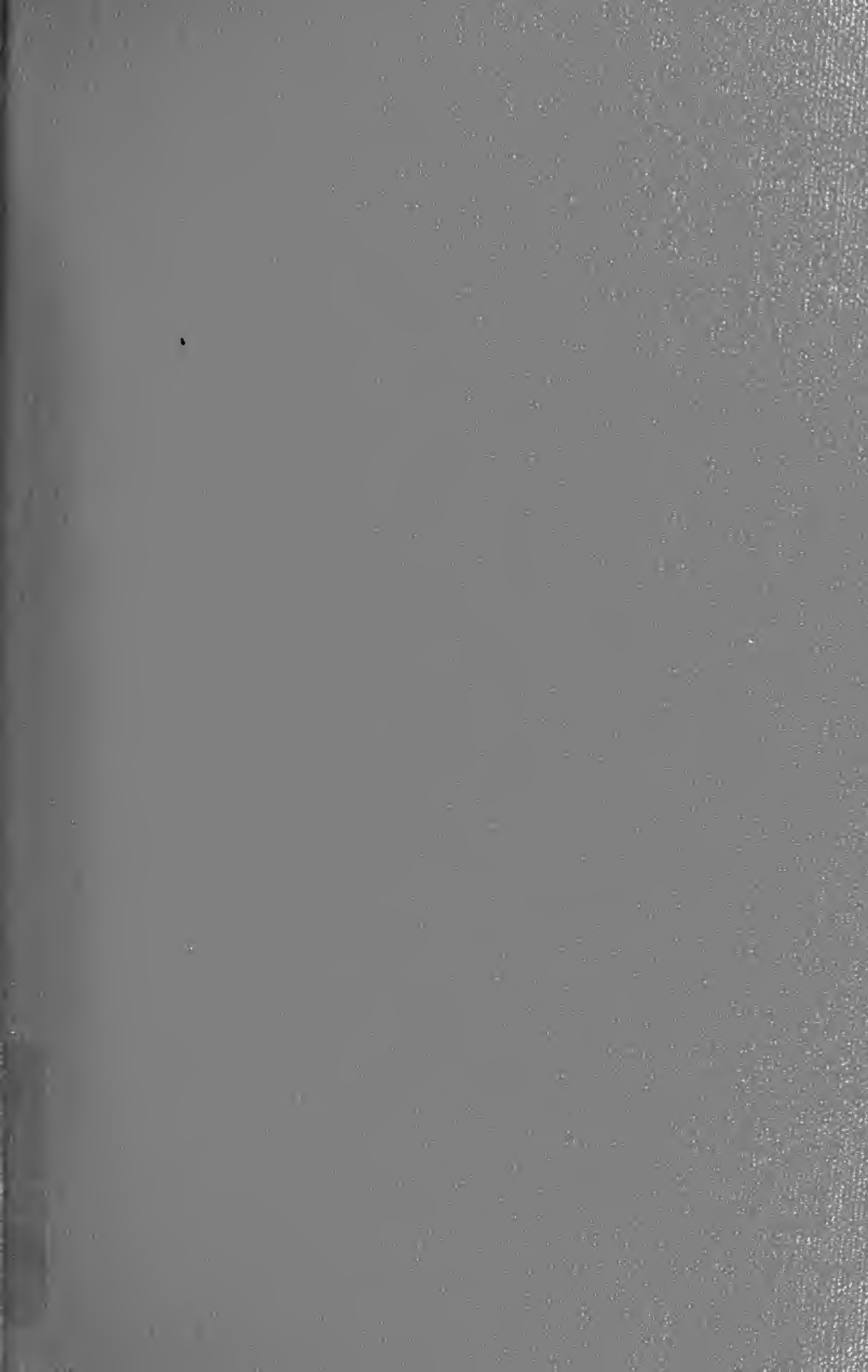

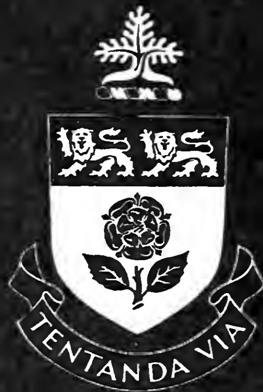

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FORM 109

ROYAL COMMISSION INQUIRY INTO CIVIL RIGHTS

PART V

REPORT NUMBER THREE

1971

COMMISSIONER

Honourable James Chalmers McRuer, S.M., LL.D., D.C.L.

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ROYAL COMMISSION
INQUIRY INTO CIVIL RIGHTS

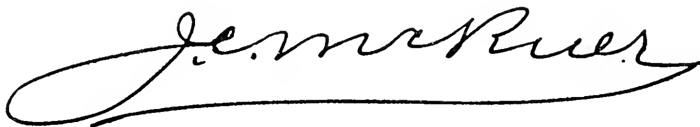
VOLUME 5

Printed and Published by
WILLIAM KINMOND
The Queen's Printer and Publisher

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 submitted my first Report on February 7, 1968 and my second Report on September 15, 1969. I now have the honour to submit Report Number 3, which will be my final Report.



Commissioner

February 22, 1971

[Seal]

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

In making the final Report of this Commission your Commissioner wishes to acknowledge, as has been previously done, the dedicated public service rendered by all those who have collaborated and assisted in the preparation of the three Reports of this Commission.

To those whose names are set out in the acknowledgments to Reports Number 1 and Number 2, your Commissioner wishes to add the names of Professor G. J. Brandt, B.A., LL.B., M.A., of the Faculty of Law of the University of Western Ontario; Professor Horace Krever, B.A., LL.B., of the Faculty of Law of the University of Western Ontario; Professor Colin H. McNairn, B.A., LL.B., LL.M., of the Faculty of Law of the University of Toronto and Professor J. B. Dunlop, B.A., LL.B., LL.M., of the Faculty of Law of the University of Toronto. To these a debt of gratitude is owed for contributions that have been made to the task of preparing this Report.

The work of the Commission has been greatly facilitated by those engaged in the public service with whom your Commissioner has had occasion to discuss matters related to the task given to him under the Commission.

We are particularly appreciative of the co-operation we received from the Chairmen, members and officers of the several tribunals which are considered and dealt with in this Report. We found them all most anxious to assist the Commission to accomplish the objects set out in the Terms of Reference. To all of them we extend our grateful thanks.

In bringing his task to a conclusion your Commissioner wishes to express again his warm appreciation of the assistance he has had throughout from the Commission Counsel, John W. Morden and Stephen Borins and the Chief Research Assistant, Carol M. Creighton. All three have rendered a devoted

public service in the discharge of their respective duties. To Miss Katherine Finnegan, who has performed the duties of secretary to the Commission and Mrs. Pauline Wheeler, who has been in charge of the preparation of the manuscript for this Report, we express our gratitude.

Table of Contents

VOLUME 5

PART V — PAGE

Introduction 1737

SECTION 1

THE APPLICATION OF GENERAL PRINCIPLES TO SPECIFIC STATUTORY TRIBUNALS 1739

Introduction 1741

CHAPTER 109

THE AIR POLLUTION CONTROL ACT, 1967 1743

Introduction 1743

Powers of Decision 1743

Subordinate Legislative Power 1745

Recommendations 1746

CHAPTER 110

THE ARCHAEOLOGICAL AND HISTORIC SITES PROTECTION ACT 1747

Recommendations 1747

CHAPTER 111

THE ATHLETICS COMMISSIONER 1748

Introduction 1748

Powers of Decision 1748

Subordinate Legislative Powers 1752

Licensing Powers 1753

Powers of Investigation 1754

Recommendations 1755

PAGE

CHAPTER 112

THE FARM PRODUCTS MARKETING BOARD 1756
Introduction 1756
Methods of Control 1757
The Board 1758
The Local Boards 1759
Scope of Powers of the Board and the Local Boards: Definitions 1760
The Plan 1764
Existing Plans 1766
Subordinate Legislative Powers 1769
Sub-delegated Subordinate Legislation 1771
Licensing Powers 1774
Limitation of Number of Licences 1776
Licensing Procedure 1778
Licence Fees 1779
Certificates of Appointment 1780
Appeals 1782
A Further Right of Appeal to the Court 1785
Judicial Review 1786
Powers of Investigation: Scope and Conditions Precedent 1787
Right of Entry and Inspection 1789
Penalties 1790
Onus of Proof 1794
Substitution of One Offence for Another 1795
Confiscation 1795
Protection of Members and Employees of the Board and Local Boards 1797
Recommendations 1798

CHAPTER 113

THE FIRE MARSHAL 1803
Introduction 1803
Judicial Powers 1803
Appeals 1805
Investigations 1805
Committal for Contempt 1806

PAGE

Witness Fees 1806
Recommendations 1807

CHAPTER 114

THE HYDRO-ELECTRIC POWER COMMISSION OF ONTARIO 1809
Introduction 1809
Powers of Expropriation and Entry 1809
Section 24 of the Power Commission Act 1812
Section 33 of the Power Commission Act 1816
The Niagara Development Act, 1951 1817
The St. Lawrence Development Act, 1952 (No. 2) 1818
Recovery of Cost of Construction 1819
Disposition of Fines 1822
Actions Against the Commission or Members Thereof 1822
Complaints as to Rates Charged 1823
Control of Energy 1824
Recommendations 1825

CHAPTER 115

THE LIQUOR CONTROL BOARD OF ONTARIO 1828
Introduction 1828
Powers of the Board 1829
Subordinate Legislative Powers 1830
Licensing 1831
Interdiction 1834
Power of Expropriation 1836
Offences 1837
Power to Arrest Without a Warrant 1837
Power to Search the Person 1838
Fines 1839
Judicial Review 1839
Appeals 1840
Appeal by Way of Stated Case 1840
Appeals from Conviction 1840
Separation of Powers 1842
Recommendations 1843

PAGE

CHAPTER 116

THE LIQUOR LICENCE BOARD OF ONTARIO 1846
Introduction 1846
Organization of the Board 1847
Licensing 1850
Cancellation and Suspension of Licences 1851
Judicial Review 1852
Appeals 1853
Appeal by Stated Case 1853
Right of Appeal to County or District Court Judge 1853
Powers of Investigation: General 1855
Powers of Seizure 1855
Powers of Entry 1856
Payment of Witness Fees 1857
Compensation 1858
Offences 1858
Power of Arrest Without a Warrant 1860
Restrictions on Use of Information Obtained 1860
Recommendations 1860

CHAPTER 117

THE MILK COMMISSION OF ONTARIO 1863
Introduction 1863
The Milk Commission of Ontario and the Marketing Boards 1865
The Plan 1866
Existing Plans 1867
Milk 1867
Cheese 1868
Cream 1869
Scope of the Powers of the Commission and Boards—Definitions 1870
Subordinate Legislative Power and the Sub-Delegation of Subordinate Legislative Power 1873
Licensing Powers 1878
Quotas 1881
Appeals 1885

PAGE

Investigations 1887
Production of Books and Records 1887
Penalties 1889
Restraining Orders 1890
Proof of Inter-Provincial or Export Trade 1891
Protection of Members of the Milk Commission and of Marketing Boards 1892
Recommendations 1893

CHAPTER 118

THE MINING COMMISSIONER 1898
Introduction 1898
The Appointment of the Commissioner 1898
Rules 1899
Forfeiture 1900
Jurisdiction of the Commissioner 1901
Judicial Review 1902
Powers of Investigation 1902
Reasons 1903
Filing Orders with the Supreme Court 1903
Appeals to the Commissioner 1904
Expert Assistance 1905
Evidence Other Than that Adduced by the Parties 1905
Costs 1906
Form of the Commissioner's Order 1907
Appeals to the Court of Appeal 1907
Hours for Business 1909
Recommendations 1910

CHAPTER 119

THE ONTARIO ENERGY BOARD 1913
Introduction 1913
Composition of the Board 1915
Powers of Decision 1916
Rate-making 1919
Powers of Investigation 1921
Scope of the Investigation 1921
Powers of Compulsion 1922

PAGE

Procedure ... 1923
Reasons ... 1925
Rules ... 1925
Privilege ... 1926
Enforcement of Board's Orders ... 1926
Penalties ... 1927
Subordinate Legislative Power ... 1928
Expropriation ... 1929
Rights of Appeal ... 1931
Rehearing ... 1931
Appeal by Way of Stated Case ... 1932
Appeal to the Court of Appeal ... 1932
Appeal to the Lieutenant Governor in Council ... 1933
Powers Exercised Under the Municipal Franchises Act ... 1936
Powers Exercised Under the Public Utilities Act 1937
Powers Exercised Under the Assessment Act ... 1938
Summary of Appeal Procedures ... 1938
Licensing ... 1941
Conclusion ... 1945
Recommendations ... 1946
Appendix to Chapter 119 ... 1950

CHAPTER 120

THE ONTARIO FOOD TERMINAL BOARD ... 1952
Introduction ... 1952
The Powers of the Board ... 1952
Recommendations ... 1956

CHAPTER 121

THE ONTARIO HIGHWAY TRANSPORT BOARD ... 1958
Introduction ... 1958
Hearings ... 1959
Investigatory Powers ... 1960
Enforcement of the Board's Orders ... 1960
Reasons ... 1961

PAGE

Appeals 1961
Stated Case 1961
Appeal to the Court of Appeal 1961
Appeal to the Lieutenant Governor in Council 1962
Proceedings Against the Board 1963
Recommendations 1963

CHAPTER 122

THE ONTARIO HOSPITAL SERVICES COMMISSION 1965
Introduction 1965
Subordinate Legislative Powers 1966
Defining Words Used in the Act 1966
Discipline of Patients 1966
Subrogation 1966
Disclosure of Information 1969
Protection for Members of the Commission and its Employees 1971
Conflict with the Provisions of any other Act 1972
Disposition of Fines 1973
Recommendations 1973

CHAPTER 123

THE ONTARIO HUMAN RIGHTS COMMISSION 1975
Introduction 1975
The Commission 1977
Boards of Inquiry 1978
Enforcement 1979
Powers of Compulsion 1983
Recommendations 1984

CHAPTER 124

THE ONTARIO LABOUR RELATIONS BOARD 1986
Introduction 1986
Structure of the Board 1988
Powers of Decision 1990
Powers of Investigation 1995
Powers of Delegation 1996

	PAGE
Rules	2000
Practice of the Board	2001
Adjournments	2004
Practice Notes	2004
Consultation with the Full Board	2004
Reasons	2006
Judicial Review	2006
Privilege	2007
Recommendations	2011

CHAPTER 125

THE ONTARIO MUNICIPAL BOARD	2013
Introduction	2013
Constitution of the Board	2016
Liability of Members of the Board	2018
General Jurisdiction and Powers	2018
General Municipal Jurisdiction	2027
Jurisdiction over Railways and Utilities	2028
Practice and Procedure	2029
Rules of Procedure	2032
Appeals	2035
Appeal by Way of Stated Case	2035
Appeal to the Court of Appeal	2036
Appeal to the Lieutenant Governor in Council	2039
Judicial Review	2041
Recommendations	2041
Appendix to Chapter 125	2045

CHAPTER 126

THE ONTARIO SECURITIES COMMISSION	2068
Introduction	2068
Composition of the Commission	2069
Procedural Provisions of General Application	2070
Hearings	2070
Written Notice of Hearing	2071
Powers of the Presiding Officer	2071
Reasons for Decision	2072
Notice of Decision	2073
Right to Counsel	2073

PAGE

Evidence 2074
  Transcript of Evidence 2074
Appeals 2075
Powers of the Commission 2077
  Licensing 2077
    Granting and Renewing Registrations 2078
    Suspension or Cancellation of Registration 2079
Powers of Investigation 2080
  Power to Order Investigations 2080
  The Powers of the Investigator 2081
  Reporting Results of Investigation 2082
Powers to Make Interim Orders 2083
Miscellaneous Powers of Decision 2085
  Primary Distribution 2085
  Rules Concerning Primary Distribution 2086
  Disclosure of Corporate Information 2087
  Insider Trading 2088
  Stock Exchanges 2088
Miscellaneous Provisions 2088
  Rule-making Power 2088
  Immunity from Action 2088
Offences 2091
Power to Exempt from Provisions of the Act 2092
Recommendations 2094

CHAPTER 127

THE ONTARIO TELEPHONE SERVICE COMMISSION 2098
Introduction 2098
Inquiry Procedure 2098
Appeals 2100
  Appeal by Way of Stated Case 2100
  Appeal upon Questions of Law or Jurisdiction 2101
  Appeal to the Lieutenant Governor in Council 2101
Subordinate Legislative Power 2102
Penalties 2103
Recommendations 2103

PAGE

CHAPTER 128

THE ONTARIO WATER RESOURCES COMMISSION 2105
Introduction 2105
General Powers of the Commission 2106
Business Functions 2107
Right to Acquire Land 2108
Right to Use Water 2109
The Supervision of All Waters: Conflicts with other Acts 2110
The Permission to Pollute 2112
The Definition of Sources of Public Water Supply 2115
Control of Water Supply 2115
Licensing 2117
Approval of Water Works and Sewage Works 2117
Closing Roads 2118
Adjudication of Complaints 2120
Expropriations 2121
Powers of Entry 2121
Subordinate Legislative Power 2122
Recommendations 2123

CHAPTER 129

THE POLICE ACT 2126
Ontario Police Commission 2126
Investigatory Powers 2127
Boards of Commissioners of Police 2129
The Composition of Boards of Commissioners of Police 2129
Subordinate Legislative Powers 2131
Police Discipline 2132
Trial of Minor Offences 2134
Trial of Major Offences 2135
Power to Summon Witnesses 2138
Witness Fees 2139
Recommendations 2139

PAGE

CHAPTER 130

THE WORKMEN'S COMPENSATION BOARD 2141
Introduction 2141
Powers of Decision 2144
Compensation 2144
Destination of Compensation 2145
Amount of Compensation 2149
Manner of Payment of Compensation 2151
Commutation of Periodical Payments 2151
Application of a Lump Sum Where Payments are Commuted 2151
Assessment of Employers 2152
Penalties 2152
Classification of Employers 2156
Powers of Investigation 2157
Summons of Witnesses and Production 2160
Power to Enter, Search and Seize 2160
Use of Information Obtained on an Inquiry 2162
Procedure 2162
The Claims Department 2164
The Review Committee 2166
The Appeal Tribunal 2167
The Board 2169
Medical Reports 2173
Appeals 2178
Workmen's Entitlement to Compensation 2178
Amount of Compensation 2179
Destination of Compensation 2179
Classification and Assessment of Employers 2180
Restrictions on Judicial Review 2180
Workmen's Adviser 2182
Recommendations 2188

SECTION 2

THE PROCEEDINGS AGAINST THE CROWN ACT, 1962-63 2195
Introduction 2197

PAGE

CHAPTER 131

THE PROCEEDINGS AGAINST THE CROWN ACT, 1962-63 2199
Introduction 2199
The Effect of the Act 2201
Special Statutory Provisions 2205
Farm Products Marketing Act 2205
Hospital Services Commission Act 2206
Milk Act, 1965 2206
Ontario Energy Board Act, 1964 2206
Ontario Highway Transport Board Act 2206
Ontario Municipal Board Act 2206
Power Commission Act 2206
Securities Act, 1966 2207
Procedure 2212
Recommendations 2215

CONSOLIDATED SUMMARY OF RECOMMENDATIONS 2217

TABLE OF STATUTES 2265

TABLE OF CASES 2279

PART V

INTRODUCTION

In Report Number 1 we dealt with the exercise and control of statutory powers in the administrative processes of government, the administration of civil and criminal justice in the Province and safeguards against the unjustified exercise of certain special powers.

In Report Number 2 we dealt with representations made to the Commission that there should be general safeguards against unjustified encroachments and infringements on the rights of the individual by the appointment of an Ombudsman, the adoption of a system of administrative courts and a Bill of Rights.

The first Section of this Report is devoted to the application of general principles recommended for adoption in Report Number 1 with respect to the safeguards considered necessary for the protection of the civil rights of the individual in the exercise of powers conferred on certain typical statutory tribunals.

In the second Section we consider the effect of the Proceedings Against the Crown Act with particular reference to special provisions contained in the statutes setting up the tribunals dealt with in the first Section and in relation to other statutory provisions.

Since the manuscript for this Report was prepared an amendment to the Judicature Act was passed[1] creating a Divisional Court of the High Court of Justice and conferring jurisdiction on it to hear all appeals under any statute now referred to the High Court or the Court of Appeal either by way of stated case or otherwise under any Act of the Legislature other than the Judicature Act and the County Courts Act. Any reference made in this Report to such appeals must be read in the light of the provisions of this amendment when it comes into force.

[1] Ont. 1970, c. 97 not yet in force.

Section 1

THE APPLICATION OF GENERAL PRINCIPLES TO SPECIFIC STATUTORY TRIBUNALS

INTRODUCTION

In this Section we analyze and discuss particular powers but not necessarily all those conferred on twenty-two tribunals exercising a wide variety of powers of decision affecting the rights of the individual. The tribunals dealt with are by no means all of those which exercise similar powers of decision. To discuss and analyze all the powers of decision conferred by statute on persons or bodies would be a task of vast proportions and not warranted for the purposes of this Commission. The tribunals we have selected for consideration are representative and the principles we have applied in making recommendations with respect to them may be applied to other decision-making bodies. This is a task that may be accomplished by law revision without further assistance from this Commission.

If the recommendations contained in Report Number 1 with respect to a revision of the Public Inquiries Act, a simplified form of judicial review and a Statutory Powers Procedure Act are implemented the statutory revision will be greatly simplified and safeguards for the rights of the individual in the decision-making processes of the administration of government will be given a very real measure of security.

CHAPTER 109

The Air Pollution Control Act, 1967

INTRODUCTION

THE powers conferred under this Act[1] are divisible into two parts:

(1) The prevention of the construction of sources of air pollution, and

(2) The correction of air pollution from sources of pollution that have already been constructed.

POWERS OF DECISION

The Act forbids any person to construct a stationary source of air pollution unless he has obtained from the Minister of Health a certificate of approval as to the methods and devices to be employed to control the emission of any air contaminant. The Minister may issue a certificate of approval subject to terms and conditions.[2]

Where a person complains that it is not feasible or practicable to comply with a certificate of approval or order issued or made under the Act an application may be made to the Minister to review the certificate or order.[3] A right of appeal from the certificate or order lies to a county or district court judge. The appeal shall be a hearing *de novo*.[4]

[1] Ont. 1967, c. 2.
[2] *Ibid.*, s. 7.
[3] *Ibid.*, s. 6(1).
[4] *Ibid.*, s. 6(2).

A provincial officer may survey from time to time any source of air pollution and shall make a report and recommendations. A copy of the report shall be served on the operator or owner of the source of pollution.[5]

Upon the request of the operator or owner filed not later than 14 days after the receipt of a copy of the report and recommendations of the provincial officer, the Air Pollution Control Advisory Board shall review the report and make recommendations. Parties are entitled to be heard and to be represented by counsel. The report of the Board to the Minister must be served upon the operator or owner.[6] The Minister may, upon receiving the report of the Board "make such order as he deems necessary for prohibiting the operation of the source of air pollution . . .".[7] Such order is subject to appeal to a county court judge under the provisions of section 6.

Provision is made for an interim order by the Minister to cover urgent cases. "Whenever the Minister, after investigation, is of the opinion that any person is emitting or causing to be emitted into the outdoor atmosphere any air contaminant that constitutes a serious danger to the health of any persons and that it would be prejudicial to the interests of such persons to delay action to complete a survey . . ."[8] he may give a direction to discontinue the emission. After such an order is made an opportunity to be heard must be given to the person so notified "to present any evidence that such emission does not constitute a serious danger to the health of any persons".[9] We think that the Minister should have the power to make an interim order only where the opinion is based on reasonable and probable grounds.[10]

Negotiation procedure is provided, "where a person complains that air pollution is causing or has caused injury or damage to livestock or to crops, trees or other vegetation which may result in economic loss . . .".[11] Upon request the Minister may provide for the conduct of an investigation and the estab-

---

[5]*Ibid.*, s. 8(2).
[6]*Ibid.*, s. 8(3) (4) (5).
[7]*Ibid.*, s. 9.
[8]*Ibid.*, s. 10(1).
[9]*Ibid.*, s. 10(2).
[10]See Chapter 7 *supra* and pp. 257-61 *supra*.
[11]Ont. 1967, c. 2, s. 11(1).

lishment of a board of negotiation to proceed "without prejudice to any subsequent proceedings . . . in a summary and informal manner to negotiate a settlement of the claim".[12] It does not appear that the provisions for negotiation affect the right of any of the parties to have liability determined and damages assessed in the ordinary courts, but this is not specifically set out.[13]

SUBORDINATE LEGISLATIVE POWER

The Lieutenant Governor in Council may make regulations concerning specific matters and "respecting any matter necessary or advisable to carry out effectively the intent and purpose of this Act".[14]

One of the regulations passed under the authority of the Act contains the following provisions:

> "6.—(1) No person shall operate or cause to be operated any equipment that does not comply with the minimum specifications set out in the standards therefor in respect of air quality in section 10.
>
> (2) No person shall cause or permit to be caused the emission of any odour to such extent or degree as,
>
> (a) causes discomfort to persons;
>
> (b) causes loss of enjoyment of normal use of property; or
>
> (c) interferes with normal conduct of business."[15]

Subsection 2 is a classic example of what ought not to be done under subordinate legislative power. For contravention of this far-reaching prohibition a person is guilty of an offence and liable to a fine of up to $2,000, and a corporation, to a fine of up to $5,000 for the first offence and on each subsequent conviction to a fine of up to $10,000.[16] It is in no sense a regulation for carrying out the intent and purpose of the Act. It is prohibitory legislation that should be contained in the statute where it may be readily found.[17]

---

[12] *Ibid.*, s. 11(10).
[13] *Ibid.*
[14] *Ibid.*, s. 14(1) (k).
[15] O. Reg. 449/67, s. 6 as amended by O. Reg. 45/68, s. 2.
[16] Ont. 1967, c. 2, s. 16.
[17] No *mens rea* is required. See *Regina v. Peconi*, [1970] 3 O.R. 693.

RECOMMENDATIONS

1. Section 10(1) of the Act should be amended to provide that the Minister's opinion shall be based on reasonable and probable grounds.
2. Section 11(10) of the Act should be amended to state expressly that the proceedings of the board of negotiation shall be without prejudice to subsequent proceedings of any type, administrative or judicial.
3. If the provisions of section 6(2) of O. Reg. 449/67 are to form part of the law, they should be contained in the statute and not the regulations made under the Act.

CHAPTER 110

The Archaeological and Historic Sites Protection Act

THE purpose of this statute[1] is no doubt a worthy one but in seeking to accomplish its purpose the Legislature has neglected the rights of the owner of the proposed historic site.

"The Minister may designate any land as an archaeological site or as an historic site."[2] "No person shall excavate or alter an archaeological site or an historic site or remove any archaeological or historical object therefrom unless he is the holder of a permit."[3] The Minister is empowered to issue permits.[4] The effect of these provisions is to deprive the owner of the designated land of very real property rights without compensation and without any provision for being heard.

RECOMMENDATIONS

1. Provision should be made for proper compensation to owners of land for rights required for achaeological or historic sites.

2. Procedure should be provided for notice to the owner of land before the Minister's decision is made and an opportunity to be heard should be given.

3. Procedure should be provided to fix compensation for injury suffered by the owner as a result of the Minister's order.

---

[1] R.S.O. 1960, c. 19.
[2] *Ibid.*, s. 2.
[3] *Ibid.*, s. 3.
[4] *Ibid.*, s. 4.

CHAPTER 111

The Athletics Commissioner

INTRODUCTION

The Athletics Control Act[1] and the Athletics Commissioner appointed thereunder are both misnomers. The Act does not control athletics and the Commissioner is not a commissioner of athletics.

The Act and the regulations passed pursuant to it affect a small segment of athletics and are principally concerned with the sports of boxing and wrestling, amateur and professional. The regulations passed under the Act deal with these sports only. However, the Act gives to the Minister, subject to the approval of the Lieutenant Governor in Council, power to make regulations "regulating the holding and conduct of professional contests or exhibitions of dancing, swimming, rowing and tennis"[2] and power to define the words "amateur" and "professional" for the purposes of the Act and the regulations.[3]

The Commissioner is appointed by the Lieutenant Governor in Council.[4] There is no provision concerning the term for which he shall hold office.

POWERS OF DECISION

The powers conferred on the Commissioner are far-reaching. They may be necessary but proper safeguards should be provided.

[1] R.S.O. 1960, c. 26.
[2] *Ibid.*, s. 12(1) (l).
[3] *Ibid.*, s. 12(1) (n).
[4] *Ibid.*, s. 3.

The first three subsections of section 5 of the Act set out the principal powers exercised by the Commissioner:

"5.—(1) Where the Commissioner or any other person charges,

(a) that a boxing or wrestling contest or exhibition was conducted in violation of this Act or the regulations; or

(b) that an agreement, contract or undertaking with respect to any boxing or wrestling contest or exhibition was entered into in violation of this Act or the regulations; or

(c) that the conduct of a person connected with or participating in a boxing or wrestling contest or exhibition was in violation of this Act or the regulations or was not in the interest of boxing or wrestling,

the Commissioner may order any person to deliver to him forthwith any moneys that were paid or may be payable in connection with such contest or exhibition and such moneys shall be impounded by him pending the disposition of the charge.

(2) The Minister may direct the Commissioner or any other person to hold an investigation into the charge so made and to report thereon to him and, if in his opinion the charge has been proven, he may declare the moneys impounded to be forfeited, and such moneys thereupon become the property of the Crown.

(3) If the Minister does not direct an investigation or if he is of the opinion that the charge has not been proven, he shall order any moneys impounded to be released."

The extent of these powers is obvious. We shall deal with certain aspects of them only. Before doing so, we make the following general observations. The provisions impose, potentially, a very serious penalty for what, in many cases, might be minor or trivial offences. In addition, under these provisions moneys may be forfeited to the Crown notwithstanding that they may belong to persons who have not been guilty of any wrongdoing whatsoever. A charge that the Act or the regulations have been violated is susceptible of some form of reasonable proof, but no standards are set for determining

what is "not in the interest of boxing or wrestling". It may well be asked whether any or all of these powers, in their present form, are necessary.

We turn now to more specific criticism of the legislation.

The subjective language in section 5(2)—"if in his opinion the charge has been proven"—does not accord with the principles relating to the exercise of powers of decision of judicial tribunals.[5] The subsection should provide that a declaration forfeiting the moneys can only be made "if the charges are proven".

Section 5(1) provides for, what is in effect, the making of a receiving order without notice. Clearly this is against fundamental principles of natural justice. However, it may be that the power in question might be considered, in the context of the legislative scheme, to be of an emergency nature and that the application of the notice of hearing rule and other procedural rules would frustrate the object of the statute.[6]

It is clear that the powers of the Minister under subsections 2 and 3 to declare the moneys forfeited or to order that they be released are judicial powers of a serious nature. They should be exercised by a person holding a position of independence, and not by the Minister. In Report Number 1 we said, in considering the composition of judicial tribunals, that in the absence of exceptional circumstances justifying the establishment of special tribunals to exercise judicial powers, a judicial "tribunal should not be a Minister nor consist of officials subject to the control and direction of a Minister."[7]

A further fundamental objection to these provisions is that they violate the well-established principles that he who hears must decide and he who decides must hear.[8] We said that such a principle should be applicable to the proceedings of judicial tribunals and recommended that the proposed Statutory Powers Rules Committee should be empowered to make rules applicable to judicial tribunals on the following points, amongst others:

(a) the "findings of fact of a judicial tribunal should be required to be based exclusively on the evidence put before

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[5]See pp. 101-02 *supra*.
[6]See pp. 213 and 219 *supra*.
[7]p. 123 *supra*. See also p. 76 *supra*.
[8]See p. 137 *supra*.

it at the hearings and on matters officially noticed disclosed to the parties."[9]

(b) "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."[10]

As the legislation now stands the Minister bases his decision on the Commissioner's report and not on the evidence. The Minister does not consider or hear the evidence.

Subsections 2 and 3 of section 5 should be amended to provide that the tribunal hearing the evidence should make the decision.

Under the legislation the Commissioner may be both the accuser and the investigator and on his report the Minister may make the declaration forfeiting the moneys. This is wrong in principle. When the Commissioner is the accuser he does not hold that degree of independence required of one who conducts an investigation and on whose report a declaration of forfeiture may be made. This objection would be answered by providing that the deciding tribunal shall hear the evidence and that the charge which initiates the proceedings should be made by some person other than the tribunal.[11]

No procedural provisions are contained in the subsections of section 5 which we have quoted. This will be rectified if the Statutory Powers Procedure Act which we have recommended is enacted and special rules made thereunder by the Statutory Powers Rules Committee.[12]

The statute contains no provision relating to an appeal from the Minister's decision. This is a clear case where an appeal should lie to the courts.[13]

Section 9(1) of the Act enables the Minister "where moneys payable to the Minister under this Act or the regulations . . . are not received by the Minister within one week"

[9]p. 219 *supra*.
[10]p. 220 *supra*.
[11]See pp. 47-49 and 76-79 *supra*.
[12]See Chapter 14, *supra*.
[13]See p. 234 *supra*.

from the holding of a wrestling or boxing contest or exhibition to "direct that the building or other place where such contest or exhibition was held shall not be used for the holding of any professional contest or exhibition or any contest or exhibition of amateur boxing or wrestling until such moneys have been paid to the Minister."[14]

In accordance with the recommendations which we have made with respect to section 5 we recommend that the power referred to in section 9(1) be exercised by an independent judicial tribunal and that there should be a right of appeal from the decision of this tribunal.

The proposed Statutory Powers Procedure Act should provide the necessary procedural rights to persons affected by the exercise of the power conferred; as the legislation now stands no procedural rights of any type are provided.

SUBORDINATE LEGISLATIVE POWERS

The powers given to the Minister to make regulations with the approval of the Lieutenant Governor in Council with respect to the sports of wrestling and boxing have been exercised.[15] The power to make regulations extending to the holding and conduct of contests or exhibitions of dancing, swimming, rowing and tennis have not been exercised. It is difficult to see why the power to make regulations controlling these activities should be given to the Minister when it has not been necessary to exercise it for over twenty years.

Section 12(1)(h) provides that regulations may be made "authorizing the Commissioner to levy fines or other pecuniary penalties against officials or against persons who are the holders or who by the regulations are required to be the holders of licences under this Act for failure to comply with any provision of this Act or of the regulations."

This subordinate legislative power has been exercised.

> "Where a person holding a licence fails to comply with any provision of the Act or this Regulation, the Commissioner may fine him an amount not exceeding $50 or suspend his licence, or both."[16]

[14]R.S.O. 1960, c. 26, s. 9(1).
[15]O. Reg. 26/67.
[16]*Ibid.*, s. 5(1).

The power to levy fines for breach of any provision of substantive law should be conferred on the ordinary courts and not on any other bodies.

A mere reading of this provision shows a departure from principle. A penalty may be levied but no procedure whatsoever is laid down to govern the Commissioner's power to fine. This may be contrasted with the procedures provided in the Summary Convictions Act relating to prosecutions which may result in the imposition of fines. In addition, section 12(1)(h) places no limit on the amount of the fine or other pecuniary penalty which may be authorized by regulation. In Report Number 1 we said that while "some sanctions for breach of prohibitory regulations are necessary . . . 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".[17]

The power conferred under section 12(1)(n) to make regulations "defining 'amateur' and 'professional' for the purposes of this Act and the Regulations" has been exercised.[18] These words should be defined in the Act and not by regulations.[19]

LICENSING POWERS

Under paragraphs (d), (e), (f) and (g) of section 12(1) regulations may be made concerning the licensing and the issue of permits for the holding of amateur and professional boxing and wrestling contests and the licensing of amateur and professional boxers and wrestlers, and other related matters.

Regulations respecting licensing have been made in the exercise of the powers. For example:

> "4.—(1) Where the Commissioner is of the opinion that he should not issue a licence, he may refuse to issue it. . . .
>
> 5.—(1) Where a person holding a licence fails to comply with any provision of the Act or this Regulation, the Commission r may fine him an amount not exceeding $50 or suspend his licence, or both.

[17]p. 350 *supra*.
[18]See O. Reg. 26/67, s. 1.
[19]See pp. 345-48 *supra*.

(2) Where a person holding a licence contravenes the Act or this Regulation, the Commissioner may, after a hearing, cancel the licence. . . .

11.—(1) Except under a licence in Form 1, no person shall hold an amateur boxing contest or exhibition."[20]

There are several provisions in the Regulation similar to section 4(1) respecting different types of licences.

No standards or factors are set out in the Regulation to govern or influence the Commissioner's subjective decision not to issue a licence. Guidance relating to the licensing process should be set out in the Act and the basic principles should be stated in the statute and not in the regulation.[21] The subjective power of the Commissioner should be abolished.[22] The absence of adequate procedural safeguards respecting licensing procedures should be met by the Statutory Powers Procedure Act when enacted and specific rules made governing the licensing proceedings of the Commissioner.[23]

There should be a right of appeal from the licensing decisions.[24]

POWERS OF INVESTIGATION

Section 7 of the Act confers on the Commissioner, for the purposes of investigations under section 5 or 6 of the Act, "all the powers that may be conferred upon a commissioner under *The Public Inquiries Act*". We have recommended that this formula should read "the provisions of the Public Inquiries Act should apply . . . to investigations under this Act" and we have further recommended that the Public Inquiries Act should be re-drafted having regard to the substantive and procedural recommendations made in Section 4 of Part I of Report Number 1.[25] The Statutory Powers Rules Committee recommended in Report Number 1 should be empowered to make rules respecting investigations under the Act.[26]

[20] O. Reg. 26/67, ss. 4, 5, 11.
[21] See p. 1117 *supra*.
[22] pp. 1105-06 *supra*.
[23] See Chapter 76 *supra*.
[24] See pp. 1128-32 *supra*.
[25] See p. 465 *supra*.
[26] See pp. 451-52 *supra*.

RECOMMENDATIONS

1. The power in section 5(2) of the Athletics Control Act to declare moneys forfeited should be expressed in objective, and not subjective terms.
2. The powers exercisable under subsections 2 and 3 of section 5 should be exercised by a person holding a position of independence, and not by the Minister.
3. Subsections 2 and 3 of section 5 should be amended to provide that the person hearing the evidence should make the decision and the charge initiating the proceedings should be made by some person other than the person on whom the power to hear and decide is conferred.
4. There should be an appeal to the courts from decisions made under subsection 2 of section 5.
5. Section 9(1) should be amended to provide that an independent judicial tribunal exercise the powers conferred thereunder and that there be a right of appeal from the decision of this tribunal.
6. Section 12(1)(h) should be amended by deleting the power to make regulations authorizing the Commissioner to levy fines or other pecuniary penalties. If fines or pecuniary penalties are to be levied the Act and not a regulation passed thereunder should provide a maximum limit for the fine or penalty.
7. Section 12(1)(n) enabling regulations to be made defining certain words in the Act, should be repealed.
8. The licensing provisions in section 12 of the Act should afford guidance by setting standards or factors governing the decision to license. The subjective power of the Commissioner to refuse licences should be abolished.
9. There should be a right of appeal from licensing decisions.

CHAPTER 112

The Farm Products Marketing Board

INTRODUCTION

THE Farm Products Marketing Board, referred to in this Chapter as "the Board", has general responsibility for administering the Farm Products Marketing Act.[1] Section 2 of the Act states that its "purpose and intent" is:

> "(a) to provide for the control and regulation in any or all respects of the marketing within Ontario of farm products; and
>
> (b) where a plan established under this Act for control and regulation of the marketing of a regulated product is amended to provide for control and regulation in any or all respects of the producing of the regulated product, to provide for control and regulation in any or all respects of the producing and marketing within Ontario of the regulated product,
>
> including the prohibition of such marketing or such producing and marketing, as the case may be, in whole or in part."[2]

The balance of the statute provides for, in varying degrees of detail, the methods and machinery for carrying out these broad objectives. Before examining the nature of the Board and its powers insofar as they bear on civil rights, it is

[1] R.S.O. 1960, c. 137 as amended by Ont. 1961-62, c. 41; Ont. 1962-63, c. 45; Ont. 1964, c. 31; Ont. 1965, c. 39; Ont. 1966, c. 56; Ont. 1968, c. 40; and Ont. 1968-69, c. 37.

[2] R.S.O. 1960, c. 137, s. 2 as re-enacted by Ont. 1962-63, c. 45, s. 2. Attention is drawn to the General Farm Organization Act 1968-69, Ont. 1968-69, c. 42, s. 3(3) which has not been proclaimed since the vote taken under s. 2 was unfavourable.

helpful to indicate briefly the scope, purpose and content of the legislation which it administers.

The references in section 2 of the Act to "the marketing *within Ontario*" and to "the producing and marketing *within Ontario*"[3] are reflections of the Province's incompetence to regulate the production and marketing of products in inter-provincial and export trade. This power is reserved to the Parliament of Canada.[4]

Generally, the purpose of "controlling and regulating" marketing is to accord to farmers—primary producers—a measure of economic protection. Without some form of control the "weak bargaining power of the individual, unorganized farmer, and the perishable nature of most of his products, make him a passive price-taker."[5]

METHODS OF CONTROL

The main methods of control and regulation of the production and marketing of farm products are: the establishment by the Lieutenant Governor in Council of "plans for control and regulation of the marketing within Ontario or any part thereof of any farm product";[6] the constitution by the Lieutenant Governor in Council of local boards to administer such plans;[7] the requirement of licences to engage in

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[3]Italics added.

[4]"A producer is entitled to dispose of his products beyond the Province without reference to a provincial marketing agency or price, shipping or other trade regulation: . . ." *Reference re The Farm Products Marketing Act*, [1957] S.C.R. 198, 210 per Rand, J. The constitutional decisions on the subject of marketing legislation can be found in Laskin, *Canadian Constitutional Law*, (3rd ed., 1966) 357-415. On the practical problems flowing from the division of legislative power provincially and federally in the marketing field see Corry, *Difficulties of Divided Jurisdiction*, Royal Commission on Dominion-Provincial Relations Study, (Appendix 7, 11 ff.). The Parliament of Canada in the Agricultural Products Marketing Act, R.S.C. 1952, c. 6, s. 2(1) has enabled the Governor in Council to confer on provincially-established marketing boards authority to regulate inter-provincial and export trade. The Supreme Court of Canada in *P.E.I. Potato Marketing Board* v. *H. B. Willis Inc. and A.-G. Canada*, [1952] 2 S.C.R. 392 has upheld the constitutionality of this delegation. Pursuant to this Federal statute Ontario local boards both make and administer federal law.

[5]Report of the Agricultural Marketing Enquiry Committee of Ontario, June 1961, 80. For detailed studies on the under-lying economic situations giving rise to this legislation and its effects see the bibliography in that Report, 212-17. For the history of Ontario marketing legislation see G. F. Perkin, *Marketing Milestones in Ontario*, 1935-1960.

[6]R.S.O. 1960, c. 137, s. 6(1) (a).

[7]*Ibid.*

"the producing, marketing or processing of a regulated product";[8] the establishment of production quotas (applicable only to tobacco)[9] and marketing quotas;[10] the control and regulation of agreements entered into between farmers and persons engaged in marketing or processing the regulated product;[11] a form of conciliation procedure to settle minimum prices for regulated products and other matters;[12] the conducting of pools by local boards for the distribution of all moneys received from the sale of a regulated product[13] and the requirement that all sales of a regulated product be "to or through the local board constituted to administer the plan under which the regulated product is regulated."[14]

THE BOARD

The Act provides that the Board shall be a body corporate[15] and that it shall consist of "*one* or more persons who shall be appointed by and hold office during the pleasure of the Lieutenant Governor in Council".[16] At "any meeting of the Board, a quorum shall consist of at least three members of the Board".[17] Obviously the Act should require that the Board should "consist of *three* or more persons". The Board must *consist* of at least the number fixed for its quorum.

The Board has the power, subject to the approval of the Lieutenant Governor in Council, to appoint its own employees—their remuneration to be determined by the Lieutenant Governor in Council.[18]

Generally, the Board's powers are adjudicative, legislative (including the power to sub-delegate legislative powers) and investigative. The power to sub-delegate legislative powers

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[8]*Ibid.*, s. 8(1), para. 1.
[9]*Ibid.*, s. 8(1), para. 11 and s. 18 as amended by Ont. 1962-63, c. 45, s. 11 and Ont. 1966, c. 56, s. 2.
[10]*Ibid.*, s. 8(1), paras. 11a and 11b as enacted by Ont. 1962-63, c. 45, s. 6(4) and amended by Ont. 1966, c. 56, s. 1(1).
[11]*Ibid.*, s. 8(1), para. 12a as re-enacted by Ont. 1966, c. 56, s. 1(3).
[12]*Ibid.*, s. 8(1), paras. 16-19 as amended by Ont. 1965, c. 39, s. 3(3) (4).
[13]*Ibid.*, s. 8(1), para. 20 as re-enacted by Ont. 1968-69 c. 37, s. 3(2).
[14]*Ibid.*, s. 8(1), para. 28a as enacted by Ont. 1962-63, c. 45, s. 6(12) and amended by Ont. 1966, c. 56, s. 1(4).
[15]*Ibid.*, s. 3(1).
[16]*Ibid.*, s. 3(2). Italics added.
[17]*Ibid.*, s. 3(4a) as enacted by Ont. 1965, c. 39, s. 1(2).
[18]*Ibid.*, s. 3(5).

is the Board's most significant power as far as the actual operation of the Farm Products Marketing Act is concerned and also with regard to its impact on civil rights. Section 8(5) of the Act[19] enables the Board to sub-delegate to a local board *all* of the extensive powers to make regulations which are conferred on the Board by section 8(1). Our survey of Board regulations and local board regulations shows that ample use has been made of this power of sub-delegation. This we shall discuss in detail later in this Chapter.

