not Committed in the Face of a Tribunal**

This power does not relate to the performance of testimonial duty. It relates to such contempts as intemperate attacks on members of the tribunal and improper attempts to influence its decision. However, the power is to be considered in the adoption of a formula conferring on an investigatory tribunal "such powers, rights and privileges as are vested in the Supreme Court", or "all the powers of a court of record". The decision in the *Diamond* case indicates that the formulae used in the Ontario Municipal Board Act did not include power to commit for contempt not committed in the face of the tribunal.

In the light of the recommendations that we shall make, further discussion of this subject here is unnecessary.

### **Subpoenas Issued out of the Supreme Court Requiring the Attendance of a Witness "To Give Evidence" Before a Tribunal**

A witness is liable to committal for failure to perform his testimonial duty, even though he has attended court voluntarily.<sup>30</sup> In most cases it is not the subpoena that forms

<sup>28</sup>[1962] O.R. 328.

<sup>29</sup>R.S.O. 1960, c. 274.

<sup>30</sup>*R. v. Sadler* (1830), 4 Car. & P. 218; VIII Wigmore on Evidence (McNaughton Revision, 1961), 121.

the basis of the obligation to testify. However, in some legislation in this Province the obligation to attend is created by making statutory provision for the issue out of the Supreme Court of a subpoena *ad testificandum* to witnesses who are to appear before a body conducting a statutory investigation e.g., the Collection Agencies Act.<sup>31</sup> Such subpoenas include a command by the court to give evidence. As we have indicated, we think it an improper practice to make statutory provision that a subpoena be issued out of the Supreme Court to compel witnesses to attend before an administrative tribunal. The command is in the name of the court but the proceedings have nothing to do with the court.

## RECOMMENDATION

All summonses to witnesses to attend and give evidence before tribunals should be issued by the tribunal, and the attributes of a subpoena issued out of the Supreme Court ought not to be imported into administrative procedure.

## PRIVILEGE

Every person, except the sovereign, may be called upon and is bound to give evidence to the best of his knowledge upon any question of fact material and relevant to an issue in the trial in any of the Queen's Courts, unless he can show some exception in his favour.<sup>32</sup>

Whether the common law privileges apply to statutory investigations depends upon the language used in conferring the investigatory powers and the limitations placed thereon. For example, the powers conferred by the Public Inquiries Act are confined to the "power to enforce the attendance of witnesses and to compel them to give evidence and produce documents and things as are vested in a court in civil cases".<sup>33</sup> This language imports the disabilities of a court and preserves common law and statutory privileges through the adoption of "the powers vested in any court in civil cases". These safe-

<sup>31</sup>R.S.O. 1960, c. 58, s. 23a(4), as enacted by Ont. 1964, c. 7, s. 9.

<sup>32</sup>*Ex parte Fernandez* (1861), 10 C.B. (N.S.) 3, 39-40.

<sup>33</sup>R.S.O. 1960, c. 323, s. 2.



guards, however, have been abrogated in certain cases by specific statutory provisions. The Securities Act formerly provided:

"21. (3) For the purposes of subsections 1 and 2, the person making the investigation has the same power to summon and enforce the attendance of witnesses and compel them to give evidence on oath or otherwise, and to produce documents, records and things as is vested in the Supreme Court or a judge thereof for the trial of civil actions, provided that, . . .

(b) no person is entitled to claim any privilege in respect of any document, record or thing asked for, given or produced on the ground that he may be incriminated or exposed to a penalty or to civil litigation thereby;

(c) no person shall refuse to answer any question upon any ground of privilege provided that a solicitor shall not be required to disclose any communications between himself and his client. . . ." <sup>34</sup>

This section was amended in 1966, <sup>34a</sup> to eliminate the objectionable features of clauses (b) and (c).

The Succession Duty Act provides:

"30. (3) No person is entitled to claim any privilege in respect of any information, question, document, record or thing." <sup>35</sup>

The Election Act provides:

"142. (2) Upon such inquiry, no person is excusable as a witness upon any ground of privilege or upon the ground that his answer may expose him to criminal proceedings or to any penalty that may be imposed under any statute of Ontario." <sup>36</sup>

The Liquor Licence Act, <sup>37</sup> as it was prior to the amendment of 1965, <sup>38</sup> provided:

"16. For the purpose of any hearing or investigation, the Board has the same power to summon and enforce the attendance of witnesses and compel them to give evidence on oath or otherwise and to produce documents, records and things as is vested in the Supreme Court or a judge thereof for the trial of civil actions, except that, . . .

<sup>34</sup>R.S.O. 1960, c. 363, s. 21(3).

<sup>34a</sup>Ont. 1966, c. 142, s. 21(4).

<sup>35</sup>R.S.O. 1960, c. 386, s. 30(3).

<sup>36</sup>R.S.O. 1960, c. 118, s. 142(2).

<sup>37</sup>R.S.O. 1960, c. 218, s. 16.

<sup>38</sup>Ont. 1965, c. 59, s. 3.

(c) no person shall refuse to answer any question upon any ground of privilege, but a solicitor shall not be required to disclose any communications between himself and his client. . . .”

The provisions of the Succession Duty Act and the Election Act abolish all privileges known to law, while those of the Securities Act (as it formerly was) and the Liquor Licence Act (as it formerly was) abolished all except the solicitor and client privilege. We have dealt fully with privileged communications in Chapter 53. It is sufficient to say here that we can see no good reason why an administrative investigatory body should have rights to extract communications from witnesses, which rights are denied to courts of law on the ground that it is in the general public interest that such communications ought not to be revealed through compulsion.

We go further than this. Witnesses who give evidence at statutory inquiries should be protected from the use, to their detriment in any subsequent proceedings, of any evidence which is given under compulsion.

## RECOMMENDATIONS

1. The law of Ontario should be clarified to provide that all evidential privileges should be recognized by investigating tribunals.
2. Legislation governing investigations should contain a provision similar to section 25(4) of the Coroners Act which reads as follows:

“25. (4) A witness shall be deemed to have objected to answer any question upon the ground that his answer may tend to criminate him or may tend to establish his liability to a civil proceeding at the instance of the Crown, or of any person, and the answer so given shall not be used or be receivable in evidence against him in any trial or other proceeding against him thereafter taking place, other than a prosecution for perjury in giving such evidence.”<sup>38a</sup>

3. No statute providing for an investigation should impair any of the evidential privileges.

<sup>38a</sup>R.S.O. 1960, c. 69, s. 25(4).

4. Provisions such as those in the former Securities Act, the Succession Duty Act, the Election Act and formerly in the Liquor Licence Act, wherever they appear, should be repealed.

## POWER TO COMMIT TO PRISON FOR CONTEMPT OF A TRIBUNAL

We consider the power to commit apart from any constitutional aspects of the subject. The power is an extreme power which is rarely used even by the courts, but the fact that it exists has a salutary and disciplinary effect on proceedings. In the *Singer* case, which we have discussed, Chief Justice Meredith laid down sound guidelines for its exercise:

"That arbitrary and needlessly harsh and despotic applications of the power to deprive human beings of their liberty under the cloak of punishment for contempt of Court are not countenanced in any Courts; if they were the power to imprison for contempt of Court should soon be taken from them. That power is never exercised by Courts except with much circumspection and caution and is very seldom exercised because it is very seldom necessary to exercise it. It is an extreme case in which the use of a bludgeon by a Judge or Court can be necessary. . . ." <sup>39</sup>

When a court exercises this power it is administering a law which is a matter for courts experienced in its administration. Investigating bodies are not so experienced. The general rule for courts is that their proceedings are conducted in public. This rule does not apply to purely investigative proceedings. It is not necessary in all cases that it should apply and in many cases it would be unjust to hold public hearings. The result is that under our law in many cases it is possible for a person to be committed to jail by an inspector, e.g., under the Fire Marshals Act,<sup>40</sup> after private questioning in his home; or after similar questioning by a representative of the Ontario Securities Commission, under the Deposits Regulation Act;<sup>41</sup> or by an officer of the Workmen's Compensation Board under the Workmen's Compensation Act.<sup>42</sup> These are examples

<sup>39</sup>(1930), 52 C.C.C. 243, 247.

<sup>40</sup>R.S.O. 1960, c. 148, s. 13.

<sup>41</sup>Ont. 1962-63, c. 36, s. 5(5).

<sup>42</sup>R.S.O. 1960, c. 437, ss. 65, 75(2).

that demonstrate an unjustified statutory encroachment on the civil rights of individuals in respect of this aspect of the law.

We emphasize that the possibility of speedy and unobtrusive imprisonment, which exists under Ontario legislation, is a continuing threat to personal security. The statutes creating this possibility are precedents serving as cloaks of respectability for future legislation of the same type. The fact that the powers are rarely exercised is no answer to the charge that their continued existence is an erosion of civil rights.

For those who are concerned solely with what actually happens, the "long custody" of Mr. Singer in the *Singer* case—for the purpose of "keeping him *in terrorem*" or, in plainer language, "under the thumb of the commissioner"—should suffice.<sup>42a</sup>

The generally accepted view in the United States is that it would be unconstitutional to empower an administrative tribunal to commit for contempt of court.<sup>43</sup>

When legislation confers on an investigating body the powers of a civil court, as is done in many Ontario statutes, it does not make the body a court. This creates anomalies. A witness committed for contempt of court by a High Court judge in the course of civil action has a right of appeal to the Court of Appeal under the Judicature Act,<sup>44</sup> but a witness committed by an inspector under the Fire Marshal's Act has no right of appeal. The provision of the Judicature Act gives a right of appeal from "any judgment, order or decision of a judge of the High Court". It obviously does not extend to the orders or decisions of those who are not judges of the High Court, even if they exercise some of the powers of such a judge.

Legislation empowering administrative tribunals and officers to commit for contempt is wrong in principle and may be unconstitutional. It exists in abundance in Ontario statutes and it is an unjustified encroachment on the civil rights of individuals. It impairs respect for the law.

<sup>42a</sup>(1930), 52 C.C.C. 243, 249.

<sup>43</sup>*I.C.C. v. Brimson*, 154 U.S. 447, 460 (1894).

<sup>44</sup>R.S.O. 1960, c. 197, s. 26(1).

In lieu of the conferment of power on tribunals or officers to commit for contempt in order to enforce testimonial obligations, we recommend that this power be exercised by the Supreme Court of Ontario only on application, by way of originating notice of motion launched by the investigating tribunal or any party having a sufficient interest in the proceedings. A court is the only forum in which facts and law, which may give foundation for committal to imprisonment, should be decided. We interviewed many members of administrative tribunals clothed with power to commit and they were all in agreement that it would be entirely sufficient if coercive powers to compel witnesses to attend, to give evidence and to produce documents, were exercised upon application to the court.

There is a precedent in Ontario statutes for the adoption of these principles, but we think the procedure devised is wrong. The Police Act provides:

“48a. (3) Subject to subsection 9, the Commission has all the powers to enforce the attendance of witnesses and to compel them to give evidence and produce documents and things as are vested in any court in civil cases.