THE LOCAL BOARDS

Section 6(1)(a) provides, in part:

> "The Lieutenant Governor in Council may make regulations . . . establishing . . . plans for control and regulation of the marketing . . . of any farm product and constituting local boards to administer such plans; . . ."[20]

Section 6(3) provides:

> "The method by which the members of a local board shall be appointed, elected or chosen and the application of the plan shall be set out in the plan under which the local board is established."[21]

Local boards are bodies corporate.[22] The qualifying word "local" does not connote that a local board is intended to function only within a particular geographical locality in Ontario (although with respect to many regulated products this is the case) but rather that the local board is established to administer a marketing plan covering one product (e.g. apples) or a group of related products (e.g. greenhouse vegetables) only. The method of choosing the local board usually provided for in the plans made by the Lieutenant Governor in Council is that of election by farmers affected by the plan. The local boards are, for the most part, producer boards.[23]

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[19] *Ibid.*, s. 8(5) as amended by Ont. 1962-63, c. 45, s. 6(14).

[20] *Ibid.*, s. 6(1) (a).

[21] *Ibid.*, s. 6(3).

[22] *Ibid.*, s. 4(5).

[23] In the case of apples the local board is the Ontario Apple Marketing Commission which comprises twelve producers, one retailer, one consumer (as defined), five dealers and four processors: O. Reg. 424/68.

"The acts of a member or an officer of a local board are valid notwithstanding any defects that may afterwards be discovered in his qualifications and appointment or election."[24]

This provision goes too far. A brief reading of the Act shows that local boards have many wide-ranging powers which may profoundly affect the civil rights of an individual. It is wrong that a person acting on behalf of a local board should have the authority to exercise these powers validly even though he lacks the necessary qualifications required by law for his election (e.g., he is not a producer) or has not been elected in conformity with the applicable legislative provisions—or has not been properly elected at all. To give validity to the exercise of such powers is to justify a purported act which otherwise lacks proper legal sanction. It must be assumed that the provisions in the Act and the regulations passed thereunder on the qualifications of local board members, and the procedure for their election, are intended to be some safeguards protecting the interests of those who will be affected by the acts of such members. Section 6(4) aborts these safeguards.

The provision would be acceptable, we suggest, if the defects intended to be covered thereby were of a technical nature only. Substantial defects should result in the purported acts being invalid.[25]

It may be, however, that the provision as it now stands, as a matter of interpretation, is not effective to validate all the acts referred to in it. If a "member" or "officer" is not appointed or elected in compliance with the applicable legislative requirements then it could be argued that his or their "acts" are not "the acts of a member or officer of a local board".

SCOPE OF POWERS OF THE BOARD AND THE LOCAL BOARDS: DEFINITIONS

The powers of the Board and the local boards are limited by the definition of "farm product". The definition is wide. Farm product means:

[24]R.S.O. 1960, c. 137, s. 6(4).

[25]See the effect given to the provision in *Robbins v. Ontario Flue-Cured Tobacco Growers' Marketing Board*, [1964] 1 O.R. 56, 64.

". . . animals, meats, eggs, poultry, wool, dairy products, grains, seeds, fruit, fruit products, vegetables, vegetable products, maple products, honey, tobacco, wood, or any class or part of any such product, and such articles of food or drink manufactured or derived in whole or in part from any such product, and such other natural products of agriculture as are designated by the regulations and for the purposes of this Act, fish shall be deemed to be a farm product."[26]

Section 8(1) paragraph 24 provides that the Board may make regulations:

"designating as a farm product any article of food or drink manufactured or derived in whole or in part from a farm product or any natural product of agriculture."[27]

This power may be delegated by the Board to a local board.[28] The result is that a local board could extend the scope of the Act by extending the definition of "farm product".

The power given to the Board and by the delegation to local boards to define the scope of the statute is an abnegation of the constitutional process of democratic government.

The power of the Board to make regulations generally [28a] or with respect to any regulated product, designating as a farm product any article of food or drink manufactured or derived in whole or in part from a farm product or any natural product of agriculture is wide enough to permit the Board to bring within its control a whole range of articles of food or drink, from alcoholic beverages to cake mixes, milk shakes, and chocolate bars. The provisions giving the Board the power to define "farm product" should be repealed.

The device of extending the definition of "farm product" to "such other natural products of agriculture as are designated by the regulations" is, also, objectionable. The definition of "farm product" contained in the first part of the clause and the potential consequences which may ensue to the producers and marketers of a non-included product if it is brought within the ambit of the Act, are such that the

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[26]R.S.O. 1960, c. 137, s. 1(b) as amended by Ont. 1962-63, c. 45, s. 1(1).
[27]*Ibid.*, s. 8(1), para. 24.
[28]*Ibid.*, s. 8(5) as amended by Ont. 1962-63, c. 45, s. 6(14).
[28a]*Ibid.*, s. 8(1).

Legislature itself, and not an appointed body, should decide what the Act is intended to cover.[29]

The definition section includes "dairy products" within the meaning of farm products. The Milk Act, 1965[30] provides for a marketing control and regulation system for milk products very much the same as that of the Farm Products Marketing Act.[31] Obviously, with respect to milk or dairy products, the two Acts overlap. It may well be that the courts would hold that by implication the products covered by the Milk Act, 1965 are exempt from the Farm Products Marketing Act but the legislation should not be drawn so as to make such an implication necessary. Conceivably a farmer who produces and sells milk products could be subject to two different schemes of control with respect to the same product. Since the Legislature clearly intends to regulate the marketing of milk products under the Milk Act, 1965 consideration should be given to deleting "dairy products" from the Farm Products Marketing Act.

"Marketing" is defined as meaning:

> ". . . buying, selling and offering for sale, and includes advertising, financing, assembling, storing, packing and shipping and transporting in any manner by any person, and 'market' and 'marketed' have corresponding meanings."[32]

This definition is too wide. "Marketing" means, amongst other things, "financing" and "transporting". It may be noted that section 8 of the Act enables the Board to pass regulations "providing for the licensing of any or all persons before commencing or continuing to engage in the producing, marketing or processing of a regulated product".[33] A regulation passed under this provision requiring a licence for a person to

[29]pp. 345-48 *supra*. When the Farm Products Marketing Act was first enacted (as the Farm Products Control Act) the definition clause respecting farm products read, in part:

> ". . . and such other natural products of agriculture as the Lieutenant-Governor in Council may designate and such articles of food or drink manufactured or derived in whole or in part from any such product as the Lieutenant-Governor in Council may designate; . . .": Ont. 1937, c. 23, s. 2(b).

This is less objectionable than leaving the definition to an appointed body not responsible to the Legislature.

[30]Ont. 1965, c. 72.

[31]See Chapter 117 *infra*.

[32]R.S.O. 1960, c. 137, s. 1(e) as re-enacted by Ont. 1962-63, c. 45, s. 1(2).

[33]*Ibid.*, 8(1), para. 1.

market, for example, apples, would make it unlawful for a man to carry ("transport") a basket of apples to a friend across the street without a licence.[34] Further, such a regulation could have the effect of making it unlawful for a man without a licence to borrow money on the security of a crop which he does not, in any way, intend to "market" in the ordinary sense.

"Transporting," "financing" and other words in the definition clause can, in several given instances, cover situations entirely disassociated from marketing. The clause should contain language to the effect that the various acts or activities defined as "meaning" or "including marketing" should be part of a process intended to result in a sale of the regulated product in question.

In contrast, there is an absence of a definition, for the purposes of the Act, of what are obviously two key words in the Act—"producing" and "processing". The Act makes repeated reference to these activities and subjects them to at least as much control and regulation (through prohibition, adjudication, licensing, investigation, prosecution, etc.) as "marketing". The Board has informed us that the "variety of products capable of being regulated under the Act are amenable to so many different forms of processing that a single definition in the Act capable of being applied to such forms of processing would be so long and complex as to pose difficulties in drafting".[35] It may be that the same explanation would apply to "producing". We recognize these drafting difficulties but where the Legislature intends to subject two otherwise lawful activities to close regulation and control it has a responsibility to define these activities with as much certainty and precision as possible. Even if the statutory definitions of these activities were extremely wide they would, at least, mark off the outside limits of the type of activity intended to be controlled, and therefore confine any subordinate legislation made under the Act, or other steps to regulate given products, within these boundaries. Many of

[34]The Interpretation Act, R.S.O. 1960, c. 191, s. 6 provides that where an Act confers power to make regulations "expressions used therein, unless the contrary intention appears, have the same meaning as in the Act conferring the power".

[35]Letter, December 18th, 1967.

the plans made under the Act contain definitions of "producers" and "processors"—with reference to the regulated product in question. If the Act contained general definitions of the words "producing" and "processing" then it could be determined at a glance whether or not the definitions in these plans are authorized. As the legislation now stands this is not possible.

THE PLAN

The powers of the Board to control and regulate the production and marketing of any product are set in motion by establishing plans under the Act. Local boards have been constituted with respect to the following products: apples, asparagus, beans, berries for processing, broiler chickens, celery, eggs and fowl, fresh fruit, fresh grapes, fresh vegetables, grapes for processing, greenhouse vegetables, hogs, onions, seed-corn, soya-beans, sugar-beets, tender fruit for processing, tobacco, turkeys, vegetables for processing, and wheat. It appears that at the present time there are in fact no local boards in operation with respect to celery, fresh vegetables and sugar-beets. There are, therefore, 19 local boards now operating in the Province.

A plan is defined as "a plan to provide for the control and regulation of the marketing of a farm product that is in force under this Act and includes a scheme approved under any predecessor of this Act.[36] The following is the legislative provision for bringing a plan into being:

> "5. (1) Where the Board receives from a group of producers in Ontario or any part thereof a petition or request asking that a plan be established for the control and regulation of the marketing of a farm product or any class or part thereof and the Board is of the opinion that the group of producers is representative of the persons engaged in the production of the farm product or class or part thereof, the Board may recommend the establishment of such plan to the Minister."[37]

> "6. (1) Notwithstanding section 5, the Lieutenant Governor in Council may make regulations,

[36]R.S.O. 1960, c. 137, s. 1(h) as re-enacted by Ont. 1962-63, c. 45, s. 1(4).
[37]*Ibid.*, s. 5(1) as re-enacted by Ont. 1962-63, c. 45, s. 4.

(a) establishing, amending and revoking plans for control and regulation of the marketing within Ontario or any part thereof of any farm product and constituting local boards to administer such plans."[38]

When a group of producers files a petition with the Board asking for a plan to be established, the Board must form an opinion that this group of producers is representative of the persons engaged in the production of the farm product in question. If the Board forms this opinion it may recommend to the Minister of Agriculture and Food the establishment of a plan. The Minister then advises the Lieutenant Governor in Council of the petition and the Board's opinion and it is the Lieutenant Governor in Council that decides whether or not a regulation should be passed establishing the plan.

Prior to 1963 the legislation made provision for a plebiscite of affected producers as a condition precedent to the Board's power to recommend the establishment of the plan.[39] Since 1963 the Board has conducted informal votes prior to recommending the establishment of a plan, although not required to do so by statute. The procedure has been described to us as follows:

> "The Board had available to it statistics published by the Department of Agriculture and Food from which a reasonable approximation of the total number of producers of any given farm product may be obtained. The Board first insists that, as a general rule, it will not consider a petition unless the number of names on the petition equals 15% of the known total number of producers. Before acting on a petition the Board then arranges for producers in the Province to express their opinion secretly by means of a ballot. The Board considers that ⅔ of the total number of persons who ballot expressing themselves as being in favour of the petition is sufficient to establish that the petitioners are, in fact, representative of the producers as a whole."[40]

[38]*Ibid.*, s. 6(1) (a).
[39]*Ibid.*, s. 5, repealed by Ont. 1962-63, c. 45, s. 4.
[40]Letter from the Board, December 18, 1967. And see R.S.O. 1960, c. 137, s. 8(1), para. 25 as enacted by Ont. 1962-63, c. 45, s. 6(10) enabling the Board to make regulations "providing for the holding of a plebiscite of producers upon a question of favour of a plan or amendment of a plan or any matter respecting the marketing of a regulated product".

Existing Plans

The plan established for the control and regulation of the marketing within Ontario of fresh grapes may be taken as reasonably typical of the plans made under the Act. It was established by Ontario Regulation 184/66 made by the Lieutenant Governor in Council. Under this regulation the Ontario Fresh Grape Growers' Marketing Board was constituted and provision made for the method of electing members to this Board. The Order in Council passed by the Lieutenant Governor in Council provides that the "plan in the Schedule is established for the control and regulation of the marketing within Ontario of fresh grapes"[41] but it makes no further provision for regulating and controlling the marketing of fresh grapes. One must go to Ontario Regulation 191/66[42] made by the Farm Products Marketing Board and then to the General Regulations[43] made by the Ontario Fresh Grape Growers' Marketing Board, a local board, to ascertain the law respecting the control and regulation of the marketing of fresh grapes. This is a confusing pattern which is the same with respect to almost all regulated products, except in the case of two or three where the relevant local boards have passed no regulations.

The Act expressly states that the marketing plan, which is the core of marketing legislation in Ontario, is to be established by the Lieutenant Governor in Council. However, as we have seen, the Lieutenant Governor in Council does not, in fact, establish a plan at all. The Order in Council authorizing a plan contains no substantive provisions relating to the control and regulation of the marketing of the regulated product. There is nothing in the Order in Council specifically delegating the power to control and regulate, and the Act does not authorize this to be done. The main powers of the Farm Products Marketing Board are conferred on it directly under the Act (particularly by sections 4, 8 and 9). The result is that while it appears that the Lieutenant Governor in Council establishes the marketing policies of the plans, these policies

[41]O. Reg. 184/66, s. 1.
[42]As amended by O. Reg. 289/66.
[43]July 9, 1969. See also Regulation No. 1-69, September 5, 1969.

are in fact established by local boards composed, for the most part, of producers.

This scheme of the legislation has been reviewed and sustained by the Supreme Court of Canada with Cartwright, J., (as he then was) dissenting. It was held that the skeleton plan is a plan as contemplated by the Act.[44] Cartwright, J. refused to strain the applicable language to hold that the scheme (plan) there in question was validly authorized. He said:

> "To come within the definition given in the Act the 'scheme' must at least set out a plan for the marketing or for the regulating of some farm product. The name of the so-called scheme suggests that it is a plan for the marketing of hogs but it contains no plan for marketing at all. It simply purports to set up a local board and seven committees and while it prescribes in some detail the manner in which the members of these bodies are to be chosen, nothing is said as to their powers, purposes or duties; the scheme contains no word as to how the marketing is to be carried out; no plan is formulated. In my opinion it cannot be said to be a scheme."[45]

The apparent intention of the Act would seem to have been defeated in practice. The scheme outlined in the Act is that the Lieutenant Governor in Council, who is responsible to producers, processors, those engaged in marketing and consumers alike, should authorize a real plan of marketing control, but the responsibility has been delegated to a subordinate authority and re-delegated by it to a still more subordinate body representative, for the most part, of producers.

The powers given to the Board to make exemptions from a plan are wide, confusing and inconsistent. The Board is given power to make regulations generally or with respect to any regulated product providing for the exemption "from any or all of the regulations, orders or directions under any plan of any class, variety, grade or size of regulated product, or any person or class of persons engaged in the producing or marketing of the regulated product . . .".[46] This is an extraordinary provision. In the first place, no regulations are made *under* plans. The plans only provide for the constitution of a

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[44] *Reference re The Farm Products Marketing Act,* [1957] S.C.R. 198.
[45] *Ibid.,* 244.
[46] R.S.O. 1960, c. 137, s. 8(1), para. 9 as re-enacted by Ont. 1962-63, c. 45, s. 6(3).

board and the method of electing its members. In the second place, this provision ostensibly gives the Board power to repeal, in effect, law made by the Lieutenant Governor in Council.

The Act enables the Board to require a local board to furnish information or particulars of "the purposes of the plan in effect for the marketing of the regulated product"[47] and the Board may require any local board "to furnish to the Board particulars of any proposed change in the purposes of the plan at least ten days before the proposed change becomes effective".[48] If plans are to be established by the Lieutenant Governor in Council, what relevance is there in a local board's furnishing to the Board particulars of the *purposes* of the plan, and what right does the local board have to make any changes in the *purposes* of a plan? On the face of the Act, one would expect the Board to get this information from the Lieutenant Governor in Council. The language used in this legislation is not only inconsistent and confusing but it is difficult to interpret, when it should be simple and clear. The Act is largely administered by laymen and if it is for the benefit of laymen, laymen should be able to understand it.

Later in this Chapter we recommend that all Board and local board regulations be subject to the approval of the Lieutenant Governor in Council. If this recommendation is adopted then, in fact, the Lieutenant Governor in Council will be responsible for the content of the *real* plans controlling and regulating the marketing within Ontario of regulated farm products and the apparent intention of the existing legislation will be carried out. If this is done the existing legislation should be amended to indicate that, pursuant to section 6, the function of the Lieutenant Governor in Council is to decide: (1) what plans shall be formulated with respect to specified products and (2) what the constitution of the local boards and method of electing their members is to be. Following this it would remain for the Lieutenant Governor in Council to approve, or refuse to approve, plans formulated by the Board, or the local boards.

[47] *Ibid.*, s. 9(3) (f).
[48] *Ibid.*, s. 9(5) (a).

SUBORDINATE LEGISLATIVE POWERS

To carry out the scheme of the Farm Products Marketing Act three bodies are empowered to enact subordinate legislation:

(1) the Lieutenant Governor in Council;[49]
(2) the Farm Products Marketing Board;[50] and
(3) local boards exercising powers delegated to them by the Board.[51]

Many of the enabling provisions in the Act are too general and imprecise to be proper vehicles for conferring powers on other bodies to make law. For example, section 8(1), paragraph 12, enables the Board to make regulations "providing for the control and regulation of the marketing of any regulated product, including the times and places at which the regulated products may be marketed". Under section 8(5) this power may be delegated to a local board. This provision, in fact, enables the power of delegation to be exercised without laying down any standards or guides for the local board in making laws with respect to any matter coming within the ambit of the Act and affecting wide areas of the economic life of the Province.

In view of the many detailed matters concerning which subordinate legislation may be enacted, it would appear that this provision is unnecessary and is inserted solely as a form of blanket authority for any subordinate legislation intended to be passed under more specific provisions but which may not in fact be justifiable under them. It serves to shield loose definition of policy and imprecise draftsmanship. The powers conferred under paragraph 12 appear to have been exercised by Regulation 147,[52] wherein the Farm Products Marketing

[49] *Ibid.*, s. 6(1) and s. 12(3) as re-enacted by Ont. 1964, c. 31, s. 1.

[50] *Ibid.*, s. 4(4), as amended by Ont. 1962-63, c. 45, s. 3; s. 8(1), as amended by Ont. 1961-62, c. 41, s. 2, Ont. 1962-63, c. 45, s. 6((1)-(12)), Ont. 1965, c. 39, s. 3, Ont. 1966, c. 56, s. 1, Ont. 1968, c. 40, s. 3 and Ont. 1968-69, c. 37, s. 3((1)-(2)); s. 9(1) as amended by Ont. 1962-63, c. 45, s. 7((1)-(7)), Ont. 1968, c. 40, s. 4, and Ont. 1968-69, c. 37, s. 4(1-3); and s. 18(2) as enacted by Ont. 1962-63, c. 45, s. 11(2) and amended by Ont. 1965, c. 39, s. 5(1) and Ont. 1966, c. 56, s. 2(2).

[51] *Ibid.*, s. 8(5) as amended by Ont. 1962-63, c. 45, s. 6(14); and s. 18(4) as enacted by Ont. 1962-63, c. 45, s. 11(4).

[52] R.R.O. 1960, Reg. 147, s. 6(h) as remade by O. Reg. 95/67, s. 2(2).

Board has delegated to the Ontario Asparagus Growers' Marketing Board "powers to make regulations in respect of asparagus . . . providing for the control and regulation of the marketing of asparagus, including the times and places at which asparagus may be marketed . . .". A provision of this broad scope in the regulation would appear to make other provisions of a more specific nature superfluous. Paragraph 12 of section 8(1) should be repealed.

The powers conferred on the Board to make regulations vesting powers in local boards are broader in scope and more comprehensive than powers usually conferred on the Lieutenant Governor in Council. "The 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."[53]

The Board may make regulations "authorizing any local board to prohibit the marketing of any class, variety, grade or size of any regulated product".[54] The sweeping effect of this provision could render unnecessary the licensing and quota-fixing provisions in the earlier paragraphs of the section and some of the provisions of section 18 respecting tobacco.

These two powers enable the Board to vest powers in the local boards which are not subject to the control of the Lieutenant Governor in Council. The Board under the first-quoted provision may confer on local boards almost unlimited powers of an investigative, adjudicative and legislative character. Potentially, the section in question confers on the Board power to confer on local boards powers that the Act does not even confer on the Board itself. It is not a power to delegate but a power to authorize local boards to perform a whole range of governmental acts. It dwarfs and overlaps any other delegation provision in the Act. It should be repealed as should the provision enabling regulations to be made authorizing local boards to prohibit marketing.

The Lieutenant Governor in Council is given power to make regulations, "notwithstanding any other Act", provid-

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[53]R.S.O. 1960, c. 137, s. 9(1) as amended by Ont. 1962-63, c. 45, s. 7(1).
[54]*Ibid.*, s. 8(1), para. 22 as amended by Ont. 1962-63, c. 45, s. 6(9).

ing for the putting of a local board into trusteeship[55] and the Lieutenant Governor in Council may make regulations "dissolving a local board on such terms and conditions as he deems proper and providing for the disposition of its assets".[56] These provisions enable the Lieutenant Governor in Council to enact subordinate legislation in conflict with, or at variance with, the express terms of a statute of the Legislature. We have condemned this form of legislation.[57]

These clauses are objectionable on another ground. They give to the Board a legislative power to deal with assets of a local board and the affairs of the local board in which individuals have a financial interest. If a local board is to be wound up and its assets distributed, this should be done by some method of adjudication which would give to those who have any specific interest in the winding up, a legal right to be heard and to present their case to the Board. The Board should deal with such matters in an adjudicative capacity, not in a legislative capacity. In such case the safeguards of the proposed Statutory Powers Procedure Act recommended in Report Number 1 would apply.[58]

The powers with which we have been just dealing are of an expropriatory nature. Their exercise, whether in their present form or in the form of a power of adjudication, as we recommend, should be dependent on the satisfaction of definite and objective conditions precedent. For example, the powers should only be exerciseable for some definite reason, such as the financial mismanagement of the affairs of the local board in question.

Sub-Delegated Subordinate Legislation

As we have indicated, the Farm Products Marketing Board has the power to sub-delegate to the local boards virtually all of its legislative power. Regulations made by the local boards pursuant to this sub-delegated power are subject to none of the usual safeguards governing the exercise of powers to enact subordinate legislation. Local board regulations are

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[55]*Ibid.*, s. 6(1) (f) as re-enacted by Ont. 1962-63, c. 45, s. 5(3).
[56]*Ibid.*, s. 6(1) (g).
[57]See p. 343 *ff. supra.*
[58]See pp. 212-13 *supra.*

not required to be filed with the Registrar of Regulations under the Regulations Act nor is there any obligation imposed to publish them in the *Ontario Gazette* in accordance with the provisions of that Act. This is highly objectionable.

Although the Farm Products Marketing Act empowers the Board to revoke any regulation made by a local board[59] there is no provision in the Act requiring a local board to file with the Board (the body which has expressly empowered the local board to make regulations) any of the regulations it makes. Section 4(4) of the Act enables the Board to make regulations providing for the filing by the local board of true copies of several types of local board documents with the Board, but none of these are local board regulations.[60] However, Ontario Regulation 98/67, section 2, which was made pursuant to section 4(4), requires a local board to file directions, orders and regulations with the Board within 5 days of their issuance or making. There would appear to be no express legislative authority for this provision.

The Board has advised us that it does not have in its possession all of the regulations passed by the local boards but it considers that it has "the important" ones.

As the legislation now stands the members of the Legislature which has enabled these legislative powers to be exercised by local boards have no prescribed method of advising themselves as to the form or content of such subordinate legislation. A member of the Legislature, as any other person, can find in the *Ontario Gazette* all regulations filed under the Regulations Act but he cannot find local board regulations whether or not they are filed with the Board. Most of the law which *directly* applies to persons engaged in marketing farm products is made by the local boards and not by the Legislature, the Lieutenant Governor in Council or the Board. This fact underlines the significant deficiency in the present legal requirements respecting publication of subordinate legislation.

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[59] R.S.O. 1960, c. 137, s. 10(b) as re-enacted by Ont. 1962-63, c. 45, s. 8.
[60] *Ibid.*, s. 4(4) (a) as re-enacted by Ont. 1962-63, c. 45, s. 3(3).

It is ironic that local boards created under the Farm Products Marketing Act may be required to publish in the *Canada Gazette*[61] the laws which they make pursuant to the Agricultural Products Marketing Act (Canada),[62] but not those made under Ontario law.

Further, what guarantee is there of, or method for determining, the authenticity of a document being put forward allegedly as a valid Ontario regulation passed by a local board? There is such a guarantee or method with respect to statutes[63] and most regulations[64] but none with regard to local board regulations. This is just another unsatisfactory aspect flowing from the power to sub-delegate.

Local board regulations should be subject to the requirements of the Regulations Act.[65]

It is essential that the form and content of marketing laws should be subject to political control. We therefore recommend that both Board regulations and local board regulations should not come into force until approved by the Lieutenant Governor in Council. The adoption of this recommendation will substantially meet the objections and criticisms which we have made with respect to the power of sub-delegation.[66]

It has been suggested to us that one of the reasons for conferring power, particularly in the Farm Products Marketing Act, to make subordinate legislation (and further subordinate legislation pursuant to it) is to enable legislation to be passed quickly and in response to immediate needs. Our review of the subordinate legislation in the marketing field indicates to us that it is passed, generally, on a seasonal basis and that no delays of any significant nature would result from the requirement that Board and local board regulations be

[61] See Regulations Act, R.S.C. 1952, c. 235, s. 2.

[62] R.S.C. 1952, c. 6. See the Regulations Act, R.S.C. 1952, c. 235, s. 2(a) (ii) and s. 6.

[63] Statutes Act, R.S.O. 1960, c. 383, ss. 6 and 7.

[64] Regulations Act, R.S.O. 1960, c. 349, s. 2.

[65] See p. 366 *supra*.

[66] See pp. 358-60 *supra*.

subject to the approval of the Lieutenant Governor in Council.[67]

LICENSING POWERS

The Board has power to license all persons engaged in all processes through which regulated farm products pass from producer to consumer.

> "8. (1) The board may make regulations generally or with respect to any regulated product,
>
> 1. providing for the licensing of any or all persons before commencing or continuing to engage in the producing, marketing or processing of a regulated product;
>
> 2. prohibiting persons from engaging in the producing, marketing or processing of any regulated product except under the authority of a licence;
>
> 3. providing for the refusal to grant a licence where the applicant is not qualified by experience, financial responsibility and equipment to engage in properly the business for which the application was made, or for any other reason that the Board deems proper;
>
> 4. providing for the suspension or revocation of, or the refusal to renew, a licence for failure to observe, perform or carry out the provisions of this Act, the regulations, any plan or any order or direction of the Board or local board or marketing agency . . .

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[67]The recommendations which we have made are consonant with those made in previous studies of the subject. See, for example, the Report of the Gordon Committee on the Organization of Government in Ontario, (1959) 61: "The power of the Farm Products Marketing Board to delegate extremely broad legislative powers to local boards and marketing agencies is in its discretion and not subject to the approval of the Lieutenant Governor in Council, as we believe it should be." The Report of the Agricultural Marketing Enquiry Committee of Ontario, (June, 1961) 38: "Governments have the responsibility of continuous scrutiny, in the public interest, of the actions of any group to whom special powers have been delegated or otherwise acquired. This is the principle of *governmental responsibility for delegated powers*". And at p. 84: "Even if these income-raising and stabilizing efforts produced benefits for farmers, the justification for the Legislature delegating such powers must be judged, in the final analysis, in terms of their effects upon the welfare of all interested parties, including the general public's interest in efficient production and marketing."

(5) The Board may delegate to a local board such of its powers under subsection 1 as it deems necessary, and may at any time terminate such delegation."[68]

Several licensing regulations have been passed under these provisions and in many cases the Board has sub-delegated to local boards its powers to make licensing regulations and these powers have been exercised by local boards.

In Report Number 1 we recommended that in the provincial sphere where detailed licensing regulations are required they should be enacted by the Lieutenant Governor in Council.[69] If the regulations made by the Board and local boards were subject to the approval of the Lieutenant Governor in Council, as we have recommended, political control over the form and content of the regulations would be preserved and, at the same time, the Board and the local boards, that have special knowledge and expertise in the relevant fields, would be empowered to initiate the applicable licensing policies.

In Chapter 75 we said that licensing requirements should not be imposed unnecessarily, nor should unreasonable standards be required in their implementation.[70]

Regulations passed under section 8 show that wide use has been made of the licensing powers conferred under this section. All producers and many persons engaged in marketing and processing are required to obtain licences from the Board or local boards. One of the chief purposes of the licensing requirement appears to be the obtaining of revenue in the form of licence fees. We do not gather from this widespread use of licensing powers that they are being unnecessarily imposed. However, the provisions in paragraph 3 of section 8(1) may not be as relevant to the right of a man to *produce* a farm product—as to his right to market or process a product. The enabling legislation respecting the grounds for refusing a licence to a producer (if any such grounds exist) should be set out in the statute and distinct from the grounds for refusing licences to those engaged in marketing and processing.

[68] R.S.O. 1960, c. 137, s. 8(1), paras. 1-4 and s. 8(5) as amended by Ont. 1962-63, c. 45, s. 6(14).
[69] p. 1117 *supra*.
[70] p. 1096 *supra*.

Limitation of Number of Licences

We have recommended that the power to limit the number of licences to be issued in a particular field should be conferred only when accompanied by adequate safeguards for the rights of the individual.[71] In the Farm Products Marketing Act with the exception of tobacco there appears to be no intention to confer the power to refuse a licence to produce on the ground of a numerical limitation and a decision based on such a ground would be invalid.[72] In Chapter 75 we discussed the applicable licensing legislation in the *Brampton Jersey* case (which is virtually identical to section 8(1) paragraph 3) and observed that the provision would be better if it did not include the words "or for any other reason the Board may deem sufficient" notwithstanding that these words would be read by a court as being controlled by the preceding provisions setting out specific grounds for refusing a licence.[73] They are misleading. This observation is equally applicable to section 8(1) paragraph 3. We recommend that these words be deleted from the section. They only mislead the reader. If the Legislature, in conferring the power to make regulations, contemplated additional grounds to those provided in the first part of paragraph 3 then it should have added them expressly and not used general language.

More objectionable than the provision we have just been discussing is section 18(2) (a):

"The Board may make regulations,

(a) notwithstanding paragraph 3 of subsection 1 of section 8, providing for the refusal to grant a licence for the producing of tobacco for any reason that the Board deems proper;"[74]

In a recent judgment this language was interpreted as follows:

> "The 1963 amendments to the Act make it clear that it was the intention of the Legislature to confer *an unrestricted discretion* on the local board to grant or refuse licences to produce tobacco . . . *There are no limits in the Act to the*

[71] p. 1108 *supra*.
[72] *Brampton Jersey Enterprises Limited* v. *The Milk Control Board of Ontario*, [1956] O.R. 1 (C.A.).
[73] p. 1100 *supra*.
[74] R.S.O. 1960, c. 137, s. 18(2) (a) as enacted by Ont. 1962-63, c. 45, s. 11.

discretion granted to the Board and there is nothing therein requiring the Board to set up standards."[75]

A consideration of the other provisions in section 18 makes it clear that this provision is part of a scheme to curtail the production of tobacco so that it will conform to the demand for the product. In other words, the wide language is specifically designed to confer a power on the licensing tribunal to refuse licences on the grounds that sufficient or enough have already been issued. This legislation is contrary to basic principles which we have outlined.[76] To be able to refuse a licence "for any reason that Board deems proper" could conceivably be to confer the power to refuse licences on grounds unrelated to the basic policy of the legislation. We recommend that these words be repealed and that in their place language importing some identifiable standards as specific as possible, be inserted. The use of broad words of this character represents a surrender of the rule of law to the rule of arbitrary power. We asked the Board what the need for this particular language was. The reply we received was "this power, like other special powers relating to tobacco, is necessary to cope with the special problems encountered in the tobacco industry".[77] Any arbitrary power could be supported on this basis. The Legislature is surely not so barren of ability to express itself as not to be able to define in express terms what powers should be exercised by a tribunal created by it for the purpose of regulating the production and sale of an important agricultural product.

What we have said with respect to section 18(2) (a) applies with equal force to other provisions in the Act giving the Board special powers. For example, the Board may make regulations generally or in respect to any regulated product providing for,

"(i) the marketing of a regulated product on a quota basis,

(ii) the fixing and allotting to persons of quotas for the marketing of a regulated product *on such basis as the Board deems proper*,

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[75]*Robbins et al v. Ontario Flue-Cured Tobacco Growers' Marketing Board*, [1964] 1 O.R. 56, 66-67, affirmed p. 653, affirmed [1965] S.C.R. 431. Italics added.

[76]pp. 1096-1100 *supra*.

[77]Letter, December 18, 1967.

(iii) the refusing to fix and allot to any person a quota for the marketing of a regulated product *for any reason that the Board deems proper,* and

(iv) the cancelling or reducing of, or the refusing to increase, a quota fixed and allotted to any person for the marketing of a regulated product *for any reason that the Board deems proper.*"[78]

Licensing Procedure

The recommendations which we have made in Chapter 76 with respect to the procedure to govern licensing applications and other licensing proceedings should apply to all licensing under the Farm Products Marketing Act and its subordinate legislation. Amendments should be made where necessary to implement these recommendations. We emphasize that no licence should be refused without a hearing which should comply with the proposed Statutory Powers Procedure Act; provision should be made for notice of intention to revoke or suspend a licence; the notice should set forth the grounds on which it is alleged the licence should be revoked or suspended; where possible, it should be accompanied by a summary of evidence which is proposed to be submitted to the tribunal; and there should be a provision giving the licensee an opportunity to show compliance with all lawful requirements in order to avoid proceedings for revocation or suspension of the licence.[79]

Prior to its repeal in 1965[80] paragraph 5 of section 8(1) of the Act empowered the Board to make regulations "providing for the right of any person whose licence was refused, suspended or revoked or was not renewed to show cause why such licence should not be refused, suspended or revoked or why such renewal should not be refused, as the case may be."[81] This provision was repealed when the general appeal section in the Act, section 10a, was enacted.[82] Notwithstanding its repeal there is still at least one regulation enacted under section 8 which contains provisions employing precisely the

[78]R.S.O. 1960, c. 137, s. 8(1), para. 11a as enacted by Ont. 1962-63, c. 45, s. 6(4) and amended by Ont. 1966, c. 56, s. 1(1). See also s. 18(2) (b). Italics added.
[79]See pp. 1120-22 *supra*.
[80]Ont. 1965, c. 39, s. 3(1).
[81]R.S.O. 1960, c. 137, s. 8(1), para. 5.
[82]Ont. 1965, c. 39, s. 4.

same language.[83] This regulation is probably invalid but apart from any issue as to its validity, provisions placing the onus on applicants and licensees to show cause "why such licence should not be refused, suspended or revoked or why such renewal should not be refused" are contrary to fundamental principles of just procedure.[84] In addition, the provision is illogical especially where the licence has been suspended or revoked. If a licence has been suspended or revoked this is an accomplished fact. A decision has been made and if relief is to be granted it should be in the form of a right of appeal. A right of appeal before a body that has made a decision, to show cause why its decision is not right, is an empty and meaningless procedure.

The provisions of section 10a, with which we shall deal more fully later, giving certain rights of appeal, may be regarded by some as a substitute for a proper procedure before an initial decision is made. The section enables a person who deems himself aggrieved by an order or direction or decision of a local board to appeal to the local board and on such appeal "the person making the appeal has the right to attend and make representations".[85] This so-called appeal procedure is an inadequate substitute for a proper procedure governing the first decision. Under this process a person may lose a licence through a defective procedure and then be cast in the role of an appellant in an effort to get his licence back, with the onus cast on him of showing that the original decision was wrong.

Licence Fees

The Act implies that it is possible, in the absence of a regulation to the contrary, that licence fees could be used for purposes not related to the paying of the expenses of a local board, the carrying out and enforcing of the Act and the regulations or the carrying out of the purposes of the plan under which the board is established. Section 8(1) paragraph 13, enables the Board to make regulations "authorizing a local

[83]Regulation 151, s. 5(3) R.R.O. 1960 (Berries).
[84]See pp. 1123-24 *supra*.
[85]R.S.O. 1960, c. 137, s. 10a(7) as enacted by Ont. 1965, c. 39, s. 4.

board to use any class of licence fees" for these purposes.[86] We have recommended that where the power to charge fees to be fixed by regulation is conferred the purpose for which the fees are to be charged should be clearly expressed.[87] This recommendation should be implemented in the Farm Products Marketing Act.

Certificates of Appointment

Another sort of licensing scheme has been provided under regulations passed by at least one local board, applying to shippers of a farm product.

The General Regulations, 1970 of the Ontario Greenhouse Vegetable Producers' Marketing Board made on February 7th, 1970 provide for the issue of certificates of appointment to "shippers". By section 1(k) of this Regulation "shipper" is defined as "any person who offers for sale, sells, receives, assembles, packs, ships for sale, or transports greenhouse vegetables but does not include:

(1) a servant employed by and driving a vehicle owned by a producer or an appointed shipper;

(2) a railway company;

(3) a person who transports greenhouse vegetables by motor transport as agent of the producer."

This Regulation provides, in part, as follows:

> "4. (1) No person shall commence or continue to engage as a shipper except under the authority of a certificate of appointment as a shipper from the local board.
>
> (2) No certificate of appointment as a shipper shall be issued except upon execution of a shipper agreement on Form 1.
>
> (3) A certificate of appointment as a shipper shall be on Form 2.
>
> (4) A certificate of appointment as a shipper expires on the 31st day of December 1970, *or upon the cancellation of the agreement mentioned in sub-section (2) whichever is earlier*."[88]

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[86] *Ibid.*, s. 8(1) para. 13 as amended by Ont. 1968-69, c. 37, s. 3(1). See also s. 12(3) (f) as re-enacted by Ont. 1964, c. 31, s. 1.

[87] See p. 353 *supra*.

[88] The Ontario Greenhouse Vegetable Producers' Marketing Board General Regulations, 1970, s. 4. Italics added.

The issue of the certificate of appointment is conditioned on the applicant's signing a written agreement with the local board containing the following, among other clauses:

> "The shipper agrees to comply with the General Regulations (1970) and General Interprovincial and Export Regulations (1970) of the local board and with all other regulations and orders relating to the marketing of Greenhouse Vegetables as may be made by the local board. General Regulations (1970) and General Interprovincial and Export Regulations (1970) are attached hereto as Schedules A and B."[89]
>
> "This agreement may be cancelled by either party hereto giving the other party not less than 72 hours notice of cancellation. In the event of the local board giving the shipper notice of cancellation of this agreement, the local board will in its notice appoint a place and time prior to the expiration of the notice of cancellation at which the shipper may appear before the local board to request that such notice of cancellation be rescinded. If the shipper fails to attend such meeting of the local board or if the local board, after hearing such request refuses to rescind the notice of cancellation, this agreement from the time of expiration of such notice shall be cancelled and at an end. It is understood and agreed that the local board has absolute discretion to refuse to rescind its notice of cancellation and such discretion shall not be subject to review by any court."[90]

The local board may cancel the agreement entered into by merely giving notice. According to the language of the agreement, the only recourse the shipper has is a right to appear before the local board "to request that such notice of cancellation be rescinded." He must appear at a time and place fixed in the notice of cancellation. The right to appear does not give the shipper any real safeguard against arbitrary action because the agreement contains the provision that "it is understood and agreed that the local board has absolute discretion to refuse to rescind its notice of cancellation and such discretion shall not be subject to review by any court."

The local board has clothed itself with arbitrary power, said not to be reviewable by any court, by merely forbidding shippers to engage in the occupation of shipping greenhouse vegetables unless they agree to submit to the exercise of

[89]*Ibid.*, para. 2.
[90]*Ibid.*, para. 7.

such power. This legislation should not commend itself to freedom-loving people; it is a weapon, not a shield.

What has been done here is to establish under the guise of an agreement a scheme for control over those wishing to ship greenhouse vegetables. The agreement is not a voluntary one between consenting parties. It has been made unlawful for a shipper to operate unless he has been granted a certificate of appointment, and no person shall receive a certificate of appointment unless he signs the agreement. The fact of the matter is that the terms of this agreement are a part of a licensing scheme which attempts to give to the local board an arbitrary power over means of earning a livelihood. We have condemned privative clauses in statutes passed by the Legislature.[91] It requires no emphasis that privative clauses contained in regulations passed by sub-subordinate bodies should never be permitted to become law. In fact, it is hard to find authority in the Farm Products Marketing Act for regulations giving local boards the power purportedly here exercised.[92]

The General Regulations, 1970 of the Ontario Greenhouse Vegetable Producers' Marketing Board, made on February 7, 1970, should be amended to conform to this Report and Report Number 1.

APPEALS

"10(a). (1) Where any person deems himself aggrieved by any order, direction or decision of a local board, he may appeal to the local board by serving upon the local board written notice of the appeal.

(2) Where any person deems himself aggrieved by,

(a) any decision of a local board on an appeal under subsection 1; or

(b) any order, direction or regulation made by the Board

he may appeal to the Board by serving upon the Board written notice of the appeal.

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[91]pp. 277-79 *supra*.

[92]In earlier local board regulations provisions of this type were more common. See, e.g., General Regulations of the Fresh Fruit Growers Marketing Board, July 11, 1966 and of the Ontario Fresh Grape Growers Marketing Board, August 10, 1966.

(3) Every notice under subsection 1 or 2 shall contain a statement of the matter being appealed and the name and address of the person making the appeal.

(4) Upon receipt of a notice under clause *a* of subsection 2, the Board shall forthwith notify the local board, and the local board shall thereupon forthwith provide the Board with all relevant by-laws, orders, directions, regulations, documents and other material, of any kind whatsoever, in its possession.

(5) In any appeal under subsection 1 or 2, the Board or the local board, as the case may be, shall, within seven days after the notice referred to in subsection 1 or 2 is received, serve notice upon the person making the appeal of the date, time and place at which the appeal will be heard.

(6) The Board or the local board, as the case may be, shall hear and decide any appeal under subsection 1 or 2, within thirty days after the notice of appeal is received, but the Board or local board may, at the request of the person making the appeal, adjourn the hearing from time to time for such period or periods of time as the Board or the local board deems just.

(7) At any hearing under this section, the person making the appeal has the right to attend and make representations and to adduce evidence respecting the appeal either by himself or through counsel.

(8) At any hearing of an appeal under clause *a* of subsection 2, the local board has the right to attend and make representations and to adduce evidence respecting the appeal either by its officers, or any of them, or through counsel.

(9) Upon an appeal to the Board under clause *a* of subsection 2, the Board may, by order, direct the local board to take such action as the local board is authorized to take under this Act and as the Board deems proper, and for this purpose the Board may substitute its opinion for that of the local board.

(10) The Board or the local board, as the case may be, shall, within ten days after the hearing is

completed, serve notice upon the person making the appeal of its decision.

(11) A proceeding that is in substantial compliance with this section is not open to objection on the ground that it is not in strict compliance therewith.

(12) Where a notice is served under this section, it may be served personally or,

(a) where the notice is served on the Board or a local board, by mailing the notice to the address of the Board or of the local board, as the case may be, at its usual business address; or

(b) where the notice is served on a person making an appeal, by mailing the notice to the address shown in his notice of appeal.

(13) After the Board or a local board has decided an appeal under this section, the Board or local board may reopen the hearing on its own motion and make a new decision, and the procedure for an appeal under this section applies to the rehearing."[93]

Three so-called rights of appeal are created under this section:

(1) Where a person deems himself aggrieved by any order, direction or decision of a local board, he may "appeal" to the local board. We take it that this means he may ask the local board to reconsider its decision. This is not a true right of appeal.[94]

(2) Where a person has appealed to the local board for a reconsideration of its decision he may appeal from the second decision by the local board to the Board. This is a true right of appeal.

(3) A person who deems himself aggrieved by any order, direction or regulation made by the Board may appeal to the Board. This again is a right to apply for a rehearing. It is not a right of appeal.

[93]R.S.O. 1960, c. 137, s. 10a, as enacted by Ont. 1965, c. 39, s. 4.
[94]See pp. 226-35 *supra*.

Where a person has been heard by a local board before it has made its first decision there seems to be no justification for an application by way of the so-called "appeal" to the local board before an appeal can be taken to the Board. This is a vexatious procedure. If it is intended to give a right to ask for a rehearing by the local board in addition to a right of appeal to the Board the appellant should have the right to either apply for a rehearing before the local board or to appeal directly to the Board. The law should not require two hearings before the local board before the matter may be brought before the Board.

It is to be observed that any person may appeal from "any . . . regulation made by the Board . . . to the Board".[95] A regulation is a legislative enactment. We can understand that persons affected by regulations made by the Board might wish to have a reconsideration of the regulation and a process for reconsideration is quite proper but it ought not to be in the nature of an appeal.

We also observe, as we did with respect to the appeal provision in the Expropriation Procedures Act,[96] that, in conferring the right of appeal, the language "he may appeal . . ." is strange and unusual. The normal language is "an appeal lies".

We do not believe it is necessary to elaborate upon any procedural deficiencies in the section—such as the failure to confer on a respondent, other than a local board, the same rights as those conferred on an appellant—"to attend and make representations and to adduce evidence respecting the appeal either by himself or through counsel".[97] The provisions of the minimum rules of procedure contained in the Statutory Powers Procedure Act when enacted and of any appropriate detailed rules of procedure when applied to the section would remedy the shortcomings.

A Further Right of Appeal to the Court

There are many different types of orders, directions and decisions which may be made under the Act and regulations

[95]R.S.O. 1960, c. 137, s. 10a(2) (b), as enacted by Ont. 1965, c. 39, s. 4.
[96]See p. 1063 *supra*.
[97]R.S.O. 1960, c. 137, s. 10a(7) as enacted by Ont. 1965, c. 39, s. 4.

made under it. One cannot therefore say that all decisions of the Farm Products Marketing Board should be appealable to the Divisional Court of the High Court of Justice.[98] However, some of these decisions—those based substantially on matters of law or the application of clearly defined standards—should, we believe, be made so appealable. Many of these decisions relate to the right of a person to earn his livelihood as he sees fit, e.g., licensing and production and marketing quota-fixing decisions. The Farm Products Marketing Board should not be the final arbiter on the legal issues involved in these decisions.[99] Where the decisions are predominantly of an administrative (i.e. policy) nature a right of appeal should lie from the Board to the Minister of Agriculture and Food.[100]

JUDICIAL REVIEW

There are no provisions in the Farm Products Marketing Act expressly restricting applications for judicial review and in fact decisions of the Board and some local boards in actions[101] and applications[102] challenging them, have been the subject matter of proceedings in the ordinary courts. We have shown that subjective ingredients in powers of decision can have the effect of restricting judicial review of such decisions and have, therefore, recommended that they should not be included in a statutory power unless they are necessary to carry out the scheme of the statute.[103] There are several of such subjective ingredients in powers of decision conferred under the Farm Products Marketing Act. We have referred to some of them in this Chapter. The Board may pass regulations providing for "the refusing to fix and allot to any person a quota for the marketing of a regulated product for any reason that the

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[98]See pp. 330 and 667 *supra*. And see Bill 183, 1970.

[99]See pp. 234 and 1131-32 *supra*.

[100]*Ibid.*

[101]*Freeman* v. *Farm Products Marketing Board et al*, [1958] O.R. 349; *McDonald et al* v. *Farm Products Marketing Board*, February 24, 1959, unreported and *Robbins et al* v. *Ontario Flue-Cured Tobacco Growers' Marketing Board*, [1964] 1 O.R. 56, affirmed p. 653, affirmed [1965] S.C.R. 431.

[102]*Wentworth Canning Co. Ltd.* v. *Farm Products Marketing Board*, [1950] O.W.N. 100, [1950] 2 D.L.R. 245 and *Atkins et al* v. *Ontario Flue-Cured Tobacco Growers' Marketing Board*, [1964] 1 O.R. 56, affirmed p. 653, affirmed [1965] S.C.R. 431.

[103]See pp. 90-94 and 275 *supra*.

Board deems proper, . . .".[104] This is more subjective than is necessary. We have dealt with this point at greater length in the discussion on licensing in this Chapter. If the recommendations which we make are adopted—the insertion of standards to govern the exercise of the power—then decisions under these provisions, and others like them, will be more susceptible to judicial review.

POWERS OF INVESTIGATION: SCOPE AND CONDITIONS PRECEDENT

The following provisions in the Act relate to the investigatory powers of the Board and the local boards.

"4. (1) The Board may,

(a) subject to the regulations, investigate, adjust or otherwise settle any dispute relating to the marketing of a regulated product between producers and persons engaged in marketing or processing the regulated product."

(aa) investigate any matter relating to the producing, marketing or processing of a regulated product; . . .

(b) investigate the cost of producing, processing and marketing any farm product, prices, price spreads, trade practices, methods of financing, management policies and other matters relating to the marketing of farm products; . . .

(e) appoint persons to inspect the books, records, documents, lands and premises and any regulated product of persons engaged in producing or marketing the regulated product:

(ea) appoint persons to inspect,

(i) the books, records and documents,

(ii) the lands and premises,

(iii) any flue-cured tobacco, and

(iv) any growing plants or other development in the producing of flue-cured tobacco,

of persons engaged in the producing of flue-cured tobacco; . . .

[104]R.S.O. 1960, c. 137, s. 8(1) para. 11a(iii) as enacted by Ont. 1962-63, c. 45, s. 6(4). See also sub-paragraphs (ii) and (iv) as re-enacted by Ont. 1966, c. 56, s. 1(1). The same language is used in section 18(2) (b), (ii)-(iv), as enacted by Ont. 1962-63, c. 45, s. 11 and amended by Ont. 1965, c. 39, s. 5(1) and Ont. 1966, c. 56, s. 2(1) (2).

(2) Upon an investigation under this section, the Board has all the powers that may be conferred upon a commissioner under The Public Inquiries Act.

(3) The Board may delegate to the local board such of its powers under subsection 1 as it deems necessary, and may, at any time, terminate such delegation."[105]

Section 4(1)(a) apparently limits the power of investigation therein conferred by the opening phrase "subject to the regulations". These words are ambiguous. The Board has advised us that "the words 'subject to the regulations' would appear to mean that a specific provision for arbitration in the regulations would take precedence."[106] If this be the case, the opening language in this investigatory provision should be amended to read accordingly. The existence of a power of investigation should not depend upon unnecessarily vague or imprecise language.[107]

The powers to investigate "any matter relating to the producing, marketing or processing of a regulated product"[108] and the "cost of producing, processing and marketing any farm product, prices, price spreads, trade practices, methods of financing, management policies and other matters relating to the marketing of farm products"[109] are almost unlimited in scope. In the exercise of these powers the Board has all the powers that may be conferred upon a commissioner under the Public Inquiries Act. While it is for the Legislature to say whether these powers should be conferred on the Board with power to delegate them to local boards, we think that the conferment of such wide powers of investigation should be under the control of the Lieutenant Governor in Council.

The recommendations which we have made in Report Number 1 respecting the conferment of the powers of a commissioner under the Public Inquiries Act and the procedures to govern investigations are applicable to investigations under the Farm Products Marketing Act.[110]

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[105]*Ibid.*, s. 4(1)-(3) as amended by Ont. 1961-62, c. 41, s. 1, Ont. 1962-63, c. 45, s. 3(1)-(2) and Ont. 1968-69, c. 37, s. 1(1)-(4).

[106]Letter, December 18, 1967.

[107]See p. 390 *supra*.

[108]R.S.O. 1960, c. 137, s. 4(1) (aa) as re-enacted by Ont. 1962-63, c. 45, s. 3(1).

[109]*Ibid.*, s. 4(1) (b).

[110]See pp. 451-52 and 465 *supra*.

Right of Entry and Inspection

"7. (1) Every person, when requested so to do by an officer of the Board or a local board or by a person appointed by the Board or a local board to inspect the books, records and premises of persons engaged in the producing or marketing of a regulated product, shall in respect of the regulated product produce such books and records and permit inspection thereof and supply extracts therefrom and permit inspection of such premises.

(2) No person shall hinder or obstruct an officer of the Board or of a local board or a person appointed by the Board or by a local board to inspect the books, records and premises of persons engaged in the producing or marketing of a regulated product in the performance of his duties or refuse to permit him to carry out his duties or refuse to furnish him with information or furnish him with false information.

(3) The production by a person of a certificate of his appointment by the Board or a local board to inspect the books, records and premises of persons engaged in the producing or marketing of a regulated product purporting to be signed by the chairman and secretary of the Board or the local board shall be accepted by any person engaged in the producing or marketing of the regulated product, as *prima facie* proof of such appointment."[111]

We have three observations to make concerning these provisions:

(1) They permit entry and inspection of a private dwelling. This is contrary to the recommendations we have made in Report Number 1.[112] A provision similar to that contained in the Industrial Safety Act[113] would appear to be all that is required. It reads:

> "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.*"

[111]R.S.O. 1960, c. 137, s. 7.
[112]See pp. 415, 416, 418 and 419 *supra*.
[113]Ont. 1964, c. 45, s. 8(3). See p. 418 *supra*.

(2) There is no restraint on the use of information that may be obtained on the inspection. The members of the local boards are those engaged in the production of the regulated product. Under this legislation they and their inspectors are in no way restrained from using or communicating to others the information they obtain in the course of their duties as inspectors. This is contrary to recommendations made in Report Number 1.[114]

(3) The person whose books and records are being inspected is required "to supply extracts therefrom". This is an unreasonable provision. It should be sufficient if the person whose records are being investigated were required to permit their temporary removal for the purpose of having copies made. To impose statutory obligations to supply extracts from records is an unjustified encroachment on civil rights.[115]

PENALTIES

Every person who fails to comply with or contravenes any of the provisions

(1) of the Act, or
(2) of the regulations, or
(3) of any plan, or
(4) of any order of the Board or local board, or
(5) of any regulation of the Board or local board, or
(6) of any direction of the Board or local board, or
(7) of any agreement or award or renegotiated agreement or award filed with the Board, is guilty of an offence and on summary conviction is liable for a first offence to a fine of not more than $500.00 and for a subsequent offence to a fine of not more than $5,000.00.[116]

This is the sort of penal legislation that brings the law into disrespect and promotes contempt for the law. It is omnibus penal legislation and lazy draftsmanship. The individual is made liable to be prosecuted and punished in the criminal

[114]See p. 462 *supra*.
[115]See pp. 421-22 *supra*.
[116]R.S.O. 1960, c. 137, s. 13 as re-enacted by Ont. 1968-69 c. 37, s. 6.

courts for contravention of laws that he has no means of knowing existed. The mere contravention is sufficient. Intention to "contravene" is not a requirement. As we have said, there is no requirement that regulations of local boards be filed anywhere except with the Board, and no requirement that orders and directions of the Board and local boards should be brought to the attention of the alleged offender or made known to anyone. A requirement that the regulations should be published in the *Ontario Gazette* and that a failure to comply with an order or direction of the local board after it has been made known to the alleged offender would seem to be minimum conditions precedent to liability.

Attention is drawn to the more humane provisions of the Regulations Act of Canada[117] (as contrasted with the Ontario Regulations Act) which stipulate that the regulations which must be published in the *Canada Gazette* include "a rule, order, regulation, by-law or proclamation . . . for the contravention of which a penalty of fine or imprisonment is prescribed by or under an Act of Parliament".[118] The Act expressly provides that:

> "(3). ... no person shall be convicted for an offence consisting of a contravention of any regulation that was not published in the *Canada Gazette* unless
>
> (a) the regulation was, pursuant to section 9, exempted from the operation of subsection (1) or the regulation expressly provides that it shall operate according to its terms prior to publication in the *Canada Gazette*, and
>
> (b) it is proved that at the date of the alleged contravention reasonable steps had been taken for the purpose of bringing the purport of the regulation to the notice of the public, or the persons likely to be affected by it, or of the person charged."[119]

As far as the "regulations" are concerned as distinct from "orders and directions", our criticism will be substantially met if our recommendation that the regulations of the local boards be subject to the approval of the Lieutenant Governor in Council and be filed and published, is adopted.

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[117]R.S.C. 1952, c. 235.
[118]*Ibid.*, s. 2(a) (ii).
[119]*Ibid.*, s. 6(3).

Penalties for the contravention of orders and directions of the Board and the local boards are a different matter. What are the orders and directions that are contemplated by section 13? The Board is empowered to "do such acts and make such orders and issue such directions as are necessary to enforce the due observance and carrying out of the provisions of this Act, the regulations or any plan".[120] "Orders and directions" referred to in section 13, which creates the offences are not defined in the Act. There is nothing in the Act even requiring the orders and directions to the Board or of a local board to be in writing.

The legislation should be amended: (1) to define expressly what are the orders and directions referred to in section 13; (2) to provide that they should be in writing; (3) to provide that the orders and directions should be brought to the attention of the person concerned before their contravention can constitute an offence; and (4) to provide that the orders and directions should state on their face that a violation thereof constitutes an offence which may be prosecuted on summary conviction.

The penal aspects of this legislation should be completely reviewed to determine how the obligations and duties it imposes can be best enforced. Prosecutions of a criminal nature are not the most appropriate methods for their enforcement in all cases. Most of the orders and directions of the Board could be enforced by civil remedies. In fact, the Board has such powerful control over the production and marketing of farm products through licensing that it is difficult to see why such a multitude of penal provisions is necessary. The use of the processes of the criminal law where any form of civil proceedings would be effective is not only an improper use of the criminal procedure, but it tends to bring discredit on all law enforcement agencies.[121]

Where a person who fails to pay at least the minimum or determined price of a product has been convicted of this offence, he is, in addition to the fine provided for in section

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[120]R.S.O. 1960, c. 137, s. 4(1) (h).

[121]Section 12a of the Act enacted by Ont. 1968-69, c. 37, s. 5, provides for a form of injunctive relief. It is virtually identical to s. 21 of the Milk Act, Ont. 1965, c. 72 on which we comment in Chapter 117.

13, "liable to a penalty of an amount equal to the amount of such minimum or determined price less any amount paid by such person as payment in full . . .".[122] This penalty is not paid to the person who has received less than the minimum price but under the Act it must be paid to the local board and the local board shall,

> "(a) distribute the money so paid *pro rata* among the persons who failed to receive at least the minimum or determined price; or
>
> (b) use the money to stimulate, increase and improve the marketing of the regulated product."[123]

These provisions emphasize the force of our recommendation that the obligations imposed under the Act could better be enforced by a civil remedy. They offend against sound principles of criminal law and criminal procedure—and this is criminal law although passed by the Province. The criminal process is being used for the purpose of collecting debts created by the Act. In addition, it is being used unnecessarily. A simple summary application made by a local board to a county court judge for an order for all the relief given by this subsection should be sufficient.

There are real procedural difficulties in obtaining relief in the criminal courts. It appears that separate charges or at least separate counts in each charge would have to be laid with regard to each transaction involving the payment of less than the minimum or determined price established for the regulated product. This is an unduly cumbersome and inefficient procedure.

We cannot see any reason justifying subsection 2(b) which permits the local board to use money rightfully belonging to producers who have been paid less than the minimum or determined price, for the general benefit of all producers. It may be an administrative convenience but this should not outweigh the right of those who have sold produce to be paid the proper amount therefor. There is no reason why they should subsidize the improvement of the marketing of the regulated product out of what is justly owing to them. The subsection should be repealed.

[122] R.S.O. 1960, c. 137, s. 14(1) as re-enacted by Ont. 1968-69, c. 37, s. 7.
[123] *Ibid.*, s. 14(2) as re-enacted by Ont. 1968-69, c. 37, s. 7.

Onus of Proof

> "17. (1) In an action or prosecution under this Act, the onus is upon the defendant or the accused, as the case may be, to prove that the product in respect of which the action or prosecution is brought is not a regulated product within the meaning of this Act."[124]

The well-established rule of criminal law procedure is that the onus is on the Crown to prove its case beyond a reasonable doubt. This subsection reverses this onus without justification. If it is read literally a producer of clover seed, and clover seed is not a regulated product, who is charged with marketing clover seed without a licence, would be required to prove each set of plans regulating the marketing of products under the Act in order to establish that clover seed is not covered by any of them. The prosecution has the means of knowing what products are regulated and it is in a position to prove what products are not regulated. There is no justification for placing such an onus on the accused.

We are advised that the real purpose of the provision is to place the onus on an accused person when he intends to rely on the defence that the product is in the course of inter-provincial or export trade and is therefore beyond the reach of Ontario legislation. If this is its purpose why not so state? It would be quite simple to place the onus on the accused to prove that his product was produced for the purposes of inter-provincial or export trade. This is a fact peculiarly within his own knowledge. The Agricultural Products Marketing Act (Canada) deals with the converse of this problem in the following manner:

> "4.(1) Every person who violates any regulation, or any order, rule or regulation made by any board or agency under this Act with reference to the marketing of an agricultural product in inter-provincial and export trade, is guilty of an offence and is liable on summary conviction to a fine not exceeding $500.00 or to imprisonment for a term not exceeding 3 months or to both fine and imprisonment.
>
> (2) In any prosecution for an offence under this Act, the act or omission complained of, in respect of which the

[124] *Ibid.*, s. 17(1).

prosecution was instituted, shall, unless the accused proves the contrary, be deemed to relate to the marketing of an agricultural product in inter-provincial and export trade."[125]

This provision does not place an unfair onus on an accused person as he knows, or should know, the intended destination of his product. Legislation similar to the federal Act should be enacted in Ontario to replace section 17(1).[126]

Substitution of One Offence for Another

"In a prosecution under the Agricultural Products Marketing Act (Canada), the magistrate, if he finds that the offence is not proved under that Act but the evidence establishes an offence of a similar kind in relation to the control or regulation of the marketing of the regulated product locally within Ontario under section 13 or 14, may convict the accused under this Act notwithstanding that no information has been laid under this Act."[127]

This legislation violates the most elementary principles of justice. It is a bad law. Under it a man may come into court charged with one offence and go out convicted of another. Its purpose may be to fill in a gap which sometimes appears as a result of the divided jurisdiction between Parliament and the Legislature over the marketing of agricultural products. But the legislation cannot be justified on this ground. The Agricultural Products Marketing Act (Canada) makes no similar provision. The section should be repealed.

Confiscation

"The Board may make regulations . . . providing for the seizing, removing, destroying or otherwise disposing of any growing tobacco plants or tobacco produced or marketed in violation of this Act or the regulations, and the retention or disposition by the local board of any proceeds of the sale thereof."[128]

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[125]R.S.C. 1952, c. 6, s. 4 as re-enacted by Can. 1957, c. 15, s. 3. See also s. 24 of The Milk Act, 1965, Ont. 1965, c. 72 discussed at pp. 1891-92 *infra*.

[126]We have recommended that statutory provisions shifting the onus of proof ought not to apply to offences created by subordinate legislation. See p. 354 *supra*.

[127]R.S.O. 1960, c. 137, s. 17(2).

[128]*Ibid.*, s. 18(2) (d) as re-enacted by Ont. 1965, c. 39, s. 5(1).

Exercising the powers of sub-delegation conferred on it[129] the Board has delegated these powers to the Ontario Flue-Cured Tobacco Growers' Marketing Board, a local board.[130] The local board has passed the following regulation:

> "(1) Where the local board determines that any person is producing tobacco or has produced any tobacco, in contravention of these regulations, the local board may issue an order to such person requiring him, within such period of time as is stated in the order, to destroy any growing tobacco plants that are being so produced or any tobacco that has been so produced, by such person.
>
> (2) Every such order shall be served upon the person named in the order by personal service or by sending it by registered mail addressed to such person.
>
> (3) If any growing tobacco plants or tobacco are not destroyed in compliance with an order made under subsection (1) within the time specified in the order, the local board may authorize in writing an officer or employee of the local board to direct and procure the destruction of the growing tobacco plants or the seizure and removal of the tobacco.
>
> (4) The officer or employee of the local board authorized to destroy the growing tobacco plants or to seize and remove tobacco under subsection (3) shall enter upon the lands on which the said tobacco plants are growing or into the premises in which the tobacco is found, taking with him such assistants and police officers, as he may deem necessary, and,
>
> (a) where the officer or employee of the local board is authorized to direct and procure the destruction of growing tobacco plants on such lands, he shall direct and procure the destruction of the growing tobacco plants; and
>
> (b) where the officer or employee of the local board is authorized to seize and remove tobacco found in such premises, he shall seize and remove the tobacco from such premises.
>
> (5) Where tobacco is seized and removed under paragraph (b) of subsection (4), the local board may order the tobacco to be destroyed or sold, as the local board deems proper, and where the local board orders the tobacco to

[129] *Ibid.*, s. 18(4) as enacted by Ont. 1962-63, c. 45, s. 11(4).

[130] R.R.O. 1960, Reg. 173, s. 4(1) (p) as remade by O. Reg. 186/65, s. 1, and amended by O. Reg. 91/68, s. 1.

be sold the proceeds of the sale shall be retained by the local board and used for the purposes of the plan."[131]

It is obvious that this legislation is intended to provide strong enforcement measures which are deemed to be necessary with respect to the production and marketing of tobacco in Ontario. The legislation, however, offends against many principles of orderly law enforcement and the rule of law. There would appear to be no good reason why this legislation should not conform to ordinary rules of just procedure. The decisions which are required to be made pursuant to it appear to be primarily of a judicial nature and it would appear fair and logical that a person whose tobacco is sought to be destroyed should be heard before such an order is made. Alternatively, if it is considered that the powers are of an emergency nature, we recommend that they be exercisable only on a warrant being obtained from a justice of the peace after showing that there are reasonable and probable grounds to believe that there has been production of, or marketing of, tobacco plants or tobacco in violation of the Act or the regulations. Further, notwithstanding compliance with this recommended warrant procedure, we recommend that a person, whose tobacco product has been seized, removed, destroyed or otherwise disposed of, who can establish that the product was *not* being produced or marketed in violation of the legislation, should have a statutory claim for compensation for the loss so inflicted upon him.

PROTECTION OF MEMBERS AND EMPLOYEES OF THE BOARD AND LOCAL BOARDS

"No member of the Board or of a local board and no officer, clerk or employee of the Board or of a local board is personally liable for anything done or omitted to be done by it or by him in good faith in the exercise of any power or the performance of any duty under the authority, or purporting to be under the authority, of this Act or the regulations."[132]

As we have said with respect to similar provisions in other statutes, we can see no reason why such members or employees should receive any wider protection than is afforded

[131]General Regulations, Ontario Flue-Cured Tobacco Growers' Marketing Board, February 17, 1969, s. 14.
[132]R.S.O. 1960, c. 137, s. 4(6) as re-enacted by Ont. 1968-69, c. 37, s. 1(5).

by the common law for those acting under statutory authority. The exemption from liability even extends to acts done without statutory authority as long as they are done in good faith and in the purported exercise of statutory authority. We believe that the Board and the local boards and their respective members and employees should be fully liable for all actionable wrongs committed by them and therefore recommend that section 4 (6) should be repealed. Members and employees who have acted in good faith should be entitled to be fully indemnified by their boards with respect to any judgments obtained against them relating to acts intended to be done pursuant to the Act and regulations.[133]

RECOMMENDATIONS

1. Section 3(2) of the Act should provide that the Farm Products Marketing Board shall consist of at least three members, the number of persons fixed for a quorum in section 3(4a).
2. Section 6(4) should be amended so as to relieve only against the consequences of technical or minor defects in the qualifications, appointments or election of a member or officer of a local board.
3. The provision enabling the Board to define "farm product" should be repealed.
4. Consideration should be given to deleting "dairy products" from the definition of "farm product".
5. The definition of "marketing" should be amended to confine the various acts or activities defined as marketing to a process intended to result in a sale of the regulated product in question.
6. The Act should contain general definitions of the words "producing" and "processing".
7. The Act should be amended to provide that the Lieutenant Governor in Council shall authorize the real plan to be formulated with respect to specified products and the constitution of the local boards and the method of electing their members.

[133]For a further discussion of Crown liability see Chapter 131.

8. Paragraph 12 of section 8(1) should be repealed and replaced by a section in more precise language.
9. Paragraph 22 of section 8(1) should be repealed.
10. The general provisions in the opening part of section 9(1) should be repealed.
11. The Lieutenant Governor in Council should not have power under section 6(1)(f) and (g) to put a local board into trusteeship. Where a local board is to be put into trusteeship it should be by the exercise of judicial power and not legislative power.
12. Both Board regulations and local board regulations should be subject to the approval of the Lieutenant Governor in Council—which would make them subject to the provisions of the Regulations Act.
13. Paragraph 3 of section 8(1) should be amended to set out the grounds on which a licence to a producer may be refused as distinct from the grounds on which a licence may be refused to those engaged in marketing and processing.
14. The words "or for any other reasons the Board may deem sufficient" should be deleted from paragraph 3 of section 8(1).
15. The words "for any reasons that the Board deems proper" in section 18(2)(a) and in other sections of the Act should be deleted and appropriate standards inserted in their place.
16. The recommendations which were made in Chapter 76 respecting procedure to govern licensing applications and other licensing proceedings should apply to all licensing under the Farm Products Marketing Act and its subordinate legislation.
17. Those regulations which provide that a person whose licence has been refused, suspended or revoked or not renewed, may show cause why such licence should not be refused, suspended or revoked or why such renewal should not be refused, should be repealed and a proper appeal procedure provided.

18. The statute should clearly provide the purpose for which licensing fees may be charged.

19. The General Regulations of February 7, 1970 of the Ontario Greenhouse Vegetable Producers' Marketing Board should be amended to conform to this Report and Report Number 1.

20. Licensing through the method of agreements containing privative clauses, as provided for in the General Regulations of the Ontario Greenhouse Vegetable Producers' Marketing Board, should not be permitted.

21. Section 10a should not require two hearings before the local board before a matter may be brought before the Board. If it is intended to give a right to ask for a re-hearing as an alternative to an appeal the Act should so provide.

22. Section 10a should be amended to state that "an appeal lies" rather than "he may appeal".

23. The provisions of the recommended Statutory Powers Procedure Act and of any appropriate detailed rules of procedure should apply to proceedings under section 10a.

24. Appeals based substantially on matters of law should lie from the Board to the Divisional Court of the High Court of Justice. Where decisions are predominantly of an administrative nature a right of appeal should lie from the Board to the Minister of Agriculture and Food.

25. The power of investigation in section 4(1)(a) should be amended so as not to depend upon vague or imprecise language.

26. The wide powers of investigation under section 4(1)(a) and section 4(1)(b) should be subject to the control of the Lieutenant Governor in Council.

27. The recommendations which we have made with respect to the powers of a commissioner under the Public Inquiries Act and the procedure to govern investigations should be applicable to investigations under the Farm Products Marketing Act.

28. The investigative provisions in section 7 should not permit entry and inspection of a private dwelling without the consent of the occupier except under the authority of a search warrant issued under section 14 of the Summary Convictions Act.

29. The statute should place a restriction on the use of information obtained in investigations and inspections.

30. Persons being investigated should not be obliged to supply extracts from books and records. It should be sufficient if books and records are temporarily removed for the purpose of having copies made.

31. The Act should define expressly what are the orders and directions referred to in section 13 and provide that they should be in writing, that they should be brought to the attention of the person concerned before their contravention can constitute an offence, and that orders and directions should state on their face that a violation thereof constitutes an offence which may be prosecuted on summary conviction.

32. The penal aspects of the legislation should be completely reviewed to determine how the obligations and duties it imposes can be best enforced. Section 14(1) of the Act should be repealed and replaced by legislation providing a simple summary application by a local board to a county court judge for an order for the relief given by section 14.

33. Section 14(2)(b) should be repealed.

34. Section 17(1) should be replaced by legislation similar to section 4(2) of the Agricultural Products Marketing Act (Canada).

35. Section 17(2) should be repealed.

36. Section 18(2)(d) should be amended to provide that regulations made thereunder should provide for just procedure for the exercise of the powers that may be conferred. A person whose tobacco is sought to be destroyed should be heard before such an order is made. Alternatively, if it is considered that the powers in question are of an emergency nature, then they should

be exercisable only on a warrant being obtained from a Justice of the Peace after showing on reasonable and probable grounds that the Act or the regulations have been violated. A person whose product has been seized, removed, destroyed or otherwise disposed of, who can establish that the product was not being produced or marketed in violation of the legislation should have a statutory claim for compensation for any loss.

37. Section 4(6) should be repealed.

CHAPTER 113

The Fire Marshal

INTRODUCTION

The Fire Marshal of Ontario is an officer appointed by the Lieutenant Governor in Council under the Fire Marshals Act[1] with wide powers of a judicial, administrative, investigative and advisory character.[2]

The Deputy Fire Marshal "shall act in the stead of the Fire Marshal in the absence of, or during the illness or incapacity of the Fire Marshal, or in the case of a vacancy in the office, and . . . when so acting, [he] has all the power and authority of the Fire Marshal, and . . . shall exercise such powers and perform such duties for the prevention or investigation of fire or the protection of life and property from fire as the Lieutenant Governor in Council deems expedient or as are prescribed by the regulations."[3]

In addition to the Deputy Fire Marshal the Act provides for the appointment of district deputy fire marshals and inspectors who may exercise the powers of the Fire Marshal.[4]

JUDICIAL POWERS

We deal only with the principal judicial powers of the Fire Marshal. If on an inspection it is found that

(1) a building or other structure is for want of repair or by reason of age and dilapidated condition or any other cause especially liable to fire, or

[1] R.S.O. 1960, c. 148, amended by Ont. 1960-61, c. 29; Ont. 1961-62, c. 44; Ont. 1962-63, c. 47; Ont. 1965, c. 41; Ont. 1966, c. 59, and Ont. 1968, c. 43.
[2] R.S.O. 1960, c. 148, ss. 2(1), 3, 4, 12 and s. 19, as amended by Ont. 1960-61, c. 29, s. 1.
[3] *Ibid.*, s. 2(2).
[4] *Ibid.*, s. 2(3) (4).

(2) is so situated as to endanger any other property, or

(3) so occupied that fire would endanger persons or property therein, or

(4) that exits from the building or buildings are inadequate or improperly used, or

(5) that there are in or upon the buildings or premises combustible or explosive materials, or

(6) conditions dangerous to the safety of the buildings or premises or to adjoining property exist,

the officer making the inspection may order

(a) the removal of the buildings or the making of structural repairs or alterations, or

(b) the removal of combustible or explosive material or anything that may constitute a fire menace, or

(c) the installation of safeguards, e.g. fire extinguishers, alarms, fire escapes, etc.[5]

> "The Fire Marshal, Deputy Fire Marshal, a district deputy fire marshal, an inspector or an assistant to the Fire Marshal may order the removal from any building not being of fire-resistive construction or being within fifty feet of a hospital, school, church, theatre or any other place of public assembly or an hotel, apartment house or multiple occupancy dwelling, of a process of manufacture or other occupancy that because of the danger of fire or explosion is especially hazardous to life or property or may order that any such premises shall not be used for any such process or occupancy."[6]

No provision is made for rules governing the exercise of these powers. The adoption of our recommendation made in Report Number 1 with respect to a Statutory Powers Procedure Act and Statutory Powers Rules Committee[7] will rectify this deficiency. We recognize that in some cases these powers must be exercised for emergency purposes and provisions should be made for such cases with proper safeguards.

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[5] *Ibid.*, s. 19(2).
[6] *Ibid.*, s. 19(4).
[7] p. 212ff. *supra.*

APPEALS

Where an order is made by an officer, other than the Fire Marshal, for the removal of buildings or the making of structural repairs or alterations therein or the removal of a "process of manufacture or other occupancy that because of the danger of fire or explosion is especially hazardous to life or property" or that premises shall not be used for such occupancy, an appeal lies to the Fire Marshal and from the Fire Marshal to a county court judge.[8]

The language of the Act does not make it clear that where the decisions in first instance under the relevant sections are made by the Fire Marshal there is a right of appeal to the county court judge. This right of appeal should be clarified. The words "the decision" appear to relate back to the decision under subsection 5 which is a decision by the Fire Marshal on appeal to him. Further, section 19(6) commences—"If the party appealing is dissatisfied. . . ." It is to be noted that the commendable principle of requiring the Fire Marshal when making a decision on an appeal to him to give reasons was introduced into the Act in 1961.[9] An appeal to a judge of the county or district court should lie in all cases when the decision is made by the Fire Marshal whether it be a decision in first instance or on appeal from a decision made by an officer. This conforms to our recommendations made in Report Number 1.[10]

INVESTIGATIONS

The powers of the Fire Marshal and anyone exercising his powers to conduct investigations include

(1) power to enter and examine any premises

(a) on which a fire has occurred, or

(b) on which he has reason to believe that there may be a substance or device likely to cause fire.[11]

The exercise of these powers is subject to proper conditions precedent.

[8]R.S.O. 1960, c. 148, s. 19(5) as amended by Ont. 1960-61, c. 29, s. 1(1), and s. 19(6).
[9]Ont. 1960-61, c. 29, s. 1(1).
[10]p. 233 *supra*.
[11]R.S.O. 1960, c. 148, s. 12.

The ancillary power to remove and retain articles or material that in the opinion of the investigator may be of assistance in connection with any matter under investigation[12] should be based on reasonable grounds to believe that the goods or material may be of assistance in connection with any matter under investigation—not merely on the opinion of the investigator. There should be a right of repossession by the owner within a reasonable time.[13]

COMMITTAL FOR CONTEMPT

Those exercising the power of the Fire Marshal have all the powers that may be conferred on a commissioner under the Public Inquiries Act.[14] In addition, all these officers "have the same power to enforce the attendance of witnesses and to compel them to give evidence and to produce documents and things as is vested in any court in civil cases."[15] These are uncontrolled powers and ought not to be vested in a tribunal of this character. We have referred specifically to these powers in Report Number 1.[16] Any of the officers named in the Act have power to commit to jail. This power we have recommended should only be exercised by the Supreme Court on application made thereto.[17]

If the recommendations that we have made in Report Number 1 with respect to the Public Inquiries Act are adopted, our criticisms respecting the powers of investigation under the Fire Marshals Act will be substantially answered.[18]

WITNESS FEES

Unlike many other Acts providing for investigations some provision is made for payment of witness fees. The scale of witness fees and allowances provided by regulation is the same as that provided under the Crown Witnesses Act.[19] As we pointed out in Report Number 1 this scale is unrealistic

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[12]*Ibid.*, s. 12(c).
[13]pp. 407ff. *supra* and see s. 14(3) of the Summary Convictions Act, R.S.O. 1960, c. 387.
[14]R.S.O. 1960, c. 148, ss. 4 and 5.
[15]*Ibid.*, s. 13.
[16]pp. 435ff. *supra*.
[17]pp. 441ff. *supra*.
[18]p. 465 *supra*.
[19]R.R.O. 1960, Regulation 183, s. 8.

having in mind the loss that a workman must suffer while absent from his job to give evidence. A fee of $6.00 a day with an allowance up to $8.00 to provide accommodation for each night the witness is required to be absent from his home is quite inadequate. Such a fee and allowance requires the unfortunate witness to subsidize this branch of government administration. We recommended in Report Number 1 that all witnesses other than qualified experts should be paid at the rate of $15.00 per day with proper travelling and accommodation allowances.[20]

"Where a witness does not reside in the local municipality in which the hearing is held and it is desirable that he remain overnight at the place of hearing" he is entitled to expenses for accommodation up to $8.00 each night.[21] In some cases a witness may come a very considerable distance without going out of the local municipality and may travel a very short distance from one local municipality to another. The entitlement to an allowance for accommodation should depend only on the necessity of the witness remaining away from home overnight regardless of from what local municipality he comes. This is a matter that could well be subject to certification of the officer conducting the hearing.

RECOMMENDATIONS

1. Rules should be made for the exercise of the judicial powers of the Fire Marshal and his officers.
2. The right of appeal from the decisions of the Fire Marshal made in the first instance should be clarified. Section 19(6) should be amended by deleting the words "If the party appealing is dissatisfied with the . . ." and substituting therefor the words "If a party is dissatisfied with a . . ." so that the subsection, in part, will read: "If a party is dissatisfied with a decision of the Fire Marshal, he may within five days after the service of the decision, apply by way of originating notice according to the practice of the court, to the judge of the county or district court. . . ."
3. The right to retain goods and material removed from premises under the provisions of section 12(c) should be

[20]p. 863 *supra*.
[21]R.R.O. 1960, Reg. 183, s. 8(5).

based on "reasonable grounds to believe" that the goods or material "may be of assistance in connection with any matter under investigation."

4. An owner of goods or material removed from premises pursuant to the powers conferred under section 12(c) should have a right of repossession within a reasonable time.
5. The investigatory powers should be made to conform to our recommendations made in Report Number 1.
6. Provision should be made for the payment of adequate witness fees to witnesses so as to compensate them for loss of time and expenses while attending to give evidence before the Fire Marshal or any of his officers.

CHAPTER 114

The Hydro-Electric Power Commission of Ontario

INTRODUCTION

The Hydro-Electric Power Commission of Ontario is a body corporate deriving its powers mainly from the Power Commission Act[1] and the Power Control Act.[2] Generally speaking, the function of the Commission is to produce and supply power to municipal corporations at cost and to other customers at rates deemed to be reasonable by the Commission.

We are not concerned with the powers conferred on the Commission to carry on its ordinary commercial activities. We are, however, concerned with its statutory powers which are in excess of those that may be exercised by an ordinary corporation, e.g. power of expropriation, power to flood lands and certain other extraordinary rights, privileges and immunities.

POWERS OF EXPROPRIATION AND ENTRY

The Commission's power to expropriate, enter upon land, and take land and personal property without the owner's consent were in a great state of confusion prior to the passing of the Expropriations Act, 1968-69[3] and since the passing of that Act the confusion has not been entirely dissolved. The Act provides:

[1]R.S.O. 1960, c. 300 as amended by Ont. 1960-61, c. 78; Ont. 1961-62, c. 106; Ont. 1965, c. 100; Ont. 1966, c. 119; and Ont. 1968, c. 98.
[2]R.S.O. 1960, c. 302.
[3]Ont. 1968-69, c. 36.

"2. (1) Notwithstanding any general or special Act, where land is expropriated or injurious affection is caused by a statutory authority, this Act applies.

(2) The provisions of any general or special Act providing procedures with respect to the expropriation of land or the compensation payable for land expropriated or for injurious affection that refer to *The Municipal Act, The Public Works Act* or any other Act shall be deemed to refer to this Act and not to *The Municipal Act, The Public Works Act* or other Act, as the case may be.

(3) This Act does not apply to the use of or injury to land authorized under *The Drainage Act, 1962-63* for the purposes of a drainage works constructed under that Act or to any proceedings in connection therewith.

(4) Where there is conflict between a provision of this Act and a provision of any other general or special Act, the provision of this Act prevails."[4]

The Expropriations Act, 1968-69 therefore applies where "land is expropriated or injurious affection is caused by a statutory authority."

"Expropriate" is defined as "the taking of land without the consent of the owner by an expropriating authority in the exercise of its statutory powers, but does not include the taking of land for the widening of a highway where entry is deferred under section 338 of the Municipal Act."[5]

"Injurious affection" is defined to mean,

"(i) where a statutory authority acquires part of the land of an owner,

a. the reduction in market value thereby caused to the remaining land of the owner by the acquisition or by the construction *of the works thereon or by the use of* the works thereon *or any combination of them,* and

b. such personal and business damages, resulting from the construction or use, or both, of the works as the statutory authority would be liable for if the construction or use were not under the authority of a statute,

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[4]*Ibid.*, s. 2.
[5]*Ibid.*, s. 1(1) (c).

(ii) where the statutory authority does not acquire part of the land of an owner,

a. such reduction in the market value of the land of the owner, and

b. such personal and business damages resulting from the construction and not the use of the works by the statutory authority, as the statutory authority would be liable for if the construction were not under the authority of a statute,

and for the purposes of this clause, part of the lands of an owner shall be deemed to have been acquired where the owner from whom lands are acquired retains lands contiguous to those acquired or retains lands of which the use is enhanced by unified ownership with those acquired;"[6]

"Land" is defined as including any "estate, term, easement, right or interest in, to, over or affecting land."[7]

The result is that where the Commission exercises powers that come within the Expropriations Act, 1968-69 that Act applies with respect to procedure and compensation, but if the exercise of a power does not come within the Expropriations Act, 1968-69 the provisions for the procedure and compensation will still be governed by the Power Commission Act.

The confusion thus created will be evident as we analyze the sections conferring power to acquire land, easements, privileges and personal property and power to injuriously affect land whether powers of expropriation have or have not been exercised.

Under the Power Commission Act, unless the contrary intention appears, land is defined as "real property of whatever nature or kind, and includes tenements, hereditaments and appurtenances, and any estate, term, easement, right or interest in, to, over, under or affecting land."[8] This definition is not the same as that given to land in the Expropriations Act, 1968-69. For example, "hereditaments" are expressly included in the definition of land in the Power Commission Act but not in the Expropriations Act, 1968-69. The word "hereditaments" has an ambiguous meaning.[9] However, it

[6] *Ibid.*, s. 1(1) (e). Italics added.
[7] *Ibid.*, s. 1(1) (g).
[8] R.S.O. 1960, c. 300, s. 1(c).
[9] Challis's *Law of Real Property*, (3rd ed., 1911) 44 ff.

may well be that the words "right or interest in, to, over or affecting land" used in the Expropriations Act, 1968-69 are sufficiently comprehensive to include anything that comes within the definition of land in the Power Commission Act. But any ambiguity should be cleared up by using the same definition in the latter Act as is used in the former.

However, as we shall see, there are powers of expropriation and powers to take property without the owner's consent and powers to injuriously affect land and property conferred on the Commission under the Power Commission Act, the Niagara Development Act[10] and the St. Lawrence Development Act (No. 2)[11] that do not involve the taking of "land" as it is defined in the Expropriations Act and include power to acquire personal property without the owner's consent and to exercise privileges which affect the enjoyment of property but do not involve an interest in land.

Section 24 of the Power Commission Act

Under section 24 the Lieutenant Governor in Council may authorize the Commission ". . . to acquire by purchase, lease, or in any other manner, or without the consent of the owner thereof to enter upon, take possession of, expropriate and use, any land, lake, river, stream or other body of water or watercourse, and temporarily or permanently to divert or alter the boundaries or course of any lake, river, stream or other body of water or watercourse, or raise or lower the level of the same or flood or overflow any land."[12]

The powers with which we are concerned, conferred under this section, are divisible into three parts:

(1) power to expropriate;

(2) power to use land; and

(3) power to divert watercourses and to raise and lower the level of water so as to drain or flood lands which may be lands neither owned nor used by the Commission.

The powers falling within (2) and (3) are not necessarily dependant on the power to expropriate. Where the power of expropriation is to be exercised it must be authorized by

[10] Ont. 1951, c. 55.
[11] Ont. 1952, (2nd session) c. 3.
[12] R.S.O. 1960, c. 300, s. 24(1).

the Lieutenant Governor in Council. But under the Expropriations Act, 1968-69 the approving authority for an expropriation by the Commission is the Minister of Energy and Resources Management.[13] The result is the power cannot arise until the authority has been conferred by the Lieutenant Governor in Council but when it has been conferred it cannot be exercised without the approval of the Minister of Energy and Resources Management. This is an anachronism but one that cannot do any harm.

A more serious matter arises under the section. Under the Expropriations Act, 1968-69 where a statutory authority acquires part of the land of an owner the owner shall be compensated for "the reduction in market value thereby caused to the remaining land of the owner by the acquisition or by the construction of the works thereon or by the use of the works thereon or any combination of them, and . . . such personal and business damages, resulting from the *construction or use, or both,* of the works as the statutory authority would be liable for if the construction or use were not under the authority of a statute."[14]

Any rights arising out of this provision are dependant on the acquisition by a statutory authority of part of the land that may be injuriously affected.