(9) The Commission shall not exercise its power to penalize any person under this section unless, on the application of the Commission, a judge of a county or district court has certified, as such judge may,

(a) that the person is guilty as alleged by the Commission;

(b) the penalty therefore; and

(c) that the Commission may impose such penalty,

and the Commission has given such person forty-eight hours notice of the hearing of the application or such shorter notice as the judge deems reasonable.”<sup>45</sup>

The whole concept of this section is wrong. The commission makes an allegation of guilt. This involves a finding of guilt by the commissioners. The judge does not make a finding of guilt or give a judgment but “certifies that the person is guilty as alleged by the commissioners”. No provision is made for procedure, except with respect to notice, or for the material on which the judge is to act. The judge certifies the

<sup>45</sup>R.S.O. 1960, c. 298, s. 48a, as enacted by Ont. 1964, c. 92, s. 17.

penalty but the commissioners impose it. A right of appeal to the Court of Appeal from the certificate of a judge, or order of the commission, is provided.<sup>46</sup> It would appear that the Legislature followed an unsatisfactory precedent taken from the Combines Investigation Act:

"17. (3) A member of the [Restrictive Trade Practices] Commission shall not exercise power to penalize any person pursuant to this Act, whether for contempt or otherwise, unless, on the application of such member a judge of the Exchequer Court of Canada or of a superior or county court has certified, as such judge may, that such power may be exercised in the matter disclosed in the application, and such member has given to such person twenty-four hours' notice of the hearing of such application or such shorter notice as the judge deems reasonable."<sup>47</sup>

Under this Act the court's function is to certify or not to certify, as it may decide, that the "power may be exercised in the matter disclosed in the application. . . ."

We think that a better approach to the problem is found in the Tribunals of Inquiry (Evidence) Act, 1921, of the United Kingdom which provides:

"1. (2) If any person—

- (a) on being duly summoned as a witness before a tribunal makes default in attending; or
- (b) being in attendance as a witness refuses to take an oath legally required by the tribunal to be taken, or to produce any document in his power or control legally required by the tribunal to be produced by him, or to answer any question to which the tribunal may legally require an answer; or
- (c) does any other thing which would, if the tribunal had been a court of law having power to commit for contempt, have been contempt of that court;

the chairman of the tribunal may certify the offence of that person under his hand to the High Court, or in Scotland the Court of Session, and the court may thereupon inquire into the alleged offence and after hearing any witnesses who may be produced against or on behalf of the person charged with the offence, and after hearing any statement that may be

<sup>46</sup>*Ibid.*, s. 48a(10).

<sup>47</sup>R.S.C. 1952, c. 314, s. 17(3).

offered in defence, punish or take steps for the punishment of that person in like manner as if he had been guilty of contempt of the court."<sup>47a</sup>

This provision enables the court, not the tribunal involved on the leave of the court, to punish for contempt. It also makes applicable, under clause (c), the whole law of contempt and not just that relating "to coercing the performance of testimonial obligations". In this respect the word "punish" is properly used.

A provision similar to section 1 (2) of the Tribunals of Inquiry (Evidence) Act, 1921, is contained in the Army Act, 1955,<sup>48</sup> and is applicable to the conduct of a court-martial.

It is to be emphasized that no non-curial body in the United Kingdom has power to commit for contempt, and in the United States, Congress has consistently withheld contempt powers from administrative agencies.

In the Federal field of the United States, the tribunal invokes the aid of the court in compelling the attendance of witnesses and the production of documents. In case of default the court makes an order that the witness comply with the subpoena, etc. If the witness refuses, the court may punish for contempt of its own order. This procedure involves two applications and we think it is unnecessarily cumbersome. A simpler and more direct procedure is provided in the State of New York.<sup>49</sup>

Judges of the Supreme Court now have power to exercise a jurisdiction to compel the performance of duties owed to other tribunals in certain circumstances. A contempt arising out of interference with a trial which might have gone before the Quarter Sessions was punished in the King's Bench Division in *Rex v. Davies*.<sup>50</sup> In our own courts a person making a scurrilous attack on judges of the county court sitting as division court judges was punished for contempt on an application made by the Attorney General to the Supreme Court of Ontario.<sup>51</sup>

<sup>47a</sup>1921, 11 & 12 Geo. V, c. 7, s. 1 (2).

<sup>48</sup>1955, 3 & 4 Eliz. II, c. 18, s. 101.

<sup>49</sup>See the Civil Practice Law and Rules of the State of New York, section 2308(b). See also pp. 165 ff. *supra*.

<sup>50</sup>[1906] 1 K.B. 32.

<sup>51</sup>*Regina v. Glanzer et al*, [1963] 2 O.R. 30.

The question remains as to whether the investigating tribunal should have power to commit, where it is presided over by a judge. This matter was considered in the report of the Royal Commission on Tribunals of Inquiry<sup>52</sup> in 1966, presided over by Lord Justice Salmon. That Commission was not considering powers of investigation of the type we are concerned with which are conferred indiscriminately on persons or bodies according to the relevant statutory provisions. It was considering inquiries under the Tribunals of Inquiry (Evidence) Act of 1921. Few tribunals have been set up under that act and "the tribunals will always be presided over by a holder of high judicial office".<sup>53</sup> Notwithstanding this, the Commission did not recommend any change in the procedure which would give the Commission, or the chairman of a commission appointed under that Act, power to commit for contempt.<sup>54</sup>

Where a judge presides over a commission, he does not do so as a judge but as a commissioner appointed under the appropriate statute. There should be no gradations of the powers of commissioners dependent on their normal occupations or professions. We think that the powers of commissioners should flow from the Public Inquiries Act alone. This we shall discuss in detail in Chapter 36.

## RECOMMENDATIONS

1. Provisions of all statutes conferring power on tribunals other than courts to commit for contempt should be repealed.
2. The Public Inquiries Act should provide that the powers of compulsion now exercised by tribunals other than courts may be exercised only by the Supreme Court on a summary application made on behalf of the tribunal or of anyone with a special interest in the matter under inquiry.

<sup>52</sup>Report of the Royal Commission on Tribunals of Inquiry, Cmd. 3121.

<sup>53</sup>*Ibid.*, para. 128.

<sup>54</sup>*Ibid.*, para. 131.



## CHAPTER 33

# Procedural Rights of Those Affected by the Exercise of Investigating Powers

THUS far we have been concerned with substantive matters relating to the exercise of statutory powers of investigation: the nature and scope of powers of investigation; the nature of persons exercising them; authorized investigative acts; and the powers of investigating bodies. The procedural rights and liabilities of those who may be affected by the exercise of investigating powers, or who may become involved in investigations as witnesses, remain to be discussed.

The first question which arises is: Should procedural rights of the same nature as those considered in Chapter 14 of this Report, with respect to such matters as notice of hearing, notice of the case to be met, adjournments, representation by counsel and the right to call witnesses and cross-examine witnesses, extend to all investigations?

The great weight of authority is that, apart from statute, persons affected by investigations falling within this class have no absolute procedural rights which must be recognized by persons conducting the inquiry.<sup>1</sup>

The effect of the provisions of the Public Inquiries Act<sup>2</sup> giving rights of appeal by way of stated case to control proce-

<sup>1</sup>*Guay v. Lafleur*, [1965] S.C.R. 12; *St. John v. Fraser*, [1935] S.C.R. 441; *Wolfe v. Robinson*, [1962] O.R. 132.

<sup>2</sup>R.S.O. 1960, c. 323, s. 5.

ture has been considered by the Ontario Court of Appeal in *Re Ontario Crime Commission, Ex parte Feeley and McDermott*.<sup>3</sup> The majority judgment held that the court had power to review the discretionary control of procedure vested in a Royal Commissioner appointed under the Act. Laidlaw, J. A., in dissenting held that it was "the legislative intention that the commission should be free to proceed with the inquiry and to regulate and control the proceedings in such manner as it might deem advisable and expedient in the particular circumstances".<sup>4</sup> In a later decision the Ontario Court of Appeal refused to interfere with the discretion of the commissioner in a similar case.<sup>5</sup> In an oral judgment in a still later decision, the Court of Appeal overruled the commissioner, a Supreme Court judge, with respect to procedural matters.<sup>6</sup> This we shall discuss later.

In dealing with coroners' inquiries,<sup>7</sup> we emphasize the real injury that may be done to individuals whose conduct is under investigation. What we say in this connection applies with equal force to other statutory investigations, particularly those held under the Public Inquiries Act. Wide publicity given to statements made, with no right of challenge or cross-examination, may do irreparable damage notwithstanding that ultimately these statements may be found to be without foundation.

On the other hand, there is much force in the argument that a statutory investigation, where there are no issues on which rights or liabilities can turn, cannot be treated as a trial. It would be most difficult to lay down for all inquiries rules defining procedural rights and determining to whom they should apply. There are, however, some cases in which the task would be relatively easy, e.g., a person whose financial affairs are being investigated under a taxation statute. It would be difficult to give standing to all persons on peripheral aspects of an inquiry. In ordinary trials, persons who are not

<sup>3</sup>[1962] O.R. 872.

<sup>4</sup>*Ibid.*, 885.

<sup>5</sup>*Re Royal Commission on Windfall Oil and Mines Limited*, April 6, 1965, unreported.

<sup>6</sup>*Re Public Inquiries Act and Shulman*, [1967] 2 O.R. 375.

<sup>7</sup>See Chapter 37 *infra*.

parties to the action do not have procedural rights to call evidence or cross-examine witnesses, even though their reputations may be affected by the evidence given or their interests indirectly affected by the result of the case.

Some attempts have been made in other jurisdictions to define in statutory language the type of person who is entitled to claim procedural rights at an inquiry. In Australia the Royal Commissions Act<sup>8</sup> gives standing to "any person . . . substantially and directly interested in any subject matter of the inquiry, or [whose] conduct in relation to any such matter has been challenged to his detriment". This standing is conferred only where the required facts are "shown to the satisfaction of the chairman, or of the sole commissioner, as the case may be".

In India<sup>9</sup> standing is conferred on persons whose conduct "the Commission considers it necessary to inquire into", or on persons whose "reputation, [in the opinion of the Commission] is likely to be prejudicially affected by the inquiry".

The Salmon Commission recommended six cardinal principles which should be observed to minimize the risk of personal hurt and injustice to any person involved in inquiries:

1. Before any person becomes involved in an inquiry, the Tribunal must be satisfied that there are circumstances which affect him and which the Tribunal proposes to investigate.
2. Before any person who is involved in an inquiry is called as a witness he should be informed of any allegations which are made against him and the substance of the evidence in support of them.
3. (a) He should be given an adequate opportunity of preparing his case and of being assisted by legal advisers.  
(b) His legal expenses should normally be met out of public funds.
4. He should have the opportunity of being examined by his own solicitor or counsel and of stating his case in public at the inquiry.
5. Any material witnesses he wishes called at the inquiry should, if reasonably practicable, be heard.

<sup>8</sup>1925 to 1934, s. 7(2).

<sup>9</sup>Central Commissions Inquiry (Procedure) Rules, 1960, Rules 4, 5.

6. He should have the opportunity of testing by cross-examination conducted by his own solicitor or counsel any evidence which may affect him.”<sup>10</sup>

It was not recommended that these rules be given the force of legal rights, but they were put forward as guidelines for the conduct of inquiries of the nature being dealt with by the Commission. They may form sound guidelines for the conduct of similar inquiries and certain inquiries held under the authority of the Public Inquiries Act of this Province. They cannot, however, be laid down as rules of law for the conduct of all statutory inquiries and investigations under the laws of Ontario.

We think the language used in the Australian statute—“any person . . . substantially and directly interested in any subject matter of the inquiry or whose conduct in relation to any such subject matter has been challenged to his detriment”—although more verbose, is to be preferred to “any person affected” or “any person involved”, in determining what persons should be protected by procedural rules or guidelines. For the sake of brevity we use the term “any person affected” as meaning those persons who would fall within the Australian definition.