"Expropriating authority" is defined to mean "the Crown or any person empowered by statute to expropriate land."[15]

"Statutory authority" is defined to mean "the Crown or any person empowered by statute to expropriate land or *cause injurious affection,*[16] as defined in the Act.[17]

> "21. A statutory authority shall compensate the owner of land for loss or damage caused by injurious affection."[18]

The words used in this section are "statutory authority" not "expropriating authority." It is clear that where the statutory authority does not acquire part of the land of the owner there is no right to compensation for injurious affection caused by

[13]Ont. 1968-69, c. 36, s. 5(4).
[14]*Ibid.*, s. 1(1) (e) (i). Italics added.
[15]*Ibid.*, s. 1(1) (d).
[16]*Ibid.*, s. 1(1) (m). Italics added.
[17]See p. 1810 *supra*.
[18]Ont. 1968-69, c. 36, s. 21.

the use of the land. On the other hand, if a statutory authority (i.e. the Crown or any person empowered by statute to expropriate land *or cause injurious affection to land*) injuriously affects land by the construction of a work on land even though no expropriation has taken place, compensation is payable. It is doubtful that the Legislature intended that the provisions of the Expropriations Act, 1968-69 should apply with respect to land injuriously affected through the construction of works by a statutory authority on lands that had been purchased or leased in the exercise of a statutory power.

Section 21 confers rights to compensation for injurious affection to land caused by a statutory authority that did not exist at common law and that are not dependant on the exercise of the power to expropriate. The common law may be broadly stated that in the absence of negligence a body exercising statutory powers will not be liable for nuisance or damage which is the inevitable result of carrying out the statutory powers conferred merely because it might, by acting in a different way, have minimized an injury.[19]

Under the Expropriations Act there is a clear distinction drawn between injurious affection caused by construction of a work and use of a work. If the damages result from the construction there is a right to compensation even though there was no expropriation of any lands, but if the damages result from the use, there is no right to compensation notwithstanding that there has been an expropriation unless part of the lands of the owner have been taken.

However, there is a wide area in which it is most difficult to determine whether damage results from the construction or from the use of the work. For example, when a dam is constructed the rights of riparian owners may be affected to a certain extent but when the flood gates are closed, damages of another sort to riparian owners, both above and below the dam, will result. Do such damages "result" from the construction of the dam or from the use of the dam?

What we have said with respect to the powers conferred on the Commission under the Power Commission Act to expropriate land and to injuriously affect land apply with

[19]See *Halsbury's Laws of England* (3rd ed.) Vol. 30, 690.

equal force to the powers conferred on the Commission under the Power Control Act.[20] That Act provides,

"5.(1) Where the Commission is satisfied that an owner is not using his land and works, or either of them, to full capacity or best advantage for the generation or supply of power or is neglecting or refusing to comply with a direction of the Commission or the provisions of this Act or the regulations, the Commission may purchase or acquire and may, without the consent of the owner, enter upon, take and expropriate any of his lands or works that it deems necessary for the generation, transformation, transmission, distribution or supply of power.

(2) Where lands or works are purchased, acquired, entered upon, taken or expropriated under this section, the Commission, in its discretion, may acquire absolute title or a limited estate, right or interest therein either on a rental basis or otherwise as it deems desirable in the circumstances, provided that whether or not it acquires absolute title to any such land or works, the Commission may use such land and works in such manner as it deems proper and may divert water therefrom, close, repair, rehabilitate, extend, improve or reconstruct such works and may construct other works in lieu thereof or in addition thereto.

(3) The provisions of *The Power Commission Act* and *The Public Works Act* as to the purchase, acquisition, entry upon, taking and expropriation of land and the fixing, payment and application of compensation therefor apply *mutatis mutandis* to the purchase, acquisition, entry upon, taking and expropriation of land and works under this Act, but where any of the provisions of *The Power Commission Act* conflict with any of the provisions of *The Public Works Act*, the former prevail."[21]

It is not the function of this Commission to give legal opinions on the construction of involved and intricate statutes affecting civil rights, such as the rights of riparian owners of land, but we do strongly recommend that where statutory power is given to affect such rights, the right to compensation and the procedure by which it is to be obtained should be clearly set out in simple language.

In dealing with the powers conferred on the Ontario

[20]R.S.O. 1960, c. 302.

[21]*Ibid.*, s. 5.

Water Resources Commission we discuss at some length the conflict between the powers of that Commission and the powers conferred on the Hydro-Electric Power Commission of Ontario and the rights of riparian owners.[22]

In addition to the power to acquire land without the owner's consent, the Commission has power to acquire "machinery, plant and other works and appliances for the transmission, transformation, supply and distribution of power."[23] The acquisition of personal property without the owner's consent does not come within the Expropriations Act, 1968-69. Therefore, one must look to the provisions of the Public Works Act[24] to determine the right to compensation and the relevant procedure. This creates an intricate legal maze which should be resolved by clear provisions in the Power Commission Act conferring a right to compensation for personal property taken without the owner's consent and the procedure by which such compensation should be determined.

Section 33 of the Power Commission Act

The section reads, in part, as follows:

"(1) Notwithstanding anything in this or any other Act, whenever the Commission has been authorized by the Lieutenant Governor in Council to exercise any of its powers with respect to conducting, conveying, transmitting, distributing, supplying, furnishing or delivering power, it may proceed under the following provisions of this section.

(2) The Commission may, without notice or without the deposit of any plan or description or any prerequisite or preliminary action or formality, and with or without the consent of the owner thereof, enter upon, take possession of and use for such time as the Commission deems desirable any land that the Commission deems to be required for the due exercise of any of its powers with respect to conducting, conveying, transmitting, distributing, supplying, furnishing or delivering of power, and may construct upon the land any works requisite for any such purpose."[25]

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[22]p. 2109ff. *infra*.
[23]R.S.O. 1960, c. 300, s. 24(2) (g).
[24]R.S.O. 1960, c. 338.
[25]R.S.O. 1960, c. 300, s. 33(1) (2).

It is important for our purposes to realize that where the powers of compulsory taking are exercised under this section a very different procedure is set out for fixing compensation than that set out for the taking of land under section 24. But nevertheless, certain of the powers conferred under section 33 are to acquire "an easement, right or interest in, to, over or affecting land" and hence they are exercised with respect to the compulsory taking of land within the definition of that term in the Expropriations Act, 1968-69. But the procedure under section 33 for fixing compensation is by means of a board of valuation with certain rights of appeal to the Ontario Municipal Board or a member thereof, or a judge of the Supreme Court or of a county or district court and thence to the Court of Appeal.[26] With respect to easements or rights or interests in or over or affecting land the section conflicts with the Expropriations Act, 1968-69 and that Act would apply.

On the other hand, the Commission may under this section make use of land for temporary purposes that do not involve the acquisition of a right or interest in the land of such a nature that the Expropriations Act, 1968-69 would apply. In many cases the use acquired is of a trivial nature and in some cases even the easements acquired are of a trivial nature such as the insertion of anchor posts for guy wires. The provisions of the Expropriations Act, 1968-69 would appear to be unsuitable for such cases. Consideration should be given to providing expressly in the Power Commission Act that the valuation procedure set out in section 33, or some simpler procedure, should be applicable for fixing compensation for small claims notwithstanding the provisions of the Expropriations Act, 1968-69. The right of appeal should be to the Land Compensation Board.

Where substantial damage arises out of the exercise of powers conferred under section 33 the damages should be fixed by the Land Compensation Board.

The Niagara Development Act, 1951

The definition of land in this Act[27] is slightly different from the definition of land in the Power Commission Act.

[26] *Ibid.*, ss. 33(7), 34.
[27] Ont. 1951, c. 55.

Power is conferred on the Commission not only to expropriate land but to use land and divert water. What we have said and the recommendations made with reference to such powers conferred on the Commission under the Power Commission Act apply with equal force to powers conferred under this Act.

The St. Lawrence Development Act, 1952 (No. 2)

The definition of "land" in this Act[28] is identical with the definition of "land" used in the Expropriations Act.

Power is conferred on the Commission to "acquire for the purposes of this Act by purchase, lease or otherwise or without the consent of the owner, enter upon, take possession of, expropriate and use such land, waters, water privileges, water powers, access and other rights, buildings and works as in its opinion are necessary, and use, utilize, develop and improve them . . .".[29]

Subject to the approval of the Lieutenant Governor in Council and for the purposes of the Act the Commission may "determine that a claim for compensation made under this Act is to be regarded as a claim in respect of an interest in land or an interest in property where such may not be the case in law."[30]

This is an extraordinary power. It is questionable that the Legislature can confer on any Board or Commission appointed by it power to declare "a claim in respect of an interest in land" to be an interest in property or to declare a claim in respect to an interest in property to be a claim in respect to an interest in land "where such may not be the case in law." In any case this is not a power that should be conferred on a tribunal.

A procedure is laid out in the statute whereby compensation for land taken or injuriously affected or property injuriously affected in carrying out the purposes of the Act may be fixed. Where land is taken or injuriously affected there is conflict with the Expropriations Act and its provisions would prevail. Where property is taken or injuriously affected there would be no such conflict and the procedure

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[28]Ont. 1952, (2nd session) c. 3.
[29]*Ibid.*, s. 8(1) (d).
[30]*Ibid.*, s. 8(2) (d).

laid down in the Act would prevail, i.e., compensation would be fixed by the Ontario Municipal Board.[31]

That being true, the Commission may by exercising its power to declare a claim for land to be a claim for property or a claim for property to be a claim for land (if it has the constitutional power to do so) determine which tribunal shall fix compensation, the Land Compensation Board or the Ontario Municipal Board.

Section 8(2)(d) should be repealed.

The Act which was passed for the purpose of the development of the St. Lawrence Waterway should be completely revised, if powers are to be exercised under it in the future, to be consistent with our recommendations concerning the Power Commission Act and to remove inconsistencies with the Expropriations Act, 1968-69.

Recovery of Cost of Construction

Section 42 is in many respects the reverse of those conferring powers to expropriate and injuriously affect land. Where the Commission constructs any work or improvements upon any lake, river, stream or other body of water, and any person or municipal corporation owning a water power or water power site is benefited by the work of the Commission, a proportion of the cost of the Commission's work may be assessed against the beneficiary. In case of dispute the portion to be borne by the respective parties is fixed by an order of a judge of the Supreme Court or a judge of a county or district court. A party affected by the order may with the consent in writing of the Commission appeal to the Court of Appeal.[32]

This is a most extraordinary provision. Provision for an appeal with the consent of the party in whose favour an order has been made cannot be said to be a right of appeal.

The words "with the consent in writing of the Commission" should be struck out.

The procedure for fixing the proportion of the cost to be borne by the respective parties is in the nature of an arbitration and the jurisdiction should be conferred on the Land

[31] *Ibid.*, s. 15.
[32] R.S.O. 1960, c. 300, s. 42(6).

Compensation Board.[33] In any case, if the jurisdiction is to be exercised by a judge, the provisions in the Act that "the judge shall be paid fees and expenses as are fixed by the Lieutenant Governor in Council"[34] are in conflict with the Judges Act[35] and should be repealed. Provisions such as this were fully dealt with and condemned in Report Number 1.[36]

After the proportions of the cost of the work that the respective parties are to bear have been fixed, "the Commission shall, subsequent to the order of the judge, annually fix and determine the cost, charges or expenses incurred by it from time to time in the operation, maintenance, repair and renewal of such works and shall apportion and charge the same against the parties in the proportions fixed by the order of the judge . . . and the amounts so charged are payable on demand recoverable in the manner hereinafter provided."[37] The amount so found to be payable by a municipal corporation may be recovered by the Commission as in the case of a charge for any other service. The amount recoverable from any other corporation or company or individual constitutes a debt due to the Commission and is recoverable in any court of competent jurisdiction from the owners of the land benefited and a lien is constituted in favour of the Commission on the lands.[38]

These provisions create a process by which a liability is created without any procedural rules. In addition, a lien may be created against lands without any provision for registration so as to provide notice to third parties. If the jurisdiction to fix the proportions in which the costs are to be borne is conferred on the Land Compensation Board it will have its rules. In any case, the lien should be invalid as against third parties who take without notice.

The section contains a curious provision for a right of periodic review with respect to the cost of operations. The order of the judge or the Court of Appeal fixing the proportions is final and binding "unless and until it *appears to the Commission* that owing to change of circumstances or condi-

[33]Expropriations Act, 1968-69, Ont. 1968-69, c. 36, s. 28(1).
[34]R.S.O. 1960, c. 300, s. 42(4).
[35]R.S.C. 1952, c. 159 as amended.
[36]Chapters 45 and 46.
[37]R.S.O. 1960, c. 300, s. 42(8).
[38]*Ibid.*, s. 42(10).

tions in respect of such works or improvements it is equitable that there should be a readjustment of the proportions theretofore fixed by the order of the judge."[39]

The result is that no matter how unjust the original order has become by reason of change of circumstances the injured party has no right to apply for readjustment unless and until it appears to the Commission that there is a change of circumstances that renders the original order inequitable. When it appears to the Commission that such is the case, "upon the application of any person liable to contribute to the cost of such works or improvements, made *with the consent in writing of the Commission,* the judge may make further inquiry and may readjust such proportions to be thereafter applied in such manner as he deems just and equitable, subject to appeal as hereinbefore provided."[40]

In summary, the injured party has no right to apply until the Commission has come to the conclusion that the original order is inequitable and can only apply with the written consent of the Commission and in case there is a readjustment he can only appeal with the written consent of the Commission.

The mere statement of these provisions is sufficient to condemn them as unjustified encroachments on the civil rights of the individual. A party affected by an order fixing the proportions of costs under section 42 should have a right to apply to the tribunal authorized to make the order to show that the proportions are inequitable or that by reason of change of circumstances there should be a readjustment.

In determining the proportions in which the original cost of the works should be borne and the costs of charges and expenses incurred annually "the cost of the works or improvements shall be deemed to include all expenditures, charges and expenses as fixed by the Commission."[41]

This means that it is not the tribunal that fixes the amount of the costs incurred annually in arriving at the order fixing the apportionment but it is the Commission itself.

If there is a dispute with respect to the Commission's costs it should be the function of the arbitral tribunal to fix

[39]*Ibid.*, s. 42(12). Italics added.
[40]*Ibid.*
[41]*Ibid.*, s. 42(5).

those costs when fixing the proportions in which they should be borne. This section should be completely revised.

DISPOSITION OF FINES

The provision in section 46 that fines recovered for contravening the prohibition against attaching anything to the property of the Commission are to be paid over to the Commission is contrary to the recommendations contained in Report Number 1 with regard to disposition of fines.[42] The maximum fine is $10.00. Quite apart from the principles dealt with in Report Number 1 concerning the person conducting a prosecution having a financial interest in penalties recovered in the courts, the bookkeeping nuisance imposed on the administrative officers of the courts under this section constitutes an unwarranted public expense. There is no reason why such fines should not be paid over and become part of the Consolidated Revenue Fund. This criticism is equally applicable to section 97(12) which provides that fines recovered for offences against that section should be paid over to the Commission.[43]

ACTIONS AGAINST THE COMMISSION OR MEMBERS THEREOF

Section 7(5) of the Act provides:

> "Without the consent of the Attorney General no action of any kind whatsoever shall be brought against the Commission, and without the consent of the Attorney General no action of any kind whatsoever shall be brought against any member of the Commission for anything done or omitted by him in the exercise of his office."[44]

This provision gives the Commission greater protection than has been enjoyed by the Government itself since the enactment of the Proceedings Against the Crown Act.[45]

That Act provides:

> "A claim against a corporation of the Crown that, if this Act had not been passed, might be enforced, subject to the con-

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[42]pp. 913-14 *supra*.
[43]R.S.O. 1960, c. 305, s. 97(12).
[44]*Ibid.*, s. 7(5).
[45]Ont. 1962-63, c. 109.

> sent of a servant of the Crown, may be enforced as of right without such consent."[46]

This provision must be read with the Crown Agency Act[47] which we quote in full.

> "In this Act, 'Crown agency' means a board, commission, railway, public utility, university, manufactory, company or agency owned, controlled or operated by Her Majesty in right of Ontario, or by the Government of Ontario, or under the authority of the Legislature or the Lieutenant Governor in Council.
>
> A Crown agency is for all its purposes an agent of Her Majesty and its powers may be exercised only as an agent of Her Majesty.
>
> This Act does not affect The Hydro-Electric Power Commission of Ontario."[48]

It has been judicially decided that the Hydro-Electric Power Commission is not a department of Government and it does not come within the definition of a Crown agency.[49] The Commissioners cannot be said to be in any way servants of the Crown.

Section 7(5) of the Power Commission Act would appear to be unaffected by the Proceedings Against the Crown Act and therefore the consent of the Attorney General is still required before any action may be brought against the Commission or any member thereof unless it can be considered a corporation of the Crown (whatever that term means).

Any question as to the right of an individual to bring an action against the Commission or its members without a fiat from the Attorney General should be made clear by legislation.

In our interview with the then Chairman of the Commission he agreed that the Commission should not have any greater protection against action than that which is given to the Crown and Crown officials.

COMPLAINTS AS TO RATES CHARGED

Where a complaint is made that a municipal corporation, company or person receiving power from the Commis-

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[46] *Ibid.*, s. 4. We discuss section 7(5) in relation to the provisions of the Proceedings against the Crown Act in Chapter 131.

[47] R.S.O. 1960, c. 81.

[48] *Ibid.*, ss. 1, 2 and 3.

[49] *St. Catharines v. H.E.P.C. of Ontario,* [1930] 1 D.L.R. 409 (P.C.).

sion is charging a rate that is excessive or unfair or that a municipal corporation is making use of the powers conferred on it under the Act for the purpose of granting a bonus by supplying power below cost "the chairman of the Commission may appoint a time and place at which the Commission or some member thereof will hear and determine the matter of the complaint, and such notice of the appointment as the chairman directs shall be given by the secretary of the Commission to such persons as the chairman directs."[50]

The Commission or a member thereof determines the matter and may allow or dismiss the complaint and may direct that the by-law or agreement in question be amended or "may make such order as seems meet."[51]

Such power of final decision ought not to be exercised by one man. It should either be exercised by the Commission or if it is exercised by one member of the Commission there should be a right of appeal to the Commission.

The Commission or the member appointed to hear the complaint has all the powers that may be conferred on a commissioner under the Public Inquiries Act. This provision is contrary to the recommendations made in Report Number 1[52] with respect to powers to be conferred on those exercising powers of inquiry. If the Public Inquiries Act is revised as recommended this matter will be corrected.

CONTROL OF ENERGY

Under the Power Control Act the Commission has power to regulate and control the generation, transformation, transmission, distribution, supply and use of power in Ontario.[53] The definition of power includes "energy".[54] Specific regulatory powers over the transmission, distribution and supply of gas and oil are conferred on the Ontario Energy Board under the Ontario Energy Board Act.[55] Under the Power Control Act its provisions prevail in the event of conflict with

[50]R.S.O. 1960, c. 300, s. 96(1).
[51]*Ibid.*, s. 96(2).
[52]pp. 446-465 *supra*.
[53]R.S.O. 1960, c. 302, s. 2.
[54]*Ibid.*, s. 1(d).
[55]Ont. 1964, c. 74.

any other Act[56] while under the Ontario Energy Board Act its provisions prevail in the event of conflict with any other Act.[57]

Notwithstanding that as a matter of law the provisions of the latter Act would prevail the Power Control Act should be amended to resolve this apparent conflict.

RECOMMENDATIONS

1. The definition of land in relation to expropriation should be the same in the Power Commission Act as that used in the Expropriations Act, 1968-69.

2. The rights of riparian owners to compensation for injuries suffered by reason of the construction and operation of works of the Commission and the procedure by which it is to be obtained should be clearly stated in the Act.

3. The right to compensation for personal property taken without the owner's consent should be clearly stated in the Act and the procedure by which the compensation is to be determined should be set out.

4. The conflict between the procedure prescribed for fixing compensation for "easements, rights to, over or affecting land" acquired under section 33 and that provided by the Expropriations Act, 1968-69 should be resolved.

5. A simple procedure should be provided to fix compensation where small claims are made in respect of the powers exercised under section 33. The right of appeal should be to the Land Compensation Board.

6. Where substantial damage arises out of the exercise of powers conferred under section 33 the compensation should be fixed by the Land Compensation Board.

7. Where any person or municipality has been assessed for a portion of the construction of a work under section 42 he or it should have a right of appeal irrespective of the consent of the Commission. The words "with the consent in writing of the Commission" should be struck out.

[56]R.S.O. 1960, c. 302, s. 7(2).
[57]Ont. 1964, c. 74, s. 56(1).

8. The provision in section 42 that the judge fixing the proportion of the cost of a work shall be paid fees should be repealed.

9. A party affected by an order made under section 42 should have a right to apply to the Land Compensation Board or the tribunal making the order for a review of the order where owing to the change of circumstances or conditions it is equitable that there should be a readjustment of the proportions. Whether there is a change of circumstances or conditions ought not to be a matter to be decided by the Commission.

10. An unregistered claim for a lien under section 42 should not be enforceable against innocent purchasers for value without notice.

11. In case of dispute as to the cost of the work under section 42(5) the Commission should be required to prove to the satisfaction of the tribunal fixing the cost what "the expenditures, charges and expenses" were.

12. Section 42 should be completely revised.

13. Fines recoverable under the Act should not be paid over to the Commission but should form part of the Consolidated Revenue Fund.

14. Section 7(5) requiring the consent of the Attorney General before an action may be brought against the Commission or any member of the Commission for anything done or omitted by him in the exercise of his office should be repealed.

15. All conflict between the Power Commission Act, the Power Control Act and the Ontario Energy Board Act, should be resolved by appropriate legislation.

16. Section 96(1) should be amended to provide that the power thereunder should be exercised by the Commission or if it is to be exercised by one member thereof that there be a right of appeal to the Commission.

17. Where applicable the recommendations made with reference to the exercise of powers by the Commission under

the Power Commission Act apply with equal force to the provisions of the Niagara Development Act, 1951.

18. Section 8(2)(d) of the St. Lawrence Development Act, 1952 (No. 2) should be repealed.

19. The St. Lawrence Development Act, 1952 (No. 2) should be completely revised if powers are to be exercised under it in the future to be consistent with our recommendations concerning the Power Commission Act and to remove inconsistencies with the Expropriations Act.

CHAPTER 115

The Liquor Control Board of Ontario

INTRODUCTION

The liquor trade in Ontario is controlled through two boards—the Liquor Control Board of Ontario and the Liquor Licence Board of Ontario which exercise the powers conferred on them, respectively, under the Liquor Control Act[1] and the Liquor Licence Act[2] and the amendments thereto.

In this Chapter we shall consider the Liquor Control Board and the provisions of the Act under which it operates. In the next Chapter we shall deal with the Liquor Licence Board and the Act under which it operates.

It is something of a misnomer to call the Liquor Control Board a "Control Board".

The main functions of the Board are to buy and sell liquor but it exercises some control over the supply of liquor for consumption in Ontario—apart from its distribution through licensed outlets for the sale of liquor by private enterprise.

The purpose of the Act and the regulations is stated to be "to prohibit transactions in liquor except under Government control through the instrumentality of the Board, and to provide the means by which such Government control shall be made effective."[3]

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[1]R.S.O. 1960, c. 217.
[2]R.S.O. 1960, c. 218.
[3]R.S.O. 1960, c. 217, s. 142, as re-enacted by Ont. 1965, c. 58, s. 78.

Liquor includes any "alcoholic, spirituous, vinous, fermented malt or other liquid, any combination of liquids or mixed liquids a part of which is alcoholic, spirituous, vinous or fermented, any drink or drinkable liquid containing alcohol and includes wine, Ontario wine and beer."[4]

The Board consists of the Chief Commissioner who is the chairman of the Board, the Deputy Chief Commissioner and one other member.[5]

The Board does not hold regular meetings and it keeps no minutes. From our discussion with the chairman of the Board and its solicitor it is difficult to see on what legal basis many of the statutory powers conferred on it are exercised.

POWERS OF THE BOARD

The powers of the Board may be roughly divided into two classes:

(1) power to merchandise liquor in Ontario, and

(2) subject to the provisions of the Liquor Licence Act and the powers of the Liquor Licence Board, power to exercise control over the sale and consumption of liquor in Ontario.

We are not concerned with the merchandising functions of the Board. So far as these are concerned the Board is set up to carry out the policy of the Government. The policy is basically one of public ownership of that branch of the distribution of liquor in the Province not conducted through outlets licensed under the Liquor Licence Act. The Board imports liquor and buys from local manufacturers and sells to the public through its stores and to those holding licences under the Liquor Licence Act. It is not an independent Board in the true sense. It is more in the nature of a Board created to carry out the policy of the Government as an agency for the Government sale of liquor than a Liquor Control Board. However, it does exercise some powers of control affecting the rights of the individual. It is with these powers that we are particularly concerned.

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[4]*Ibid.,* s. 1(1) (j) as amended by Ont. 1965, c. 58, s. 1(2).

[5]*Ibid.,* ss. 2, 3.

SUBORDINATE LEGISLATIVE POWERS

The Board may exercise its powers either by doing certain specific things, such as buying, importing, possessing and selling liquor, determining the municipalities within which Government stores shall be established, maintaining warehouses, appointing officials[6] or by making regulations with the approval of the Lieutenant Governor in Council.[7] "The Board may by order exempt from [the] Act any product or class of product that contains alcohol and that is not, in the opinion of the Board, what is commonly known as spirituous liquor, wine, Ontario wine, or beer."[8] This is a very broad power. It is open to the criticism that the power is based on "the opinion of the Board" for its existence. It is a power conferred on an appointed body to amend a statute passed by the Legislature. It is hard to understand why this power should be conferred on the Board. We have commented on the provisions of statutes giving power to the Lieutenant Governor in Council to pass regulations in effect amending the statute conferring the power.[9] *A fortiori*, the Board ought not to have power without, at least, the approval of the Lieutenant Governor in Council, to make an order exempting products from the Act which come within its terms. It may be that the power is a necessary one. If it is not, the section should be repealed. If it is necessary, an order of the Board with respect thereto should be subject to the approval of the Lieutenant Governor in Council. In any event, such orders should come under the Regulations Act and be made public and subject to all of its provisions.

It is not to be overlooked that orders made by the Board, as distinct from regulations, are not subject to any compulsory publicity and according to the procedure followed by the Board they will not even be recorded in minutes.

The Board is given power to make regulations with the approval of the Lieutenant Governor in Council.[10] Among other things this power extends to "prescribing the tax, fees and assessments payable by any brewer, distiller or producer

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[6]*Ibid.*, s. 8(1) as amended by Ont. 1965, c. 58, s. 2.
[7]*Ibid.*, s. 9, as amended by Ont. 1965, c. 58, s. 3.
[8]*Ibid.*, s. 8(2).
[9]pp. 345-48 *supra*.
[10]R.S.O. 1960, c. 217, s. 9 as amended by Ont. 1965, c. 58, s. 3.

of Ontario wine."[11] Fixing licence fees by regulation is not objectionable provided that the purpose of the fees is clearly expressed.[12] Levying taxation or assessment by regulation is objectionable and is contrary to our recommendations made in Report Number 1.[13]

LICENSING

There are several provisions in the Liquor Control Act which relate to licensing. For convenience we summarize those particularly relevant to this inquiry.

"47.(1) The Board with the approval of the Minister and subject to this Act and the regulations, may issue a licence to any brewer duly authorized under any Act of the Parliament of Canada authorizing the brewer,

(a) to keep for sale and sell beer to the Board; . . .

(c) to keep for sale and sell beer under the supervision and control of the Board and in accordance with this Act and the regulations."[14]

Similar provisions respecting the licensing of distillers are contained in section 53 and respecting the licensing of producers of Ontario wine in section 53a.[15]

"55. The Board may, for any cause that it deems sufficient after a hearing, cancel or suspend any licence issued to a brewer, to a producer of Ontario wine or to a distiller, and all right of the brewer, producer of Ontario wine or distiller to sell or deliver liquor thereunder is cancelled or suspended, as the case may be."[16]

"29. Notwithstanding anything in this Act or the regulations, the Board is not compellable to issue any permit or licence under this Act or the regulations, and it may refuse, suspend or cancel any such permit or licence, *but only after the interested person has been given an opportunity of being heard*."[17]

The italicized words were added in 1965, in place of "in its discretion, and it is not obliged to give any reason or explanation for such refusal, suspension or cancellation."

[11] *Ibid.*, s. 9(2) (o).
[12] See p. 353 *supra*.
[13] pp. 351-53 *supra*.
[14] R.S.O. 1960, c. 217, s. 47(1)(a)(c) as re-enacted by Ont. 1965, c. 58, s. 27.
[15] *Ibid.*, s. 53a as enacted by Ont. 1965, c. 58, s. 32.
[16] *Ibid.*, s. 55 as re-enacted by Ont. 1965, c. 58, s. 33.
[17] *Ibid.*, s. 29 as amended by Ont. 1965, c. 58, s. 15. Italics added.

"28. Subject to the regulations, the Board may require the holder of a licence for the sale of liquor to give such security and to comply with such other provisions as the Board deems necessary or desirable in order to secure the due observance of this Act and the regulations."[18]

"55a. Any holder of a licence or permit that is cancelled under section 29 or 55 may appeal from the order of the Board cancelling the licence or permit, and section 140 applies *mutatis mutandis* to any such appeal."[19]

Section 140 of the Act enables a person "convicted" under the Act, subject to certain conditions, to appeal from the conviction to a judge of a county or district court of the county or district in which the conviction is made, sitting in chambers without a jury.

The foregoing provisions indicate the nature of the licensing powers under the Act.

The absence of any standards or factors controlling licensing decisions made under sections 47, 53 and 53a together with the provisions that the Board "is not compellable to issue any permit or licence under this Act or the regulations, and it may refuse, suspend or cancel any such permit or licence"[20] and that it may "for any cause that it deems sufficient . . . cancel or suspend any licence issued to a brewer,"[21] etc. create licensing powers sharply at variance with the recommendations which we have made in Report Number 1.[22]

These sections should contain standards respecting a person's entitlement to a licence, even if a substantial measure of discretion is still to be vested in the Board. The arbitrary features in sections 29 and 55 should be repealed.

In addition, the provisions of sections 47, 53 and 53a that the licences thereunder can only be issued "with the approval of the Minister," subordinates what appears to be an independent Board to the political control of the Minister. The result is that the Minister, through the Board, has the power of complete control over competition in the brewing, distilling and wine-producing industries in Ontario. Persons

[18] *Ibid.*, s. 28.
[19] *Ibid.*, s. 55a as enacted by Ont. 1965, c. 58, s. 33.
[20] *Ibid.*, s. 29 as amended by Ont. 1965, c. 58, s. 15.
[21] *Ibid.*, s. 55 as re-enacted by Ont. 1965, c. 58, s. 33.
[22] See, in particular, pp. 1100-1107 *supra*.

wishing to enter these industries should have a right to apply to the Board to prove to it that they are *prima facie* entitled to a licence (which presupposes the inclusion of standards or factors in the legislation, as just discussed) and, if they are refused, they should have a right of appeal. We shall discuss appeals later. The control of the Minister should be removed.

Section 28 requiring the holder of a licence for the sale of liquor to give security gives the Board absolute power to place onerous and unnecessary burdens on a holder of a licence for the sale of liquor. There seems to be no good reason for the section. Mr. Woodrow, who has been counsel for the Board for many years, stated to us:

> "Nothing has ever been done to my knowledge under the section. Nobody—no manufacturer who has been licensed to sell in this province has ever been requested to produce a bond or anything else."

It is not to be overlooked that the provisions of section 55a with which we shall deal later, which give the holder of a licence or permit that is cancelled a right of appeal, do not apply to the holder of a licence who may be ordered to give security. Since the section is apparently of no practical use it should be repealed.

None of the provisions (notwithstanding the repeal of the language in section 29 exempting the Board from the obligation to give reasons) require that the Board shall give reasons for its licensing decisions. This omission, as well as several others of a procedural nature, would be remedied by the application of the Statutory Powers Procedure Act recommended in Report Number 1 to the licensing powers of this Board.

Section 55a does not provide for an appeal from a decision refusing to grant a licence. There should be such a right of appeal.

In providing for an appeal from an order of the Board cancelling a licence[23] the Legislature has followed an inconsistent policy. Under the Municipal Act[24] a taxicab driver

[23]See R.S.O. 1960, c. 217, s. 55a as enacted by Ont. 1965, c. 58, s. 33; s. 140 as amended by Ont. 1965, c. 58, s. 77.
[24]R.S.O. 1960, c. 249, s. 247(9).

who has had his licence revoked by a board of commissioners of police has a right of appeal to a judge of the Supreme Court of Ontario. Under the Real Estate and Business Brokers Act[25] the right of appeal from the cancellation of a licence by the Tribunal lies to the Court of Appeal. In the case of a dentist whose licence to practice has been cancelled the appeal lies to the Court of Appeal.[26] The cancellation of a licence of a brewer or distiller or wine producer may involve great economic loss to the licensee but the right of appeal that is given is to a county or district court judge.

The provisions of section 140 which are made to apply *mutatis mutandis* to appeals under section 55a are designed for appeals from convictions under the Liquor Control Act which may involve very small fines and not to a situation where an industrial plant may be rendered valueless with the resulting loss. We think the right of appeal under section 55a should be to the Divisional Court of the High Court of Justice.

In another respect the provisions of section 140 are inapplicable to licensing procedure before the Board. The section contemplates an original hearing presided over by a provincial judge at which witnesses are heard and a proper record is made. The appeal is heard on the written record. Since the Board does not even keep minutes it is difficult to see how an appeal could be heard under the provisions of section 55a.

The examination of this Act emphasizes the need for proper rules governing the first hearing and proper rules governing the appeal. We dealt fully with appeals from licensing decisions in Report Number 1.[27]

INTERDICTION

An interdiction order may be made either by the Board, a judge of a county or district court or a provincial judge.

Section 84(1) of the Act provides that "the Board may, by order of interdiction signed by the Chief Commissioner or the Deputy Chief Commissioner, prohibit any person from purchasing, having, giving or consuming any liquor", and

[25] R.S.O. 1960, c. 344, ss. 30-34 as re-enacted by Ont. 1968-69, c. 105, s. 2.
[26] Dentistry Act, R.S.O. 1960, c. 91, s. 27 as re-enacted by Ont. 1966, c. 38, s. 14.
[27] pp. 1128-32 *supra*.

section 84(3) provides that the Board may, "by order of interdiction", prohibit the supplying of liquor to anyone against whom an order of interdiction has been made.[28]

> "97. Where it is made to appear to the satisfaction of the judge of a county or district court, the judge of a juvenile and family court or a justice that a person, resident or sojourning in Ontario, by excessive drinking of liquor, misspends, wastes or lessens his estate, or injures his health, or interrupts the peace and happiness of his family, the judge or justice may make an order of interdiction prohibiting the sale of liquor to him until further ordered . . ."[29]

Where an order of interdiction is made the person against whom the order is made has a right to apply to have the order set aside if it is shown to the satisfaction of the judicial authority that the order is one that ought not to have been made or it is proved "that the interdicted person has refrained from drunkenness for at least the twelve months immediately preceding the application. . . ."[30]

No guidelines are laid down for the exercise of the powers conferred on the Board under section 84(1). An order may be made against "any person". On the other hand, the power of the county or district court judge, the judge of the juvenile and family court (now a provincial judge) or the justice (defined in the Act to mean "a magistrate"—now a provincial judge) may only be exercised when it is made to appear to his satisfaction that the specific conditions exist as set out in the governing section.

The powers conferred on the Board under section 84 offend against the general principles fully discussed in Report Number 1 insofar as there is no provision for notice to the person affected and no guidelines or conditions precedent for the exercise of the power. We discussed these matters with the Chairman of the Board and the Board solicitor and they put forward convincing reasons why the provision for a formal hearing would largely destroy the purpose of the section. It is apparently used quite extensively. In many cases complaints come to the Board from a member of the family who often is

[28]R.S.O. 1960, c. 217, s. 84(1) and (3), as re-enacted by Ont. 1965, c. 58, s. 53.
[29]*Ibid.*, s. 97(1) as re-enacted by Ont. 1965, c. 58, s. 60.
[30]*Ibid.*, s. 100(1) as re-enacted by Ont. 1965, c. 58, s. 61.

one who has been the victim of violence by reason of the excessive use of alcohol. When a complaint is made to the Board it conducts its own investigation and if an order is made it notifies the party against whom it is made. He may then ask the Board to reconsider its order and if he does, it will do so. It is said that the cases have been rare in which the Board has been asked to reconsider an order.

We are convinced that these powers of the Board fall within the class of cases which should be exempt from the provisions of the Statutory Powers Procedure Act recommended in Report Number 1. The disclosure of the source of information would, in many cases, promote violence and further disrupt family life.

However, the person against whom an order is made should have a statutory right to apply to the Board for a reconsideration of the order in addition to his right to apply to a judge under section 100(1) to have the order set aside. The matter should not be left to the informal discretion of the Board.

POWER OF EXPROPRIATION

The provisions of the Act conferring an express power of expropriation[31] were repealed in 1965[32] but the following provision remains. It is the duty of the Board and it has power "to purchase or lease or acquire the use by *any manner whatsoever* of any plant or equipment that is considered necessary or useful in carrying into effect the object and purposes of this Act and the regulations."[33] We assume that when the Legislature passed the 1965 legislation it intended to remove all powers of expropriation from the Board. It may be that the words "acquire the use by any manner whatsoever" would not now be interpreted as power to expropriate, but they are ambiguous. We emphasized in Report Number 1 that if power to expropriate is to be conferred on any body it should be conferred by express and clear language.[34] The words just quoted should be repealed.

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[31]*Ibid.*, s. 12.
[32]Ont. 1965, c. 58, s. 5.
[33]R.S.O. 1960, c. 217, s. 81(1) (g). Italics added.
[34]p. 982 *supra*.

OFFENCES

"101. Every person who contravenes any provision of this Act or the regulations is guilty of an offence against this Act, whether so declared or not."[35]

This section is objectionable penal legislation. If a section of the Act or a regulation is intended to create an offence it should specifically so state. A section in a regulation made under the Act provides:

> "Every justice shall forward monthly to the Board a certificate containing particulars of all cases heard by him arising out of offences under this Act and the regulations or *The Liquor Licence Act* and the regulations under that Act."[36]

Under the provisions of section 101 if a justice fails to file his returns monthly or is ill and unable to file his returns he would be guilty of an offence under the Act.

"78. Except as provided by this Act or *The Liquor Licence Act* or the regulations hereunder or thereunder, no person shall consume liquor unless the liquor has been acquired under this Act or the regulations, or is had or kept with the permission of the Board, and unless the package in which the liquor is contained and from which it is taken for consumption has, while containing that liquor, been sealed with the official seal prescribed by this Act or the regulations."[37]

On its face this section is an absolute prohibition and renders anyone who consumes liquor liable to conviction under the Act even though he did not know that the liquor was not obtained according to the provisions of the Act or the Liquor Licence Act. It may be that the courts might give the section a limited interpretation but penal legislation should be clear. If the section is considered to be necessary at all it should be amended to provide that "no person shall knowingly consume liquor. . . ."

Power to Arrest Without a Warrant

"111. Any constable or other police officer may arrest without warrant a person whom he finds committing an offence against this Act or the regulations."[38]

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[35] R.S.O. 1960, c. 217, s. 101.
[36] O. Reg. 35/66, s. 75.
[37] R.S.O. 1960, c. 217, s. 78 as amended by Ont. 1965, c. 58, s. 49.
[38] *Ibid.*, s. 111.

As we have already pointed out anyone who contravenes any provisions of the Act or the regulations is guilty of an offence.[39] There are many offences created under the Act and the regulations that are not appropriate for the power of arrest let alone the power of arrest without a warrant. In Report Number 1 we recommended that no statute should give power to the Lieutenant Governor in Council to make regulations creating offences for which a person may be arrested without a warrant.[40] The absurdity of this provision is illustrated by reference to section 81 which provides that "no person shall sell or supply liquor or permit liquor to be sold or supplied to any person under or apparently under the influence of liquor." It may be said that anyone who has one drink of alcoholic liquor will be under the influence of liquor. Therefore, one who supplies a second drink to anyone might be arrested without a warrant if seen to do so by a constable.

We commented on provisions such as this in Report Number 1[41] in relation to the Liquor Licence Act in another context and we repeat what we said there: "The reckless absurdity of these provisions reduces the authority of the law to the ridiculous."[42]

There should be a complete revision of the offences created under the Act and the powers of arrest conferred under the Act and such powers should be strictly confined and governed by the recommendations made in Report Number 1.

Power to Search the Person

Wide powers to search the person are conferred under the Act.[43] We commented on these powers in Report Number 1 and compared them with the powers of search of the person conferred under the Criminal Code.[44] We reaffirm the conclusions we came to there that the power of search of the

[39] *Ibid.*, s. 101.
[40] p. 729 *supra*.
[41] p. 733 *supra*.
[42] p. 735 *supra*.
[43] R.S.O. 1960, c. 217, s. 110, as re-enacted by Ont. 1965, c. 58, s. 68.
[44] p. 425 *supra*.

person ought not to be conferred under the provincial law. It is out of all proportion to the seriousness of the offences created under provincial statutes.

Fines

Subject to section 87 of the Liquor Licence Act, all fines imposed under the Act, after deducting all necessary costs, are payable to the Board.[45] In Report Number 1 we recommended that all fines payable for contravention of laws passed under the authority of the Provincial Legislature be paid to the Province.[46]

JUDICIAL REVIEW

> "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)."[47]

The last clause making provision for a stated case was added by amendment in 1965.[48] We shall deal later with the provision for appeal by way of a stated case.

The section purports to exclude the power of the court to review any "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." In Report Number 1 we recommended that all privative clauses should be repealed.[49] Privative clauses are a negation of the rule of law. It is hard to see how this clause can be justified on any ground in this Act. It is especially objectionable in view of the fact that the Board is engaged in the commercial activity of merchandising liquor. It may be that the Board feels that the shelter provided by this clause enables it to conduct its proceedings without minutes and without the

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[45]R.S.O. 1960, c. 217, s. 122.
[46]p. 914 *supra*.
[47]R.S.O. 1960, c. 217, s. 26(2) as amended by Ont. 1965, c. 58, s. 13(2).
[48]Ont. 1965, c. 58, s. 13(2).
[49]p. 277 *supra*.

elementary order that is required of private corporations. The section is out of accord with the policy of section 55a which was added in 1965[50] giving the holder of a licence or permit, whose licence has been cancelled, a right of appeal. The privative portion of the clause should be repealed.

APPEALS

Appeal by Way of Stated Case

The draftsman of the provision for a stated case "on a point of law only as provided from time to time in the Criminal Code (Canada)" no doubt meant well but expressed himself in inappropriate language. The provisions of the Criminal Code apply to convictions under the summary convictions part of the Code.[51] They provide for rights of appeal by way of stated case by a party to the proceedings or the Attorney General.[52] Where the summary conviction court refuses to state a case an application may be made to a superior court for an order that a case be stated.[53] The section under review provides only that the Board "*may* state a case on a point of law."[54] We think that the Board, on the request of a party affected by an order of the Board, in appropriate cases, should be *required* to state a case on a point of law for the decision of the Divisional Court of the High Court of Justice. In case of refusal to state a case the party affected should have a right to apply to the Court for an order directing the Board to state a case. This might well be the intention of the section but if it is, it is inappropriately expressed.

Appeals from Conviction

As we have indicated, the appeal from a conviction lies to a county or district court judge[55] with a further right of appeal to the Court of Appeal with leave of that Court or a judge thereof on any ground that involves a question of law alone.[56]

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[50]Ont. 1965, c. 58, s. 33.
[51]Crim. Code, Part XXIV.
[52]*Ibid.*, s. 734.
[53]*Ibid.*, s. 738.
[54]Italics added.
[55]R.S.O. 1960, c. 217, s. 140, as amended by Ont. 1965, c. 58, s. 77.
[56]*Ibid.*, s. 141.

On an appeal to the county or district court judge an appellant who has paid a fine is required to deposit $50.00 as security for the respondent's costs.[57] If the convicted person is in custody he shall either remain in custody until the hearing of the appeal or he may "enter into a recognizance with two sufficient sureties in such sum or sums as the justice *with the approval of the Crown attorney* may fix" conditioned on his appearance "to try the appeal and abide by the judgment thereupon and also to pay any penalty in money and costs that the judge orders."[58]

This provision is open to two objections. First, the judicial officer, who in most cases is a provincial judge, cannot fully perform his judicial function of fixing bail and the security required without the approval of the Crown attorney, who is the prosecuting officer. This is a negation of the principle of the independence of the judiciary. If the presiding judge is not capable of fixing bail and the amount of the security required he is surely not capable of trying the case. The words "with the approval of the Crown attorney" should be struck out.

The second objection relates to the requirement that the convicted person is obliged to stay in jail if the sentence is to jail or to give security to pay the amount of the money penalty and the costs of the prosecution. We dealt fully with provisions of this sort in provincial statutes in Report Number 1[59] and pointed out that this is discriminatory legislation. The person of means can prosecute his appeal but in effect the right of appeal is denied to the person without means. We pointed out that one convicted of an indictable offence may appeal without giving any security while a person convicted of an offence under the Liquor Control Act must not only give security to prosecute the appeal but security for any money penalty imposed or that may be imposed and the costs of the prosecution.

> "Where the appellant desires to deposit a sum of money instead of providing sureties he may do so on entering into a recognizance on his own behalf and depositing an amount approved by the convicting justice and the Crown attorney,

[57]*Ibid.*, s. 140(4).
[58]*Ibid.*, s. 140(5). Italics added.
[59]p. 786ff. *supra*.

not being less than a surety would be required to become responsible for, and any money so deposited shall be available for the payment of any fine and costs that the judge thinks fit to impose."[60]

This provision emphasizes what we have said that the provisions of the legislation with respect to appeals place particular hardships on the individual who is without means.

In contrast with the rights of a convicted person, an informant or complainant who is dissatisfied with an order of dismissal made by a justice has a right to appeal on any ground that involves a question of law alone and the deposit of security is dispensed with.[61] It is hard to understand why a private complainant who has laid a charge against an accused person under the Liquor Control Act should have a right of appeal against a dismissal of the charge on a question of law without giving security while the convicted person is required to give security. A case requiring the posting of security by a complainant who is not the Attorney General is much stronger than requiring a convicted person to post security. It is unjust that the complainant should be able to put an acquitted person to the costs of an appeal. In Report Number 1 we recommended that the liability of an unsuccessful appellant to pay the costs of the Crown on appeal should be abolished.[62]

SEPARATION OF POWERS

As we indicated early in this Chapter, it is something of a misnomer to call the Liquor Control Board a "Control Board". Its principal business is to sell liquor as a government agency. Its decision-making powers are quite inconsistent with the powers exercised in carrying on that business, while, on the other hand, the powers exercised by the Liquor Licence Board with which we shall deal in the next Chapter are purely "control" powers.

We think consideration should be given to completely revising the Liquor Control Act and separating the merchandising powers from the control powers and transferring all

[60]R.S.O. 1960, c. 217, s. 140(6).
[61]*Ibid.*, s. 140(14).
[62]p. 783ff. *supra*.

the decision-making powers from the Board to the Liquor Licence Board. It is quite inconsistent that there should be two licensing bodies exercising powers in the control of the sale of liquor.

RECOMMENDATIONS

1. If the power of the Board under section 8(2) of the Act to exempt products from the Act is not essential the subsection should be repealed. If it is essential such an order of the Board should be subject to the approval of the Lieutenant Governor in Council.
2. The power of the Board to make regulations prescribing taxes and assessments by regulation should be abolished.
3. The licensing provisions in sections 47, 53 and 53a should be amended by the insertion of standards or factors concerning the licensing decisions made thereunder and the arbitrary features of sections 29 and 55 should be repealed.
4. The licensing powers pursuant to these sections should not be subject to the control of a Minister.
5. Section 28 of the Act requiring the holder of a licence for the sale of liquor to give security should be repealed.
6. The Board should be required to give reasons for the refusal or the cancellation of a licence.
7. The Act should provide for a right of appeal from the refusal of a licence.
8. Appeals from licensing decisions under section 55a should not lie to the county or district court judge but to the Divisional Court of the High Court of Justice.
9. Guidelines should be laid down for the exercise of the Board's powers respecting interdiction under section 84(1).
10. Provision should be made in the Act for the right of a person against whom an order has been made under section 84(1) to apply to the Board to have the order reconsidered.

11. Section 8(1)(g) should be amended to strike out the words "by any manner whatsoever".

12. Section 101 of the Act providing that the contravention of any provision in it or the regulations constitutes an offence, whether so declared or not, should be repealed. If a section of the Act or regulations is intended to create an offence it should specifically so state.

13. Section 78 of the Act should be amended to provide that a person can be convicted thereunder only if he *knowingly* consumed liquor which has not been "acquired under the Act or regulations . . .".

14. There should be a complete revision of the offences created under the Act and the powers of arrest without a warrant.

15. The powers conferred on police officers to search the person should be repealed.

16. Section 122 of the Act should be amended to provide that fines imposed under the Act should be paid to the Province.

17. The privative portions of section 26(2) should be repealed.

18. Section 26(2) of the Act should be amended to make it clear that a party has a right to apply to the Court for an order directing the Board to state a case, in cases where the Board has refused to do so.

19. Section 140 of the Act should be amended to remove the requirements that a person convicted of an offence under the Act deposit a sum as security for costs and enter into a recognizance or deposit a sum of money in lieu of entering into a recognizance. In any event, subsections 5 and 6 thereof should be amended to delete the requirement of approval by the Crown attorney respecting the amount of the recognizance or the deposit of money in lieu thereof.

20. Consideration should be given to completely revising the Liquor Control Act so as to create a board with powers

to merchandise liquor in Ontario on behalf of the government and at the same time transfer the regulatory powers and licensing powers now exercised by the Board to a board which will regulate, control and license the liquor trade in all its aspects.

21. If the Liquor Control Board is to continue to exist there should be a statutory requirement that it keep minutes of all its decisions.

CHAPTER 116

The Liquor Licence Board of Ontario

INTRODUCTION

THE Liquor Licence Board of Ontario provided for under the Liquor Licence Act,[1] is a companion board to the Liquor Control Board for the control of the sale of liquor in Ontario. The Liquor Licence Act should be read with the Liquor Control Act[2] which we discussed in the preceding Chapter. Even when one has done so it is sometimes difficult to determine what the law is with respect to the sale of liquor in Ontario. For example, there is no simple provision in the Liquor Licence Act prohibiting the sale of liquor without a licence. The prohibition is to be found in the Liquor Control Act which provides "except as provided by this Act, The Liquor Licence Act or the regulations hereunder or thereunder, no person shall . . . sell or offer to sell liquor . . . to any other person".[3]

These statutes are very confused. They have evolved out of other statutes relating to licensing and prohibiting the sale of liquor that are quite inconsistent with the present scheme and policy of liquor legislation. As the former Chairman of the Liquor Licence Board said during his interview with us, "this 'growed like Topsy' you know". There are many provisions in the Act which are not used, and as far as the Chairman could see, they could be repealed.

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[1]R.S.O. 1960, c. 218, amended by Ont. 1961-62, c. 73 and Ont. 1965, c. 59.
[2]R.S.O. 1960, c. 217. Provisions of this Act are discussed in Chapter 115 *supra*.
[3]*Ibid.*, s. 70(1). See also s. 78 as amended by Ont. 1965, c. 58, s. 49.

ORGANIZATION OF THE BOARD

The Board consists of three members appointed by the Lieutenant Governor in Council.[4] Two members constitute a quorum.[5] Notwithstanding this, the Act provides for one member holding meetings but it does not say "meetings of the Board". Section 32 of the Act provides that "a member of the Board shall hold a meeting annually, at a convenient place determined by the Board, for each licensing district between the 1st day of October and the 31st day of January in the year next following."[6]

"34. After a meeting has been held pursuant to section 32, the Board shall review and determine applications for the renewal of licences."[7]

"35.(1) The Board or a member thereof may hold such special meetings as are deemed necessary for the hearing and determination of,

(a) applications for new licences;
(b) deferred applications for renewals of licences;
(c) proceedings involving the cancellation or suspension of a licence;
(d) applications for transfers of licences;
(e) proceedings in compensation matters;
(f) applications for revocation of the suspension of a licence;
(g) applications for review of orders of the Board; and
(h) matters within the jurisdiction of the Board.

(2) After a meeting has been held pursuant to subsection 1, the Board shall review and determine the applications or other matters before the Board at such meeting."[8]

This legislation is not founded on any sound principles relating to the exercise of judicial or administrative power. The meetings held under the last quoted section are for "the hearing and determination" of the matters involved. But after the meeting the Board shall, whether the meeting was held by the Board or a member thereof, "review and determine the

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[4]R.S.O. 1960, c. 218, s. 2.
[5]*Ibid.*, s. 4.
[6]*Ibid.*, s. 32.
[7]*Ibid.*, s. 34.
[8]*Ibid.*, s. 35.

applications or other matters before the Board at such meeting."

The former Chairman stated to us that where one member holds the meeting of the Board he does not purport to give a decision. He said he is merely gathering information, but he does not make a formal report or, in fact, any report in writing. The practice appears to be that the Deputy Registrar "generally reports the proceedings". The result is that the party whose rights may be affected may have no opportunity of presenting his case to those who decide, or to know what has been communicated to those deciding.

In Report Number 1 we dealt with the exercise of administrative powers where the volume of public business requires that many decisions must either be made by subordinates or by the Minister on reports by subordinates and the safeguards that should be applied.[9] We referred to cases where administrative power is conferred directly on tribunals "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. . . ."[10] The Liquor Licence Board, for the large part, exercises such power.

We also dealt with licensing bodies and approved of the delegation of power to *issue* licences "where large numbers of licences are issued annually."[11] This recommendation does not apply to the issue of licences by the Liquor Licence Board but it would apply to the renewal of licences where no objections have been raised. However, we said "subject to the exception to which we shall immediately refer [not relevant here], no official should have the power to refuse, suspend or revoke a licence".[12] The procedure provided by sections 32, 34 and 35, above quoted, is neither a hearing procedure with a report nor a statutory delegation of power. It is a procedure without any fair or logical basis. Under section 35 there is a meeting of the Board "for the hearing and determination . . ." followed by another meeting "to review and determine". It is most difficult to know who makes the statutory decisions, or what legal function is performed at the first meeting.

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[9]p. 126ff. *supra.*
[10]p. 130 *supra.*
[11]p. 1116 *supra.*
[12]*Ibid.*

We recommend that the legislation governing the meetings of the Board and the exercise of its powers should be completely reviewed. The powers of the Board when sitting as a board should be exercised by a quorum. It should have power to delegate its powers to a member to renew licences where no objections have been made. The annual meetings for the licensing districts should be presided over by a quorum of the Board. These are meetings at which members of the public have an opportunity to make representations with respect to the operation of the Act in the community and the manner in which the licensed premises are operated.

There are 14 districts in Ontario in which annual meetings must be held. It would not be an undue burden on the Board to have a quorum present at all these meetings. The former Chairman was asked what was the reason for the provision in the Act authorizing one member of the Board to hold a meeting. He offered this explanation, "There was a reason for this in that one might—I never travel otherwise than by train and I always get to the meetings, and some members come by plane and sometimes they never reach the meeting because the plane is grounded and they never get there. That is why the Act was drafted to provide that only one member can hold a meeting, and the present practice is that two members shall attend every meeting". We think this is a frail excuse for departing from the expressed provision of the statute with respect to a quorum.

We recommend that if it is necessary for a member to hold a meeting relevant to any matter that must be decided by the Board his powers should be clearly defined, he should be required to make a written report which should be furnished to the party affected and the party affected should have an opportunity to be heard by the Board with respect thereto if he so desires.

The confusion in this legislation and the absence of any rules of procedure emphasize the importance of our recommendations made in Report Number 1 with respect to a Statutory Powers Procedure Act and proper rules of procedure.[13]

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[13]Chapter 14 *supra*.

To the extent that the Board exercises judicial powers, it should hear the evidence directly and not rely upon the report of a delegate.[14]

LICENSING

In our view the licensing powers of the Board are not framed to include the necessary safeguards. The Act contains virtually no statement of factors or guidelines to be taken into account respecting the issuance of licences. What little guidance there is in the Act on this important question is of a negative nature. The Act does set out the circumstances where "no licence may be issued".[15] The Board is given the express power to "restrict the number of licences or of any class of licences that it issues in any municipality".[16] This, too, is a negative guideline respecting the issuance of licences and one on which we commented in Report Number 1[17] where we said that such a power should only be conferred when accompanied by adequate safeguards for the rights of the individual. In accordance with these recommendations we recommend that the power to limit the number of licences in a municipality should be subject to the approval of the Lieutenant Governor in Council and that something in the nature of a waiting list should be maintained when the full limit of the number of licences in a municipality has been reached. By this we do not mean to imply that when a new licence becomes available in a municipality the person whose name is at the top of the list is automatically entitled to it. We merely feel that there should be some regard for those who have applied for a licence and have been refused on the ground that the limit of licences in the area in question had been reached.

In Report Number 1 we said that the purpose of a licensing power and the grounds upon which it is to be exercised should be carefully determined and then expressed in the legislation with as much clarity and objectivity as possible. We recognized that if there was too much in the way of objec-

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[14]See pp. 220 and 1127 *supra*.
[15]R.S.O. 1960, c. 218, s. 28 as amended by Ont. 1965, c. 59, s. 11; s. 29, as amended by Ont. 1965, c. 59, s. 12.
[16]*Ibid.*, s. 21(3).
[17]pp. 1107-10 and p. 1118 *supra*.

tive standards in the legislation its effective purpose could be frustrated.[18] We fully appreciate that there are complex difficulties relating to licensing with respect to the sale of liquor. There are many varying and possibly conflicting policies which have to be taken into account in the decision to license, or not to license, and it would be impossible to state all relevant factors in the governing legislation in a binding manner. Nevertheless, the virtually unfettered discretion, conferred under the existing legislation, is unnecessarily wide. Some relevant standards can and should be incorporated into the Act.

Cancellation and Suspension of Licences

> "Upon an application being made to the Board for the cancellation or suspension of a licence, the Board may by notice in writing require the holder of the licence to show cause to the Board why the licence should not be cancelled or suspended, and, in the event of the failure of the holder of the licence to show cause, the Board shall take such action as the circumstances require."[19]

The only provision for procedure is that the notice of a hearing shall be sent to the licence holder. In Report Number 1 we set out the procedural provisions that should apply where an application is made to cancel a licence.[20] We emphasized the need to give the licensee notice of the grounds on which the application for revocation or cancellation is made. The provision in the Act for notice in writing requiring "the holder of the licence to show cause why the licence should not be cancelled or suspended" is an unjust provision. We discussed this in Report Number 1[21] and recommended that the onus of satisfying the tribunal on a balance of probabilities that the licence should be cancelled should rest on those who so allege. The notice of hearing should set out the allegations made against the licence holder or he should, at least, be given a reasonable statement of the allegations that he is required to meet in ample time before the hearing.

[18]p. 1106 *supra*.
[19]R.S.O. 1960, c. 218, s. 41(1) as amended by Ont. 1965, c. 59, s. 16.
[20]p. 1132 *supra*.
[21]p. 1123 *supra*.

Where the Board cancels a licence it should be required to give reasons if requested. Curiously, under the Act in case of suspension the Board is required to give reasons[22] but where the more severe penalty of cancellation is imposed it is not required to give reasons.[23] An appellate body is at a great disadvantage if no reasons are given for the decision from which the appeal is taken.

JUDICIAL REVIEW

The broad powers of the Board with which we have been dealing have to be considered in the light of the provisions of section 20 of the Act.

> "Except as provided by this Act, the decisions, orders and rulings of the Board are final and shall not be questioned, reviewed or restrained by injunction, prohibition, mandamus, *quo warranto* proceedings or other process or proceedings in any court, or be removed by *certiorari* or otherwise into any court, but the Board may, or at the request of any person having a proprietary interest in the matter before the Board shall, state a case on a point of law only as provided from time to time in the *Criminal Code* (Canada)."[24]

We shall deal first with the privative part of this section which extends to all decisions, orders and rulings of the Board. What the Legislature has done is to confer extremely wide powers on the Board (unnecessarily wide) affecting civil rights and as far as it can by legislation exclude the courts from interfering with the exercise of those powers. The Board is not required to keep a record and there are no rights of appeal from the Board's decisions save by way of a stated case and an appeal by a licence holder whose licence has been cancelled, with which we shall deal presently.

In Report Number 1 we recommended that all privative clauses of this sort should be repealed.[25] There is nothing exceptional about the jurisdiction of the Liquor Licence Board that warrants any restriction on the power of the courts to review its decisions.

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[22]R.S.O. 1960, c. 218, s. 44.
[23]See p. 218 *supra*.
[24]R.S.O. 1960, c. 218, s. 20 as amended by Ont. 1961-62, c. 73, s. 1.
[25]pp. 277-79 *supra*.

APPEALS

Appeal by Stated Case

The provision for a stated case[26] is subject to the same comments concerning procedure that we made with reference to section 26(2) of the Liquor Control Act except insofar as it confers a right to have a case stated at the request of "any person having a proprietary interest in the matter."[27] The provisions of the Criminal Code with respect to stated cases cannot be appropriately adapted generally to orders, decisions and rulings of the Board. The *right* to apply for a stated case is limited to "any person having a proprietary interest" in the matter. This is much too restrictive. It may well be that an applicant for a licence or a person whose books and records are ordered to be examined does not have a proprietary interest in the matter. This right of appeal should extend to "a person affected by a decision, order or ruling" of the Board.

Right of Appeal to County or District Court Judge

In addition to the appeal by way of stated case any licence holder whose licence has been cancelled has a right of appeal "and the provisions of the Liquor Control Act relating to appeals apply *mutatis mutandis* to the appeal".[28]

The Liquor Licence Act adopts the provisions of the Liquor Control Act as to appeals and the Liquor Control Act purports to adopt the provisions of the Criminal Code in summary matters. This two-tiered incorporation by reference compounds difficulties.

In Chapter 115 we discussed the relevant provisions of the Liquor Control Act and pointed out the difficulty of applying the provisions of the Criminal Code with respect to appeals from convictions for summary offences to appeals from decisions of the Liquor Control Board. An appeal from a conviction under the Liquor Control Act is on the record but the Liquor Licence Board rarely has a court reporter present at the hearings which it holds and it has no record.

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[26]R.S.O. 1960, c. 218, s. 20 as amended by Ont. 1961-62, c. 73, s. 1.
[27]Chapter 115 *supra*.
[28]R.S.O. 1960, c. 218, s. 43a as enacted by Ont. 1961-62, c. 73, s. 6.

The Chairman of the Board was for many years a county court judge and is familiar with the appeal procedure under the Summary Convictions Act. He was asked these questions and made these answers.

"COMMISSIONER: Well now, when you have a hearing on a cancellation of licence, or for a cancellation of licence, is there a court reporter present?

JUDGE ROBB: We have had on occasion but not very frequently.

COMMISSIONER: Then on an appeal if one is trying to apply the provisions of the Liquor Control Act *mutatis mutandis* to the appeal how does the judge hearing the appeal deal with it?

JUDGE ROBB: I can't answer.

COMMISSIONER: He couldn't, could he?

JUDGE ROBB: Well, that seems to follow, doesn't it.

COMMISSIONER: Because on an appeal under the Liquor Control Act the judge hearing the appeal hears the appeal on the record.

JUDGE ROBB: Right.

COMMISSIONER: It is not an appeal de novo, and you have no record.

JUDGE ROBB: We have no record other than the record which is made in the minutes of the meeting indicating that there was a hearing and that certain matters were brought to the attention of the licensee, the licensee made his reply, and the Board either suspended or cancelled his licence as the case may be."

We dealt with rights of appeal from licensing decisions in Report Number 1.[29] What we said there applies to the powers exercised by the Board. The appeal should lie to the Divisional Court of the High Court of Justice as recommended in Report Number 1.[30]

The Act does not provide a right of appeal from decisions refusing to issue or renew licences or suspending licences. It should be amended to make such provisions.

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[29]pp. 1128-32 *supra*.
[30]p. 1134 *supra*.

POWERS OF INVESTIGATION: GENERAL

"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 or conduct of any person holding a licence or of any of his servants, agents or employees;

(b) any authority at any time issued or held under *The Liquor Control Act* or *The Liquor Authority Control Act,* 1944, or any licence at any time issued or held under this Act, or any premises in respect of which any such authority or licence was at any time issued or held; or

(c) any matter pertaining to the sale or handling of or transactions in liquor."[31]

We criticized these powers on several grounds in Report Number 1.[32]

We turn now to the method by which the Board may implement its investigatory powers. It 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 . . . as is vested in the Supreme Court or a judge thereof for the trial of civil actions."[33] This includes the power to commit for contempt of court. We dealt with powers such as these in Report Number 1[34] and there recommended that powers of committal should be exercised only by the Supreme Court on an application thereto. In discussing the matter with us the Chairman of the Board agreed that the operations of the Board would not be interfered with if the power of committal could be exercised only in such manner. He said the Board has never used the power. The section should be recast and the power of committal conferred on the Supreme Court as recommended in Report Number 1.

Powers of Seizure

"Where an investigation is or is about to be undertaken . . . the Board may by order,

(a) authorize an inspector of the Board to seize and take possession of any documents, records or other property

[31]R.S.O. 1960, c. 218, s. 17(1) as amended by Ont. 1965, c. 59, s. 4(1).
[32]pp. 79 and 421 *supra*.
[33]R.S.O. 1960, c. 218, s. 16 as amended by Ont. 1965, c. 59, s. 3.
[34]pp. 441-46 *supra*.

belonging to, in the possession or under the control of any person that the Board considers may be relevant to the investigation; and

(b) appoint an accountant or other expert to examine documents, records, property or other matters that the Board considers may be relevant to the investigation."[35]

The power of search and seizure is wide and unlimited by any objective standard. Anyone is liable to have his records seized without an opportunity to be heard and without any obligation on the Board to show their relevancy. This is contrary to our recommendation in Report Number 1 and we have already said so.[36]

Long years of experience have proven that this power is unnecessarily wide because it has never been exercised. Clearly the purposes of the Act would not be frustrated if judicial authority were required before the powers of search and seizure of the records of others than licensees could be exercised. It is, no doubt, proper that the books and records of licensees should be subject to examination by the Board, but the Board should not have unlimited power to have its accountant examine books and records of others.

Powers of Entry

In addition to any audit provided for by the regulations the Board may at any time authorize and direct a representative "to enter upon the premises where the books, accounts or records of or *pertaining to any establishment,* distillery, brewery or winery are or may be kept and to inspect, study, audit, take extracts from or seize such books, accounts or other records".[37] This power of search and seizure extends to any "establishment". "Establishment" is defined by the Act as "a club, hotel, inn, public house, tavern, military mess, restaurant, railway car, aircraft, theatre or steamship having premises that comply with the requirements of this Act and the regulations prescribing the qualifications of premises in

[35]R.S.O. 1960, c. 218, s. 17(2) as amended by Ont. 1965, c. 59, s. 4(2).

[36]pp. 419-23 *supra.*

[37]R.S.O. 1960, c. 218, s. 18(1) as amended by Ont. 1965, c. 59, s. 5. Italics added.

respect of which licences may be issued."[38] It is to be observed that this definition extends beyond licensed premises. There is a power of search and seizure respecting any of the defined places in respect of which licences "may be issued"—not "have been issued".

There is no reason why the Board should have power to enter, examine or seize the books or records of *all* restaurants, clubs, etc. The Chairman answered questions which we put to him, in the following manner:

"COMMISSIONER: That is the definition of 'establishment' but it is not a licensed establishment?

JUDGE ROBB: Yes, that is right.

COMMISSIONER: This section is not confined to a licensed establishment, is it?

JUDGE ROBB: No, no, not as it reads.

COMMISSIONER: Is there any reason why it should not be?

JUDGE ROBB: I see no reason why it should not be a licensed establishment."

It is not to be overlooked that under the provisions of the Act a proprietor of any establishment coming within the definition could not refuse to have his books examined or seized without committing an offence and being liable to a penalty of $1,000.[39]

The power of search and seizure under section 18(1) should be confined to licensed establishments.

Payment of Witness Fees

No provision is made in the Act for the payment of witnesses. The practice is to pay some witness fees. The Chairman was asked what the basis for payment was and his reply was "By guess and by gosh".

In the city, witnesses are not paid but those who come from a distance are paid transportation allowance. All witnesses required to attend under compulsion should be paid proper witness fees as recommended in Report Number 1.[40]

[38] *Ibid.,* s. 1(f) as amended by Ont. 1965, c. 59, s. 1(3).
[39] *Ibid.,* s. 18(2).
[40] pp. 408 and 861 *supra.*

COMPENSATION

Where the Board disqualifies any premises from holding a licence for a cause that is not the fault of or is beyond the control of a licence holder it may, subject to the approval of the Lieutenant Governor in Council, award compensation to the owner of the premises or the licence holder.[41]

This section is permissive only. If the Board wrongfully disqualifies a premises it should be compelled to award compensation. The amount of compensation permitted shall be determined by an arbitrator appointed by the Board and the provisions of the Arbitrations Act[42] apply to the arbitration.[43]

The Board should not have power to appoint the judge in a cause to which it is a party.

The Arbitrations Act provides that "where it is agreed by the terms of the submission that there may be an appeal from the award, an appeal lies to a judge in court [which means a judge of the Supreme Court] and from him to the Court of Appeal."[44] In this case the submission is a statutory one and there is no provision for an appeal. Provision should be made in the Act for an appeal from the award on arbitration. We think that a proper body to fix the compensation is the Land Compensation Board.[45]

OFFENCES

> "No person who is a parent, guardian or head of a family having the care, custody and control of a child under the age of eight years shall enter or remain upon any premises where liquor is sold or kept for sale while such child is unattended by a competent person."[46]

The penalty provided is a fine of up to $1,000 or imprisonment for a term of not more than three months or both.[47]

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[41]R.S.O. 1960, c. 218, s. 48.
[42]R.S.O. 1960, c. 18.
[43]O. Reg. 187/65, s. 62.
[44]R.S.O. 1960, c. 18, s. 16(1).
[45]p. 1045 *supra*. See the Expropriations Act, 1968-69, c. 36, s. 28 establishing the Land Compensation Board.
[46]R.S.O. 1960, c. 218, s. 56.
[47]*Ibid.*, s. 61(4) as re-enacted by Ont. 1965, c. 59, s. 19(2).

The purpose of this section is, no doubt, commendable. It is intended to penalize parents who go to licensed premises and leave their children unattended, but its terms may be harsh. A parent, guardian or head of a family coming within the section who enters or remains upon any premises where liquor is sold while a child under 8 years of age is unattended by a competent person is guilty of an offence. The offence is entering or remaining on the premises. There is no *mens rea* expressly required with respect to the child's being unattended. It is a matter for judicial interpretation whether it is or is not required.[48] For example, on a strict interpretation of the Act, a parent away from home who entered premises where liquor is sold while his 7-year-old child was unattended would be guilty of an offence and it is clear that if the Act should be so interpreted he would be liable to be arrested without a warrant.[49] It is doubtful if any effort has been made to enforce this law. It is not a law for the regulation and control of the sale of liquor. It is a law for the protection of young children. The object of the law is desirable and if there is to be such a law it should apply to all cases where parents leave young children unattended. The children are just as likely to come to harm if the parents have left them unattended and entered any other premises. This provision in this Act would appear to be window-dressing.

In fact, leaving children under the age of 10 years unattended for an unreasonable length of time without making reasonable provision for their supervision and safety has been an offence under the Child Welfare Act since 1954.[50] The penalty under the Child Welfare Act is a fine of not more than $100 for the first offence and not more than $200 for a subsequent offence or imprisonment for not more than one year.[51]

The provisions of the Child Welfare Act and the Liquor Licence Act should be reconciled.

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[48]*Regina v. Allied Towers Merchants Ltd.*, [1965] 2 O.R. 628.
[49]R.S.O. 1960, c. 218, s. 59.
[50]Ont. 1954, c. 8, s. 31(2).
[51]Ont. 1965, c. 14, s. 40(2).

Power of Arrest without a Warrant

> "Any constable or other police officer may arrest without a warrant any person whom he finds committing an offence against this Act or the regulations."[52]

We dealt with this section in Report Number 1[53] and there stated that we thought it was hard to justify the power of arrest without a warrant for many of the offences created under the Liquor Licence Act or the regulations. The provisions of the Act and the offences created thereunder condemn this wide power of arrest without a warrant.

RESTRICTIONS ON USE OF INFORMATION OBTAINED

> "No member of the Board, registrar, deputy registrar, official, inspector or employee of the Board is compellable to give testimony in a court of civil jurisdiction with regard to information obtained by him in the discharge of his official duty, or to produce any files, papers, information, reports, correspondence or other documents relating to the business of the Board."[54]

This section puts restrictions on the use of information obtained by members of the Board and its employees insofar as the administration of justice is concerned but it puts no restrictions on otherwise communicating such information.

We see no reason why the courts should be barred from obtaining such information. On the other hand, the Board and its officers should not be permitted to communicate information obtained in the course of their duties otherwise than required for the purposes of the Act or by legal process.

RECOMMENDATIONS

1. The legislation governing meetings of the Liquor Licence Board of Ontario and the exercise of its powers should be completely reviewed. The Board should act only through a quorum of its members, except when it renews licences where no objections have been made. In such

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[52]R.S.O. 1960, c. 218, s. 59.
[53]p. 733 *supra*.
[54]R.S.O. 1960, c. 218, s. 11.

case it should have power to delegate its powers to a member.

2. If it is necessary for a member to hold a meeting relevant to a matter that must be decided by the Board the member's powers should be clearly defined and he should be required to make a written report which should be furnished to the party affected who should have an opportunity to be heard by the Board with respect thereto if he so desires.

3. To the extent that the Board exercises judicial powers it should hear evidence directly and it should not rely upon the report of a delegate.

4. The power of the Board to limit the number of licences that may be issued in any municipality should be subject to the approval of the Lieutenant Governor in Council.

5. Standards relating to a person's entitlement to a licence should be contained in the Act.

6. The provision in section 41(1) requiring "the holder of a licence to show cause why the licence should not be cancelled or suspended" should be repealed.

7. Before a licence may be revoked or cancelled the holder of the licence should be given notice of the hearing setting out the allegations made against him and a reasonable opportunity to meet them.

8. The Board should be required to give reasons in all cases where it cancels a licence.

9. The privative clause contained in section 20 should be repealed.

10. The right of appeal by way of stated case conferred by section 20, incorporating the Criminal Code, is not appropriate for application to orders, decisions and rulings of the Board. In any event, it should extend to "a person affected by a decision, order or ruling" of the Board.

11. The right of appeal to a district or county court judge, now conferred by the Act, should lie to the Divisional Court of the High Court of Justice.

12. The Act should provide for a right of appeal from decisions refusing to issue or renew a licence or suspending a licence.
13. The power to commit for contempt of the Board's order should be exercised by the Supreme Court of Ontario as recommended in Report Number 1.
14. The power of search and seizure of the Board should be limited by some objective standards. The Board should not have power to have its accountant examine the books and records of persons other than licensees.
15. The power of search and seizure under section 18(1) of the Act should be confined to licensed establishments.
16. All witnesses compelled to attend for the purpose of proceedings under the Act should be paid proper witness fees.
17. The Act should provide for an appeal from arbitration decisions respecting compensation under section 48.
18. Where the Board wrongfully disqualifies premises it should be compelled to compensate the owner for loss suffered.
19. The body to fix compensation under section 48 should be the Land Compensation Board.
20. Section 56 imposing liability on a parent or guardian for leaving a child under the age of eight years unattended should be reconciled with the Child Welfare Act.
21. Section 59 enabling the arrest of a person without a warrant who is found committing an offence against the Act or the regulations should be completely reviewed and the provisions not coming within the recommendations contained in Report Number 1[55] should be repealed.
22. Section 11 should be recast so as to restrain the Board, its members, or its staff from communicating information obtained in the course of their duties otherwise than may be necessary for the purposes of the Act or as required by legal process.

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[55]p. 741 *supra.*

CHAPTER 117

The Milk Commission of Ontario

INTRODUCTION

The Milk Act, 1965[1] is a kindred Act to the Farm Products Marketing Act[2] which we discuss in Chapter 112. The purpose of the Act is "to provide for the control and regulation in any and all respects of, (a) the marketing within Ontario of milk, cream or cheese, or any combination thereof, including the prohibition of such marketing in whole or in part; and (b) the quality of milk, milk products and fluid milk products within Ontario."[3]

The methods of control and regulation are similar to those provided in the Farm Products Marketing Act. Some matters common to both statutes, which are discussed in detail in Chapter 112 will be mentioned briefly in this Chapter with cross-references.

The Milk Act, 1965 differs from the Farm Products Marketing Act in one significant respect. The Milk Act is not only concerned with the economics of the marketing of milk and milk products but, also, with the quality of the product and with public health.

There are arguments in favour of bringing the marketing of milk and milk products under the Farm Products Marketing Act. Some confusion now exists between the two Acts. In Chapter 112 we refer to the possible confusion resulting from the inclusion of "dairy products" in the definition of

[1]Ont. 1965, c. 72 amended by Ont. 1967, c. 53 and Ont. 1968-69, c. 67.
[2]R.S.O. 1960, c. 137.
[3]Ont. 1965, c. 72, s. 2.

"farm products". One central authority might be given jurisdiction over all farm products. One recent study recommended this.[4] However, three other studies, one of them relating to marketing of milk in British Columbia, have firmly recommended against it.[5] It is not our function to make recommendations with respect to these conflicting views. However, it would appear that good reasons are advanced why the production and distribution of milk should be under separate control from other farm products and dealt with by a statute relating solely thereto.

The philosophy underlying the legislation affecting the marketing of milk and milk products in Ontario has been a developing one. In the early thirties the milk industry was in a very disorganized state. Milk was being sold to consumers at retail prices below the cost of production at the farm. Competition in the distribution of dairy products was keen and "give away" practices were common. It was to relieve against this condition that the first Milk Control Act[6] was passed.[7]

In 1965 the Ontario Milk Industry Inquiry Committee (known as the "Hennessey Committee") reported:

> "The nature of the industry requires that careful attention be directed to the determination of the extent to which competitive forces should be permitted to operate, and to the establishment of the nature of the competition that should be permitted. For example, we believe that free competition between producers in the marketing of raw milk cannot help but lead to destructive competition, and a price level well below that necessary to maintain a suitable level of income. Processing, manufacturing, and distribution seem to represent activities best left with substantial freedom for competitive forces to act. This latter contention can be disputed and no doubt will be challenged, but we consider it to be a valid view."[8]

Following the report of the Committee, the Milk Act, 1965 was passed.

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[4]Agricultural Marketing Enquiry Committee Report (June, 1961), 92.

[5]Ontario Royal Commission on Milk Report (1947), 27; British Columbia Royal Commission on Milk Report (1954-55), 161 and Ontario Milk Industry Inquiry Commitee Report (January, 1965), 125-26.

[6]Ont. 1934, c. 30.

[7]Report of Royal Commission on Milk (1947), 147.

[8]Hennessey Committee Report (1965), 123.

Under our Terms of Reference we are not required to consider the policy of the Act. Our only concern is whether there are within the legal framework provided to carry out the policy unjustified encroachments on the civil rights of individuals and whether proper safeguards have been provided against the abuse of the wide powers of decision that have been conferred on bodies and persons under the Act. We endorse the view expressed in the Hennessey Report that there should be a "minimum practicable degree of governmental control and participation."[9] We emphasize the word "practicable"; what is practicable depends on the nature of the problems existing in the milk industry and the basic policies adopted to cope with them.[10]

THE MILK COMMISSION OF ONTARIO AND THE MARKETING BOARDS

Similar to the legislative structure for control and regulation of the marketing of farm products in the Farm Products Marketing Act, the Milk Act, 1965 provides for the creation of the Milk Commission of Ontario (the counterpart of the Farm Products Marketing Board) to which we shall hereafter refer as "the Commission" and marketing boards which have jurisdiction confined to particular products, (the counterpart of the local boards). While there are 19 local boards established under the Farm Products Marketing Act[11] there are only two established under the Milk Act, 1965:

> The Ontario Milk Marketing Board controlling the marketing of milk and cheese, and
> The Ontario Cream Producers' Marketing Board controlling the marketing of cream.

The Commission and the marketing boards are bodies corporate.[12]

The Commission "shall be composed of not fewer than three members who shall be appointed by and hold office

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[9] *Ibid.*, 4.

[10] Attention is drawn to the General Farm Organization Act 1968-69, Ont. 1968-69, c. 42, s. 3(3) which has not been proclaimed since the vote taken under s. 2 was unfavourable.

[11] See Chapter 112, p. 1764 *supra*.

[12] Ont. 1965, c. 72, ss. 3(1), 7(4).

during the pleasure of the Lieutenant Governor in Council."[13] Unlike the Farm Products Marketing Board the Commission is "responsible to the Minister."[14]

We shall discuss later whether the Commission should be responsible to the Minister.[15]

A majority of the members of the Commission constitutes a quorum.[16]

THE PLAN

As in the Farm Products Marketing Act, the chief method of control under the Milk Act is the marketing plan.[17] A plan is defined as a "plan . . . to provide for the control and regulation of the marketing of milk, cream or cheese, or any combination thereof."[18] Procedure is provided whereby producers may initiate the establishment of a plan but the plan must in any case be established by regulation made by the Lieutenant Governor in Council and the Lieutenant Governor in Council may establish a plan even where the procedure has not been initiated by producers. The Act provides:

> "6. (1) Where the Commission receives from a group of producers in Ontario or any part thereof a petition or request that a plan be established for the control and regulation of the marketing of milk, cream or cheese, or any combination thereof, and the Commission is of the opinion that the group of producers is representative of the producers affected by the proposed plan, the Commission may recommend the establishment of such a plan to the Minister."
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> "7. (1) Notwithstanding section 6, the Lieutenant Governor in Council may make regulations,
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> (a) establishing, amending and revoking plans for control and regulation of the marketing within Ontario or any part thereof of milk, cream or cheese, or any combination thereof, and constituting marketing boards to administer such plans."[19]

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[13]*Ibid.*, s. 3(2).
[14]*Ibid.*, s. 3(1).
[15]See p. 1878 *infra* under Licensing Powers.
[16]Ont. 1965, c. 72, s. 3(4).
[17]See Chapter 112, pp. 1764-65 *supra*.
[18]Ont. 1965, c. 72, s. 1, para. 21.
[19]*Ibid.*, ss. 6, 7.

The Milk Commission is not bound to conduct a plebiscite of producers before forming the opinion that a group of producers presenting a petition requesting that a plan be established is representative of the producers affected by the proposed plan but it has power to do so.[20]

Existing Plans

There are three plans established under the Milk Act, 1965 covering respectively milk, cheese and cream.

Milk

Under a regulation passed by the Lieutenant Governor in Council the Ontario Milk Marketing Board has been established[21] for the control and regulation of the marketing within Ontario of milk and cheese. The Lieutenant Governor in Council is required to appoint to the Board persons who have been elected by the producers according to an elaborate system of election, which we need not discuss in detail. The effect of this procedure is to bring the regulations passed by the Ontario Milk Marketing Board within the Regulations Act[22] and require them to be published in the *Ontario Gazette.*

The plan contains no provisions other than those establishing the Board and providing for the election and appointment of its members.

The Milk Commission has passed certain regulations relating to the control and regulation of the marketing of milk.[23] These include the delegation to the Ontario Milk Marketing Board of power to make regulations respecting the "licensing of any or all persons before commencing or continuing to engage in the producing of milk";[24] the "marketing of milk on a quota basis";[25] the "requiring any person who produces milk to offer to sell and to sell the milk to or through the marketing board";[26] the authorizing of the

[20] *Ibid.*, s. 8(1), para. 41.
[21] O. Reg. 202/65 as amended by O. Regs. 250/65, 43/66, 304/67, 360/67, 2/68, 3/69, 27/69, 123/69 and 500/69.
[22] R.S.O. 1960, c. 349, ss. 1(d), 2, 5.
[23] O. Reg. 294/65 as amended by O. Regs. 160/66, 201/66, 261/66, 390/66, 194/67, 58/68 and 216/68.
[24] O. Reg. 294/65, s. 6(a).
[25] *Ibid.*, s. 6(*i*)(i).
[26] *Ibid.*, s. 6(o).

marketing board "to determine from time to time the price or prices that shall be paid to producers or the marketing board for milk or any class or grade of milk, and to determine different prices for different parts of Ontario"[27] and other important matters.

By several regulations, the Ontario Milk Marketing Board has provided that: "every producer shall offer to sell and sell the milk produced by him to the marketing board";[28] that all "grade A milk bought by a marketing board from a producer shall be sold by the producer and bought by the marketing board on a quota basis";[29] that the "marketing board may fix and allot to persons quotas for the marketing of milk on such basis as the marketing board deems proper";[30] that "no person shall commence or continue to engage in the producing of milk except under the authority of a licence as a producer of milk in Form 1";[31] that "all milk supplied to a plant that is used for processing into milk products shall be sold and purchased for not less than a minimum price of (a) $3.54 per 100 pounds for milk that grades 1 or 2 on a Resazurin reduction test . . . where the milk tests 3.5 per cent milk-fat";[32] that "where the marketing board sells milk to a processor, the marketing board shall assign to the processor a sufficient number of producers to supply his requirements for milk;[33] and that "every transporter shall transport milk on the terms and conditions" of O. Reg 71/68.[34]

CHEESE

The "plan" for cheese is similar to the plan for milk and, as we have said, it is administered by the Ontario Milk Marketing Board.[35]

A regulation passed by the Milk Commission[36] provides that: "no person shall commence or continue to engage in the buying of cheese except under the authority of a licence

[27]*Ibid.*, s. 7(a).
[28]O. Reg. 52/68, s. 3(1).
[29]*Ibid.*, s. 4(1).
[30]*Ibid.*, s. 4(2).
[31]O. Reg. 68/68, s. 3(1).
[32]O. Reg. 69/68, s. 3(1).
[33]O. Reg. 70/68, s. 7(1).
[34]O. Reg. 71/68, s. 3(1).
[35]O. Reg. 202/65 as amended by O. Reg. 44/66, ss. 1, 2.
[36]O. Reg. 44/66.

in Form 2";[37] power to make regulations upon certain matters with respect to cheese is delegated to the Ontario Milk Marketing Board;[38] and "all cheese shall be offered for sale and sold by auction through the Belleville Cheese Exchange or the Stratford Cheese Exchange."[39]

Exercising the powers conferred on it to permit exemptions from the regulations[40] the Ontario Milk Marketing Board has passed a regulation[41] exempting certain producers from the regulation governing the sale of cheese manufactured at specific plants.

Cream

The Ontario Cream Producers' Marketing Board was established by a regulation[42] passed under the Milk Industry Act[43] and continued in force under the provisions of the Milk Act, 1965.[44] A further regulation provided that "no person shall commence or continue to engage in the production of cream except under the authority of a licence as a producer of cream in Form 1."[45] Certain authority has been delegated to the Ontario Cream Producers' Marketing Board.[46]

The Ontario Cream Producers' Marketing Board does not have authority to make regulations.

The confusion in the structure of the legislation for establishing plans is the same under the Milk Act, 1965 as that for establishing plans under the Farm Products Marketing Act.[47] While a "plan" is defined in the Milk Act, 1965 as "a plan . . . to provide for the control and regulation of the marketing of milk, cream or cheese . . ."[48] and the Lieutenant Governor in Council may by regulation establish plans,[49] in fact, the substance of all marketing legislation is made entirely

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[37]*Ibid.*, s. 3(1).
[38]*Ibid.*, s. 6.
[39]*Ibid.*, s. 8(1).
[40]*Ibid.*, s. 6(a).
[41]O. Reg. 367/66.
[42]R.R.O. 1960, Reg. 428 as amended by O. Regs. 256/65 and 287/65.
[43]R.S.O. 1960, c. 239.
[44]Ont. 1965, c. 72, s. 27.
[45]R.R.O. 1960, Reg. 427 as amended by O.Regs. 286/65 and 307/67.
[46]*Ibid.*, s. 6 as amended by O.Reg. 286/65 and s. 7.
[47]See Chapter 112, pp. 1764-68.
[48]Ont. 1965, c. 72, s. 1, para. 21.
[49]*Ibid.*, s. 7(1).

by the Milk Commission and the Ontario Milk Marketing Board.

The Commission may require a marketing board to vary the purpose of a plan as the Commission deems necessary. The approval of the Lieutenant Governor in Council is not required for the exercise of this power.[50] The Lieutenant Governor in Council should approve and, therefore, be responsible for, the actual plans made under the Act and any variations of plans.

We recommend that the regulations made by the Commission and the Ontario Milk Marketing Board should not come into effect until approved by the Lieutenant Governor in Council.

SCOPE OF THE POWERS OF THE COMMISSION AND BOARDS—DEFINITIONS

> " 'Milk product' means any product processed or derived in whole or in part from milk, and includes cream, butter, cheese, cottage cheese, condensed milk, milk powder, dry milk, ice cream, ice cream mix, casein, malted milk, sherbet and *such other products that are designated as milk products in the regulations*."[51]

The power to define milk products by regulation so as to bring products within the provisions of the Act is an extraordinarily broad one and may be exercised under two different provisions of the Act.

Under section 18, paragraph 42 the Commission, subject to the approval of the Lieutenant Governor in Council, may make regulations "designating as a milk product any product processed or derived in whole or in part from milk." Under section 8(1), paragraph 39 the Commission may (without the approval of the Lieutenant Governor in Council) make regulations "designating as a milk product any product processed or derived in whole or in part from milk."

The powers are identical. It is hard to understand what the Legislature meant. One asks oneself the question: can the Commission exercise the broad powers under section 8(1) paragraph 39 to extend the scope of the Act by definition

[50] *Ibid.*, s. 8(8).
[51] *Ibid.*, s. 1, para. 18. Italics added.

and without the approval of the Lieutenant Governor in Council?