If the judgment in the *Shulman* case referred to above and quoted from in the next chapter is to be interpreted as giving everyone who makes charges that give rise to a public inquiry a right to be examined by his own counsel before he is examined by counsel for the Commission, it lays down a rule that will not promote the usefulness of public inquiries. Such a rule would encourage unfounded charges against public officials and give an opportunity for wide publicity before the evidence is properly developed. We do not think the strict rules of the examination in chief and cross-examination applicable to criminal and civil cases should be made to apply to public inquiries. Much should be left to the discretion of the Commissioner. Generally, we think the best procedure to be followed is for Commission counsel to examine all witnesses called by the Commission to testify. Where counsel appears

<sup>10</sup>Report of the Royal Commission on Tribunals of Inquiry, Cmd. 3121, para. 32.

for a witness he should be permitted to examine the witness further to bring out any relevant evidence that has not been elicited by counsel for the Commission, with the right in counsel appearing for other interested parties to examine the witness. However, where allegations are made against any person he should be entitled to be examined by his own counsel first with the right in Commission counsel to further examine in chief or to cross-examine him. Other persons affected should have the right to cross-examine depending upon their interests and the relevancy of the evidence.

We do not think it would be wise to attempt to lay down precise rules governing all inquiries or to define rights of all persons involved in inquiries. Such a course would put an uncertain restraint on investigating bodies which might work to the detriment of individuals where unforeseen circumstances arise. Notwithstanding that a considerable discretion must rest with the person conducting the inquiry, it would be useful for the guidance of investigating bodies to set out what they may do, while at the same time making it clear that what is stated is not all-inclusive. This should be the task of the Statutory Powers Rules Committee, recommended in Chapter 14 of this Report. We make some recommendations as to some things that should be incorporated in the rules.

No provision is contained in the Public Inquiries Act of Ontario requiring that notice be given to a person against whom a charge of misconduct has been made, before a report may be made against him, as is contained in the Inquiries Act of Canada.<sup>11</sup> This we shall discuss in Chapter 36.

## RECOMMENDATIONS

1. Unless it would frustrate the purposes of the statute, any person substantially and directly interested in the subject matter of an inquiry should have:
  - (a) an opportunity to be heard on any relevant matter; and
  - (b) a right to cross-examine witnesses in respect to relevant matters.

<sup>11</sup>R.S.C. 1952, c. 154, s. 13.

2. Any person against whom allegations of misconduct have been made should have the right to be examined by his own counsel before he is examined by the Commission counsel.
3. Unless restrained by statute, an investigating officer should have a discretion:
  - (a) to hold an inquiry in private if in the circumstances it would be unjust to hold it in public; and
  - (b) to grant an adjournment to any person affected, enabling him to prepare a reply.

## CHAPTER 34

# Appeal From or Review of Decisions of Investigating Officers

THE Public Inquiries Act provides as follows:

“5. (1) Where the validity of the commission or the jurisdiction of a commissioner or the validity of any decision, order, direction or other act of a commissioner is called into question by any person affected, the commissioner, upon the request of such person, shall state a case in writing to the Court of Appeal setting forth the material facts and the decision of the court thereon is final and binding.

(2) If the commissioner refuses to state a case, any person affected may apply to the Court of Appeal for an order directing the commissioner to state a case.

(3) Pending the decision of the stated case, no further proceedings shall be taken by the commissioner.

(4) No action shall be brought or other proceeding taken with respect to anything done or sought to be done by the commissioner or to restrain or interfere with or otherwise direct or affect the conduct of any such commissioner.”

This right of appeal is a unique provision. No right of appeal is given in other inquiries legislation in Canada or in England. The matter was considered by Lord Justice Salmon in 1966<sup>1</sup> and rejected as “undesirable and impracticable”.

<sup>1</sup>Report of the Royal Commission on Tribunals of Inquiry, Cmd. 3121, para. 134.

Few applications to the Court of Appeal have been made under this section and, as we have seen,<sup>2</sup> the decisions of the court have not been uniform and have not specifically clarified the duties and powers of commissioners, nor the jurisdiction of the Court of Appeal.

In *Re Public Inquiries Act and Shulman*,<sup>3</sup> the court held that certain orders and directions given by the Commissioner should be varied with respect to the right to call witnesses and to cross-examine witnesses. There was little discussion of the ground of invalidity of the Commissioner's orders, or of legal principles which would guide commissioners in the future. The question still remains: May the decisions of a Royal Commission be attacked on the ground that the principles of natural justice have been violated?

The court, after referring to *Re Children's Aid Society of the County of York*<sup>4</sup> and *Re Ontario Crime Commission, Ex parte Feeley and McDermott*,<sup>5</sup> said:

"Accordingly, and within the principles enunciated in the two authorities, to which reference has been made, Dr. Shulman should be accorded the privilege, if he so requests, of having his evidence-in-chief upon any allegation which he has made brought out through his own counsel and he should be subject to cross-examination not only by counsel for the Commission but by any person affected by his evidence. Cross-examination, wherever it is permitted, is not to be a limited cross-examination but is to be cross-examination upon all matters relevant to eliciting the truth or accuracy of the allegations or statements made. Similarly, any person affected by allegations made before the learned Commissioner should be accorded the privilege of examination as a witness by his own counsel and should be subject to a right of cross-examination, not only by counsel for the Commission but by any person affected by the evidence of that witness.

All these privileges of examination-in-chief and cross-examination, and particularly with respect to cross-examination, are, of course, subject to the discretion of the learned Commissioner as to relevancy, the avoidance of repetition and like matters. This Court is not under any apprehension that

<sup>2</sup>See pp. 447-48 *supra*.

<sup>3</sup>[1967] 2 O.R. 375.

<sup>4</sup>[1934] O.W.N. 418.

<sup>5</sup>[1962] O.R. 872.



competent counsel appearing before the Commission will abuse the privileges which are accorded to them. They, as well as the learned Commissioner himself and the learned counsel for the Commission are, of course, engaged in furthering the very object, if not the sole object of the inquiry itself which is to elicit in the fullest and fairest manner all relevant information on the subject-matter thereof. It goes without saying that counsel for the Commission has a heavy responsibility in these matters and will be the proper person to call witnesses and to examine them in chief where those witnesses are not represented before the Commission by their own counsel.

One part of the ruling by the learned Commissioner should be mentioned. The last paragraph thereof refers to a right which may be termed a right of summing up or making representations to the Commissioner after all witnesses have been examined. That, of course, is a right which the learned Commissioner manifestly intends should be accorded, and we agree it should be, and although we have been compelled to answer the first question "no" it should be made plain that that answer does not in any way impugn the ruling lastly mentioned.

Because of the very nature of an inquiry of this character and of the duties of the learned Commissioner, much must be left to his discretion and to the common sense of competent counsel appearing before him. If proper co-operation is observed in seeing that all legitimate means are employed to bring out the very truth as to allegations made and being inquired into, there would appear at present, at least, to be but slight ground, if any, remaining for addressing further requests for stated cases to this Court with their consequent delays in the completion of the subject-matter of the inquiry. It is, of course, for the Commissioner in his wisdom and the Commissioner alone to decide whether he will permit Dr. Shulman through his counsel to pursue without interruption the whole series of his allegations before any cross-examination takes place or whether, on the contrary, each allegation should be exhausted by examination and cross-examination before another allegation is investigated. Dr. Shulman's counsel should be permitted to examine in chief any witnesses whom he may call and any such witnesses, as has been more than amply demonstrated in what has been said, are subject to the fullest rights of cross-examination by other counsel participating in the inquiry."<sup>6</sup>

<sup>6</sup>[1967] 2 O.R. 375, 378-79.

In the *Feeley and McDermott* case the court held that "validity" had a broad meaning. Schroeder, J. A., said:

"'Validity' as used in the statute is intended to denote the quality of being sound and well grounded, embracing the concept of flawlessness in reasoning, but more particularly solidity in the grounds upon which it is based. The legislators have been careful not to restrict the power of the Court to a determination of questions of law or jurisdiction . . . over the exercise of powers of an administrative tribunal. This strongly supports the view that the word is used in the broader sense indicated rather than in a narrower sense implying the quality of strict legal efficacy. . . ."<sup>7</sup>

These decisions leave a wide grey area with respect to powers exercised by a commissioner under the Public Inquiries Act. The result seems to be that anyone affected may apply for a stated case on any ruling that is given by a commissioner or any act done by the commissioner. This is a much wider appellate jurisdiction than is conferred by other statutes conferring rights of appeal. If it was the intention of the Legislature to give the Court of Appeal power to interfere in the most minute details with the conduct of a commissioner appointed under the Public Inquiries Act, the legislation should be clarified.

The cases that have gone to the Court of Appeal have emphasized that commissions of inquiry into misconduct of public officials should not be subject to the procedural restraints of a trial. Nevertheless, individuals have civil rights to be safeguarded against wanton and unfounded allegations of misconduct made before commissions of inquiry. The procedure should be such that counsel for the commission should have an opportunity first to investigate whether there is any foundation for allegations; and the commissioner should have some discretion in the conduct of the inquiry, not only to insure that the inquiry is thorough and complete but to protect individuals who may be affected. Inquiries should not be subject to harassment and long delays by repeated applications for stated cases.

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<sup>7</sup>[1962] O.R. 872, 894.

If procedural rules are formulated for the conduct of inquiries, as we have recommended, commissioners will have some defined standards to guide them. It is important that there should be supervisory powers which have a salutary and disciplinary effect on those exercising the powers of investigation conferred under many statutes of Ontario, where all the powers of the Public Inquiries Act are made applicable.

However, subsection 3 of section 5 is, in any case, expressed in language which is too broad, and it unnecessarily obstructs the conduct of inquiries. It would be quite sufficient if the subsection provided that, pending the decision of the stated case, no further proceedings should be taken by the commissioner with respect to matters involved in the stated case. The investigation could proceed to deal with matters that have not been put in issue in the appeal.

The formula often used in Ontario statutes to confer powers of investigation on investigating officers, "all the powers which may be conferred upon a commissioner under the Public Inquiries Act", or words to that effect, is not in itself sufficient to make applicable all the provisions of the Public Inquiries Act, and particularly the right of appeal by way of stated case under section 5. All statutes conferring power of investigation should contain not only the powers that may be conferred under the Public Inquiries Act, but also the safeguards contained therein against the abuse of the powers.

## RECOMMENDATIONS

1. The right of appeal by way of stated case should remain in the Public Inquiries Act.
2. The powers of the appellate court should be clearly specified.
3. Section 5 (3) should be amended to permit the commissioner to proceed with the inquiry with respect to matters that are not in issue in the stated case.

## CHAPTER 35

# Use of Information and Evidence Obtained on Statutory Inquiry

IT is essential that the use of information and evidence obtained through the exercise of statutory powers of inquiry should be confined to the purpose for which it was obtained and that purpose only.

No problem arises where a commissioner is appointed under the Public Inquiries Act. Such inquiries are usually conducted in public so that the public may know, but the same considerations do not apply to other statutory inquiries. "Furnishing information to an administrative agency is not the equivalent of disclosing that information to the public. . . ."<sup>1</sup>

Broadly speaking, statutory inquiries, other than inquests or public inquiries, are held in aid of the administration of a statute. Statutes authorizing such inquiries should contain adequate safeguards to insure that the information obtained by the exercise of the investigative power is not used for any other purpose. Disclosure of information to unauthorized parties could well cause great hardship, e.g., disclosure of business or trade secrets. Even disclosure to other government departments or agencies should be prohibited. For example, information obtained by the Workmen's Compensation Board through the exercise of its powers of investigation ought not to be disclosed to the Treasury Department. The government

<sup>1</sup>Davis, *Administrative Law Treatise*, s. 3.13.

should not be permitted to proceed through one legal channel to obtain information which it might be unable to obtain through the proper legal process provided for another purpose. The subject should not be required to be on his guard when producing information for one purpose, against other possible uses or misuses to which it might be put by different departments of government.