In any case, by the exercise of the power of definition of "milk products" the scope of the Act may be extended beyond anything envisaged by the Legislature. The type of "other products" that may be designated as milk products in the regulations is not limited by anything in the Act—other than what is set out in the "regulations" which are defined to mean "regulations made under this Act"[52] and by the words products "processed or derived in whole or in part from milk."[53]

Apart from the criticism that the power to enlarge the scope of the Act should not be delegated either to the Lieutenant Governor in Council or the Commission the language "any product, processed or derived in whole or in part from milk" is too broad. These words would include cake mixes, pies and countless other food products in no way related to the legislative scheme. In legislation of this sort the Legislature should direct its mind to specific matters in framing the scope of the statute. It should not use vague and general terms when conferring wide powers of control. Under the definition of milk products used in this Act the Commission would have power to launch an inquiry into the sale of milk-shakes and chocolate bars.[54] It would enable a field-man to require a drug store selling ice cream cones to furnish copies of all records relating to the sale of such products.[55] This may have been intended by the draftsman but, if so, we doubt that the members of the Legislature thought so when they voted on the Bill when it came before the House. Where wide powers are to be given to control articles of commerce the Legislature should be the body that defines what should be controlled. The Legislature should be the sole architect of the scope of a statute.

The Commission, in a regulation approved by the Lieutenant Governor in Council, has exercised its power of definition of milk products.[56] The products defined in the

[52] *Ibid.*, s. 1, para. 28.
[53] *Ibid.*, s. 8(1), para. 39 and s. 18, para. 42.
[54] *Ibid.*, s. 4(2)(a).
[55] *Ibid.*, s. 5(d).
[56] O. Reg. 107/66.

regulation are products which could well have been enumerated in the statute.

The objections to the delegation of the power to define products which come within the Act which we have been discussing apply with greater force to the power of the Commission to sub-delegate this power to a marketing board.[57]

The scope of the Act should be determined by the Legislature and the sections conferring power on subordinate bodies to extend the scope of the Act by the definition of milk products should be repealed.

The definitions in the Act itself give to it a very wide scope.

"Marketing" is defined as:

> "buying, selling and offering for sale, and includes advertising, assembling, storing, distributing, financing, packing and shipping and transporting in any manner by any person, and 'market' and 'marketed' have corresponding meanings."[58]

Section 8(1), paragraph 1 authorizes the Commission to make regulations "providing for the licensing of any or all persons before commencing or continuing to engage in the producing, processing or *marketing* of a regulated product."[59] In its present form the Commission has power to require everyone who continues to buy milk to have a licence.[60]

Sections in the statute conferring powers of investigation[61] use the expression "marketing of milk or milk products." These sections confer wide powers to investigate matters completely disassociated from the normal business of marketing milk in Ontario.

The words, "transporting", and "financing" in the paragraph defining marketing are wide enough to cover many situations quite unrelated to the true objectives of the Act.[62]

"Producer" is defined as "a producer of milk, cream or cheese."[63] It would appear that any person owning a milk

[57]Ont. 1965, c. 72, s. 8(6).

[58]*Ibid.*, s. 1, para. 15.

[59]*Ibid.*, s. 8(1), para. 1. Italics added.

[60]The Interpretation Act, R.S.O. 1960, c. 191, s. 6 provides that where an Act confers power to make regulations "expressions used therein, unless the contrary intention appears, have the same meaning as in the Act conferring the power."

[61]See for example Ont. 1965, c. 72, ss. 4(2)(a), 5.

[62]See Farm Products Marketing Board, Chapter 112, pp. 1763ff *supra*.

[63]Ont. 1965, c. 72, s. 1, para. 25.

cow is potentially liable to be compelled to submit to all of the various controls in the Milk Act, 1965 relating to producers. This definition of producer may be usefully contrasted with the definition of producer in the Milk Industry Act: "a producer of milk or cream *for sale*."[64] This limits the scope of the definition to commercial activities related to the production of the milk or cream.[65] Similar useful comparison may be made between the definitions of "processor" and "transporter" used in the Milk Act, 1965 and in the Milk Industry Act. In the Milk Act, 1965 "processor" is defined as "a person engaged in the processing of milk products or fluid milk products."[66] This would include the separation of cream from milk. In the Milk Industry Act "processor" is defined as "a person *engaged in the business of* manufacturing milk products."[67] In the Milk Act, 1965 "transporter" is defined as "a person transporting milk or cream"[68] and in the Milk Industry Act it is defined as "a person *engaged in the business of* transporting milk or cream."[69]

Some of the words of definition are an integral part of the offences created under the Act. All words of definition including "marketing," "producer," "processor" and "transporter" should be restricted to the relative necessities and purposes of the Act. It is an unwarranted encroachment on the rights of the individual to create a broad spectrum of offences that are not intended to be in force but simply to relieve the draftsmen of the task of expressly defining the intended purposes of the Act.

SUBORDINATE LEGISLATIVE POWER AND THE SUB-DELEGATION OF SUBORDINATE LEGISLATIVE POWER

The Milk Commission may make regulations,

> "providing for the control and regulation of the marketing of any regulated product, including the times and places at which the regulated product may be marketed."[70]

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[64]R.S.O. 1960, c. 239, s. 1, para. 29. Italics added.
[65]This Act was repealed by the Milk Act, 1965, Ont. 1965, c. 72, s. 29.
[66]Ont. 1965, c. 72, s. 1, para. 24.
[67]R.S.O. 1960, c. 239, s. 1, para. 28. Italics added.
[68]Ont. 1965, c. 72, s. 1, para. 29.
[69]R.S.O. 1960, c. 239, s. 1, para. 32. Italics added.
[70]Ont. 1965, c. 72, s. 8(1), para. 13.

The scope of the power delegated to the Commission in this paragraph is too wide and imprecise. There are no standards or guides laid down for the exercise of the power delegated to the Commission, nor are there standards or guides relating to the exercise of its power to sub-delegate legislative powers to marketing boards. The Commission may make laws touching on any matter that comes within the ambit of the Act itself. This provision would appear to be inserted as a sort of omnibus legislative power to cover cases where the Commission might go beyond the specific provisions conferring power to regulate or delegate. It serves to shield loose formulation of policy and imprecise draftsmanship. It should be repealed.

The Commission may make regulations authorizing any marketing board to prohibit the marketing of any class, variety, grade or size of any regulated product.[71] It could by the exercise of its power to define milk products authorize a marketing board to prohibit the marketing of any product derived in whole or in part from milk.

No doubt the Commission should have power to prohibit the sale of milk products that have an unsafe bacteriological count or are unpasteurized or do not meet certain standards. But under this section the Commission may confer power on a marketing board to prohibit the sale of skim milk, cheddar cheese or milk chocolate bars.

The powers of prohibition under the Act should be strictly defined. What we have said with reference to the power of the Commission to prohibit applies with greater force to the power conferred on the Commission to sub-delegate to a marketing board any of the wide range of powers conferred on the Commission.[72] If exercised, this power would enable a marketing board to legislate on any matter within the ambit of the Act with no specific guidelines.

The power of sub-delegation is still wider. The Commission may authorize "any officer or field-man to exercise such of its powers as it deems necessary and to report thereon to the Commission."[73]

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[71] *Ibid.*, s. 8(1), para. 32.
[72] *Ibid.*, s. 8(6).
[73] *Ibid.*, s. 4(2)(j).

This provision enables the Commission to delegate to an officer or a field-man not only the whole range of its administrative powers but its judicial, legislative and investigative powers as well. These powers of delegation should be limited to minor matters appropriate for delegation to officers and field-men.

Not only has the Commission wide powers to delegate its powers to officers and field-men but it may delegate its powers of delegation to marketing boards. It would be possible for a marketing board, when authorized, to give authority to any of its officers to exercise wide powers of the Commission. There appears to be no underlying philosophy for this dispensation of legislative power.

The Commission, subject to the approval of the Lieutenant Governor in Council, may make regulations exempting from the Act or the regulations, or any part thereof, "any plant or class of plants, any person or class of persons, or any milk product or any class, variety or grade of milk product."[74] This power enables the Commission in effect to repeal a portion of the parent Act. We condemned legislation of this sort in Report Number 1 and recommended that powers of definition or amendment should not be conferred unless they are required for urgent and immediate action.[75]

The Commission may make regulations "providing for the exemption from any or all of the regulations under any plan of any class, variety, grade or size of regulated product or of any person or class of persons engaged in the producing or marketing of the regulated product or any class, variety, grade or size of regulated product."[76] The effect of this is that the Commission, by regulation, may repeal parts of other regulations passed by it or by a marketing board. It is conceivable that it could give power to the Commission to pass regulations repealing parts of regulations made by the Lieutenant Governor in Council if the expression "regulations under any plan" is deemed to mean and include regulations which are part of a plan established by the Lieutenant Governor in Council under section 7(1) of the Act. The paragraph should

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[74]*Ibid.*, s. 18, para. 63.
[75]p. 348 *supra*.
[76]Ont. 1965, c. 72, s. 8(1), para. 9.

be repealed or restricted in its scope to that which is essential for the purposes of the Act. In any case such amending power should be subject to the approval of the Lieutenant Governor in Council.

"25.(1) Any word or expression used in the Act or the regulations may be defined in the regulations for the purpose of the regulations."[77]

This provision alone does not give power to the Commission to alter the scope of the Act. It may define words used in the Act only *for the purpose of the regulations.* Nevertheless, it is inconsistent with what we said in Report Number 1[78] and with the basic principles set out in section 6 of the Interpretation Act[79] which provides that "expressions used [in regulations], unless the contrary intention appears, have the same meaning as in the Act conferring the power [to make the regulations]." Section 25(1) should not go further than to give power to define words used in the Act for the purposes of the regulations, provided that the definition is within the ambit of the meaning of the words as used in the Act. A word used in the Act should not be given a meaning by regulation *at variance* with its meaning as used in the parent statute.

The Commission may make regulations providing that each marketing board shall file with the Commission "all orders, directions and regulations of the marketing board."[80] This is an improvement over the corresponding section of the Farm Products Marketing Act which requires that regulations may be made providing for the filing of "orders and directions of the local board," but not the regulations of the local board, with the Farm Products Marketing Board.[81]

In Report Number 1 we criticized the provisions of the Milk Act, 1965 which confer power on the Lieutenant Governor in Council to make regulations:

"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,

[77]*Ibid.*, s. 25(1).
[78]pp. 345-348 *supra*.
[79]R.S.O. 1960, c. 191.
[80]Ont. 1965, c. 72, s. 4(5)(a)(iii).
[81]See Chapter 112, pp. 1771-72 *supra*.

(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."[82]

Legislation conferring power on the Executive to override Acts of the Legislature is contrary to the elementary principles of democratic government.[83]

This power and that which enables the Lieutenant Governor in Council to make regulations "dissolving a marketing board on such terms and conditions as he deems proper and providing for the disposition of its assets"[84] are of an adjudicative nature and should provide for a right to be heard in accordance with the Statutory Powers Procedure Act which we have recommended in Report Number 1.[85] The exercise of the powers should be subject to stated conditions precedent.[86]

As we have stated, since members of the Ontario Milk Marketing Board are appointed to their respective positions by the Lieutenant Governor in Council the regulations of this Board are required to be filed with the Registrar of Regulations and published in the *Ontario Gazette*. This makes them available to the public. However, it is otherwise with regulations passed by the Ontario Cream Producers' Marketing Board. The members of this Board are not required to be appointed by the Lieutenant Governor in Council. Their position depends solely on their election by fellow producers.[87] Although the Board has not passed any regulations, not at present being empowered to do so, it would appear that, as in the case of local boards under the Farm Products Marketing Act, the regulations which such a Board, when so empowered, might pass would not have to be filed or published in accordance with the Regulations Act. In Report Number 1[88] we

[82]Ont. 1965, c. 72, s. 7(1)(f).
[83]See *Ibid.*, s. 8(1), para. 21. See also pp. 343-45 *supra*.
[84]Ont. 1965, c. 72, s. 7(1)(g).
[85]pp. 212-19 *supra*.
[86]See Farm Products Marketing Board, Chapter 112, pp. 1770-71 *supra*.
[87]R.R.O. 1960, Reg. 428, ss. 9, 10 as amended by O.Regs. 256/65 and 287/65.
[88]p. 366 *supra*.

recommended that the definition of "regulations" in the Regulations Act[89] be expanded to include, as far as possible, all rules made in the exercise of sub-delegated powers. This recommendation, if implemented, would be effective to require any regulations made by the Ontario Cream Producers' Marketing Board to be filed and published.

LICENSING POWERS

In Report Number 1[90] we stated, as a general proposition, that licensing requirements should not be unnecessarily imposed. The Hennessey Report, to which we have already referred, affirmed the validity of the principle of "equal opportunity for everyone to engage in any aspect of the milk industry and equitable treatment for all."[91] This is a sound principle that should govern all licensing.

Early in this Chapter we pointed out that the Milk Commission of Ontario is a body corporate "responsible to the Minister."[92] The Commission's decision-making powers in the licensing process should be exercised as judicially as possible.[93] Licensing under this Act is not something for which the Commission should be responsible to the Minister.

"No person shall operate a plant without a licence therefor from the Commission" and "no person shall carry on business as a distributor without a licence therefor from the Commission."[94]

The Commission may make regulations under section 8(1), paragraph 3 "providing for the refusal to issue a licence to commence to engage in the producing, processing or marketing of a regulated product where the applicant is not qualified by experience, financial responsibility or equipment to properly engage in the business for which the application was made, *or for any other reason that the Commission deems proper*."[95] Notwithstanding that it has been judicially decided that the italicized words are to be read *ejusdem*

[89]R.S.O. 1960, c. 349, s. 1(d).
[90]p. 1096 *supra*.
[91]Report of the Milk Industry Inquiry Committee (January, 1965), 4.
[92]Ont. 1965, c. 72, s. 3(1).
[93]See p. 1106 *supra*.
[94]Ont. 1965, c. 72, s. 14.
[95]*Ibid.*, s. 8(1), para. 3. Italics added.

generis with the preceding words,[96] we criticized the language of this section in Report Number 1[97] as misleading. We recommend the deletion of the italicized words.

> "18. Subject to the approval of the Lieutenant Governor in Council, the Commission may make regulations,
>
> 1. providing for the issue, renewal, suspension or revocation of or refusal to issue or renew licences for the operation of any class of plant, and prescribing the fees payable for licences or the renewal thereof;
> 2. providing for the issue, renewal, suspension or revocation of or refusal to issue or renew licences for any class of distributor, and prescribing the fees payable for licences or the renewal thereof;
> 3. prescribing the terms and conditions upon which licences under paragraphs 1 and 2 are issued, renewed, suspended or revoked."[98]

Purporting to exercise the powers conferred under these provisions the Commission has enacted a regulation providing that it may refuse to issue a licence or to renew a licence of any distributor "*where, in the opinion of the Commission,* the distribution area or municipality or part thereof in respect of which the application is made is already adequately served."[99] This regulation demonstrates the wide scope of the power delegated under section 18, paragraph 3 quoted above.

The basic terms and conditions respecting entitlement to a licence should be set out in the Act and not in regulations made thereunder.

There is no limitation upon the type or nature of the terms and conditions which may be imposed under paragraph 3. It is to be noted that this regulation could not be enacted under section 8(1), paragraph 3 of the Act just discussed because that paragraph prescribes standards to govern the Commission in its refusal to issue a licence.

Standards are set for the exercise of the power to make regulations concerning the refusal to issue licences for those engaged in the producing, processing or marketing of a regulated product (section 8(1), paragraphs 1, 2, 3) but no

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[96]*Brampton Jersey Enterprises Ltd. v. Milk Control Board* [1956] O.R. 1.
[97]p. 1099 *supra*, and see also Chapter 112, p. 1776 *supra*.
[98]Ont. 1965, c. 72, s. 18, paras. 1, 2 and 3.
[99]R.R.O. 1960, Reg. 432, s. 46c(c) as amended by O.Reg. 86/66, s. 1(c). Italics added.

standards are set controlling the power to make regulations concerning the issue, renewal, suspension or revocation of licences for the operation of a plant (cheese factory, concentrated milk plant, cream receiving station, creamery, dairy or milk receiving station) or for a distributor of milk (section 18, paragraph 3).

The subjective term set out in the regulation "in the opinion of the Commission" gives to it wide powers to refuse to issue a licence or to refuse to renew one which are difficult to control and which may be exercised arbitrarily.[100]

The words "in the opinion of the Commission" should be deleted.

In any case, there should be a right of appeal from the refusal to grant a licence and the refusal to renew a licence of a distributor on the ground that the area or municipality or part thereof in respect of which the application is made is adequately served. The regulation confers a power on the Commission which may be delegated to the Board to make orders of far-reaching consequences to both consumers and distributors of fluid milk products. It gives the Commission vast powers to create monopolies and if so disposed to bestow favours with no right of relief.

In this regulation there is no provision for a right to a hearing and there are no rules governing the exercise of the discretionary power. In Report Number 1 we recommended that the power to limit the number of licences issued should be conferred only when accompanied by adequate safeguards of the rights of the individual.[101]

We recommend that section 18, paragraphs 1, 2 and 3 be amended to provide proper standards for the power to make regulations respecting the licensing powers and rights of appeal.

The council of any municipality may pass by-laws for the licensing, regulating and governing of persons who sell fluid milk products to the consumer or any persons who sell fluid milk products to any person for resale, and for revoking such licences.[102]

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[100]See Report Number 1, pp. 90-93, 257-64 and 1104-06 *supra*.
[101]p. 1118 *supra*.
[102]Ont. 1965, c. 72, s. 19(2).

These powers are to a certain extent a duplication of the licensing powers conferred under the Municipal Act which were discussed in Report Number 1 along with general licensing powers.[103] What we said there and our recommendations apply with equal force here. There are no standards laid down. In addition, the powers vested in the municipal council would seem to overlap the powers conferred on the Commission under section 18, paragraphs 1, 2 and 3 which we have just discussed.

The Municipality of Metropolitan Toronto Licensing Commission has passed a by-law (No. 88-69, Schedule 19) relating to the distribution of milk and cream for human consumption. This by-law would appear to be designed to provide certain safeguards with respect to health and to supplement the licensing powers set out in the Milk Act.

Quotas

The Milk Commission may make regulations:

"8.(1) 11. providing for,

i. the marketing of a regulated product on a quota basis,

ii. the fixing and allotting to persons of quotas for the marketing of a regulated product on such basis as the Commission deems proper,

iii. the refusing to fix and allot to any person a quota for the marketing of a regulated product for any reason that the Commission deems proper,

iv. the cancelling or reducing of, or the refusing to increase, a quota fixed and allotted to any person for the marketing of a regulated product for any reason that the Commission deems proper, and

v. the terms and conditions upon which a person may market a regulated product in excess of the quota fixed and allotted to him;"[104]

This power has not been exercised but has been delegated in the following manner:

"6. The Commission delegates to the marketing board its power to make regulations with respect to milk,

[103]Chapter 75.

[104]Ont. 1965, c. 72, s. 8(1), para. 11.

(l) providing for,

(i) the marketing of milk on a quota basis,

(ii) the fixing and allotting to persons of quotas for the marketing of milk on such basis as the marketing board deems proper,

(iii) the refusing to fix and allot to any person a quota for the marketing of milk for any reason that the marketing board deems proper,

(iv) the cancelling or reducing of, or the refusing to increase, a quota fixed and allotted to any person for the marketing of milk for any reason that the marketing board deems proper, and

(v) the terms and conditions upon which a person may market milk in excess of the quota fixed and allotted to him."[105]

The Ontario Milk Marketing Board has exercised the power delegated to it by passing the following regulation:

"4. (1) All grade A milk bought by the marketing board from a producer shall be sold by the producer and bought by the marketing board on a quota basis.

(2) The marketing board may fix and allot to persons quotas for the marketing of milk on such basis as the marketing board deems proper.

(3) The marketing board may refuse to fix and allot to any person a quota for the marketing of milk for any reason that it deems proper.

(4) The marketing board may cancel or reduce or refuse to increase the quota fixed and allotted to any person under subsection 2 for any reason that it deems proper."[106]

Elsewhere in this Report we criticize the arbitrary power which is conferred by the language "on such basis as the marketing board deems proper" and "for any reason that it deems proper."[107]

The Commission in the delegation of its power to fix quotas[108] has not set out guidelines for fixing or refusing to fix quotas. It has sub-delegated the power to the Ontario Milk Marketing Board. The Board in its turn has not formulated any basis for fixing or allotting quotas. The basis and reasons

[105]O. Reg. 294/65, s. 6(1).
[106]O. Reg. 52/68, s. 4 as amended by O. Reg. 131/68, s. 1.
[107]Chapter 112, pp. 1776-78 *supra*.
[108]Ont. 1965, c. 72, s. 8(1), para. 11.

are left entirely to the exercise of mere administrative discretion and not founded on any legislative guidelines. In view of the fact that the quota system can have such a far-reaching effect on the ordinary common law rights of the individual there should be some defined legal basis on which the power to fix quotas must be exercised.

The Ontario Milk Marketing Board has stated a quota policy which it has expressed in writing but it is not part of the law.[109]

The document contains six main sections, entitled respectively:

1. Definitions
2. Entry into the Group 1 Pool
3. Quota Transfers
4. Maintenance of Quota
5. Quota Adjustments
6. General Terms and Conditions

We quote from paragraph 2(a):

"2. Entry into the Group 1 Pool.

(a) An eligible producer who sold Grade A milk for dairy requirements purposes up to and including May 31st, 1967, shall automatically be included in the Group 1 Pool and be allocated a quota by the Board as calculated below for each pool area.

Calculation

Total quota to be allocated, expressed in pounds per day	÷	Total qualifying milk of producers expressed in pounds per day	=	Percentage to be applied to each producer's qualifying milk

Where *total quota to be allocated* equals dairy requirements in the base period, plus 10%, less a reserve for quota to be allocated to qualified industrial producers and small quota holders; and where *total qualifying milk is all* the qualifying milk as defined in Section 1(d)."

At the end of the policy statement there appears this qualifying statement.

"This policy carries the intent of the Ontario Milk Marketing Board, but is subject to word change on legal advice."

[109]The Ontario Milk Marketing Board Group 1 Pool Quota Policy, November 1, 1967.

In the result, it appears that the Board has considered the matter of determining the quota policy and has expressed its determination in writing. But it has stopped short of embodying the policy in a regulation, as the language of the statute indicates it should. If the policy for fixing quotas had been stated in the form of a regulation the qualification we have just quoted could not have been inserted.

An explanatory note is contained in the document which to some extent explains and summarizes this statement and contains information not in the policy statement. We refer particularly to that portion entitled "Quota Appeal Procedure". It reads:

> "1. Forms used for appealing are available at Head Office in Toronto only.
>
> 2. If you wish to appeal your new Pool quota, write or telephone the Board and request the form "Application for Quota Appeal". Please send it to Mr. John P. Schuster, Quota Supervisor, The Ontario Milk Marketing Board, 31 Wellesley Street East, Toronto 5, Ontario. Telephone 416-924-6646.
>
> 3. The deadline for submitting appeals is December 15, 1967.
>
> 4. The Appeal Committee of the Board will review your appeal. We shall acknowledge receipt of your appeal by return mail, and inform you of the results as soon as possible."

A right of appeal and an appeal procedure is an essential part of the quota fixing policy. It should be part of the law respecting the control of the marketing of milk in Ontario and not something set out in a policy statement. The policy and rights of appeal should both form part of a regulation having the force of law.

The purpose of conferring power to enact subordinate legislation is to save the Legislature from having to state in complete detail in new statutes all the rules that are to apply. It enables the subordinate law-making body "to complete the statutory schemes by making regulations which have the force of law."[110] The purpose is not to confer wide administrative

[110] p. 335. *supra*.

discretion on subordinate bodies which may make declarations of policy to avoid giving the individual clear, enforceable legal rights defined by recognized legislative process.

It is quite evident that throughout, the draftsmen of this Act and the regulations made under it were power conscious and showed an indifference to the rights of the individual. The language used affords an excellent example of a form of legislation which we consistently condemned in Report Number 1. The objective of the draftsmen was to create powers with as little control as possible over their exercise.

APPEALS

The Act makes some provision for rights of appeal from decisions of a marketing board and the Commission,

> "(1) Where any person deems himself aggrieved by any order, direction or decision of a marketing board, he may appeal to the marketing board by serving upon the marketing board written notice of the appeal.
>
> (2) Where any person deems himself aggrieved by,
>
> (a) any decision of a marketing board on an appeal under subsection 1; or
>
> (b) any order, direction or regulation made by the Commission,
>
> he may appeal to the Commission by serving upon the Commission written notice of the appeal."[111]

These provisions are similar to the appeal provisions of the Farm Products Marketing Act.[112]

As we pointed out, an appeal from a decision, etc. of a marketing board to the marketing board is not an appeal in the true sense. It is a right of review. All of what we said in discussing the provisions of the Farm Products Marketing Act are equally applicable here.[113]

Appeals from decisions made under the Milk Act, 1965 which involve questions of law should lie to the Divisional Court of the High Court, and appeals involving matters of policy should lie to the Minister of Agriculture and Food.

The Commission may, subject to the approval of the Lieutenant Governor in Council, make regulations "providing

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[111]Ont. 1965, c. 72, s. 26(1)(2).
[112]R.S.O. 1960, c. 137, s. 10a, as enacted by Ont. 1965, c. 39, s. 4.
[113]Chapter 112, pp. 1782-86 *supra*.

for the settlement of disputes in connection with the selecting, grading, rejecting, weighing, sampling and testing of milk or cream and the payment for the milk or cream."[114] Regulations may be made "establishing classes of field-men, and prescribing the powers and duties of field-men or any class thereof."[115]

> "(3) Where the field-man finds that,
> (a) the milk delivered from a producer for purposes of human consumption or processing does not comply with this Regulation; or
> (b) premises on which milk is produced do not comply with this Regulation,
>
> the field-man shall notify immediately the producer and any plant to which the milk is delivered of his findings and may by order require that no milk from the producer be accepted at a plant until the milk, or premises, comply with this Regulation.
>
> (4) A producer who deems himself aggrieved by an order of a field-man under sub-section 3, may appeal to the Commission and the Commission may, after a hearing, confirm, amend or revoke the order."[116]

This is the sort of power that should be conferred on a field-man by the Act and not by regulation made under general language in the Act, i.e. ". . . prescribing the powers and duties of field-men. . . ." It is, however, sound to confer a right of appeal to the Commission from the decision of a field-man but the field-man should be required to give written reasons for his decision on demand.

Milk graders may make decisions rejecting milk based on findings of fact.[117] There are no provisions for any appeal from or review of these decisions. The nature of the product and its fast deteriorating qualities make any procedure for formal appeal inappropriate. Notwithstanding this, where there is dissatisfaction with the results of testing, procedures should be provided by regulation for further tests at the request of the party affected.[118]

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[114] Ont. 1965, c. 72, s. 18, para. 28.
[115] *Ibid.*, s. 18, para. 61.
[116] R.R.O. 1960, Reg. 432, s. 97(3)(4) as made by O. Reg. 208/61, s. 11 and amended by O. Reg. 289/65, s. 2(2).
[117] *Ibid.*, ss. 61, 62, 63, 66(4), 67(1), and 74(1) and, R.R.O. 1960, Reg. 434, ss. 51, 52, 59 and 67.
[118] See p. 235 *supra.*

INVESTIGATIONS

The powers of investigation conferred on the Milk Commission[119] are virtually the same as those conferred on the Farm Products Marketing Board.[120] We have discussed these powers at some length in Chapter 112.[121]

Upon any inquiry, arbitration or investigation under the Act the Commission has "all the powers that may be conferred upon a commissioner under the Public Inquiries Act."[122]

In Report Number 1 we recommended that the Public Inquiries Act be re-drafted so as to incorporate certain procedural safeguards respecting investigations involving the use of the powers conferred by that Act[123] and we also recommended that statutes referring to the Public Inquiries Act use the formula—"The provisions of the Public Inquiries Act shall apply to investigations under this Act."[124] The Act should be amended to conform to this recommendation.

Production of Books and Records

The right to production and inspection of books and documents is dealt with in two sections—one respecting "officers or field-men" of the Commission and persons appointed by the Commission,[125] and the other respecting officers of a marketing board and persons appointed by a marketing board.[126] We quote the section applying to the former.

> "9. (1) Every person, when requested so to do by an officer or field-man of the Commission or a person appointed by the Commission to inspect the books, records, documents, equipment and premises of persons engaged in the producing, processing or marketing of milk or milk products, shall, in respect of milk and milk products, produce such books, records and documents and permit inspection thereof and supply extracts therefrom and permit inspection of such equipment and premises.

[119]Ont. 1965, c. 72, s. 4(2).
[120]R.S.O. 1960, c. 137, s. 4(1)(2).
[121]p. 1787 *supra*.
[122]Ont. 1965, c. 72, s. 4(3).
[123]p. 465 *supra*.
[124]*Ibid.*
[125]Ont. 1965, c. 72, s. 9.
[126]*Ibid.*, s. 10.

(2) No person shall hinder or obstruct an officer or field-man of the Commission or a person appointed by the Commission to inspect the books, records, documents, equipment and premises of persons engaged in the producing, processing or marketing of milk or milk products in the performance of his duties or refuse to permit him to carry out his duties or refuse to furnish him with information or furnish him with false information.

(3) The production by any person of a certificate of appointment by the Commission to inspect the books, records, documents, equipment and premises of persons engaged in the producing, processing or marketing of milk or milk products, purporting to be signed by the chairman and secretary of the Commission, shall be accepted by any person engaged in the producing, processing or marketing of milk or milk products as proof of such appointment."[127]

These sections are prototypes of section 7 of the Farm Products Marketing Act which we discussed in Chapter 112.[128] The powers are much broader than necessary and proper safeguards for the rights of the individual are not provided in the following respects:

1. The inspection of a private dwelling without the obtaining of a warrant is authorized.

2. There is no restraint on the use of the information that may be obtained on the inspection.

3. The subject being inspected must supply extracts from his books instead of allowing copies to be made thereof.

All persons engaged in marketing "milk products" are subject to the power of inspection. The definition of "milk products" is so wide as to confer powers of inspection of books, records, documents, equipment and premises of all merchants who sell any product derived in whole or in part from milk. This would include a wide range of stores, e.g., grocery stores, drug stores and confectioneries.

Subject to the approval of the Lieutenant Governor in Council the Commission may pass regulations "requiring producers, transporters, processors and distributors to furnish to the Commission such information or returns as the Com-

[127]*Ibid.*, s. 9.
[128]p. 1789 *supra*.

mission determines."[129] This legislative power conferred on a subordinate body is obviously too wide. There is no limitation on the sort of information that may be required by the Commission. It should be confined to relevant aspects of the milk industry.

Every field-man may "stop any conveyance that he believes may contain any milk or milk product and inspect the conveyance and any milk or milk product found therein."[130] The right to stop and inspect should be conditioned on the field-man's having reasonable grounds for believing that the conveyance contains any milk or milk product in respect of which a contravention of the Act or the regulations has taken place.[131]

PENALTIES

Every person who contravenes any of the provisions of the Act or the regulations, or of any plan, or of any order or direction of the Commission or any marketing board, or of any agreement or award or re-negotiated agreement or award filed with the Commission, or of any by-law under the Act, is guilty of an offence and on summary conviction is liable, for a first offence, to a fine of not less than $50 and, for a subsequent offence, to a fine of not less than $50 and not more than $500.[132]

This provision is subject to the same criticism as section 13 of the Farm Products Marketing Act which we dealt with in Chapter 112.[133] We said there "this is the sort of penal legislation that brings the law into disrespect and promotes contempt for the law. It is omnibus penal legislation and lazy draftsmanship. The individual is made liable to be prosecuted and punished in the criminal courts for contravention of laws that he has no means of knowing existed."[134] The contravention is sufficient. The intention to contravene is not a requirement. It should be.

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[129]Ont. 1965, c. 72, s. 18, para. 59.
[130]*Ibid.*, s. 5(b).
[131]p. 425 *supra*.
[132]Ont. 1965, c. 72, s. 20.
[133]p. 1790ff *supra*.
[134]pp. 1790-91 *supra*.

In addition to the penalties provided for offences under the Act, every person who fails to pay at least the minimum price established for any regulated product is liable to a penalty of an amount equal to the difference between the amount paid and the minimum price.[135]

We criticized a similar section in the Farm Products Marketing Act[136] on the ground that the legislation is designed to use the criminal law to collect civil debts and we pointed out that a simple summary application to a judge of the county or district court should be sufficient to provide adequate relief. We also emphasized the procedural difficulty involved in an application under the section.[137]

Restraining Orders

The Act provides:

> "Where it is made to appear from the material filed or evidence adduced that any offence against this Act or the regulations or any plan, order, direction, agreement, award or re-negotiated agreement or award made under this Act has been or is being committed, the Supreme Court or a judge thereof may, upon the application of the Commission, enjoin any transporter, processor, distributor or operator of a plant from carrying on business as a transporter, processor, distributor or operator of a plant, absolutely or for such period as seems just, and any injunction cancels the licence of the transporter, processor, distributor or operator of a plant named in the order for the same period."[138]

The object of this section is commendable but the procedure is confusing.

Provision is made for a summary application to "the Supreme Court or a judge thereof." The alternative language is difficult to understand. The Supreme Court exercises its jurisdiction through the judges of the Supreme Court and an application to the Supreme Court would be disposed of by a judge of the Supreme Court. If it is the intention to confer jurisdiction on a judge of the Supreme Court as an alternative to the jurisdiction of the Supreme Court it could be argued that he would exercise the jurisdiction as *persona designata.*

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[135]Ont. 1965, c. 72, s. 22.
[136]See Chapter 112, pp. 1792-93 *supra.*
[137]*Ibid.,* p. 1793 *supra.*
[138]Ont. 1965, c. 72, s. 21.

In such case no appeal would lie from his decision except by leave of the Court of Appeal.[139] If such should be the case it is wrong that the Commission should have the right to elect whether to make an application to the Supreme Court where a right of appeal would lie from the decision of the judge hearing the application or to make application to a judge of the Supreme Court as *persona designata* where no right of appeal would lie from his decision except with leave. In view of the amount of legal argument that can be developed in many cases in deciding whether a judge on whom jurisdiction is conferred acts as *persona designata* or a judge of the court, the confusion should be cleared up by striking out the words "or a judge thereof."[140]

The provision in the Act which we have just been discussing is to be preferred to the use of the criminal law to attain the same ends.[141] This provision imports the flexible, equitable doctrines associated with the granting of injunctions.[142] It would enable a judge to exercise his powers subject to a discretion and the imposition of appropriate terms, having regard to the justice of the case. However, the court should be given express power to enjoin the respondent to an application from continuing the commission of the offence giving rise to the application. In most cases it would not be necessary for a person to be enjoined from carrying on business absolutely or for a limited period of time. The purpose of the section is not to impose an economic punishment but to prevent the continuation of the offence.

Proof of Inter-Provincial or Export Trade

> "In any prosecution for an offence under this Act, the act or omission of an act, in respect of which the prosecution was instituted, shall be deemed to relate to the marketing within Ontario of milk, cream or cheese, or any combination thereof, unless the contrary is proven."[143]

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[139]The Judges' Orders Enforcement Act, R.S.O. 1960, c. 196, s. 3.
[140]For discussion see p. 657 *supra*.
[141]See Chapter 112, p. 1790ff *supra*.
[142]See *Weatherall and Betzner v. Lennox*, [1949] O.W.N. 685, 687 on the statutory injunction jurisdiction conferred by the Municipal Act, R.S.O. 1937, c. 194, s. 525. See now Municipal Act, R.S.O. 1960, c. 249, s. 486.
[143]Ont. 1965, c. 72, s. 24.

This provision is a great improvement on the corresponding legislation under the Farm Products Marketing Act.[144] It deals with the problem of proof where it may be alleged by the accused that the transactions in milk are in the course of export or inter-provincial trade and, therefore, beyond the competence of the provincial Legislature.

Under the Farm Products Marketing Act the onus is placed on the accused to prove that the product in respect of which the action or prosecution is brought is not a regulated product within the meaning of the Act. As we pointed out, the accused is not in possession of all the requisite information.

Under the Milk Act, 1965 the accused should be able to discharge the onus as to whether the transaction involved shipping milk beyond the limits of the province.[145]

PROTECTION OF MEMBERS OF THE MILK COMMISSION AND OF MARKETING BOARDS

> "No member of the Commission and no officer, field-man or other employee of the Commission is personally liable for anything done by him in good faith under or purporting to be under the authority of this Act or the regulations."[146]
>
> "No member of a marketing board or any of its officers or employees is personally liable for anything done by it or by him in good faith under or purporting to be under the authority of this Act or the regulations."[147]

We criticized similar provisions of the Farm Products Marketing Act. The exemption from liability even extends to acts done without statutory authority as long as they are done in good faith and in the purported exercise of a statutory authority. It is difficult to see why an injured party should not have his ordinary common law remedies for such wrongful acts. If a member of the Commission or a local board or an officer, clerk, or employee of either by his wrongful act causes injury to anyone he should be liable just as an officer, employee or servant of any other corporation.

Provision, however, should be made that members of the Commission and the boards, their officers and employees who

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[144]R.S.O. 1960, c. 137, s. 17. This was discussed in Chapter 112, p. 1794 *supra*.
[145]See discussion Chapter 112, p. 1794 *supra*.
[146]Ont. 1965, c. 72, s. 3(8).
[147]*Ibid.*, s. 7(6).

have acted in good faith should be entitled to be fully indemnified by the Commission and the boards with respect to any judgments obtained against them relating to acts intended to be done pursuant to the Act and the regulations.

We discuss further provisions such as these in Chapter 131 and their effect on the citizens' right against the Crown.

> "The acts of a member or an officer of a marketing board are valid notwithstanding any defects that may afterwards be discovered in his qualifications and his appointment, election or choosing."[148]

We criticized a similar provision in the Farm Products Marketing Act.[149] What we said there applies with equal force to this provision. The provision should relieve against the consequences of minor defects in the qualifications, appointments or election of a member or officer of a board only.

RECOMMENDATIONS

1. All regulations made by the Commission or by a board under the Act should be approved by the Lieutenant Governor in Council before they come into effect.
2. The Lieutenant Governor in Council should approve the actual plans made under the Act.
3. The scope of the Act should be determined by the Legislature and the sections conferring power on subordinate bodies to extend the scope of the Act by the definition of "milk products" should be repealed.
4. All words of definition including "marketing," "producer," "processor" and "transporter" should be restricted to the relative necessities and purposes of the Act.
5. Section 8(1), paragraph 13 giving the Commission power to make regulations "providing for the control and regulation of the marketing of any regulated product, including the times and places at which the regulated product may be marketed" should be repealed or the powers

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[148] *Ibid.*, s. 7(5).
[149] Chapter 112, p. 1760 *supra*.

restricted by proper guidelines confining the power to the express purposes of the Act.

6. Section 8(1), paragraph 32 empowering the Commission to make regulations authorizing any marketing board to prohibit the marketing of any class, variety, grade or size of any regulated product should be amended so as to define strictly the powers of prohibition that may be exercised. These should be set out in the Act and limited to the necessary purposes of the Act.
7. Section 4(2)(j) conferring power on the Commission to "authorize any officer or field-man to exercise such of its powers as it deems necessary . . . " should be amended to limit the powers of delegation to minor matters.
8. The powers conferred on the Commission under section 18, paragraph 63 to exempt from the Act or regulations, or any part thereof, any plant or class of plants, any person or class of persons, or any milk product or any class, variety or grade of milk product should be limited by guidelines laid down in the Act for their exercise.
9. Section 8(1), paragraph 9 giving power to the Commission to make regulations "for the exemption from any or all of the regulations under any plan of any class, variety, grade or size of regulated product or of any person or class of persons engaged in the producing or marketing of the regulated product or any class, variety, grade or size of regulated product" should be repealed or restricted in its scope to that which is essential for the purposes of the administration of the Act and such regulations should be approved by the Lieutenant Governor in Council.
10. Section 25(1) providing that "any word or expression used in the Act or the regulations may be defined in the regulations for the purpose of the regulations" should be amended to limit the power of definition of words used in the Act for the purpose of the regulations so that the definition is within the ambit of the meaning of the words as used in the Act. A word used in the Act should not be given a meaning by regulation at variance with its meaning as used in the Act.

11. Where the Lieutenant Governor in Council makes regulations under section 7(1)(f) and (g) providing for the carrying out by the Commission or a trustee of any or all of the powers of a marketing board, or the vesting of the assets of a marketing board in the Commission or a trustee, or disposing of any or all of the assets of a marketing board, or dissolving a marketing board on terms and conditions prescribed, those affected by such a regulation should be given a statutory right to be heard in accordance with the provisions of the Statutory Powers Procedure Act recommended in Report Number 1 and the exercise of the powers should be subject to statutory conditions precedent.

12. The Commission should not be responsible to the Minister in the exercise of its licensing powers.

13. The words "or for any other reason that the Commission deems proper" in section 8(1), paragraph 3 should be repealed.

14. The grounds entitling a person to a licence should be set out in the Act and not in the regulations as in R.R.O. 1960, Reg. 432, section 46c(c). Section 18, paragraph 3 of the Act should set out the basic terms and conditions for holding a licence. R.R.O. 1960, Reg. 432, section 46c(c) should be amended to delete the words "in the opinion of the Commission."

15. Proper standards should be laid down in the Act governing the licensing powers in accordance with our recommendations in Report Number 1 (p. 1132).

16. There should be a defined legal basis on which the power to fix quotas is to be exercised.

17. Rights of appeal should be provided in cases where a licence is refused or revoked.

18. Rights of appeal and appeal procedure in the quota fixing policy should be set out in the regulations and not in a policy statement of the Ontario Milk Marketing Board.

19. Appeals from decisions under the Act involving questions of law should lie to the Divisional Court of the High

Court and appeals involving matters of policy should lie to the Minister of Agriculture and Food.

20. The powers of a field-man as set out in R.R.O. 1960, Reg. 432, section 97(3) and (4) should be contained in the Act. The field-man should be required to give written reasons for his decision on demand.

21. Where milk graders reject milk based on findings of fact, there should be a procedure for further tests at the request of a party affected.

22. When the Public Inquiries Act is redrafted as recommended in Report Number 1, section 4(3) should be amended to use the formula "the provisions of the Public Inquiries Act shall apply to investigations under this Act."

23. The powers of investigation under sections 9 and 10 of the Act are much broader than necessary. These sections should be amended to provide:
    (1) that where it is sought to enter a private dwelling, a warrant must be obtained;
    (2) that information obtained on the inspection shall not be disclosed except for the purposes of the Act and the administration of justice, and
    (3) that where books cannot be properly inspected on the premises, there be provision for the person investigating to make copies and return the books within a reasonable time. (See p. 422).

24. Section 18, paragraph 59 should be restricted to aspects of the milk industry.

25. The power in section 5(b) to stop and inspect should be conditioned on reasonable grounds to believe that the conveyance stopped contains milk or a milk product in respect of which a contravention of the Act or regulations has taken place.

26. Section 20 should be repealed and penalties enacted only if appropriate to particular contraventions. No one should be liable to punishment unless it can be shown that he knowingly contravened the Act or the regulations.

27. Section 22 should be repealed and in its place provision should be made for a summary application to a judge of the county or district court for an order requiring a party who has not paid the minimum price for a milk product to make good the deficiency.

28. The words "or a judge thereof" should be deleted from section 21. Under section 21 the court should be given express power to enjoin the respondent from continuing the commission of the offence without necessarily enjoining the carrying on of the business absolutely.

29. Section 7(2) should be amended so as to relieve against minor defects only in the appointment, election, or choosing of a member or officer of a marketing board.

CHAPTER 118

The Mining Commissioner

INTRODUCTION

THE Mining Commissioner for Ontario exercises wide judicial and administrative powers relative to "mining" as the term is used in the Mining Act.[1]

It is not our purpose in this Chapter to deal exhaustively with the powers exercised by the Commissioner. We shall be concerned particularly with the provisions of the Act relative to the procedure provided for the exercise of the powers.

THE APPOINTMENT OF THE COMMISSIONER

The Commissioner is appointed by the Lieutenant Governor in Council, but not for any fixed term. In view of the very important judicial powers he exercises provision should be made for security of tenure.

No provision is made for a deputy commissioner to exercise the powers of the Commissioner during his absence or his inability to act—except that in such case the Minister may, in writing, appoint a person to act in his stead with respect to making orders under section 92 of the Act which deals mainly with relief against forfeiture.[2]

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[1]R.S.O. 1960, c. 241, as amended by Ont. 1961-62, c. 81; Ont. 1962-63, c. 84; Ont. 1964, c. 62; Ont. 1965, c. 73; Ont. 1967, c. 54; Ont. 1968, c. 71 and Ont. 1968-69, c. 68.

[2]*Ibid.*, s. 125(3).

Provision should be made giving the Lieutenant Governor in Council power to appoint a person to perform all of the duties of the Commissioner where for any reason he is unable to perform those duties. Mr. J. F. McFarland, the present Commissioner, agrees with this view.