It is useful to consider some examples of safeguards provided in Ontario legislation. The Collection Agencies Act provides that:

"23c. No person, without the consent of the Attorney General, [now the Minister of Financial and Commercial Affairs] shall disclose, except to his counsel, any information or evidence obtained in the course of an investigation made under section 23a or the name of any witness examined or sought to be examined at such investigation."<sup>2</sup>

Somewhat similar provisions are contained in the Mortgage Brokers Registration Act,<sup>3</sup> the Real Estate and Business Brokers Act,<sup>4</sup> the Securities Act, 1966,<sup>5</sup> and the Used Car Dealers Act.<sup>6</sup> The prohibition as expressed in these statutes is very wide; so wide that restraint is put on the person who is the subject of the investigation and who is making legitimate use of what has been said in his own defence. If the primary purpose of the provision is to prevent official misuse of the information, the rights of the person involved are not protected by the requirements of having to obtain the consent of the Minister or of the Securities Commission, as the case may be. There are many interests to be considered in framing a non-disclosure provision, depending on the character of the relevant statute. An investigation under the Securities Act, 1966, may be very different from an investigation under the Collection Agencies Act. The non-disclosure provision is a proper one, but right of relief against hardship should be provided through an application to the court in proper cases. Under the formula adopted in the statutes we have been discussing, a person charged with

<sup>2</sup>R.S.O. 1960, c. 58, s. 23c, as enacted by Ont. 1964, c. 7, s. 9.

<sup>3</sup>R.S.O. 1960, c. 244, s. 8b, as enacted by Ont. 1964, c. 63, s. 5.

<sup>4</sup>R.S.O. 1960, c. 344, s. 26, as re-enacted by Ont. 1964, c. 99, s. 10.

<sup>5</sup>Ont. 1966, c. 142, s. 24.

<sup>6</sup>Ont. 1964, c. 121, s. 13.

a breach of the Securities Act, 1966, would be prevented from disclosing the evidence given by others during an investigation, unless the Securities Commission consented.

A typical example of the formula employed in taxation statutes is that contained in the Corporations Tax Act:

"90. (1) No person employed in the service of Her Majesty shall communicate or allow to be communicated to any person not legally entitled thereto any information obtained under this Act or allow any such person to inspect or have access to any written statement furnished under this Act.

(2) Every person who contravenes any provision of this section is guilty of an offence and on summary conviction is liable to a fine of not more than \$200."<sup>7</sup>

An exception is made enabling the Treasurer of Ontario to exchange information obtained under the Act on a reciprocal basis with the Government of Canada, or that of any province. There are similar provisions in the Gasoline Tax Act,<sup>8</sup> the Hospital Tax Act,<sup>9</sup> the Motor Vehicle Fuel Tax Act,<sup>10</sup> the Race Tracks Tax Act,<sup>11</sup> and the Retail Sales Tax Act.<sup>12</sup> The provision in the Income Tax Act<sup>13</sup> is slightly different. It extends to every person "while employed in the administration of this Act". The prohibition is on communication "while employed". The prohibition should extend to the communication, at any time, of information obtained while employed in the administration of the Act. Persons not employed in the service of Her Majesty, who may obtain information under statutory authority, should be prohibited from communicating the information in any manner not necessary for the administration of the relevant statute.

It is difficult to devise a formula limiting the right to communicate information suitable to be applied to all statutes that confer powers of investigation. The words frequently used are: to "any person not legally entitled thereto". These, however, are ambiguous. Who is legally entitled thereto? In

<sup>7</sup>R.S.O. 1960, c. 73, s. 90.

<sup>8</sup>R.S.O. 1960, c. 162, s. 6, as amended by Ont. 1964, c. 36, s. 2.

<sup>9</sup>R.S.O. 1960, c. 178, s. 34.

<sup>10</sup>R.S.O. 1960, c. 248, s. 19, as amended by Ont. 1964, c. 67, s. 2.

<sup>11</sup>R.S.O. 1960, c. 341, s. 10.

<sup>12</sup>Ont. 1960-61, c. 91, s. 12, as amended by Ont. 1962-63, c. 61, s. 5.

<sup>13</sup>Ont. 1961-62, c. 60, s. 42, as re-enacted by Ont. 1964, c. 104, s. 7.

*Regina v. Snider*,<sup>14</sup> Cartright, J. held that the judicial officer presiding at the trial of a person charged with an indictable offence was a person legally entitled to the information referred to. It is not clear how far the right to disclosure extends to civil cases and other administrative proceedings. It seems manifestly unfair that an individual who gives information at a departmental investigation should have to be on his guard throughout lest he disclose matters that may be quite irrelevant to the investigation underway, but at the same time be useful to another department of government, or to an opposite party in civil litigation. We think that, apart from disclosure in the courts, information obtained through departmental inquiries authorized by statute should not be disclosed, except in so far as it may be necessary for the proper administration of the Act conferring the authority to investigate.

The formula used in the Statistics Act<sup>15</sup> is not a satisfactory one. It prohibits disclosure without consent of the minister. We do not think that the minister should have power to permit the disclosure of the type of information obtained under the Statistics Act. No such power is given to the minister under the Federal Statistics Act.<sup>16</sup> The conflict between the two Acts creates an anomaly. The Ontario Act gives the Lieutenant Governor in Council power to authorize the minister to enter into an agreement with the Government of Canada for an exchange or joint collection of information. Under the Ontario Act, information so obtained may be disclosed with the written consent of the minister, while it may not be disclosed under the Dominion Act, even with the consent of the minister.

The nature and scope of restrictions on the communication of information obtained through the exercise of statutory powers of investigation is important, but of greater importance is the fact that in many statutes conferring the widest powers to investigate and obtain information, there are no restrictions whatever on the communication of the information obtained. For example, under the Farm Products Marketing

<sup>14</sup>[1954] S.C.R. 479.

<sup>15</sup>Ont. 1962-63, c. 133, s. 4(2).

<sup>16</sup>R.S.C. 1952, c. 257, ss. 6, 15.

Act,<sup>17</sup> inspectors and persons appointed for that purpose have the widest powers to examine books and records and inspect lands and premises. These wide powers are in practice exercised by laymen who have no statutory guidance as to what use may be made of the information obtained.

### RECOMMENDATION

There should be a statutory prohibition on the communication of information obtained in a statutory investigation beyond the purposes of the relevant statute and the administration of justice.

<sup>17</sup>R.S.O. 1960, c. 137, s. 4(1), as amended by Ont. 1962-63, c. 45, s. 3(1).



## CHAPTER 36

# The Public Inquiries Act

IN AT least sixty-one statutory provisions<sup>1</sup> the Public Inquiries Act has been treated in part as a master Act for the purpose of conferring powers on investigating bodies. In twenty-seven statutory provisions listed in Appendix B, formulae are used in conferring investigatory powers by reference to court powers. We have said we think it is wrong to give tribunals, which are largely composed of laymen, the powers of a court.

The confusion that exists in the many statutes conferring powers of investigation should be resolved by redrafting the Public Inquiries Act and making it of wide application to statutory investigations.

This may be done by adopting and expanding the scheme of the Inquiries Act of Canada<sup>2</sup> which is divided into four parts. Part I deals with inquiries authorized by the Governor in Council, Part II, with departmental inquiries, and Part III with general powers applicable to inquiries coming within Parts I and II. We are not concerned with Part IV as it is in relation to international commissions.

There may be some advantages in distinguishing between public inquiries in the nature of Royal Commissions, and inquiries for the purpose of carrying out the scheme of a statute. In any case the provincial statute should contain a

<sup>1</sup>See Appendix A to this Section, pp. 466 ff. *infra*.

<sup>2</sup>R.S.C. 1952, c. 154

provision similar to section 13 of the federal Act, which reads as follows:

“13. No report shall be made against any person until reasonable notice has been given to him of the charge of misconduct alleged against him and he has been allowed full opportunity to be heard in person or by counsel.”

The language of this section is not in satisfactory form. The words “of the charge of misconduct alleged against him” are not clear in their meaning. We can find no place where they have been judicially considered. The Honourable Mr. Justice Davis of the Supreme Court of Canada, who conducted a Royal Commission “On the Bren Machine Gun Contract” in 1939, dealt at some length with section 13 of the Federal Act.<sup>3</sup> The learned commissioner concluded:

“That a report upon the Inquiry is contemplated by the statute is not open to doubt. But that a finding of misconduct cannot be made against any person, until reasonable notice shall have been given to him of the charge of misconduct alleged against him and he shall have been allowed full opportunity to be heard in person or by counsel, is expressly enacted by sec. 13 of the statute. No charges of misconduct, however, were formulated against any particular person.

Having fully weighed the objections advanced on this ground, as well as the weighty consideration brought to my attention by counsel that the rights of the individuals interested in the contract might become the subject of legal controversy elsewhere, I have come to the conclusion that it is inexpedient to comment upon the evidence in respect to its bearing on the conduct of the individuals concerned.”<sup>4</sup>

In some cases it has been argued that the words “a charge of misconduct” means criminal charge. We do not think that a similar section, if incorporated in the Ontario Act, should be so limited. Wording to this effect would be appropriate: “No finding of misconduct on the part of any person shall be made against him until he has had reasonable notice of the substance of the misconduct alleged against him, and he has been allowed full opportunity to be heard in person or by counsel.”

<sup>3</sup>See Report of the Royal Commission on the Bren Machine Gun Contract (1939), 30 ff.

<sup>4</sup>*Ibid.*, 35.

## RECOMMENDATIONS

1. The Public Inquiries Act should be re-drafted, having regard to the recommendations made in this section with respect to safeguards that should apply to all investigations.
2. The only formula that should be used in conferring powers of investigation similar to those exercised by a commissioner under the Public Inquiries Act should be—"the provisions of the Public Inquiries Act should apply (Parts I or II, if divided into two parts) to investigations under this Act"—or words to that effect.
3. This formula should be substituted for all other formulae defining powers of investigation, e.g., "powers that may be conferred upon a commissioner appointed under the Public Inquiries Act" (Department of Education Act);<sup>5</sup> "in the same manner as a court of record in civil cases" (Labour Relations Act);<sup>6</sup> "as is vested in any court in civil cases" (Mining Act);<sup>7</sup> "in like manner as the Supreme Court may in civil cases" (Registry Act);<sup>8</sup> "as is vested in the Supreme Court for the trial of actions" (Securities Act);<sup>9</sup> "like powers as the Supreme Court" (Workmen's Compensation Act).<sup>10</sup>
4. A section similar to section 13 of the Inquiries Act of Canada, but in more precise language, should be included in the Act.
5. Where the Public Inquiries Act is to apply to the exercise of a statutory power it should be so stated in the relevant statute.

<sup>5</sup>R.S.O. 1960, c. 94, s. 11(1)(f). For a list of statutes using a similar formula, see Appendix A, pp. 466 ff. *infra*.

<sup>6</sup>R.S.O. 1960, c. 202, s. 28(a).

<sup>7</sup>R.S.O. 1960, c. 241, s. 629.

<sup>8</sup>R.S.O. 1960, c. 348, s. 122.

<sup>9</sup>Ont. 1966, c. 142, s. 21(4).