RULES

Unlike the legislation governing many of the tribunals we have dealt with in this Report, the Act contains many provisions setting out in some detail the procedure to be followed relative to the exercise of the jurisdiction conferred on the Commissioner.

The Lieutenant Governor in Council may make rules prescribing the practice and procedure before the Commissioner respecting sittings of the Commissioner and places at which sittings will be held, and any other matter necessary or advisable to carry out effectively the intent and purpose of the part (Part VIII) of the Act concerning the duties of the Commissioner.[3]

The rules in force in the Mining Court of Ontario on the first of June 1956 are stated to continue in force and to apply *mutatis mutandis* to proceedings before the Commissioner until revoked.[4]

No rules have been made under this provision and no rules were in force in the Mining Court on the first of June, 1956.

Mr. McFarland stated to us that he had considered having rules made by the Lieutenant Governor in Council but in view of the fact that so many matters come before him that are in the nature of applications made by individuals unrepresented by lawyers, he thought that it would be unwise to have definite rules. He said: "I felt that if I tied up some of these people who appear without benefit of counsel through rules and procedures then actually I may be depriving them of some of their rights and equities through lack of experience in the fact that they have not benefit of counsel, and for that reason I didn't go ahead with these practices and procedures."

We think Mr. McFarland is right in principle, that is,

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[3]*Ibid.*, s. 133.
[4]*Ibid.*, s. 133(2).

that technical rules ought not to deprive those having cases before him of their rights and equities. But we do not agree that the solution is to have no rules. The better course would be to have rules which would guide those who have matters before the Commissioner and to give to the Commissioner power to relieve against technical failure to follow the rules.

In fact, Mr. McFarland stated that "actually as far as the practices and procedures are concerned we follow pretty well the practices and procedures as laid down by the Supreme Court except that perhaps we are a little more lenient as far as the evidence is concerned."

Obviously, many of the practices and procedures laid down by the Rules of Practice and Procedure of the Supreme Court are not suitable for application to proceedings before the Commissioner.

It would be most useful to have, in pamphlet form, the rules that are to be followed, including the provisions of the statute that are in the nature of rules some of which we shall deal with presently.

FORFEITURE

Under the Act the rights of the holder of a mining claim before the patent has issued are automatically forfeited on certain conditions, e.g., where the licence has expired or the prescribed work has not been duly performed.[5] Where forfeiture of rights occurs an application may be made for relief against the forfeiture.[6]

No provision is made to give one who has an intervening interest a right to be heard before an order is made relieving against forfeiture. We were told that in practice where a third party has acquired an interest he may be allowed to join as a party to the application. Provision should be made for this by rules, but this is not enough. It would give a party claiming under the licensee a right to be heard but a claimant adverse in interest would have no right to be heard to resist an order relieving against forfeiture. In fact, "no person, other than the Minister or an officer of the Department or a licensee inter-

[5] *Ibid.*, s. 91 as amended by Ont. 1965, c. 73, s. 3.
[6] *Ibid.*, s. 92(1) as amended by Ont. 1962-63, c. 84, s. 26 and Ont. 1965, c. 73, s. 4.

ested in the property affected, is entitled to raise any question of forfeiture except by leave of the Commissioner, and proceedings raising questions of forfeiture shall not be deemed to be or be entered as disputes under section 64" of the Act.[7]

Mr. McFarland was asked if he knew the reason for this provision and his reply was "I don't know, sir. That has been in my mind ever since I have been connected with the Department of Mines."

We recommend that in forfeiture proceedings any person claiming under the licensee and any person holding an adverse interest should have a right to be heard on the application.

JURISDICTION OF THE COMMISSIONER

Except in the case of the enforcement of mechanics liens no "action lies and no other proceeding shall be taken in any court as to any matter or thing concerning any right, privilege or interest conferred by or under the authority of this Act, *but, except as in this Act otherwise provided,* every claim, question and dispute in respect of such matter or thing shall be determined by the Commissioner, and in the exercise of the power conferred by this section the Commissioner may make such order or give such directions as he deems necessary to make effectual and enforce compliance with his decision."[8]

The exception provided is that a party to a proceeding under the Act brought before the Commissioner and "involving any right, privilege or interest or in connection with any patented lands, mining lands, mining claims or mining rights, may, at any stage of the proceeding, apply to the Supreme Court for an order transferring the proceeding to the Supreme Court."[9]

The proceedings coming within this exception comprise almost the entire jurisdiction of the Commissioner. It is. however, of real interest that only one or two applications have been made during the last 15 years to transfer proceedings from the Commissioner to the Supreme Court. This is surely a testimonial to the wisdom of the Commissioner.

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[7]*Ibid.*, s. 91(2).
[8]*Ibid.*, s. 126. Italics added.
[9]*Ibid.*, s. 130.

JUDICIAL REVIEW

"Except as provided in this Part [Part VIII], 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."[10]

This section does little harm and no good. Proceedings before the Commissioner may be removed into the Supreme Court on the application of any party to the proceedings and the Commissioner exercises almost a complete appellate jurisdiction over those on whom decision-making powers are conferred under the Act. There are wide rights of appeal from the Commissioner to the Court of Appeal. In view of all this there is little purpose for the privative clause.

Mr. McFarland agreed that anyone who contended that the Commissioner did not have jurisdiction should have a right to move in the Supreme Court to restrain him from acting and likewise where the Commissioner felt he did not have jurisdiction a party affected should have the right to compel him to act. Broadly speaking the privative clause does not affect these rights.

The section should be repealed.

POWERS OF INVESTIGATION

Unlike many Acts that we have dealt with in this Report which confer powers on much lesser tribunals, the Mining Act does not purport to confer on the Commissioner all the powers of a court in civil cases, notwithstanding that he exercises a jurisdiction very akin to that exercised by judges of the Supreme Court and the county and district courts. The powers conferred on the Commissioner to summon and enforce the attendance of witnesses and to compel them to give evidence and produce documents are those that may be conferred on a commissioner under the Public Inquiries Act.[11]

Mr. McFarland stated that in all his experience he had only to consider exercising a power to commit for contempt

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[10] *Ibid.*, s. 157.
[11] *Ibid.*, s. 128.

once and he was doubtful as to whether he had the power. He agreed with us that it would be useful if a right was provided as recommended in Report Number 1[12] to apply to the Supreme Court for an order of committal when his orders were not obeyed. Such a provision should be made.

REASONS

The Commissioner stated that he always gives reasons, but this is not true of the recorders. The Commissioner has been trying to impress on the recorders that whenever they issue orders they should give written reasons.

The Act should provide that where the Commissioner or a recorder makes an order affecting rights he should be required to give written reasons if requested by a party whose rights are affected.

FILING ORDERS WITH THE SUPREME COURT

A duplicate of any order made by the Commissioner or by a recorder may be filed in the office of the Registrar of the Supreme Court or in the office of any local registrar or in the office of the clerk of the county or district court where the land lies and "upon being so filed it becomes an order of the court in which it is filed and is enforceable as an order of such court, but the court or a judge thereof may stay proceedings thereon if an appeal from the order is brought."[13]

We have criticized statutory provisions of this sort repeatedly. Under the statute the order of the Commissioner or a recorder upon being filed becomes an order of the Supreme Court or county or district court, which in reality it is not.

Mr. McFarland was asked, "Now [to] what sort of cases would an "order of the recorder" be referring?" His answer was, "I don't know." Orders are filed with the Mining Recorder and if there is no recorder, with the Minister of Mines. They are not filed with the Registrar of the Supreme Court or a local registrar or the clerk of the county or district court.

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[12] p. 446 *supra*.

[13] R.S.O. 1960, c. 241, s. 137.

The administration of the Mining Commissioner's office should not be confused with the Supreme Court or the county courts. Provision should be made for a central place for filing all orders where they may be found and examined. There should be a provision in the Act that when orders are so filed they may be enforced in the same way as orders of the Supreme Court or county or district court are enforced. If, for instance, an order is to pay money, it should be enforceable by filing a copy of the order with the sheriff.

APPEALS TO THE COMMISSIONER

As we have stated, the widest rights of appeal to the Commissioner are given to "a person affected by a decision of or by any act or thing, whether ministerial or judicial, done or refused or neglected to be done by a recorder."[14]

The appeal is in the nature of a trial *de novo*.

> "The appeal shall be by notice in writing in the prescribed form, filed in the office of the recorder and served upon all parties adversely interested within fifteen days from the entry of the decision on the books of the recorder or within such further period not exceeding fifteen days as the Commissioner allows. . . ."[15]

There is one obvious difficulty in this provision. The Commissioner cannot extend the time for appealing after the expiration of 30 days from the entry of the decision in the books of the recorder except possibly in those cases coming within sections 96 (cancellation) and 134 (disputes between licensees). It may well be that in certain cases the party affected would not gain knowledge of the entry of the decision in the books of the recorder until after the expiry of the 30 day period. There is no provision requiring the parties to be notified, although this is now the practice. Notices may miscarry or there may be parties affected by the order who were not made parties on the original application.

Provision should be made that adequate notice be given to parties affected by the decision of the recorder.

The Commissioner should have a right to extend the time for appealing notwithstanding that the 30 day period

[14] *Ibid.*, s. 138(1).
[15] *Ibid.*, s. 138(3).

may have expired. Such power should be exercised only after notice to all persons who may be affected and on its being shown that no substantial injustice will be caused by the order.

EXPERT ASSISTANCE

> "The Commissioner may obtain the assistance of engineers, surveyors or other scientific persons who may under his order view and examine the property in question, and in giving his decision he may give such weight to their opinion or report as he deems proper."[16]

There is no provision that copies of the opinions or reports received by the Commissioner must be furnished to the parties affected and that they shall have an opportunity to make submissions in regard thereto. This is the practice but it should be required by statute or rules passed thereunder.

EVIDENCE OTHER THAN THAT ADDUCED BY THE PARTIES

In addition to the evidence adduced by parties the Commissioner may require and receive such other evidence as he deems proper and may view and examine the property in question and give his decision upon such evidence or view and examination, or he may appoint a person to make an inspection of the property and he may receive as evidence and act upon the report of a person so appointed.[17]

Where the Commissioner receives other evidence than was adduced by the parties or acts on the report of a person who has been appointed to make an inspection, he should be required to furnish the parties with a statement of the evidence he has received and in the case of a report, a copy of the report. The Act, however, does provide that "where the Commissioner proceeds partly on a view or on any special knowledge or skill possessed by himself, he shall put in writing a statement of the same sufficiently full to enable a judgment to

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[16]*Ibid.*, s. 142.
[17]*Ibid.*, s. 143(1).

be formed of the weight that should be given thereto."[18] There should be a provision that a copy of this statement should be furnished to the parties.

COSTS

The costs in proceedings before the Commissioner are in his discretion and he may order that they be taxed or he may order that a lump sum be paid in lieu of taxed costs.[19] This provision would appear to give to the Commissioner a complete discretion as to costs but that is not true.

> "The costs and disbursements payable upon proceedings before the Commissioner, as to any matter in which the amount or value of the property in question does not in the opinion of the Commissioner exceed $400, shall be according to the tariff of the county court, and as to any matter in which the amount or value of the property in question in his opinion exceeds $400, shall be according to the tariff of the Supreme Court."[20]

These provisions are unduly confusing. In the first place, the requirement that where the amount or the value of the property in the opinion of the Commissioner does not exceed $400, the costs shall be on the county court scale and other costs shall be on the Supreme Court scale makes the Commissioner's "court" the most expensive in the Province in which to litigate.

Where the amount involved is not more than $400 in counties or $800 in districts an action may be brought in the division court in Ontario. The county and district courts have a normal jurisdiction of $7,500.

Sections 149 and 150 should be repealed and provision made to confer on the Commissioner the same jurisdiction with respect to costs as is vested in a Supreme Court judge or a county court judge and to provide that where in the opinion of the Commissioner the amount or value of the property in question is not more than $7,500, costs should not be awarded on a scale higher than that provided in the tariff of costs applicable to proceedings in the county court.

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[18] *Ibid.*, s. 143(2).
[19] *Ibid.*, s. 149.
[20] *Ibid.*, s. 150(1).

FORM OF THE COMMISSIONER'S ORDER

> "Except where inapplicable, the decision of the Commissioner shall be in the form of an order or judgment, but need not show upon its face that any proceeding or notice was had or given or that any circumstance existed necessary to give jurisdiction to make the order or judgment."[21]

Mr. McFarland was asked if he knew any reasons why an order should not show on its face that the circumstances existed necessary to give jurisdiction to make the order. His answer was, "No, I don't. I see no reason why it shouldn't."

It is desirable that there should be certain informality in the proceedings before the Commissioner but we see no good reason for a specific statutory provision that an order, which may involve very large sums of money or valuable rights, need not show the elementary things necessary to give the tribunal making the order jurisdiction, e.g., the party who applied for it; the persons appearing, the notices served and the nature of the issue.

If the intention of the provision is that the order should not be invalid because it does not show on the face of it all the circumstances necessary to give jurisdiction to make an order, it should be stated in the statute.

Provision should be made for a proper form of the formal order.

APPEALS TO THE COURT OF APPEAL

As we have stated, there are wide rights of appeal given by the statute. Any decision of the Commissioner may be appealed to the Court of Appeal.[22]

Although there is no provision that the evidence shall be taken down in written form except as required by the Commissioner or a party to the proceedings,[23] that is the practice.

There should be a provision that a record be made of the evidence taken before the Commissioner in the same form as is required in the Supreme Court.

Except in cases where references have been made by the Supreme Court to the Commissioner as an official referee and

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[21]*Ibid.*, s. 152(1).
[22]*Ibid.*, s. 155.
[23]*Ibid.*, s. 148.

in the case of a reference under the Arbitrations Act, the decision of the Commissioner is final unless an appeal is taken within fifteen days after the filing thereof with the recorder or in the Department or within such further period not exceeding fifteen days as the Commissioner or a judge of the Supreme Court allows.[24]

The appeal shall be begun by filing a notice of appeal with the recorder of the division in which the property in question or part of it is situated and paying the prescribed fee. "Unless such filing and payment are so made, and unless the appeal is set down and a certificate of such setting down lodged with the recorder within five days after the expiration of such fifteen days" or such further time allowed by the Commissioner or a judge of the Supreme Court, the appeal shall be deemed to be abandoned.[25]

This language is very confusing and the provision is a very important one. Do the words "set down" mean the appeal completed by filing the evidence and all material necessary for the hearing of the appeal? Or do they mean the filing of the notice of appeal with proof of service?

The latter is the only reasonable interpretation as it would not be reasonable to require that an appeal be completed for hearing within the limited time provided under the Act. The procedure should be clarified. We recommend the following steps:

(1) The appeal shall be commenced by filing a notice of appeal with the recorder and the payment of the prescribed fee within 15 days from the date of the decision.

(2) The notice of appeal with proof of service shall be filed with the Registrar of the Supreme Court forthwith after service.

(3) A certificate of the Registrar certifying that the notice of appeal and proof of service have been filed shall be filed with the recorder within 20 days of the commencement of the appeal.

(4) Unless the notice of appeal and the certificate of the Registrar are filed with the recorder within the required time the appeal shall be deemed to have been abandoned.

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[24] *Ibid.*, s. 156(1).
[25] *Ibid.*, s. 156(2).

(5) The Commissioner or a judge of the Supreme Court shall have power to extend the time for filing the notice of appeal and the certificate notwithstanding that the time for filing may have expired.

(6) An order extending the time shall not be made unless the Commissioner or the judge is satisfied that no substantial wrong or miscarriage of justice will result.

HOURS FOR BUSINESS

There is no provision in the Act specifying the hours when the offices of the recorders or the Commissioner must be open for business.

The absence of such provision works two ways. A recorder is not required to have his office open at certain specific times to receive registrations or filings and business may be done with a recorder at his home or where he may be found. We cannot put it any better than Mr. McFarland did in his interview with the Commission. "Someone may come in after hours and contact the recorder at home and get him to take some action or something that I don't think he should and in my own way I have tried to tell them that they must not accept any documents except during the hours of 8:30 and 5, the office hours; but I think there should be some specific limitation in the statute."

The Judicature Act provides that every local registrar's office and the offices of the Supreme Court at Osgoode Hall shall be kept open from 9:30 o'clock in the forenoon until 4:30 in the afternoon except on Saturdays and holidays.[26] There is a similar provision in the County Courts Act[27] and there are provisions in the Registry Act[28] and the Land Titles Act[29] concerning the hours during which the offices must be open. The Registry Act provides that no instrument shall be received for registration except within the hours provided.

We agree with Mr. McFarland that specific provision should be made in the Mining Act defining the hours that the offices of the recorders and the Commissioner should be

[26] R.S.O. 1960, c. 197, s. 91.
[27] R.S.O. 1960, c. 76, s. 6.
[28] R.S.O. 1960, c. 348, s. 16.
[29] R.S.O. 1960, c. 204, s. 19.

open and stating the days on which they should be open for business.

RECOMMENDATIONS

1. Security of tenure should be provided for the Commissioner.
2. The Lieutenant Governor in Council should have power to appoint a person to perform all the duties of the Commissioner if for any reason he is unable to act.
3. Rules of practice suitable for the practice before the Commissioner should be prepared and be available in pamphlet form.
4. Provision should be made that in forfeiture proceedings a person claiming under the licensee and any person holding an adverse interest should have a right to be heard.
5. Section 157 should be repealed.
6. Provision should be made giving a right to apply to a judge of the Supreme Court for an order of committal where a person has refused to obey the orders of the Commissioner.
7. Where the Commissioner or recorder makes an order affecting rights he should be required to give written reasons if requested.
8. Provision should be made for filing all orders in a central place and when so filed that they may be enforced in the same manner as orders of the Supreme Court. They should not be filed with the Registrar or local registrar of the Supreme Court.
9. Provision should be made that adequate notice be given to parties affected by an order of a recorder.
10. The Commissioner should have a right to extend the time on terms, for appealing from an order of a recorder after the thirty day period provided in the Act has expired.
11. Provision should be made requiring the Commissioner to furnish parties to proceedings before him with copies

of opinions or reports received by him under section 142 and requiring that an opportunity be given to the parties to make submissions relevant thereto.

12. Where the Commissioner receives evidence in addition to that adduced by the parties or a report of a person appointed as provided in section 143(1), he should be required to furnish the parties with a statement of the evidence he has received and in the case of a report, a copy of the report.

13. Where the Commissioner proceeds partly on a view or any special knowledge or skill possessed by him he should be required to furnish the parties with a copy of the written statement he is required to make under section 143(2) of the Act.

14. Sections 149 and 150 should be repealed and provision made conferring on the Commissioner the same jurisdiction with respect to costs as is vested in a Supreme Court or county court judge subject to a provision that where in the opinion of the Commissioner the amount or value of the property in question is not more than $7,500 the costs should not be awarded on a scale higher than the tariff of costs applicable in county court proceedings.

15. Provision should be made for a proper form of formal order.

16. There should be a provision that a record be made of the evidence taken before the Commissioner in the same form as is required in the Supreme Court.

17. The following should be the procedure on an appeal to the Court of Appeal:

    (1) The appeal shall be commenced by filing a notice of appeal with the recorder and the payment of the prescribed fee within 15 days from the date of the decision.

    (2) The notice of appeal with proof of service shall be filed with the Registrar of the Supreme Court forthwith after service.

(3) A certificate of the Registrar certifying that the notice of appeal and proof of service have been filed shall be filed with the recorder within 20 days of the commencement of the appeal.

(4) Unless the notice of appeal and the certificate of the Registrar are filed with the recorder within the required time the appeal shall be deemed to have been abandoned.

(5) The Commissioner or a judge of the Supreme Court shall have power to extend the time for filing the notice of appeal and the certificate notwithstanding that the time for filing may have expired.

(6) An order extending the time shall not be made unless the Commissioner or the judge is satisfied that no substantial wrong or miscarriage of justice will result.

18. The statute should set out the hours that the offices of the Mining Commissioner and the recorders shall be open for business.

CHAPTER 119

The Ontario Energy Board

INTRODUCTION

CONSTITUTIONAL responsibility for the regulation of production and distribution of gas and oil is shared by the Parliament of Canada and the provincial legislatures under the British North America Act.[1] Both levels of government have enacted relevant legislation. In 1963 John Ballem wrote: "Oil and gas has the dubious and unwelcome distinction of being one of the most heavily regulated and tightly controlled industries in Canada. In many of its activities, the industry is so regulated that it resembles a public utility rather than the free-wheeling organization imagined by the public."[2]

As well as exercising certain specific powers of decision, the National Energy Board is required to

> ". . . study and keep under review matters over which the Parliament of Canada has jurisdiction relating to the exploration for, production, recovery, manufacture, processing, transmission, transportation, distribution, sale, purchase, exchange and disposal of energy and sources of energy within and outside of Canada . . ."[3]

The Ontario Energy Board, the Ontario counterpart of the National Energy Board, is not given a specific supervisory role, unless by implication. It had its genesis in the Ontario Fuel Board which was established in 1954. The Fuel Board combined the functions of the Natural Gas Commissioner,

[1] B.N.A. Act, ss. 91(2), 92(10) and 92(13).
[2] Ballem: *Constitutional Validity of Provincial Oil and Gas Legislation*, (1963) 41 C.B.R. 199, 199.
[3] Can. 1959, c. 46, s. 22(1).

the Natural Gas Referee and the Fuel Controller "to enable the Province to keep pace with the anticipated expansion and growth of the natural gas industry in Ontario, resulting from the importation of large volumes of natural gas from the United States and western Canada."[4] The Board was responsible for the control of the production and distribution of natural gas and other fuels in Ontario. It derived its powers from the Ontario Fuel Board Act 1954,[5] the Assessment Act,[6] the Public Utilities Act,[7] the Pipe Lines Act, 1958,[8] and the Municipal Franchises Act.[9]

The powers of the Fuel Board under the Fuel Board Act were wide. They included control over production, storage, transmission, distribution, sale, disposal, supply and use of natural gas.[10] In conferring these powers ". . . the intent of the Legislature appears to have been twofold: to ensure the orderly development of the natural gas industry and to safeguard public safety in regard to the production, transmission or distribution, and consumption of natural gas (and in some instances oil and coal)."[11]

In September 1959 the Board was placed for administrative purposes under the Department of Energy Resources (now named the Department of Energy and Resources Management).[12]

The Ontario Energy Board was created in 1960 to replace the Ontario Fuel Board when the Energy Act[13] and the Ontario Energy Board Act[14] came into force. The Minister of Energy Resources said on introducing these Acts, ". . . the basic purpose of the two Acts is to separate the quasi-judicial functions of the fuel board from the purely administrative functions, so that the fuel board will retain control over matters dealing with quasi- or semi-judicial functions, and the

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[4]Report of the Committee on the Organization of Government in Ontario (1959), 412.
[5]Ont. 1954, c. 63.
[6]R.S.O. 1957, c. 2, s. 7.
[7]Ont. 1954, c. 81.
[8]Ont. 1958, c. 78.
[9]Ont. 1955, c. 49.
[10]Ont. 1954, c. 63, s. 15.
[11]Report of the Committee on the Organization of Government in Ontario (1959), 72-73.
[12]R.S.O. 1960, c. 95, s. 1(a) as amended by Ont. 1964, c. 21, s. 2(1).
[13]Ont. 1960, c. 30.
[14]Ont. 1960, c. 75.

Department of Energy Resources will assume the responsibilities dealing with purely administrative functions."[15] The Minister summarized the basic functions of the Ontario Energy Board as follows:

(1) to grant and extend new and existing franchises to the municipalities;

(2) to hear complaints in relation to service and delivery;

(3) to hear applications for the withdrawal of service to a community or part of a community;

(4) to fix rates which should prevail in the various areas from time to time;

(5) to hear applications which are referred to it with reference to the cancellation of various licences which may be issued by the Department of Energy Resources;

(6) to hear expropriation applications for new transmission lines.

With the introduction of the Energy Act, 1964[16] and the Ontario Energy Board Act, 1964[17] there were no changes in principle.[18]

COMPOSITION OF THE BOARD

The Ontario Energy Board, to which we shall refer hereinafter as "the Board," has some of the characteristics of an independent board. It consists of not fewer than three and not more than five members appointed by the Lieutenant Governor in Council. One is designated as chairman and one or more may be designated as vice-chairmen. Two members of the Board form a quorum.[19]

We were advised in a discussion with the chairman of the Board that it has been the practice to appoint a number of part-time members who are usually lawyers. Although two form a quorum, three members usually sit on major rate cases.

[15]Legislature of Ontario Debates 1960, 196.
[16]Ont. 1964, c. 27.
[17]Ont. 1964, c. 74.
[18]Legislature of Ontario Debates 1964, Vol. 1, 857.
[19]Ont. 1964, c. 74, s. 2.

The Board reports annually to the Minister[20] but funds are appropriated separately for it by the Legislature.[21]

The Board exercises both administrative and judicial powers as we have defined them in Report Number 1, but it lacks many of the characteristics of an independent tribunal.[22]

By way of contrast the constitution of the National Energy Board conforms more closely to our recommendations. Under the National Energy Board Act[23] the members of the Board are appointed by the Governor in Council to hold office during good behaviour for a term of seven years. Their salaries are fixed at a minimum amount.[24] Membership in the Board is not open to anyone who is not a Canadian citizen or who is an owner, shareholder, director, officer, partner or is engaged in the business of producing or dealing in hydrocarbons or power or who holds any bond, debenture or other security of a company as defined in the Act.[25] There is no such security of tenure for the members of the Ontario Board nor are there restrictions with respect to those who may become members of the Board.

In Report Number 1[26] we emphasized the need for legal experience for members of judicial tribunals who preside at hearings so that proper rules of procedure and evidence would be applied. There is no provision in the Act that any member of the Board should have legal qualifications. Provision should be made that the Board should be presided over by at least one legally-trained member.

POWERS OF DECISION

Powers are conferred on the Board under five Acts— the Ontario Energy Board Act, 1964, (hereinafter in this Chapter referred to as "the Act"),[27] the Energy Act, 1964,[28]

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[20]*Ibid.*, s. 9.
[21]*Ibid.*, s. 10.
[22]pp. 122-23 *supra*.
[23]Can. 1959, c. 46, s. 3, as amended by Can. 1960-61, c. 52, s. 2.
[24]*Ibid.*, s. 4(1) as re-enacted by Can. 1966-67, c. 84, s. 3.
[25]*Ibid*, s. 3(5).
[26]p. 123 *supra*.
[27]Ont. 1964, c. 74.
[28]Ont. 1964, c. 27.

the Municipal Franchises Act,[29] the Public Utilities Act[30] and the Assessment Act 1968-69.[31]

We have set out in the Appendix to this Chapter a brief summary of the powers conferred on the Board under the relevant statutes.

Generally, the Board regulates the production and distribution of oil and gas from discovery to the market. It may

(1) allocate market demands to the several sources from which oil or gas is produced within a field or pool;[32]

(2) require the joining of interests within a spacing unit, field or pool for the drilling and operation of wells;[33]

(3) control the transmission of oil and gas by pipeline and the construction of pipelines;[34]

(4) fix rates for the sale of gas by transmitters, distributors and storage companies and for the transmission, distribution and storage of gas;[35]

(5) recommend gas storage areas;[36]

(6) control all injection into and drilling in gas storage areas;[37]

(7) approve of the construction and operation of works to supply gas in a municipality;[38]

(8) conduct hearings and report to the Minister with respect to applications for permits to bore, drill or deepen wells in a designated gas storage area;[39]

(9) fix compensation for rights to store gas;[40]

(10) hear applications with respect to the disposition of gas transmission lines and share control of companies engaged in the transmission and storage of gas.[41]

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[29]R.S.O. 1960, c. 255.
[30]R.S.O. 1960, c. 335.
[31]Ont. 1968-69, c. 6, s. 33.
[32]Ont. 1964, c. 74, s. 24(a).
[33]*Ibid.*, s. 24(b)(c).
[34]*Ibid.*, s. 37.
[35]*Ibid.*, s. 19.
[36]*Ibid.*, s. 35(1)(k).
[37]*Ibid.*, ss. 20, 23.
[38]R.S.O. 1960, c. 255, ss. 8, 9.
[39]Ont. 1964, c. 74, s. 23.
[40]*Ibid.*, s. 21, as amended by Ont. 1968-69, c. 81, s. 5.
[41]*Ibid.*, s. 25a, as enacted by Ont. 1968-69, c. 81, s. 7.

With respect to most of the decision-making powers the specific legislative policy to be implemented is broadly expressed and few rules and standards or factors to be taken into consideration temper the wide powers of the Board.

The only qualification in allocating market demands is that the shares be "just and equitable".[42] On an application for leave to construct a transmission line, production line, distribution line or station the Board must be of the opinion that the construction of the line or station is in the "public interest."[43]

No policy, rules or factors are specified for the Board's decision with respect to injection and drilling in storage areas,[44] and no rules or factors are specified for the issuance of certificates of public convenience and necessity and the approval given under the Municipal Franchises Act.[45]

The provisions of the Ontario statutes are to be contrasted with those of the federal National Energy Board Act[46] where specific factors to be considered in granting certificates of necessity and convenience are set out. We quote in full the relevant provision of the National Energy Board Act:

> "The Board may, subject to the approval of the Governor in Council, issue a certificate in respect of a pipe line or an international power line if the Board is satisfied that the line is and will be required by the present and future public convenience and necessity, and, in considering an application for a certificate, the Board shall take into account all such matters as to it appear to be relevant, and without limiting the generality of the foregoing, the Board may have regard to the following:
>
> (a) the availability of oil or gas to the pipe line, or power to the international power line, as the case may be;
>
> (b) the existence of markets, actual or potential;
>
> (c) the economic feasibility of the pipe line or international power line;
>
> (d) the financial responsibility and financial structure of the applicant, the methods of financing the line and the extent to which Canadians will have an opportunity of participating in the financing, engineering and construction of the line;

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[42] *Ibid.*, s. 24.
[43] *Ibid.*, s. 39(8).
[44] *Ibid.*, ss. 21 and 23.
[45] R.S.O. 1960, c. 255, s. 8.
[46] Can. 1959, c. 46.

and

(e) any public interest that in the Board's opinion may be affected by the granting or the refusing of the application."[47]

Rate-Making

One of the main powers exercised by the Board is rate-making in the sale, transmission, distribution and storage of gas. Of the eighty-five hearings held by the Board during 1969, thirty-four were concerned with rates.[48]

"Subject to the regulations, the Board may make orders approving or fixing just and reasonable rates and other charges for the sale of gas by transmitters, distributors, and storage companies, and for transmission, distribution and storage of gas."[49]

The Lieutenant Governor in Council may make regulations requiring the Board to approve of or fix rates or other charges[50] and the Board may of its own motion or at the request of the Lieutenant Governor in Council hold a hearing to inquire into existing rates, in which case the Board shall make an order approving or fixing just and reasonable rates and other charges. At such a hearing the burden of establishing that such rates are just and reasonable is on the transmitter, distributor or storage company.[51]

Except those who sell, transmit, distribute or store liquefied petroleum gas, no person engaged in the transmission, distribution or storage of gas may sell gas or charge for its transmission, distribution or storage other than in accordance with an order of the Board.[52]

No policy is set out in the legislation to be implemented by the Board in exercising its powers to decide whether to fix or not to fix rates. Where it exercises the power to fix rates, rates must be "just and reasonable."[53] The social or economic

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[47]*Ibid.,* s. 44.
[48]Annual Report of the Ontario Energy Board, 1969, 3.
[49]Ont. 1964, c. 74, s. 19(1).
[50]*Ibid.*, s. 35(1)(b).
[51]*Ibid.*, s. 19(6), as re-enacted by Ont. 1967, c. 64, s. 3(2).
[52]*Ibid.*, s. 19(3) and O. Reg. 323/64, s. 4.
[53]*Ibid.*, s. 19(1).

policy for rate-making is not expressed in the Act or the regulations.

The Minister in introducing the legislation gave the following reasons for the necessity for controls:

(1) the distribution of natural gas is a monopoly and a public utility;

(2) people become tied to a system and the distributor has a large investment in equipment.

The rate system should therefore be designed to meet the interests of the consumer and distributor.[54]

By an amendment to the Act passed in 1969[55] the Board is required to fix a rate base and criteria are laid down for determining the rate base but the rate of return on invested capital is not fixed by statute. The Chairman of the Board advised us that it had been stated on the floor of the Legislature that the rate of return should be about 7% but he was not in favour of an allowable rate of return being fixed by statute.

In Report Number 1, in speaking of administrative decisions (and rate-making is an administrative decision) we said: "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."[56] The amendment to the statute made in 1969 has done much to bring the statute into conformity with this recommendation. We have come to the conclusion that the allowable rate of return ought not to be fixed by statute. There are so many changing economic considerations involved in fixing a rate of return that it would be unwise to lay down fixed limits, binding on the Board in determining what is reasonable. The economic development of the country in many areas is dependent on the availability of capital for the extension and maintenance of adequate transmission facilities coming under the control of the Board. The rights of appeal from the Board's orders, with which we shall deal later, should be an adequate safeguard of the public interest.

[54]Legislature of Ontario Debates, 1960, 190.
[55]Ont. 1968-69, c. 81, s. 4(1) enacting s. 19(1a), (1b), (1c), (1d) and (1e).
[56]p. 130 *supra*.

POWERS OF INVESTIGATION

> "13(4a). The Board of its own motion may, and upon the request of the Lieutenant Governor in Council shall, inquire into, hear and determine any matter that under this Act or the regulations it may upon an application inquire into, hear and determine, and in so doing the Board has and may exercise the same powers as upon an application."[57]
>
> "36. The Lieutenant Governor in Council may require the Board to examine and report on any question respecting energy that, in the opinion of the Lieutenant Governor in Council, requires a public hearing."[58]

Under these provisions the Board is given an arbitrary power of investigation. When it acts of its own motion there are no conditions precedent laid down. Power is given to make a determination even when no dispute has arisen. The regulations[59] set out a code of procedure to be followed by "applicants" for relief, but this procedure may be set at naught where the Board acts on its own motion.

It is hard to conceive why a Board before which proceedings may be set in motion by applications for relief or by the Lieutenant Governor in Council should have power to inquire into and determine on its own motion any matter that may be raised on an application—which comprehends almost all matters coming within the jurisdiction of the Board.

In Report Number 1 we recommended that arbitrary powers of investigation ought not to be conferred in any statute.[60] We recommend that the power of the Board to act on its own motion to inquire into and determine any matter that might be raised upon an application be repealed.[61]

Scope of the Investigation

The powers exercised by the Board under the first section just quoted whether of its own motion or upon a reference by the Lieutenant Governor in Council are limited to

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[57]Ont. 1964, c. 74, s. 13(4a) as enacted by Ont. 1967, c. 64, s. 2.
[58]*Ibid.*, s. 36.
[59]O. Reg. 324/64, as amended by O. Reg. 99/67.
[60]p. 390 *supra*.
[61]See references to a similar provision in The Ontario Municipal Board, Chapter 125, p. 2021 *infra*.

"the same powers as upon an application" but under the second section just quoted the powers of the Lieutenant Governor to "require the Board to examine and report on any question respecting energy that, in the opinion of the Lieutenant Governor in Council, requires a public hearing" are not limited. The word "energy" is not defined in the Act nor is the power conferred limited to those matters over which the Legislature has constitutional control.

It should be clearly stated in the Act what forms of energy come within the investigatory powers that may be exercised by the Board at the direction of the Lieutenant Governor in Council.

Again, useful comparison may be made with the National Energy Board Act.

> "The Board shall study and keep under review matters over which the Parliament of Canada has jurisdiction relating to the exploration for, production, recovery, manufacture, processing, transmission, transportation, distribution, sale, purchase, exchange and disposal of energy and sources of energy within and outside of Canada, shall report thereon from time to time to the Minister and shall recommend to the Minister such measures within the jurisdiction of the Parliament of Canada as it considers necessary or advisable in the public interest for the control, supervision, conservation, use, marketing and development of energy and sources of energy."[62]

Powers of Compulsion

The powers of compulsion conferred on the Board are wider than necessary and do not conform to the recommendations made in Report Number 1.

> "14. The Board for the due exercise of its jurisdiction and powers and otherwise for carrying into effect this or any other Act has all such powers, rights and privileges as are vested in the Supreme Court with respect to the amendment of proceedings, addition or substitution of parties, attendance and examination of witnesses, production and inspection of documents, entry on and inspection of property, enforcement of its orders and all other matters necessary or proper therefor."[63]

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[62]Can. 1959, c. 46, s. 22(1).
[63]Ont. 1964, c. 74, s. 14.

These powers fall into two classes—compulsive powers and procedural powers. It is necessary for the Board to have power to amend its own proceedings and to add or substitute parties. However, these powers should be set out concisely without reference to the powers of the Supreme Court.

It is wrong and unnecessary to confer on the Board the broad powers of compulsion that are vested in the Supreme Court. We have discussed such statutory provisions repeatedly and dealt with them in Report Number 1.[64]

In our interview with the Chairman of the Board he agreed that it was not necessary that the Board should have power to commit an individual to jail and that where it was necessary to enforce the attendance of witnesses or to compel them to give evidence or to produce documents a right to apply to the judge of the Supreme Court for an order of committal would provide an adequate remedy.

We recommend that when the Public Inquiries Act is amended as we recommended in Report Number 1[65] the relevant provisions should be made applicable to the powers of inquiry vested in the Board.[66]

PROCEDURE

The Board has in all matters within its jurisdiction authority to hear and determine all questions of law and fact.[67] Two members of the Board form a quorum.[68] Two non-lawyer members could therefore exercise the power to decide most involved questions of law. It is the practice that one legally qualified member should sit at all hearings where a question of law is likely to arise. However, as we shall see later, there are safeguards provided against errors of law which are applicable to most of the powers exercised by the Board.

Where proceedings are commenced by filing an application (except in the case of an application for leave to dispose of or acquire a gas system and an application for a regulation designating a gas storage area) the Board shall proceed

[64] p. 442 *supra*.
[65] pp. 463-65 *supra*.
[66] See references to similar provisions in Chapter 125, pp. 2020-27 *infra*.
[67] Ont. 1964, c. 74, s. 13(1).
[68] *Ibid.*, s. 2(4).

by order.[69] It is not clear what is meant by "shall proceed by order." We assume that it means that its decisions shall be embodied in orders. The provision would not appear to apply where the Board proceeds on its own motion[70] since there has been no application. However, the difficulty would be resolved if the power to proceed on its own motion is deleted as we have recommended. Where a proceeding before the Board is commenced by requirement of the Lieutenant Governor in Council the Board shall proceed in accordance with such requirement.[71]

The need for clarification of the matters we have been discussing is important since a right to a hearing depends on whether the Board makes an order or proceeds in accordance with any reference or order in council under the Ontario Energy Board Act, the Energy Act or any other Act.[72]

In addition, the provision that the Board shall proceed "by order" would appear to conflict with the provisions of the Public Utilities Act which confer power on the Board to hear an application for a "declaration" that a gas distributing company has contravened the provisions of a by-law prohibiting the sale or distribution of gas containing sulphuretted hydrogen.[73] In such case the Board is not required to make an order but it may make a declaration. But the declaration conclusively establishes the fact.

Under the section of the Public Utilities Act just referred to, a municipality may apply to the Board for a declaration. This would be an "application" coming within the language of section 13(2) of the Ontario Energy Board Act. But it is not intended that on such an application that the Board should make an order or direction of any sort. It makes a declaration from which legal results flow by reason of the terms of the Public Utilities Act. We shall return to discuss these provisions in another aspect later.

With certain exceptions "the Board shall not make any order or proceed in accordance with any reference or order

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[69] *Ibid.*, s. 13(2), as amended by Ont. 1968-69, c. 81, s. 2.
[70] *Ibid.*, s. 13(4a), as enacted by Ont. 1967, c. 64, s. 2.
[71] *Ibid.*, s. 13(4).
[72] *Ibid.*, s. 15(3) as amended by Ont. 1968-69, c. 81, s. 3.
[73] R.S.O. 1960, c. 335, s. 66.

in council . . . until it has held a hearing upon notice in such manner and to such persons as the Board directs."[74]

This provision does not conform to our recommendation in Report Number 1. There we recommended that any party whose rights may be affected by a decision should have an opportunity of attending a hearing and being heard.[75] The notice required to be given under the Act "to such persons as the Board directs" does not comply with this recommendation. The Board should not have power to deprive a proper party of notice merely by not making a direction. The Act should provide for reasonable notice by service or publication.

One of the exceptions to the requirement for a hearing is where the Board ". . . is satisfied that the special circumstances of the case so require or that the delay necessary to give notice of an application might entail serious mischief."[76] This is an entirely subjective test. We think there should be a requirement that special circumstances should be shown to the satisfaction of the Board and that it should be made to appear to the satisfaction of the Board that the delay necessary to give notice of an application might entail serious mischief before the Board can exercise its far-reaching powers to proceed *ex parte*. If such provision were made, the Board could not act arbitrarily.

Reasons

Where an application has been opposed the Board shall give written reasons for its decision. Where an application is unopposed the Board may and at the request of the applicant shall give written reasons for its decision.[77]

Rules

A code of rules has been drawn up and approved by the Lieutenant Governor in Council.[78] In view of our recommendation in Report Number 1 that a Statutory Powers Procedure Act should be passed and a Rules Committee be

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[74]Ont. 1964, c. 74, s. 15(3) as amended by Ont. 1968-69, c. 81, s. 3.
[75]p. 213 *supra*.
[76]Ont. 1964, c. 74, s. 15(2).
[77]*Ibid.*, s. 17.
[78]O. Reg. 324/64 as amended by O. Reg. 99/67.

established[79] it is unnecessary for us to comment extensively on the rules of the Board. There is no provision for a witness fee. Provision should be made for the payment of witnesses as we recommended in Report Number 1.[80]

Privilege

No document, record or photocopy in the hands of the Energy Returns Officer shall be excluded as evidence on the grounds of privilege.[81] This provision is much too broad and it is difficult to see its purpose.

The Energy Returns Officer has power to obtain certain information under the Act. Information obtained in the ordinary course of his duties would normally be admissible as evidence before the Board. However, if in the exercise of his powers of entry the officer should get possession of a letter from a solicitor to his client advising on the client's business, the solicitor and client privilege would be destroyed by this section.

In Report Number 1 we recommended that the common law and statutory rules of evidence as to privilege should prevail in proceedings before tribunals.[82] Section 53(2) should be repealed.

ENFORCEMENT OF BOARD'S ORDERS

The Act provides for the entry of orders of the Board in the office of the Registrar of the Supreme Court "whereupon the order shall be entered in the same way as a judgment or order of that court and is enforceable as such."[83]

The Chairman advised us that the Board had never had occasion to act under this provision. The question has been raised by Mr. Justice Laskin as to whether a provision such as this makes the Board a court within the meaning of section 96 of the B.N.A. Act.[84]

Any difficulty that might arise through the wording of the statute would be resolved if the recommendation con-

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[79]p. 212ff. *supra.*
[80]p. 863 *supra.*
[81]Ont. 1964, c. 74, s. 53(2).
[82]p. 440 and p. 832 *supra.*
[83]Ont. 1964, c. 74, s. 29(1).
[84]Laskin, *Constitutional Law*, 3rd ed., 815.

tained in Report Number 1 is adopted that one of the minimum rules of procedure for all tribunals should be that the decision of the tribunal should be enforceable in the same manner as an order of an ordinary court but not enforceable "as such."[85]

Penalties

Every person who contravenes any provision of the Act or regulations or *any order of the Board* is guilty of an offence and may be subject to a fine of not less than $200 and not more than $2,000 per day or to imprisonment of up to two years, or both.[86] This is a harsh penal provision. The contravention of an order of the Board might involve a very trivial offence but nevertheless the penalty is $200 per day. On the other hand, the contravention of an order of the Board may be of such serious consequences that a penalty of more than $2,000 per day would be warranted. Penalties should be provided in accordance with the seriousness of the offence. There should be no minimum penalty.

The Regulations Act does not apply to the orders of the Board,[87] and there is no provision in the Act requiring service of the Board's orders on persons affected. Hence, persons may contravene orders of the Board without knowledge that they exist and be subject to fines of not less than $200 per day over a long period of time.

We have had occasion to comment many times in this Report on statutes which provide penalties for breaches of the law that no one can readily find in any published document. It is true that the Act provides that "no information may be laid under this section without the written permission of the Minister in the form prescribed in the regulations".[88] However, this is not an answer to the right of the individual to have an opportunity to know what the law is before he becomes liable to a prosecution for a breach of it. It is a violation of the principles of the Rule of Law that a Minister should have power to authorize the prosecution of a person

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[85]p. 217 *supra* and see pp. 1994-95 *infra* as to enforcement of orders of the Ontario Labour Relations Board.
[86]Ont. 1964, c. 74, s. 34(1). Italics added.
[87]*Ibid.*, s. 11(3).
[88]*Ibid.*, s. 34(2) and see O. Reg. 323/64, Form. 2.

and that he may be convicted for breach of an order when he could have no means of knowing it existed.