<sup>10</sup>R.S.O. 1960, c. 437, s. 65. For a list of statutes using a similar formula, see Appendix B, pp. 477 ff. *infra*.

## APPENDIX A

**Statutory Provisions Conferring All the Powers that May Be  
Conferred on a Commissioner Under The  
Public Inquiries Act**

<i>Statute</i>	<i>Recipient of Power</i>	<i>General nature or purpose of Investigation</i>
The Architects Act, s.19	The Registration Board of the Ontario Association of Architects	The investigation of a complaint against a member of the Association
The Athletics Control Act, s.7	The Athletics Commissioner or any other person	The investigation into charges respecting violations of the Act and the investigation into any matter in the interest of amateur sport in Ontario
The Boundaries Act, s.4	The Director of Titles	In connection with the Director's functions under the Act
The Cemeteries Act, s.19	Any person appointed by the Lieutenant Governor in Council	The investigation of the conditions of any cemetery and the conduct of its affairs
The Certification of Titles Act, s.3	The Director of Titles	In connection with the Director's functions under the Act
The Charitable Gifts Act, s.7(2)	Any person appointed by the Treasurer of Ontario	Such investigation as the appointed person deems expedient respecting any interest in any business that has been given to or vested in any person for any religious, charitable, educational, or public purpose, or respecting any person to or in whom any such interest has been given or vested

## Appendix A—(Continued)

<i>Statute</i>	<i>Recipient of Power</i>	<i>General nature or purpose of Investigation</i>
The Charities Accounting Act, s.6(4)	The Public Trustee on the direction of a judge of a County or District Court	An investigation into the manner in which a person or organization has solicited or procured funds by way of contribution or gift from the public for any purpose, or as to the manner in which any such funds have been dealt with or disposed of
The Corporations Tax Act, s.86(6)(10)	Any person authorized by the Treasurer of Ontario	Such inquiry as is deemed necessary with reference to anything relating to the administration or enforcement of the Act
The Credit Unions Act, s.50(4)	The Supervisor of Credit Unions or any person authorized by the Director of the Registration Examination Branch of the Department of the Attorney General	The inspection and examination into the conditions and affairs of any credit union
The Department of Education Act, s.11(1)(f)	One or more persons appointed as a Commission by the Minister of Education	To inquire into and report upon any school matter
The Department of Labour Act, s.9(2)	The Industry and Labour Board or any member or members of the Board	For procuring information concerning rates of wages, hours of work, regularity of employment and other matters that the Deputy Minister of Labour may deem necessary for the proper carrying out of the Act or of any of the Acts or Regulations administered by the Department of Labour or for carrying out any of the provisions of section 6 (which is concerned with the collection of information respecting several different matters relating to labour)

**Appendix A—(Continued)**

<i>Statute</i>	<i>Recipient of Power</i>	<i>General nature or purpose of Investigation</i>
Department of Municipal Affairs Act, s.6	The Deputy Minister of Municipal Affairs and such of the officers of the Department as are authorized by the Lieutenant Governor in Council	For any of the purposes of the Department or any Act that it administers
Department of Municipal Affairs Act, s.19	Any officer of the Department of Municipal Affairs or other person appointed by the Minister	A provincial municipal audit of the financial affairs of a municipality
Embalmers and Funeral Directors Act, s.16(4)	The Board of Administration appointed under the Act	In respect of the hearing under the section into whether or not a certificate of qualification should be revoked, or a permit or licence suspended or cancelled
The Farm Loans Adjustment Act, s.4(2)	A Judge of the County or District Court	A hearing to determine whether a person who is liable for the payment of a loan is entitled to certain specified relief
The Farm Products Marketing Act, s.4(2)	The Farm Products Marketing Board	An investigation under the section, which includes several types, such as investigations into any matter relating to the producing, marketing or processing of a regulated product and hearings to determine whether or not to prohibit a person engaged in marketing a regulated product from terminating or varying, without just cause, the buying and selling, as the case may be, of the regulated product
The Fire Marshals Act, ss.4,5	The Fire Marshal and his deputy <i>pro tempore</i>	Any inquiry or investigation that it is the duty of the Fire Marshal or which he has power to hold under the Act

## Appendix A—(Continued)

<i>Statute</i>	<i>Recipient of Power</i>	<i>General nature or purpose of Investigation</i>
The Gasoline Tax Act, s.3 (By a Regulation made by the Lieutenant Governor in Council thereunder)	The person holding such inquiry	An inquiry into the operation of the Act and into any charge or complaint that any person has contravened any provision of the Act or the Regulations, or has made any false statement in any return or statement required to be made under the Act or Regulations, or into any other matter arising in the administration of the Act
The Hospitals and Charitable Institutions Inquiries Act, s.1	One or more persons appointed by the Lieutenant Governor in Council	An inquiry concerning any matter connected with or affecting a hospital, sanatorium, charitable institution or other organization that is granted aid out of moneys appropriated by the Legislature
The Hospitals Tax Act, s.13(6)	Any officer authorized by the Treasurer of Ontario	Such inquiry as is deemed necessary to ascertain the amount of any tax collectible by an owner under the Act
The Hours of Work and Vacations with Pay Act, s.7(2)	The Chairman of the Industry and Labour Board	An inquiry into the facts respecting any persons engaged or working in or about an industrial undertaking as members or alleged members of a partnership or association, or in the execution of any agreement or scheme or profit-sharing or co-operative or joint contract or undertaking, including the investigation of the contractual and other relations of the persons so engaged or working, as between themselves or as between them and their master or employer

**Appendix A—(Continued)**

<i>Statute</i>	<i>Recipient of Power</i>	<i>General nature or purpose of Investigation</i>
The Income Tax Act, 1961-62, s.34(4)(8)	Any person authorized by the Treasurer of Ontario	For any purpose related to the administration or enforcement of the Act
The Industrial Standards Act, s.3	An Industrial Standards Officer	Inquiries and investigations respecting all matters coming within the scope of the Act and the Regulations
The Industrial Safety Act, 1964, s.8(4)	The Chief Inspector	An investigation, inquiry or examination made by him under the Act
The Jurors Act, s.35(2)	A Judge of the County or District Court	An examination and inquiry into supposed incorrect entries, erasures, mutilations or alterations in jurors' books, their nature and extent, and by whom, when and for what purpose they were made
The Loan and Trust Corporations Act, s.115(4)	Any competent person appointed by the Minister responsible for the administration of the Act	A special examination and audit of a corporation's books, accounts and securities, and a general inquiry into the conduct of its business
The Logging Tax Act, s.14(6)	Any person authorized by the Treasurer of Ontario	Such inquiry as is deemed necessary with reference to anything relating to the administration or enforcement of the Act
The Magistrates Act, s.3(3)	A Judge of the Supreme Court	An inquiry into the circumstances of the misbehaviour or inability to perform his duties properly of a Magistrate



## Appendix A—(Continued)

<i>Statute</i>	<i>Recipient of Power</i>	<i>General nature or purpose of Investigation</i>
The Milk Act, 1965, s.4	The Milk Commission of Ontario	Any inquiry, arbitration or investigation under subsection 2 of section 4 of the Act
The Mining Act, s.128	The Mining Commissioner	In respect of matters that may be dealt with by the Mining Commissioner
The Minimum Wage Act, s.7a(2)	The Chairman of the Industry and Labour Board	An inquiry into the facts respecting any persons engaged or working in or about an undertaking as members or alleged members of a partnership or association, or in the execution of any agreement or scheme of profit-sharing or co-operative or joint contract or undertaking, including the investigation of the contractual and other relationships of the persons so engaged or working, as between themselves or as between them and their master or employer
The Motor Vehicle Fuel Tax Act, 1965, s.5(2)	Any person authorized by the Treasurer of Ontario	Such inquiry as is deemed necessary for any purpose related to the administration or enforcement of the Act
The Municipal Act, s.230(2)	The auditor of a municipality	An inspection of all books, records, documents, accounts and vouchers of a municipality or any local board thereof including the obtaining of information and explanations as are necessary to enable the auditor to carry out the duties prescribed by the Department of Municipal Affairs

**Appendix A—(Continued)**

<i>Statute</i>	<i>Recipient of Power</i>	<i>General nature or purpose of Investigation</i>
The Municipal Act, s.241(1)	A Judge of the County or District Court	An investigation into any matter relating to a supposed malfeasance, breach of trust, or other misconduct on the part of a member of a municipal council or of an officer or a servant of the corporation, or of any person having a contract with it, etc.
The Municipal Act, s.320(1)	(No particular officer or official mentioned; presumably any person)	An inquiry into any of the affairs of any municipality, or local board thereof
The Municipality of Metropolitan Toronto Act, s.261(1)	A Judge of the County Court of the County of York, or a Judge of the County Court of a County adjoining the County of York	An investigation into any matter relating to a supposed malfeasance, breach of trust or other misconduct on the part of a member of the Metropolitan Council, or an officer or an employee of the Metropolitan Council, or of any person having a contract with it, etc.
The Municipality of Metropolitan Toronto Act, s.262	(No particular officer or official mentioned; presumably any person)	An inquiry into the affairs of the Metropolitan Corporation or a local board thereof, and any matter connected therewith
The Ontario Food Council Act, 1962-63, s.6	The Chairman or Vice-Chairman of the Ontario Producers, Processors, Distributors and Consumers Food Council	Such investigations as the Lieutenant Governor in Council approves into matters relating to the producing, distributing, processing and handling of agricultural products or agricultural food products

## Appendix A—(Continued)

<i>Statute</i>	<i>Recipient of Power</i>	<i>General nature or purpose of Investigation</i>
The Ontario Water Resources Commission Act, s.47 (by Regulation made by the Commission subject to the approval of the Lieutenant Governor in Council)	A Grievance Board	In connection with the hearing of grievances
The Operating Engineers Act, 1965, s.24	The Chairman of the Board of Examiners	A hearing to determine whether or not the certificate of qualification of an operating engineer or operator should be cancelled or suspended
The Optometry Act, 1961-62, s.11	The President or Vice-President of the Board of Directors of the College of Optometrists of Ontario	A public hearing concerned with the possible suspension or revocation of the registration of any optometrist
The Pharmacy Act, s.51(6)	The disciplinary body of the College of Physicians and Surgeons of Ontario, the Royal College of Dental Surgeons of Ontario, the Ontario Veterinary Association or the Ontario College of Pharmacy	An inquiry into the matter of a legally qualified medical practitioner, dentist, veterinary surgeon or pharmaceutical chemist selling or prescribing an excessive, unreasonable or improper amount of any drug referred to in Schedule D of the Act or failing to make a complete report under subsection 1 of section 51 to the Minister or to the Ontario College of Pharmacy
The Police Act, s.40(3)	The Ontario Police Commission, the Commissioner of the Ontario Provincial Police Force, or a Deputy Commissioner	An inquiry into the conduct of any member of the Ontario Provincial Police Force or of any employee connected therewith

**Appendix A—(Continued)**

<i>Statute</i>	<i>Recipient of Power</i>	<i>General nature or purpose of Investigation</i>
The Police Act, s.48(1)(2)	The Ontario Police Commission or any member thereof designated by the Chairman	An investigation into the conduct of or the performance of duties of any Chief of Police, police officer etc., the administration of any police force, the system of policing any municipality and the police needs of any municipality
The Power Commission Act, s.96(3)	The Hydro Electric Power Commission of Ontario or the member thereof hearing the complaint	A hearing to determine the matter of a complaint in writing that a municipal corporation, company or person receiving power from the Commission is charging a rate that is excessive or unfair, or that any municipal corporation is making use of the powers conferred upon it by the Act for the purpose of granting a bonus by supplying power below cost to manufacturers or others
The Professional Engineers Act, s.28(3)*	The Council of the Association of Professional Engineers of the Province of Ontario	A hearing to determine whether or not the membership or licence of any person should be suspended or cancelled
The Public Health Act, s.5(1)	An officer of the Department of Health directed by the Minister	An investigation into the causes of any communicable disease or mortality in any part of Ontario
The Public Service Act, 1961-62, s.18(2)	The Civil Service Commission	Any investigation

\*Has the same power as commissioners under the Public Inquiries Act to compel witnesses to appear and give evidence under oath in the same manner and under penalties prescribed by such Act.

## Appendix A—(Continued)

<i>Statute</i>	<i>Recipient of Power</i>	<i>General nature or purpose of Investigation</i>
The Public Service Act, 1961-62, s.20(1) (p). (By regulation made by the Civil Service Commission subject to the approval of the Lieutenant Governor in Council)	Departmental or Branch Councils, Grievance Boards, Medical Boards, and Committees of any kind	To implement the jurisdictions, powers and duties prescribed for these bodies
The Public Trustee Act, s.6	The Public Trustee	An inquiry as to the property that has escheated or become forfeited for any cause to the Crown, or in which the Crown in right of Ontario may be interested
The Race Tracks Tax Act, s.6	Any officer of the Treasury Department appointed by the Comptroller of Revenue	Such inquiry as is necessary to obtain any information that the Comptroller deems necessary for the purposes of the Act
The Radiological Technicians Act 1962-63, s.10(3)	The Chairman or Vice-Chairman of the Board of Radiological Technicians	A public hearing to determine whether or not the registration of any registered radiological technician should be suspended or revoked
The Retail Sales Tax Act, 1960-61, s.24(11)	Any person authorized by the Comptroller of Revenue	Such inquiry as is deemed necessary with reference to anything relating to the administration or enforcement of the Act

**Appendix A—(Continued)**

<i>Statute</i>	<i>Recipient of Power</i>	<i>General nature or purpose of Investigation</i>
The Schools Administration Act, s.29(1)	A Board of Reference (which comprises a County or District Court Judge as Chairman and a representative named by each of the school board and teacher to a dispute)	An inquiry into the matter in dispute between a school board and a teacher
The Security Transfer Tax Act, s.11(b)	Any officer of the Treasury Department appointed by the Treasurer of Ontario	Such inquiry as may be necessary to obtain information that the Treasurer of Ontario may deem necessary for the purpose of the Act
The Telephone Act, s.6(2)	The Ontario Telephone Service Commission	A hearing to determine all applications made, proceedings instituted and matters brought before the Commission under the Act
The Tobacco Tax Act, 1965, s.9	Any person authorized by the Treasurer of Ontario	An inquiry as is deemed necessary for any purpose related to the administration or enforcement of the Act or the Regulations
The Veterinarians Act, s.14(3)	The Council of the Ontario Veterinary Association	A hearing to determine whether or not the Council should suspend or cancel the registration of any member of the Association
The Water Powers Regulations Act, s.11(2)	The Referee	Any inquiry under the Act directed by the Lieutenant Governor in Council
The Water Powers Regulation Act, s.13(1)	Three judges of the Supreme Court	An inquiry under the Public Inquiries Act as to several matters respecting the rights and liabilities of owners of water powers

## Appendix A—(Continued)

<i>Statute</i>	<i>Recipient of Power</i>	<i>General nature or purpose of Investigation</i>
The Workmen's Compensation Act, s.94(1)	The Workmen's Compensation Board of Ontario or any member of it, or any officer or person authorized by it	An examination of the books and accounts of an employer and any other inquiry as the Board may deem necessary for the purpose of ascertaining whether any statement furnished to the Board under section 92 is an accurate statement, or of ascertaining the amount of the payroll of any employer or ascertaining whether an industry or person is under the operation of Part I of the Act and whether in Schedule 1 or Schedule 2 thereof

## APPENDIX B

## Conferment of the Powers of a Court in Civil Cases

<i>Statute</i>	<i>Recipient of Power</i>	<i>General nature or purpose of Investigation</i>
The Administration of Justice Expenses Act, s.24(3)	The Chairman of a Board of Audit	The auditing of accounts and demands preferred against a county in respect of the administration of criminal justice
The Coroners Act, s.25(2)	A Coroner	An inquest under the Act
The Deposits Regulation Act, 1962-63, s.5(5)	Any duly authorized representative of the Ontario Securities Commission	The inspection of books, accounts, documents and other records kept by any person or corporation receiving or accepting deposits

**Appendix B—(Continued)**

<i>Statute</i>	<i>Recipient of Power</i>	<i>General nature or purpose of Investigation</i>
The Fire Marshals Act, s.13	The Fire Marshal, The Deputy Fire Marshal, District Deputy Fire Marshals and Inspectors	Investigations under the Act respecting fires or possible causes of fires
The Insurance Act, s.4	The Superintendent of Insurance (which by paragraph 60 of section 1 includes the Deputy Superintendent of Insurance)	For the purposes of his duties and in the exercise of his powers under the Act or any other Act relating to insurance
The Labour Relations Act, s.28(a)	A conciliation board	A conciliation under the Act
The Labour Relations Act, s.34(7)(a)	An arbitrator or the chairman of an arbitration board	Arbitration proceedings under the Act
The Labour Relations Act, s.77(2)(a)	Ontario Labour Relations Board	In the exercise of its functions under the Act
The Law Society Act, s.53(8)	The Benchers	In considering applications for grants from the compensation fund (see also s. 37)
The Legislative Assembly Act, s.45(1), paras. 6, 7	The Legislative Assembly	Inquiries into, <i>inter alia</i> , the giving of false evidence or refusing to give evidence or produce papers before the Assembly or a committee thereof or disobedience to a warrant requiring the attendance of a witness before the Assembly or a Committee thereof
The Liquor Licence Act, s.16	Liquor Licence Board of Ontario	Any hearing or investigation under the Act



## Appendix B—(Continued)

<i>Statute</i>	<i>Recipient of Power</i>	<i>General nature or purpose of Investigation</i>
The Mental Hospitals Act, s.18(1)	The Deputy Minister of Health or an inspector authorized by the Minister of Health	An inquiry into the management or affairs of a hospital, hospital school or an examination unit or into any matter in connection therewith, or into the truth of any returns made by an officer thereof
The Mining Act, s.629	Any person appointed by the Minister of Mines	An inquiry into any charge or complaint that a person has contravened any of the provisions of Part X of the Act or into any matter connected with or arising out of the operation of the Part
The Municipal Arbitrations Act, s.1(3)(e)	An Official Arbitrator	An arbitration
The Municipality of Metropolitan Toronto Act, s.212	The Metropolitan Licensing Commission	In exercising its functions
The Ontario Energy Board Act, 1964, s.14	The Ontario Energy Board	For the due exercise by the Board of its jurisdiction and powers and otherwise for carrying into effect the Act or any other Act
The Ontario Highway Transport Board Act, s.9(1)	The Ontario Highway Transport Board	In the exercise of its jurisdiction
The Ontario Municipal Board Act, ss.33, 37, 52	The Ontario Municipal Board and an inspecting engineer or person appointed under the Act	In the exercise of its jurisdiction

**Appendix B—(Continued)**

<i>Statute</i>	<i>Recipient of Power</i>	<i>General nature or purpose of Investigation</i>
The Police Act, s.12	A Board of commissioners of police	Any matter connected with the execution of its duties
The Police Act, s.48a	The Ontario Police Commission (Power to commit limited to those cases where a county or district court judge has issued a certificate under the Act)	An inquiry into the extent, investigation or control of crime or the enforcement of law
The Private Sanitaria Act, s.36	One or more persons appointed by the Lieutenant Governor in Council	An inquiry into the operation of the Act, the operation, management and affairs, financial or otherwise, of any sanitarium, any matter concerning the committal, treatment or detention of any person to, or in, any sanitarium, any charge or complaint that any person has contravened any provision of this Act or the regulations or has made any false statement in any return, etc., and any other matter relating to the administration of the Act
The Public Inquiries Act, s.2	A person appointed by the Lieutenant Governor in Council	A public inquiry under the statute
The Registry Act, s.122	The inspector of legal offices	An inquiry in the performance of his duties under the Act
The Schools Administration Act, s.84(4)	A school inspector	A hearing of a complaint made to him or the minister
The Securities Act, 1966, s.21(4)	A person appointed by the Ontario Securities Commission (No power to commit)	An investigation for the due administration of the Act

## Appendix B—(Continued)

<i>Statute</i>	<i>Recipient of Power</i>	<i>General nature or purpose of Investigation</i>
The Succession Duty Act, s.28(3)	A commissioner appointed by the Treasurer of Ontario	An inquiry for the purpose of obtaining information in order that the Treasurer may ascertain whether any duty, interest or penalty under the Act is, or may be due or payable and, if so, the amount thereof
The Workmen's Compensation Act, ss.65,75(2)	The Workmen's Compensation Board (section 65) and any member or officer of the Board appointed by it (section 75(2))	No purpose stated

## CHAPTER 37

# Coroners

IN previous chapters in this section we discussed fully the subject of public inquiries and much of what we said there applies to the conduct of coroners' inquests. We recommend that the Coroners Act be completely revised. It should be divided into two parts: one, dealing with the appointment of coroners and their duties in the investigation of deaths coming within the Act, irrespective of whether or not an inquest is held; and the other, dealing with the conduct of inquests.

The office of coroner has its roots deep in history but no useful purpose would be served by any elaborate historical discussion. The office is an inheritance from England, but the functions and jurisdiction of coroners in Ontario are very different from those in England. Historically, in England the coroner was an integral part of the administration of the criminal law and, to a certain extent, still is. The coroners' court has jurisdiction not only to inquire into causes of death but to commit persons for trial for murder, manslaughter and infanticide.<sup>1</sup> This power gives the coroners' court the attributes of a court in a true sense.

In the early history of this Province, the legal position of the office of coroner was very similar to that in England, but with the enactment of the Criminal Code in 1892 the right to commit for trial was taken away and what remains is a prescribed system of investigation into deaths by violence or

<sup>1</sup>Purchase and Wollaston, *Jervis on Coroners* (9th ed., 1957), 208.

in untoward circumstances. This development is fully and usefully set out by Wells, J. (now C.J.H.C.) in *Wolfe v. Robinson*.<sup>2</sup> Nothing more need be added in this Report.

Notwithstanding the change in jurisdiction, the office of coroner has remained a useful and necessary office.

## APPOINTMENT OF CORONERS

The coroners in Ontario are appointed by the Lieutenant Governor in Council and are assigned to jurisdictional districts. There is a supervising coroner for Ontario. A chief coroner may be appointed for any city having a population of more than 100,000. Chief coroners have been appointed in the past for the cities of Toronto and Hamilton.

The Coroners Act provides that the Lieutenant Governor in Council may make regulations prescribing the powers and duties of the supervising coroner and the chief coroners.<sup>3</sup> No regulations have been made.

The method of appointing coroners creates real difficulties. A coroner may be appointed for Ontario or any part thereof.<sup>4</sup> The Attorney General may direct any coroner to act in any designated municipality or provisional district in addition to the municipality or district for which he is appointed. The supervising coroner may direct a coroner who is appointed for part of Ontario to perform duties of a coroner in respect of any particular death in any part of Ontario that is outside the part for which he is appointed.<sup>5</sup>

The appointment of coroners for a municipal district creates difficulties that should be avoided. In the first place, as we shall discuss elsewhere in this report, municipal boundaries create great inconvenience. The place of residence of the coroner is much more important than the jurisdictional boundaries. He should be so located that he can easily be reached and be available on short notice. For example, a coroner should be able to cross municipal boundary lines in

<sup>2</sup>[1961] O.R. 250, affirmed [1962] O.R. 132.

<sup>3</sup>R.S.O. 1960, c. 69, s. 43.

<sup>4</sup>*Ibid.*, s. 1

<sup>5</sup>*Ibid.*, s. 5.

the same manner as practising physicians do. Few coroners have been appointed with a province-wide jurisdiction, and it would be unwise to make any substantial increase in the number of such coroners under the present circumstances. If a coroner with province-wide jurisdiction moves from the locality for which he was appointed to another locality, he continues to be a coroner, thus increasing the number of coroners in that area and depleting the number of coroners in the area that he has left, making another appointment necessary.

We recommend that the Act provide for the appointment of coroners with province-wide jurisdiction, but as resident coroners; for example, a coroner should be appointed to reside at North Bay, and if he ceased to reside at North Bay he would cease to be a coroner unless appointed for another area. Such an amendment would have an additional advantage. Coroners would be appointed to give service in areas without regard to municipal boundaries, and in an emergency coroners would be available to attend at the scene of the emergency irrespective of where they resided.

What we have said with respect to the appointment of those who fill judicial office or quasi-judicial office applies with equal force to the appointment of coroners. The public welfare only should be considered, and in no case should a coroner be appointed for political considerations.

Submissions were made to the Commission stating that there are too many coroners in Ontario. A Committee was appointed by the Attorney General of Ontario in 1960, under the chairmanship of Mr. Eric Silk, Q.C., Assistant Deputy Attorney General, to study and report on "The Coroners' System in Ontario". He recommended that the number of coroners be reduced. At that time there were approximately 450 coroners in Ontario. We are advised that provision is now made for the appointment of approximately 400 coroners. In the whole of England and Wales there are approximately 250 coroners to service a population of over fifty million. Even taking into consideration the dispersal of the population in Ontario, it would appear that representations made to this Commission that the number of coroners be reduced, are

sound. It is most difficult to institute an efficient system of training and education of coroners with such a vast number of them, many of whom may conduct very few investigations each year.

## DUTIES OF THE SUPERVISING CORONER

The supervising coroner for Ontario holds an important office, for which the duties should be clearly defined by statute. While certain powers are conferred on the supervising coroner under the Act,<sup>6</sup> his general duties or powers have never been set out. The Act provides that "the Lieutenant Governor in Council may appoint a coroner for Ontario to be known as the supervising coroner who shall act in a supervisory and advisory capacity to coroners and who shall have such other powers and perform such other duties as the regulations prescribe".<sup>7</sup> No regulations have been passed. One asks the question: What is a supervisory and advisory capacity? When the language of this section is compared with the language of section 3, with which we shall deal presently, the anaemic character of the powers of the supervising coroner is well demonstrated.

Where a chief coroner is appointed for a city with a population of more than 100,000 he "shall have control over the coroners for the city".<sup>8</sup> This is an anomalous situation. The supervising coroner is a coroner for Ontario and hence a coroner for the city to which the chief coroner has been appointed. It is said by some that by statute the supervising coroner is, with respect to that city, subject to the control of the chief coroner, but by the same statute the chief coroner for the city is subject to the supervision and advice of the supervising coroner. The result is that the supervising coroner for the Province supervises the chief coroner of the city, but the chief coroner of the city controls the supervising coroner with respect to matters relevant to the city. If this argument is

<sup>6</sup>*Ibid.*, ss. 5(2), 10(2), 10(3), 12(2), 13, 15(3), 23(1)(a), 23(2), 37(9), 38(14), 43 and Schedule D.

<sup>7</sup>*Ibid.*, s. 2.

<sup>8</sup>*Ibid.*, s. 3.

correct, the statute creates legal difficulties that ought not to exist.

The history of the offices may explain the anomaly. In 1913 provision was made for the appointment of a chief coroner for the cities of Toronto and Hamilton, and for associate coroners for those cities.<sup>9</sup> In 1936 the Lieutenant Governor in Council was given power to appoint a chief coroner for each provisional jurisdictional district and provisional county.<sup>10</sup> The power to appoint chief coroners for the cities of Toronto and Hamilton was not altered.

In 1948 the Lieutenant Governor in Council was given power to appoint a coroner to be known as the supervising coroner, "who shall act in an advisory capacity to coroners and who shall have other powers and perform such other duties as may be prescribed by the regulations".<sup>11</sup> At the same time the Act was amended to give the Lieutenant Governor in Council power to appoint chief coroners for cities having a population of more than 100,000, "who shall have control over the coroners of the city".<sup>12</sup> In 1961 the Coroners Act was amended to give the supervising coroner power to act in a "supervisory capacity" to all other coroners, while heretofore he had only acted in an advisory capacity.<sup>13</sup> This legislation creates a legalistic maze that appears to have no exit. The serious practical problems arising out of the uncertainty of authority ought to be resolved by clear legislative action.

## THE PURPOSE OF A CORONER'S INVESTIGATION

The purpose of a coroner's investigation is not clearly defined in the Act or by regulations, nor is the purpose of an inquest defined. This we shall deal with later. Inquests, while important, form a small part of the duties of coroners. Out of about 18,000 cases reported annually to coroners, only 1,500 inquests are held—slightly over eight per cent.

<sup>9</sup>Ont. 1913, c. 21, s. 1(4).

<sup>10</sup>Ont. 1936, c. 12, s. 2.

<sup>11</sup>Ont. 1948, c. 17, s. 2.

<sup>12</sup>*Ibid.*, s. 3.

<sup>13</sup>R.S.O. 1960, c. 69, s. 2(1), as amended by Ont. 1960-61, c. 12, s. 2(1).



The Coroners Act provides:

"7. (1) Every person who has reason to believe that a deceased person died,

(a) as a result of,

- (i) violence,
- (ii) misadventure,
- (iii) negligence,
- (iv) misconduct, or
- (v) malpractice;

(b) by unfair means;

(c) during pregnancy or following pregnancy in circumstances that might reasonably be attributable thereto;

(d) suddenly and unexpectedly;

(e) from disease or sickness for which he was not treated by a legally qualified medical practitioner;

(f) from any cause other than disease; or

(g) under such circumstances as may require investigation, shall immediately notify a coroner of the facts and circumstances relating to the death."<sup>14</sup>

The first purpose of the coroner's investigation is to ascertain the cause of death. When this has been determined, if it can be determined, the coroner must then conduct such a preliminary investigation as will satisfy him that an inquest is or is not necessary. If he decides that an inquest is necessary, he shall issue a warrant for an inquest. If he decides that an inquest is not necessary, the Attorney General, supervising coroner or the Crown Attorney may direct that the coroner hold an inquest. The coroner's decision that an inquest is necessary is absolute and he cannot be overruled by any authority.

## PUBLICITY OF INVESTIGATION

We received many representations to the effect that the publicity given to coroners' investigations and inquests is in many cases a serious invasion of the civil rights of the individual. We shall deal with publicity with respect to inquests later.

<sup>14</sup>*Ibid.*, s. 7(1), as amended by Ont. 1960-61, c. 12, s. 3.

A coroner who conducts an investigation antecedent to an inquest is performing a quasi-judicial duty. He must make decisions that not only affect the public interest, but the private interests of individuals. It is inconsistent with that office that he should make statements to the press and other news media relative to the matter under investigation, other than to say that the matter has been reported to the coroner and that an inquest will or will not be held. Press interviews about the details of the matters under investigation are entirely inconsistent with the statutory obligations of a coroner and his oath of office. Rules governing the course to be followed by coroners in the conduct of investigations should be clearly laid down. Rules, however, should provide that where a coroner decides not to hold an inquest, he should be required to give written reasons when requested to do so by the Attorney General, Crown Attorney or any person with a direct interest in the matter.

## **INQUESTS**

Many submissions were made to the Commission with respect to the conduct of inquests. These submissions may be broadly classified as follows:

Who should preside;

Definition of the purpose of an inquest;

Right of interested parties to be represented by counsel, with the right to examine and cross-examine witnesses;

Limitation on the publication of proceedings by news media; and

Power to commit for contempt and to order arrest.

### **Who Should Preside**

The Ontario Medical Association made strong representations that the statute should provide that any person claiming to be affected by an inquest should have the right to apply to the coroner, before or during an inquest, for an order that the inquest be conducted by a county court judge, and that if the application were refused there should be a right of appeal to a county court judge, other than the judge who might conduct the inquest.

Members of the legal profession submitted that all inquests should be conducted by legally qualified magistrates or commissioners.

These submissions are based on two contentions:

- (1) The coroner who is called to the scene of a violent death is an important witness at the inquest and should be available as a witness and subject to examination and cross-examination;
- (2) The good name of persons may be irreparably damaged by wide publicity of evidence given at the inquest which has no real evidentiary value. It is contended that it is therefore important that inquests should be conducted only by those qualified to hold judicial office.

These are meritorious submissions and require careful consideration. The tendency in England is to develop a class of coroners who are both legally and medically trained. This is an ideal, but an ideal that is impossible of attainment in Ontario. In some other jurisdictions inquests are conducted by qualified lawyers. For example, in Nova Scotia there is a system of examiners who make the medical examination, and if an inquest is held it is presided over by a magistrate. In Melbourne, Australia, a city of more than two million population, the coroner is a lawyer with the standing of a magistrate. His duties partly include the supervision of a laboratory, similar to the Crime Laboratory of the Department of the Attorney General in Ontario.

After careful consideration we have come to the conclusion that the difficulties arising in the system in Ontario should not be resolved by adopting the recommendations of either the Ontario Medical Association or the legal profession.

To have all inquests presided over by magistrates would be an unwarranted trespass on the time of the magistrates. The vast majority of inquests are routine and raise no particular problems. We think the committee of the Ontario Medical Association has the right solution in principle, but the wrong method is suggested.

To give everyone who "claims to be affected by an inquest" a right to apply, either before or during an inquest,

for an order that the inquest be conducted by a county court judge, with a right of appeal, would make the whole machinery so cumbersome that it would tend to founder with applications and delays. We do not think that the county judges should be either called upon to conduct inquests or hear appeals of the sort suggested.

The proper solution of the difficulty is to follow the present pattern of authority, but making provision for the conduct of inquests by legally trained persons who may be appointed commissioners in proper cases. The crown attorney or any one who claims to be affected by an inquest should have the right to apply to the Attorney General for an order appointing a magistrate or a commissioner or commissioners to conduct an inquest in place of the coroner. This would make provision for those exceptional cases where the inquest should be presided over by someone of wide experience. We say a commissioner or commissioners. There may well be cases where there has been considerable destruction of life by explosion or structural collapse where the presiding officer should have the assistance of engineers, architects or other experts in interpreting the evidence.

When these steps have been taken, the next step should be to reduce the number of coroners in Ontario. The present number cannot be justified on the ground of necessity. With a reduced number of coroners, education and training in their duties may be intensified and the quality of their work improved.

### **The Purpose of an Inquest**

The purpose of an inquest, although not laid down by statute, may be inferred to a certain extent from the provisions of section 7(1) of the Act. In England there are statutory rules governing coroners' inquests. These rules read in part as follows:

"26. The proceedings and evidence at an inquest shall be directed solely to ascertaining the following matters, namely:

(a) who the deceased was;

(b) how, when and where the deceased came by his death;

(c) the persons, if any, to be charged with murder, manslaughter or infanticide, or of being accessories before the fact should the jury find that the deceased came by his death by murder, manslaughter or infanticide;

(d) the particulars for the time being required by the Registration Acts to be registered concerning the death.

27. Neither the coroner nor the jury shall express any opinion on any matters other than those referred to in the last foregoing Rule:

Provided that nothing in this Rule shall preclude the coroner or the jury from making a recommendation designed to prevent the recurrence of fatalities similar to that in respect of which the inquest is being held."<sup>15</sup>

For the protection of civil rights of individuals who may be affected, the purpose of an inquest should be clearly defined, either in the statute or in the regulations, and it should not be left to inference.

### Right to Appear by Counsel

There are no rules or regulations that give those affected by the proceedings any right to be heard and there is no legal right to be heard.<sup>16</sup> This we think is wrong and our view is shared by many coroners, including the Supervising Coroner for Ontario. The practice has been for crown counsel or counsel appointed by the Attorney General to call and examine the witnesses. Others may suggest witnesses that may be called and questions that should be asked. This is wholly unsatisfactory. The verdict of the jury has no legal effect, except in those cases where there is a verdict alleging murder or manslaughter. In such cases the coroner shall direct "the arrest of the person or that he enter into a recognizance with or without sureties to appear before a justice of the peace".<sup>17</sup> The publicity given to the proceedings and the verdict of the jury may have a very devastating effect on the individual involved, not only socially but financially.

The English rules provide:

"16. (1) Without prejudice to any enactment with regard to the examination of witnesses at an inquest, any person who

<sup>15</sup>Coroners Rules, 1953 (S.I. 1953, No. 205), Rules 26, 27.

<sup>16</sup>*Wolfe v. Robinson*, [1961] O.R. 250, affirmed [1962] O.R. 132.

<sup>17</sup>Crim. Code, s. 448.

in the opinion of the coroner is a properly interested person shall be entitled to examine any witness at an inquest either in person or by counsel or solicitor:

Provided that—

(a) the chief officer of police, unless interested otherwise than in that capacity, shall only be entitled to examine a witness by counsel or solicitor;

(b) the coroner shall disallow any question which in his opinion is not relevant or is otherwise not a proper question.

(2) If the death of the deceased may have been caused by an injury received in the course of his employment or by an industrial disease, any person appointed by a trade union to which the deceased at the time of his death belonged shall be deemed to be a properly interested person for the purpose of this Rule.

17. Unless the coroner otherwise determines, a witness at an inquest shall be examined first by the coroner and, if the witness is represented at the inquest, lastly by his representative.”<sup>18</sup>

We recommend that there be a specific statutory right in persons substantially and directly interested in the inquest to appear by counsel, to call witnesses and cross-examine witnesses, but that there should be a discretion in the presiding officer to limit this right where it appears to be exercised vexatiously or beyond what is reasonably necessary in the circumstances. An inquest should be kept within the bounds of its manifest purpose—an inquiry in the public interest. It should not be a process devised as a preliminary round to the determination of civil liability.

## LIMITATION ON PUBLICATION OF PROCEEDINGS

Submissions were made that the publication of proceedings of inquests should be restricted. This aspect of the subject must be considered in the light of the Coroners Act. It provides:

“18. (1) Where a person is charged with a criminal offence arising out of a death, an inquest touching the death shall be held only upon the direction of the Attorney General.

<sup>18</sup>Coroners Rules, 1953 (S.I. 1953, No. 205), Rules 16, 17.

(2) Where during an inquest a person is charged with a criminal offence arising out of the death, the coroner shall discharge the jury and close the inquest, and shall then proceed as if he had determined that an inquest was unnecessary, but the Attorney General may direct that the inquest be re-opened."<sup>19</sup>

There are, no doubt, cases where a charge is made following the inquest, but these cases are rare. The argument that the publication of proceedings may tend to prevent the fair trial of an accused has little application in the circumstances.

An inquest is essentially a public inquiry and the public has a right to know on what evidence the findings of a coroner's jury is based. The English rules provide that every inquest shall be held in public, except in those cases where national security is involved.<sup>20</sup> There are cases where an inquest must be held, e.g., a fatal accident in a mine,<sup>21</sup> and in the case of the death of a person while in custody of an officer of a reformatory, industrial farm, jail or lock-up, or while a ward at a training school.<sup>22</sup>

The prime reason for holding an inquest in these cases is that the public shall be informed of the circumstances of the death. It is equally important that the public be informed in other cases where it is felt necessary to hold an inquest because of the untoward circumstances of the death. For those who are required to do dangerous work, it is essential to their safety that all proper precautions should be taken to safeguard them against injury. Where death has occurred and the circumstances are such that an inquest should be held, it is imperative that it be held in public and reported to the public.

There are, no doubt, cases where persons involved may have been unjustly pilloried by wide publicity given to the evidence adduced before the coroner, but these cases are rare and injustice could well have been mitigated by a more orderly conduct of the inquest. We think there should be no

<sup>19</sup>R.S.O. 1960, c. 69, s. 18.

<sup>20</sup>Coroners Rules, 1953 (S.I. 1953, No. 205), Rule 14.

<sup>21</sup>Mining Act, R.S.O. 1960, c. 241, s. 169(1).

<sup>22</sup>Coroners Act, R.S.O. 1960, c. 69, s. 22, as amended by Ont. 1965, c. 20, s. 8.

restraint on the publication of proceedings at an inquest, other than what may be necessary for national security.

We have already stated that coroners should be restrained from making comments for publication during an investigation. What we have said applies with greater force with regard to making comments after an inquest has been ordered, during the inquest or after the inquest. A coroner should preside at the inquest and instruct the jury and receive the jury's verdict. This should be done with judicial impartiality. When the jury has rendered the verdict, the coroner's duties are over. It is no part of his duty and it is improper for him to discuss cases that have been before him. He should not, however, be restrained from advocating changes in the law in an orderly manner. The experience and wisdom of a coroner ought not to be lost by unduly restrictive rules, but there should be rules restricting him from using inquests to propound theories as to what is in the public interest. When he does this the public loses faith in his impartiality and the impartiality of the office.

### **THE POWER OF A CORONER TO COMMIT FOR CONTEMPT OF COURT AND IMPOSE PENALTIES**

The Coroners Act provides:

"25. (1) The coroner shall summon such persons to attend an inquest as he deems advisable or as are directed by the supervising coroner, the Crown Attorney or the counsel for the Attorney General.<sup>23</sup>

(2) In addition to the other powers that he possesses, a coroner has the same power to issue summonses to witnesses, to enforce their attendance and to punish for non-attendance or refusing to give evidence as is possessed by the Supreme Court.<sup>24</sup>

(3) A fine imposed for non-attendance or refusal to give evidence shall not, in the case of a medical practitioner, exceed \$500, and in the case of any other witness shall not exceed \$100.<sup>25</sup>

<sup>23</sup>*Ibid.*, s. 25(1), as amended by Ont. 1965, c. 20, s. 10.

<sup>24</sup>*Ibid.*, s. 25(2).

<sup>25</sup>*Ibid.*, s. 25(3), as amended by Ont. 1966, c. 27, s. 7.



(4) A witness shall be deemed to have objected to answer any question upon the ground that his answer may tend to criminate him or may tend to establish his liability to a civil proceeding at the instance of the Crown, or of any person, and the answer so given shall not be used or be receivable in evidence against him in any trial or other proceeding against him thereafter taking place, other than a prosecution for perjury in giving such evidence."<sup>26</sup>

In Chapter 32 we made our view clear concerning who should have powers over the liberty of the subject. We do not think the powers of the Supreme Court over the liberty of the subject should be exercised by others than judges. The right to commit to jail is not a power that should be given to a coroner. We were told by the Supervising Coroner that he never knew the power to be exercised.

There is a recent case on record where a coroner issued a warrant for the arrest of a practising physician who did not appear as a witness in response to a subpoena. The subpoena was sent by registered mail and a receipt signed by a receptionist. It is to be assumed that the witness knew of the subpoena. He was engaged with patients at the time he should have been attending at the opening of the inquest. After an hour and twenty minutes the coroner ordered the witness's name to be called, and upon proof of service of the subpoena a warrant was issued for the arrest of the physician. The police officer went to the doctor's office but was advised that the doctor would not be back until 1:30 p.m. The police officer remained at the office to await the doctor's return. In the meantime the doctor reported to the morgue where the inquest was being held. The officer returned and served the warrant on the doctor. This was an arrest. The doctor gave his evidence and was admonished by the coroner, but no fine was imposed. The doctor's explanation was that he was busy with his patients. This was no doubt a frail excuse, but in view of the fact the doctor did report, although late, there was no justification for arresting him. The only purpose of a subpoena is to procure the attendance of a witness. The witness was there. It was not necessary to effect an arrest. This

<sup>26</sup>*Ibid.*, s. 25(4).

case emphasizes the wisdom of placing restrictions on the powers of administrative bodies to make orders affecting the liberty of the subject.

We think that a coroner should have all the powers which we recommend that a commissioner appointed under the Public Inquiries Act should have, but no more.<sup>27</sup> We do not think the coroner should have the right to impose fines for non-attendance or refusal to give evidence. The threat of an application to a Supreme Court judge to commit a witness to jail should be sufficient to compel him to attend or to answer questions. The liability for costs of such an application would be quite persuasive.

The present powers of the coroner under the Act are quite offensive on another ground. There is no right of appeal from the coroner's order imposing penalties. The non-attendance may be quite justified, or the question that the witness refuses to answer may be quite irrelevant. The Act puts no restraint on the coroner's arbitrary authority.

## RECOMMENDATIONS

1. A survey should be made to determine how many coroners are required in Ontario and in what areas they should be located.
2. All coroners should be appointed coroners for Ontario but resident in a particular area. When a coroner ceases to reside in the area he should cease to be a coroner.
3. Political considerations ought not to enter into the appointment of coroners.
4. The duties of the Supervising Coroner should be expressly defined by statute and all coroners should be subject to his control.
5. If chief coroners are appointed for cities of 100,000 population and over, they should be subject to the control of the Supervising Coroner.
6. The purpose of a coroner's investigation should be defined either in the statute or by regulations.

<sup>27</sup>See Chapters 32 and 36 *supra*.

7. Regulations should be formulated, placing limitations on the nature of the information that a coroner is permitted to give out prior to an inquest.
8. Inquests should normally be conducted by a coroner, but the Crown Attorney or anyone who claims to be affected by an inquest should have a right to apply to the Attorney General for an order appointing a magistrate or a commissioner or commissioners to conduct the inquest in place of the coroner.
9. The education and training of coroners should be intensified.
10. The statute or regulations should define the purpose of an inquest and the duties of the coroner and the jury.
11. Regulations should provide that persons who, in the opinion of the presiding officer, are substantially and directly interested, should have full right to appear by counsel and to call, examine and cross-examine witnesses, with discretion in the presiding officer to limit these rights where it appears they are vexatiously exercised or beyond what is reasonably necessary.
12. Inquests should be held in public, except where national security may be violated.
13. Coroners should be restrained from entering into public debate respecting matters that have been the subject of an inquest. But a coroner should not be restricted from advocating changes in the law.
14. A coroner should not have power to make orders affecting the liberty of the subject or impose penalties.
15. The recommendation which we have made with respect to the enforcement of orders or subpoenas issued in the conduct of public inquiries by application to the Supreme Court, should be adopted for coroners' inquests.<sup>28</sup>

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<sup>28</sup>See p. 446 *supra*.

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