There are several means of enforcing the Board's orders without making a failure to obey an order an offence. It is wrong in principle to create offences of a criminal nature punishable with large fines for failure to obey an order of a tribunal, or to conform to regulations, when provision is available for enforcement of orders or regulations by civil processes. Such means have been provided for under the statute we have been considering. For example, an order of the Board requiring a person to pay money to the Board may be enforced by a written direction from the Board to the sheriff;[89] a lien against lands is provided;[90] a suspension of a licence may be ordered under the Energy Act.[91] Provisions creating offences where the use of civil processes would be adequate and proper bring the criminal law and its enforcement into disrepute. The penal sections of the Act should be completely revised to create penalties only where no other remedy would be adequate.

SUBORDINATE LEGISLATIVE POWER

Three sections of the Act provide for the exercise of subordinate legislative power.[92] Not all of these require comment.

The provision that the Lieutenant Governor in Council may make regulations "limiting, restricting or taking away any rights to use or consume gas without charge or at a reduced rate"[93] gives the Lieutenant Governor in Council a wide legislative power.

It is not clear what rights there are or may be "to use or consume gas without charge or at a reduced rate."

The Act provides:

> "Subject to the regulations, no transmitter, distributor or storage company shall sell gas or charge for the transmission, distribution or storage of gas except in accordance with an

[89] *Ibid.*, s. 29(3).
[90] *Ibid.*, s. 29(4)(5).
[91] Ont. 1964, c. 27, s. 10.
[92] Ont. 1964, c. 74, s. 27(1), as re-enacted by Ont. 1965, c. 83, s. 2; s. 35, as amended by Ont. 1965, c. 83, s. 3; and s. 47(2).
[93] *Ibid.*, s. 35(1)(a).

order of the Board, which is not bound by the terms of any contract entered into prior to the day upon which this Act comes into force."[94]

What "subject to the regulations" means is obscure. In this case the enactment of the senior legislative body is subject to what the body exercising subordinate legislative power may do.

There do not appear to be any regulations giving a right to sell gas except in accordance with an order of the Board. Nor is there power given in the Act to permit a sale without charge.

The relevant provision in the regulations reads:

"2. (1) No person shall furnish or supply any gas without charge or at a reduced rate under any agreement for which the supplying of gas without charge or at a reduced rate is a consideration.

(2) Subsection 1 does not apply to any agreement or renewal thereof made before the 1st day of January, 1955."[95]

It would therefore appear that the power conferred on the Lieutenant Governor in Council is to make a regulation without exempting any agreement or renewal made before the 1st of January, 1955. This is a power to confiscate contractual rights without compensation.

The Act should specifically provide that the power does not apply to any agreement or renewal thereof made before the 1st day of January, 1955 or in the alternative, provision should be made for compensation.

The power to prescribe fees payable to the Board[96] contravenes the principles set out in Report Number 1 that the purpose for which fees are to be charged should be expressed in the statute.[97]

EXPROPRIATION

The Board now has power to determine compensation for rights to store gas conferred under an order of the Board.[98]

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[94] *Ibid.*, s. 19(3).
[95] O. Reg. 323/64, s. 2(1)(2).
[96] Ont. 1964, c. 74, s. 35(1)(f).
[97] p. 353 *supra*.
[98] Ont. 1964, c. 74, s. 21, as amended by Ont. 1968-69, c. 81, s. 5.

The amendment of 1968-69 implements the recommendation of the Ontario Law Reform Commission.[99]

Where land or rights to land are expropriated pursuant to the provisions of the Act, the compensation if not agreed upon shall be determined by the Land Compensation Board.[100]

Relevant provisions in the Ontario Energy Board Act are:

> "43. Any person who has acquired land for the purposes of his line or station by *agreement* with the owner of the land shall make to the owner of the land due compensation for any damages resulting from the exercise of his rights under the agreement, and, if the compensation is not agreed upon by them, it shall be determined in the manner prescribed by section 41."[101]

> "44. Any person, his servants or agents, who,
>
> (a) require at any time to enter upon any land to gain access to his right of way established under this Part, or a predecessor thereof, for the purpose of maintaining, repairing, renewing or removing his line or part of it;
>
> (b) require at any time to enter upon any land to gain access directly to his pipe line or any part thereof for the purpose of effecting emergency repairs to his pipe line, have the right to do so without the consent of the owner of the land so entered, and compensation for any damages resulting from the exercise of such right, if not agreed upon by such person and the owner of the land, shall be determined in the manner prescribed by section 41."[102]

> "39. (10) Any person to whom the Board has granted leave to construct a line or station, his officers, employees and agents, may enter into or upon any land at the intended location of any part of the line or station and may make such surveys and examinations as are necessary for fixing the site of the line or station, and, failing agreement, any damages resulting therefrom shall be determined in the manner provided in section 41."[103]

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[99]Report on The Basis for Compensation on Expropriation, September 21, 1967, 63.

[100]Ont. 1964, c. 74, s. 41 as re-enacted by Ont. 1968-69, c. 81, s. 10.

[101]*Ibid.*, s. 43. Italics added.

[102]*Ibid.*, s. 44.

[103]*Ibid.*, s. 39(10).

Section 41 reads:

> "Where compensation for damages is provided for in this Part and is not agreed upon, the procedures set out in clauses *a* and *b* of section 26 of *The Expropriations Act, 1968-69* apply to the determination of such compensation, and such compensation shall be determined under section 27 of that Act or by the Land Compensation Board established under section 28 of that Act."[104]

Compensation is not "determined" under section 27 of the Expropriations Act. That section provides for negotiation only.

It is to be observed that under section 43 the right to compensation arises under the statute but there has been no expropriation, as the land has been acquired by agreement. Under sections 39 and 44 the right of entry without the owner's consent is acquired under the statute and the right to compensation for damages resulting from the exercise of the right arises under the statute.

The *procedure appropriate for the expropriation of land* is more involved than is necessary where the nature and extent of damages caused are not dissimilar to those that may be caused by the Hydro-Electric Power Commission when it exercises its power to enter land to repair lines.

Simple procedures should be provided to fix compensation where small claims are made with a right of appeal to the Land Compensation Board. Such procedure should apply to small claims arising out of the exercise of powers of the nature we have been discussing.[105]

RIGHTS OF APPEAL

Rehearing

"The Board may at any time and from time to time rehear or review any application before deciding it, and may by order rescind or vary any order made by it."[106] There are no limitations on this power to rehear in the statute but there may be by implication.[107]

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[104]*Ibid.*, s. 41 as re-enacted by Ont. 1968-69, c. 81, s. 10.

[105]See recommendation re Hydro-Electric Power Commission, Chapter 114, p. 1817 *supra*.

[106]Ont. 1964, c. 74, s. 30.

[107]See *Regina v. Ont. Labour Relations Bd.* [1964] 1 O.R. 173. We discuss a similar provision in the Ontario Municipal Board Act, Chapter 125, pp. 2022-23 *infra*.

Where the Board exercises its judicial powers there should be no power to grant a rehearing but wide rights of appeal should be given. It should be made clear that no power is given to grant a rehearing of a rehearing except in exceptional and specified circumstances.

Appeal by Way of Stated Case

The Board may at the request of the Lieutenant Governor in Council or of its own motion or upon the application of a party to proceedings before it state a case in writing for the opinion of the Court of Appeal upon any question that, in the opinion of the Board, is a question of law.[108] When a case is stated the Court of Appeal shall determine the stated case and remit it to the Board with the opinion of the Court thereon.[109]

This provision is a good one. It gives the Board an opportunity to have questions of law resolved before the determination of the proceedings so that it may proceed in accordance with the opinion of the Court of Appeal. The right to appeal is dependent on whether the Board forms an opinion that there is a question of law. Provision should be made that if the Board refuses to state a case on a question of law a party to the proceedings should have a right to apply to the Court of Appeal for an order directing it to do so.

The Act does not require the Board to proceed in accordance with the opinion of the Court of Appeal. It should be required to do so.

We discuss an identical provision in the Ontario Municipal Board Act and what we say there and the recommendations there made apply with equal force to the provision of the Ontario Energy Board Act.[110]

Appeal to the Court of Appeal

Except in the case of an order fixing compensation for storage of gas and damage necessarily resulting from the exercise of authority to store gas an appeal lies to the Court of Appeal on any question of law or jurisdiction but only

[108] Ont. 1964, c. 74, s. 31(1).
[109] *Ibid.*, s. 31(2).
[110] See Chapter 125, pp. 2035-36 *infra*.

with leave of the Court obtained within one month from the making of the order. The Court has power to extend the time in special circumstances.[111]

The Supreme Court may fix the costs and fees to be taxed and paid on such appeals and may make rules of practice applicable thereto. Until such rules are made the Rules of Practice of the Supreme Court apply.[112]

Where the Board fixes compensation for the storage of gas or damages resulting from the exercise of authority to store gas an appeal lies to the Court of Appeal without leave.[113]

Orders made in the exercise of the rate-making powers of the Board take effect notwithstanding that an appeal is pending.[114] This provision would seem to be an arbitrary one. Either the Board or the Court of Appeal should have power to suspend a rate-making order pending an appeal. If an important question of law or jurisdiction is raised it would appear to be undesirable that there should be a possibility of rates being collected on the basis of an illegal order.

Appeal to the Lieutenant Governor in Council

> "33(1). Upon the petition of any party or person interested, filed with the clerk of the Executive Council within sixty days after the date of any order or decision of the Board, the Lieutenant Governor in Council may,
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> (a) confirm, vary or rescind the whole or any part of such order or decision; or
>
> (b) require the Board to hold a new public hearing of the whole or any part of the application to the Board upon which such order or decision of the Board was made,
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> and the decision of the Board after the public hearing ordered under clause *b* is not subject to petition under this section."[115]

This right of appeal would appear to be too broad in one sense and may be too narrow in another as we shall see later.

[111]Ont. 1964, c. 74, s. 32(1).

[112]*Ibid.*, s. 32(4). The Supreme Court is not an appropriate body to make rules.

[113]*Ibid.*, s. 21, as amended by Ont. 1968-69, c. 81, s. 5.

[114]*Ibid.*, s. 32(6).

[115]*Ibid.*, s. 33(1).

In the first place it is from any "order or decision" of the Board. The Board formally exercises its powers by order and all orders made by the Board shall be signed by the chairman, vice-chairman, the secretary or assistant secretary and sealed.[116] Decisions are quite different. Rulings on evidence would be decisions. Likewise, fixing the date for a hearing would be a decision. There should be no right of appeal to the Lieutenant Governor in Council in matters of an interlocutory nature.

A broader question arises with respect to the right of appeal from what may be called orders of the Board. The Board makes certain orders which are in the nature of policy decisions. Rate-making orders come within this class. The right of appeal with respect to such orders should be to a political authority and the Lieutenant Governor in Council is the proper authority.

On the other hand, it is incongruous that where an appeal has been taken to the Court of Appeal on a question of law or jurisdiction and the Court of Appeal has given its opinion and the Board has made an order accordingly that there should be a right of appeal to the Lieutenant Governor in Council. The statute confers on the Lieutenant Governor in Council a right to reverse the Court of Appeal.

The right of appeal to the Lieutenant Governor in Council should be confined to matters not involving questions of law or jurisdiction.

It is also incongruous that when a matter comes before the Board there must be a hearing, but on an appeal to the Lieutenant Governor in Council there may be a decision reversing the order of the Board without a hearing. Definite rules of procedure should be provided applicable to appeals to the Lieutenant Governor in Council. These should provide for a hearing for the parties affected by a decision of the Board.

It is not clear as to whether the rights of appeal which we have been discussing apply to orders made under Part II of the Act relating to the authorization of the construction of pipe lines and the exercise of powers of expropriation in connection therewith.

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[116]*Ibid.*, s. 11(2).

Under section 45 the decision of the Board on any application to it under Part II is stated to be final and conclusive.[117] The question arises with respect to orders or decisions made under Part II, does section 45 override the power given to the Board to rehear or review any application and to rescind or vary an order made by the Board,[118] or the right of appeal to the Court of Appeal,[119] or the right to petition the Lieutenant Governor in Council?[120] The provisions we have just referred to are in broad language and apply to "any order of the Board."

If it is the intention of the statute to give the Board final and conclusive power with respect to policy matters coming within Part II, e.g. whether a pipe line should be constructed or in what area it should be constructed, this is wrong in principle, since these are not legal decisions but political decisions and the right of appeal to the Lieutenant Governor in Council should be maintained. If it is intended that the finality provisions should limit the right of appeal to the courts on questions of law and jurisdiction, it is likewise wrong in principle.

In a matter that came before the Board in 1967 the Lieutenant Governor in Council entertained a petition to vary an order of the Board authorizing the expropriation for the purposes of a pipe line in the Township of North Dumfries in the County of Waterloo in spite of the final and conclusive provisions of section 45. In doing so the Executive Council was apparently taking a view similar to that taken by the Court of Appeal of British Columbia in *Nanaimo Community Hotel v. Board of Referees*[121] and *Oak Bay v. Victoria*[122] where finality clauses of the sort we are discussing were held not to oust rights of appeal otherwise given in the relevant Act.

The result would appear to be that the only value the section has is to promote legal contention in the courts. It should, therefore, be repealed.

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[117] *Ibid.*, s. 45.
[118] *Ibid.*, s. 30.
[119] *Ibid.*, s. 32.
[120] *Ibid.*, s. 33.
[121] [1945] 3 D.L.R. 225.
[122] [1941] 3 D.L.R. 680.

Powers Exercised Under the Municipal Franchises Act

Under the Municipal Franchises Act[123] the Board exercises power to grant certificates of convenience and necessity for the supply of gas,[124] to approve the terms of municipal by-laws for submission to the electors concerning the supply of gas and to renew or extend the term of a right to operate works for distribution of gas to a municipal corporation.[125]

A right of appeal with leave of a judge of the Court of Appeal lies from a certificate or order of the Board made under the Act on any question of law or fact if the application for leave to appeal is made within fifteen days from the certificate or order.[126]

This provision is quite different from the provisions for appeal when the Board exercises its powers under the Ontario Energy Board Act. Under that Act, with one exception, the right of appeal lies only with leave of the Court of Appeal obtained within one month of the making of the order and is confined to questions of law or jurisdiction.

In *Union Gas Co. of Canada Ltd. v. Sydenham Gas and Petroleum Co. Ltd.*[127] the Supreme Court of Canada held that the Court of Appeal could not substitute its judgment for that of the Ontario Fuel Board as to whether a certificate of public convenience and necessity should issue. The Court considered that the decision was an administrative one and not a finding of fact. In Report Number 1 we recommended that the right of appeal to the courts should be confined to questions of law and jurisdiction and that there should be no appeal to the courts from an administrative decision. Appeals from such decisions should lie to a Minister or a committee of the Lieutenant Governor in Council.[128]

Since a right of appeal is given from orders of the Board under section 32 of the Ontario Energy Board Act, section 10 of the Municipal Franchises Act should be repealed.

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[123]R.S.O. 1960, c. 255.

[124]*Ibid.*, s. 8.

[125]*Ibid.*, s. 9a, as enacted by Ont. 1968-69, c. 76, s. 1.

[126]*Ibid.*, s. 10, as amended by Ont. 1968-69, c. 76, s. 2.

[127][1957] S.C.R. 185.

[128]p. 234 *supra*.

Powers Exercised Under the Public Utilities Act

After they have been submitted to and approved by the Lieutenant Governor in Council by-laws may be passed by councils of municipalities prohibiting the sale or distribution within the municipality of natural or manufactured gas containing sulphuretted hydrogen.[129] The Board on proof to its satisfaction that a company has contravened such a by-law may make a declaration to that effect and the fact of such contravention or neglect or refusal is thereby conclusively established.[130]

A declaration made in the exercise of this power may have a wide effect on a company holding a franchise and investors owning securities issued by the company. There is no procedure laid down for a hearing other than that which may be implied from the provisions of the Ontario Energy Board Act and the regulations made thereunder.

It is by no means clear that there is a right of appeal under section 32 of the Ontario Energy Board Act. As we have stated earlier a right of appeal is stated to lie from "an order of the Board." But the Board does not make an order under this provision of the Public Utilities Act. It makes a declaration and the results flow from the provisions of the statute. When a declaration is made a company's franchise ". . . *ipso facto* comes to an end . . .".[131]

In making a declaration under the Act the Board is acting in a purely judicial capacity. It must find whether the holder of the franchise has contravened the by-law or has neglected or refused to furnish a supply of gas sufficient for all public and private purposes which does not contain sulphuretted hydrogen. There is no question of policy involved. There should be a clear right of appeal from a declaration made by the Board in such case, without leave.

The situation is quite different where the Board has acted under section 66 (5). Under this provision on the application of a municipal corporation "upon proof of the sale or distribution of natural or manufactured gas containing sulphuretted hydrogen within the municipality after

[129] R.S.O. 1960, c. 335, s. 66(1).
[130] *Ibid.*, s. 66(3).
[131] *Ibid.*, s. 66(2).

the passing of a by-law prohibiting the same, an *order* shall be made [by the Board] for the removal by the company . . . of its conduits, mains, pipes and works. . . ." Under this clause an appeal would clearly lie to the Court of Appeal with leave under section 32 of the Ontario Energy Board Act because the Board has acted by order.

Powers Exercised Under the Assessment Act[132]

The Board is empowered to decide all disputes as to whether or not a gas pipe line is a transmission line within the meaning of the Act and its decision is final. Are the words "is final" intended to destroy any right of appeal that would otherwise exist or are they intended to mean that the decision of the Board "is final and binding upon all the world saving only that the right of appeal is not interfered with?"[133] The right of appeal should clearly lie.

Summary of Appeal Procedures

1. An appeal lies by way of stated case on any question that in the opinion of the Board is a question of law.[134]

2. Except in the case of an order fixing compensation for storage of gas and damage necessarily resulting from the exercise of authority to store gas an appeal lies to the Court of Appeal from any order of the Board upon leave to appeal being obtained from the Court within one month of the making of an order upon any question of law or jurisdiction, with power in the Court to extend the time under the Ontario Energy Board Act.[135]

3. In the case of an order fixing compensation for storage of gas or damage resulting from the exercise of authority to store gas an appeal lies to the Court of Appeal without leave.[136]

4. An appeal lies to the Lieutenant Governor in Council from any order or *decision* of the Board within 60 days

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[132]Ont. 1968-69, c. 6, s. 33(3).
[133]See *Oak Bay v. Victoria* [1941] 3 D.L.R. 680 at p. 698 and *Nanaimo v. Board of Referees* [1945] 3 D.L.R. 225 at p. 248.
[134]Ont. 1964, c. 74, s. 31.
[135]*Ibid.*, s. 32.
[136]*Ibid.*, s. 21 as amended by Ont. 1968-69, c. 81, s. 5.

of the date of the order or decision under the Ontario Energy Board Act.[137]

5. An appeal lies to the Court of Appeal on any question of law or fact from a certificate of public convenience and necessity granted under the Municipal Franchises Act upon obtaining leave of a judge of the Court of Appeal if an application is made within 15 days of the date of the order.[138]

6. No appeal appears to lie from a refusal to grant a certificate unless such refusal can be considered to be "an order of the Board" so as to bring it within the appeal provisions of section 32 (1) of the Ontario Energy Board Act.

7. Where the Board makes an order approving or refusing to approve of a by-law granting the right to construct or operate works for the distribution of gas, etc. under the provisions of section 9 of the Municipal Franchises Act an appeal lies to the Court of Appeal upon any question of law or fact with leave of a judge thereof if application for leave to appeal is made within 15 days of the date of the order. In this case the Court has no power to extend the time.[139]

8. Where the Board makes an order renewing or extending the term of a right to operate works for the distribution or supply of gas in a municipality or refuses to make such an order an appeal lies to the Court of Appeal upon any question of law or fact with leave of a judge thereof if application for leave to appeal is made within 15 days of the date of the order. In this case the Court has no power to extend the time.[140]

9. Where the Board makes a declaration under section 66(3) of the Public Utilities Act that a company has contravened the provisions of a by-law, forbidding it to supply gas containing sulphuretted hydrogen any right of appeal is doubtful.

[137] *Ibid.*, s. 33(1).
[138] R.S.O. 1960, c. 255, s. 10, as amended by Ont. 1968-69, c. 76, s. 2.
[139] *Ibid.*, s. 10, as enacted by Ont. 1968-69, c. 76, s. 2.
[140] *Ibid.*, s. 10, as enacted by Ont. 1968-69, c. 76, s. 2.

10. Where the Board has made an order under section 66(5) of the Public Utilities Act for the removal of gas lines upon proof that the distributor has contravened a by-law forbidding the sale or distribution of gas containing sulphuretted hydrogen there is a right of appeal under section 32 of the Ontario Energy Board Act with leave of the Court of Appeal if obtained within one month of the making of the order and in such case the Court of Appeal may extend the time.

11. Where the Board acts to settle a dispute under section 33(3) of the Assessment Act, 1968-69 concerning a dispute as to whether a pipe line is a transmission line the decision of the Board is stated to be "final" but an appeal may lie to the Court of Appeal with leave of the Court if obtained within one month from the making of the order under section 32 of the Ontario Energy Board Act.

This summary demonstrates the great confusion that exists respecting the rights of appeal given under the different statutes concerning orders, decisions, certificates and declarations of the Board. Added to this confusion is the provision of the Ontario Energy Board Act that "in the event of conflict between this Act and any other general or special Act, this Act prevails."[141]

It is not clear that the provisions of other statutes concerning appeals are necessarily in conflict in all respects with the provisions of the Ontario Energy Board Act. Some may be in conflict and some may be only in addition thereto, e.g. appeals as to facts under the Municipal Franchises Act. In addition, where the Board acts by certificate or declaration under any other Act the right of appeal may be broader under that Act depending on the interpretation of "order" as used in section 32 of the Ontario Energy Board Act. But the difficulty does not end there. Section 10 of the Municipal Franchises Act was amended in 1969,[142] with respect to the powers of the Board and rights of appeal with the result that the most recent legislation would prevail.[143]

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[141]Ont. 1964, c. 74, s. 56(1).
[142]Ont. 1968-69, c. 76, s. 2.
[143]*Ellen Street Estates* v. *Minister of Health,* [1934] 1 K.B. 590. See reference Chapter 122, the Ontario Hospital Services Commission, pp. 1972-73 *infra.*

The right of appeal to the Court of Appeal from orders, certificates or declarations of the Board made under any statute should be uniform.

There should be no rights of appeal which would give the Lieutenant Governor in Council power to override a decision of the Court of Appeal.

LICENSING

The Energy Act,[144] and the Ontario Energy Board Act must be read together when considering the licensing powers of the Board. The following provisions of the Energy Act are relevant:

> "5(1). No person shall,
> (a) conduct a geophysical or geochemical exploration for gas or oil; or
> (b) lease gas or oil rights from an owner other than the Crown; or
> (c) produce gas or oil
> unless he is the holder of a licence for such purpose. . ."[145]
>
> "5(2). No person shall operate a machine for boring, drilling, deepening, or plugging wells unless the machine is licensed."[146]
>
> "5(3). No person shall bore, drill or deepen a well unless he is the holder of a permit for such purposes."[147]
>
> "6(1). Subject to the regulations, no person shall repressure, maintain pressure in or flood any gas or oil horizon by the injection of gas, oil, water or other substance unless he is the holder of a permit for such purpose." . . . (This does not apply to a person who injects gas for storage in a designated gas storage area.)[148]
>
> "6(2). If in the opinion of the Minister, the special circumstances of a case so require, he may refer an application for a permit to repressure, maintain pressure in or flood a gas or oil horizon to the Board, and the Board shall report to the Minister thereon, but, where, in the opinion of the Board, the special circumstances of the case so require, the Board shall hold a hearing before reporting to the Minister."[149]

[144]Ont. 1964, c. 27.
[145]*Ibid.*, s. 5(1).
[146]*Ibid.*, s. 5(2) as amended by Ont. 1965, c. 37, s. 2.
[147]*Ibid.*, s. 5(3).
[148]*Ibid.*, s. 6(1).
[149]*Ibid.*, s. 6(2).

"7(1). No person shall,

(a) transmit a hydrocarbon;

(b) distribute gas;

(c) distribute fuel oil by pipe line;

(d) transfer propane to a pressure vessel; or

(e) transport propane,

unless he is the holder of a licence for such purpose . . ."[150]

"7(3). No person shall carry on the business of installing, repairing, servicing or removing appliances or any class or classes thereof unless he is registered for the purpose."[151]

"7(4). No person shall install, repair, service or remove or permit or cause to be installed, repaired, serviced or removed an appliance unless the installation, repair, service or removal is done by or under the supervision of a person who is licensed for such purpose."[152]

The Minister shall refer every application for a permit to bore, drill or deepen a well in a designated gas storage area to the Board and the Board shall report to the Minister thereon. Where the applicant does not have authority to store gas in the area or where in the opinion of the Board the special circumstances so require the Board shall hold a hearing before reporting. The Minister shall grant or refuse to grant the permit in accordance with the report.[153] There does not seem to be any useful purpose in having the application made to the Minister in the first instance since he must act in accordance with the report of the Board. The application should be made directly to the Board.

A copy of the report shall be sent to the parties within ten days after submitting it to the Minister and it shall be deemed to be a decision for the purpose of giving to the parties affected a right of appeal to the Lieutenant Governor in Council under section 33 of the Ontario Energy Board Act.[154]

Where an application is made under section 6 of the Energy Act for a permit to repressure, etc. by the injection of gas, etc. the Minister may refer the application to the Board

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[150]*Ibid.*, s. 7(1) as re-enacted by Ont. 1967, c. 25, s. 2.

[151]*Ibid.*, s. 7(3) as re-enacted by Ont. 1967, c. 25, s. 2.

[152]*Ibid.*, s. 7(4) as re-enacted by Ont. 1967, c. 25, s. 2.

[153]The Ontario Energy Board Act, 1964, Ont. 1964, c. 74, s. 23.

[154]*Ibid.*, s. 23(2) as enacted by Ont. 1968-69, c. 81, s. 6.

and the Board shall report to the Minister. Where in the opinion of the Board the circumstances of the case so require the Board shall hold a hearing before reporting to the Minister.[155]

Under this section, unlike the provisions of section 23 of the Ontario Energy Board Act, the Minister is not required to refer the application to the Board. It is difficult to understand why an application under this section may or may not be referred to the Board while an application under section 23 of the Ontario Energy Board Act must be referred to the Board.

Unless there is some reason that is not disclosed in the statute the applicant should have a right to apply directly to the Board for permits under this section and the Board should be required to hold a hearing before making an adverse report.

There is no provision that the report shall be sent to the applicant or that it should be deemed to be a decision of the Board so as to give a right of appeal to the Lieutenant Governor in Council under section 33. There should be such provisions.

The powers exercised by the Board with respect to the injection and storage of gas or removal of gas in a designated area, under section 21 of the Ontario Energy Board Act, are not ordinary licensing powers where general standards should be laid down concerning entitlement to an authorization. The powers are conferred for the purpose of regulating and conserving storage areas. The provisions of the Act in this regard substantially comply with our recommendations in Report Number 1.[156]

Where licences or permits are required or registration is required, subject to section 6(2) of the Energy Act and to "section 21 of The Ontario Energy Board Act, 1964, the Minister may, in his discretion, with or without an examination of the applicant, grant or refuse to grant a licence or permit, or effect or refuse to effect a registration, and he may, in granting a licence or permit or effecting a registration, impose such terms and conditions as he in his discretion deems proper,

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[155]Ont. 1964, c. 27, s. 6(2).
[156]pp. 1132-34 *supra.*

and, before granting a licence or permit, or effecting a registration, he may refer the matter to the Board, and the Board shall hold a hearing and report to him thereon with its recommendations."[157] This section fails to provide minimum proper safeguards for the rights of the individual:

(1) the power to grant or refuse is discretionary;

(2) there are no standards for the exercise of the discretion;

(3) the Minister may refuse a licence, permit, or registration without a hearing;

(4) the Minister may impose terms and conditions as he in his discretion deems proper;

(5) before "granting" a licence, etc., the Minister may refer the matter to the Board but he may refuse the licence without referring the matter to the Board.

These are harsh provisions. They could give rise to arbitrary action with no right of appeal to a higher authority. Standards should be provided for the exercise of the discretion. Before refusing a licence, permit, or registration the Minister should be required to grant the applicant a hearing either by him or before the Board. There should be a right of appeal to the Lieutenant Governor in Council against the refusal to grant a licence and with respect to the terms and conditions imposed.

The provisions of the Energy Act governing renewals of licences, permits and registrations read as follows:

> "The Minister may grant or refuse to grant a renewal of a licence in whole or in part, a renewal of a permit in whole or in part, or effect or refuse to effect a renewal of a registration in whole or in part, and he may, in granting a renewal of a licence or permit or in effecting a renewal of a registration, impose such terms and conditions as he in his discretion deems proper, but, where he refuses to grant a renewal of a licence or permit in whole or in part, or to effect a renewal of a registration in whole or in part, or, in granting a renewal of a licence or permit or effecting a renewal of a registration, imposes any term or condition that was not previously imposed, he shall, if requested by the applicant, refer the matter to the Board, and the Board shall hold a hearing and report

[157] Ont. 1964, c. 27, s. 10(1).

to him thereon, and he shall grant or refuse to grant or effect or refuse to effect the renewal in accordance with the report."[158]

Under these provisions the applicant for renewal has a right to require a hearing by the Board before his application is refused or new terms and conditions are imposed. However, he has no right to receive a copy of the Board's report, or to appeal since it is the Minister who refuses the renewal or imposes new terms and conditions in accordance with the Board's report. The Board should be required to furnish the applicant with a copy of its report and a right of appeal to the Lieutenant Governor in Council should be provided.

In addition to penalties provided for certain specific offences created under the Act,[159] a person may have his licence, permit, or registration suspended or revoked. In such case the person aggrieved is entitled to a hearing before the Board and the Minister shall make an order in accordance with the Board's report.[160] These provisions substantially comply with our recommendations in Report Number 1. However, the Board should be required to furnish the applicant with a copy of the report as is required by the amendment to section 23 of the Ontario Energy Board Act.[161] There should be a right of appeal to the Lieutenant Governor in Council in accordance with our recommendation in Report Number 1.[162]

CONCLUSION

In view of the great confusion that exists with respect to the powers conferred on the Board under the different statutes we have considered and the inconsistencies with respect to procedure and rights of appeal there should be a complete revision of the Board's powers and procedures. With the enactment of the Statutory Powers Procedure Act recommended in Report Number 1 this revision would be greatly simplified.

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[158] *Ibid.*, s. 10(2).
[159] *Ibid.*, s. 9(1) as amended by Ont. 1967, c. 25, s. 3.
[160] *Ibid.*, s. 10(3).
[161] Ont. 1964, c. 74, s. 23(2) enacted by 1968-69, c. 81, s. 6.
[162] p. 1134 *supra*.

RECOMMENDATIONS

Unless otherwise indicated references in these recommendations are to the Ontario Energy Board Act.

1. Members of the Board should have security of tenure.

2. There should be restrictions on those eligible for membership in the Board similar to those contained in the National Energy Board Act.

3. The Act should provide that the Board be presided over by at least one legally qualified member.

4. The power conferred on the Board under section 13(4a) to act on its own motion to inquire into and determine any matter that may be raised on an application should be repealed.

5. Section 36 should be amended to define the forms of energy which come within its scope.

6. Section 14 should be amended so as to,
   (a) set out the procedural powers of the Board without reference to the powers of the Supreme Court;
   (b) delete the Board's powers of committal to jail. The enforcement of the Board's orders for attendance of witnesses and production should be made by application to a judge of the Supreme Court.

7. Section 15(3) should be amended to provide that reasonable notice of the Board's hearing (by service or publication) shall be given to those who will be affected by the Board's decision rather than "to such persons as the Board directs".

8. Section 15(2) should be amended so as to require that before the Board has power to proceed *ex parte*, it be made to appear to the Board that the delay necessary to give notice of the hearing of an application would likely entail serious mischief.

9. Provision should be made for payment of witness fees.

10. Section 53(2) should be repealed.

11. Section 29(1) should be amended to provide that the decisions of the Board shall be filed with the secretary of the Board and be enforceable in the same manner as orders of an ordinary court.

12. The penal sections of the Act should be completely revised to create penalties only where no other remedy would be adequate. Minimum penalties should be abolished.

13. Section 19(3) should be amended to delete the words "which is not bound by the terms of any contract entered into prior to the day upon which this Act comes into force".

14. Section 35(1)(f) should be amended to set out the purpose for which fees may be charged by the Board.

15. Simple procedures should be provided to fix compensation for small claims with respect to the acquisition of rights over land or rights of entry on land with a right of appeal to the Land Compensation Board.

16. There should be no power to grant a rehearing where the Board has exercised judicial powers but there should be a right of appeal to the Court of Appeal.

17. There should be no power to grant a rehearing of a rehearing except in exceptional and specified circumstances.

18. Section 31 should be amended to provide a right in a party to a proceeding before the Board to apply to the Court of Appeal for an order that the Board state a case on any question of law where the Board refuses to state a case. The words "in the opinion of the Board" should be deleted.

19. Where an appeal has been taken to the Court of Appeal the Board should be required to proceed in accordance with the opinion of the Court of Appeal.

20. Section 32(6) should be amended to provide that either the Board or the Court of Appeal has power to suspend a rate-making order pending an appeal.

21. Section 33 should be amended to provide that the right of appeal to the Lieutenant Governor in Council,
    (a) does not apply to interlocutory matters;
    (b) does not extend to matters involving questions of law and jurisdiction.

22. Where an appeal lies to the Lieutenant Governor in Council there should be defined rules of procedure providing for a hearing of the parties affected by a decision of the Board.

23. Section 45 providing that the decision of the Board on an application made to it under Part II of the Act is final and conclusive should be repealed.

24. Section 10 of the Municipal Franchises Act should be repealed as it is inconsistent with section 32 of the Ontario Energy Board Act with respect to rights of appeal to the Court of Appeal.

25. There should be a clear right of appeal from declarations of the Board under section 66(3) of the Public Utilities Act.

26. All statutes conferring power on the Board should be amended to provide uniform rights of appeal.

27. The Lieutenant Governor in Council should not have power to reverse a decision of the Court of Appeal.

28. An application under section 23 for a permit to bore, drill or deepen a well in a designated gas storage area should be made to the Board.

29. Unless there is some good reason not apparent in the statutes, an application under section 6 of the Energy Act to repressure, maintain pressure in or flood a gas or oil horizon should be made to the Board.

30. Section 6(2) of the Energy Act should be amended to require that a copy of the Board's report be sent to the applicant and that it be deemed a decision of the Board from which there is a right of appeal to the Lieutenant Governor in Council under section 33 of the Ontario Energy Board Act.

31. Standards should be provided for the exercise of the discretionary powers conferred on the Minister under section 10 of the Energy Act.

32. Before refusing a licence, permit, or registration under section 10 of the Energy Act the Minister should hold a hearing or require the Board to hold a hearing.

33. Section 10(1)(2)(3) of the Energy Act should be amended to require that the person affected receive the report of the Board and to provide for a right of appeal to the Lieutenant Governor in Council.

34. The Ontario Energy Board Act and the Energy Act together with the relevant sections of the other statutes under which powers are conferred on the Ontario Energy Board should be completely revised with a view to eliminating the procedural inconsistencies that exist with respect to the exercise of the powers of the Board and the rights of appeal from decisions or orders of the Board.

35. Section 32(4) should be amended to provide that rules made thereunder be made by the Rules Committee constituted under the Judicature Act.

APPENDIX TO CHAPTER 119

Powers Conferred on the Board under:

(1) The Ontario Energy Board Act, 1964:

(a) Approving and fixing the rates and charges for the sale, transmission, distribution and storage of gas in the Province .... s. 19

(b) Granting of leave to construct transmission pipe lines, production lines, distribution lines and stations .... ss. 38 and 42

and powers of entry to make surveys and examinations .... s. 39(10)

(c) Granting authority to expropriate land for pipe lines and stations .... s. 40

(d) Recommending designation of lands for gas storage areas .... ss. 35(1)(k) and 35(2)

(e) Authorizing storage of gas in designated gas storage areas and the entry on and use of land for such purpose .... s. 21

(f) Requiring the joining of interests in gas or oil pools s. 24

(g) Examining and reporting on any matters pertaining to energy referred to the Board by the Lieutenant Governor in Council .... s. 36

(h) Reporting to the Minister on references for permits to bore, drill or deepen wells in designated gas storage areas s. 23

(i) Ordering the sharing of storage capacity and facilities and approving of terms of storage agreements .... s. 22

(j) Ordering the payment of money out of the Abandoned Works Fund (see ss. 40, 41, O.Reg. 326/64) to be created by regulation under the Energy Act 1964, s. 11(3), para. h .... s. 26

(k) Granting leave to discontinue supply of gas .... s. 25

(l) Hearing applications for leave to sell, lease or convey or otherwise dispose of gas transmission and storage facilities or to acquire more than 20 percent of the shares of a gas transmitter, gas distributor or storage company (Ont. 1968-69, c. 81, s. 7) .... s. 25a

(2) The Energy Act, 1964:

(a) Examining and reporting on certain matters referred to the Board by the Minister of Energy and Resources Management .... ss. 6(2) and 10

(3) The Municipal Franchises Act:

(a) Approving terms and conditions of franchise agreements .... ss. 9 and 4

(b) Granting certificates of public convenience and necessity .... s. 8

(4) The Assessment Act, 1968-69:

(a) Determining of proper classification of pipe lines for assessment purposes when classification as transmission lines is in dispute .... s. 33(3)

(5) The Public Utilities Act:

(a) Making declarations that municipal by-laws prohibiting the sale or distribution of gas containing sulphuretted hydrogen have been contravened .... s. 66(3)

(b) Ordering the removal of conduits, mains, pipes and works of companies on proof of their contravention of the municipal by-law .... s. 66(5)

CHAPTER 120

The Ontario Food Terminal Board

INTRODUCTION

The Ontario Food Terminal Board is constituted under the Ontario Food Terminal Act.[1] The Board shall consist of not more than seven persons appointed by the Lieutenant Governor in Council.[2]

The objects of the Board are to acquire, construct and operate a wholesale fruit and produce market in the County of York and to do such other acts as may be necessary or expedient for the carrying out of its operations and undertakings.[3]

The term "fruit and produce" is defined to include dairy products, eggs, honey, maple products, poultry and vegetables.[4]

In the exercise of its powers the Board acquired a parcel of land in Metropolitan Toronto and erected thereon a food terminal warehouse in which wholesale marketing operations are carried on. It is unnecessary for us to discuss in detail the method of carrying on these operations. We are principally concerned with the powers of the Board.

THE POWERS OF THE BOARD

The Board may rent space in the Terminal to such persons and upon such terms as to the Board may seem proper and may make such arrangements and enter into such agreements with such persons as it may deem advisable in the

[1] R.S.O. 1960, c. 272 as amended by Ont. 1964, c. 75.
[2] *Ibid.*, s. 2, and R.R.O. 1960, Reg. 461, s. 1.
[3] *Ibid.*, s. 4.
[4] *Ibid.*, s. 1(b).

circumstances.[5] This is a broad power and as we shall see it has been exercised broadly.

No person shall establish within the City of Toronto or the Counties of York or Peel any market for the sale by wholesale of fruit and vegetables except with the approval of the Board. This provision does not extend to any market that was being regularly and continuously operated as of the 1st of April, 1955, so long as it is not extended or enlarged.[6]

Subject to the approval of the Lieutenant Governor in Council the Board may make regulations,

(a) prescribing the officers of the Board;

(b) prescribing the powers and duties of the manager of the Terminal and the officers of the Board;

(c) prescribing the form of the seal of the Board;

(d) respecting the operation, management and maintenance of the Terminal;

(e) respecting any matter necessary or advisable to carry out effectively the intent and purpose of the Act.[7]

It is to be observed that sub-clause (e) just quoted is a very wide delegation of legislative power.

Subject to the regulations the Board may make rules with respect to,

(a) the conduct of the Board's employees;

(b) the conduct of the Board's tenants and their employees;

(c) the conduct of any person on the Board's premises for any purpose;

(d) the use by any person of the Board's facilities and equipment.[8]

In addition to the rule-making powers, the exercise of which must be approved by the Lieutenant Governor in Council, the Board in the exercise of its powers to do such "other" acts as may be necessary or expedient for the carrying out of its operations and undertakings may make rules affecting not only the interests of the tenants of the Terminal but those doing business with them. For example, it has been

[5] *Ibid.*, s. 5.
[6] *Ibid.*, s. 12.
[7] *Ibid.*, s. 13.
[8] *Ibid.*, s. 14.

decided that under these powers the Board could make an order that the Terminal should not be open for selling fruit and produce on Saturdays.[9]

Every person who contravenes any of the provisions of the Act or the regulations or any rule made by the Board is liable to both fine and imprisonment. This gives the Board power to create offences for which an offender may be imprisoned and there is no means by which the rules of the Board creating such offences are to be published unless they are approved by the Lieutenant Governor in Council.

All the rules of the Board made affecting the rights of tenants or the public should require the approval of the Lieutenant Governor in Council.

The Government of Ontario provided the funds for the erection of the Terminal on an amortization plan to be secured by the rents from 30-year binding leases for warehouse space with parties engaged in the fruit and produce trade.

We have been furnished with a specimen of the warehouse lease which provides for an annual rental over the 30-year period. At the end of the period the tenant is entitled, by giving 30 days' notice in writing prior to the expiration of the term, or any renewal thereof, to further successive terms of 30 years upon an annual rental payment of $1.00 per year, and in the case of "A" Units 1% and in the case of "B" Units ½ of 1% of all operating and maintenance expenses, taxes or payments in lieu of taxes under the Municipal Tax Assistance Act and all other charges for the upkeep of the Food Terminal Building but excluding therefrom any charges for depreciation or amortization of the original cost of the Food Terminal Building and any repairs, replacements, labour and other expenses chargeable to the operation of the cold storage plant.

Thirty-one wholesalers have entered into leases with the Board and they have the right to assign and sublet with leave of the Board.

The effect of the Act and the terms of the leases is to give those holding leases a wide control over the wholesale

[9] *Jamieson's Foods Ltd. v. Ont. Food Terminal Bd.*, [1961] S.C.R. 276.

marketing of fruit and vegetables in the Counties of York and Peel subject to the orders of the Board and with the exception of those operations that were carried on (but must not be enlarged) when the Terminal commenced its operation.

The right to the renewal of the leases at the end of 30 years at the nominal rent, together with their monopolistic attributes, has given to them great value.

In a publication prepared by the Board there is this statement:

> "Since the Ontario Food Terminal came into operation, its warehouse facilities have been leased to capacity. Its capital cost of $5,100,000.00 financed through a sale of debenture bonds in 1955 has been fully serviced. The property has greatly increased in value since operations commenced in 1954 and some tenants have doubled and trebled their sales volume since moving out of their former premises in the old downtown Toronto wholesale market area. Three tenant leases have been sold within the past two years for about as much money as the lessees paid in rent since the Food Terminal opened due to the 30-year amortization provisions and the franchise privileges in the warehouse lease held by the tenants. It is expected at the end of this period that the capital cost of the Food Terminal will be retired. The firms then completing the agreement under their lease will be relieved of all future payments of rent and will only pay henceforth their pro rata share of the taxes, upkeep and overhead of the Food Terminal. Meanwhile, they have the right to transfer or dispose of their leases subject to the approval of the Food Terminal Board. This explains why all warehouse leases are now increasing in value."

We are not concerned with the policy of establishing this form of control over the wholesale marketing of fruit and produce or whether it is in the public interest to confer on lessees rights in perpetuity at their election. That is a political question. We are, however, concerned with the safeguards that have been provided with respect to the exercise of the powers of the Board.

The Board is given power to rent space in the Terminal "to such persons and upon such terms as the Board may deem proper" and it may make such arrangement and enter into such agreement with any such person "as it may deem advisable in the circumstances." No standards are set to guide

the Board in the exercise of these wide powers and although the Government has provided the funds for the acquisition of the site and erection of the Terminal, the approval of the Lieutenant Governor in Council is not required with respect to their exercise.

The prohibition against establishing any market for sale by wholesale of fruit and vegetables in the City of Toronto or the Counties of York and Peel without the approval of the Board and the prohibition against the enlargement of any market being operated on the 1st of April, 1955, is a much wider power than the licensing powers which we discussed in Report Number 1.[10]

It is a power to create and maintain a monopoly in the interests of the tenants of the Terminal. No guidelines are set out in the statute for the exercise of this power and no rights of appeal are provided.

We have been informed by the Board that they have received applications for leave to operate markets for the sale by wholesale of fruit and vegetables, some of which have been granted and some of which have been refused.

It is not clear from the Act whether the powers we have been discussing are granted to the Board to protect those who have leased premises in the Terminal or to protect the public.

In Report Number 1 in dealing with licensing powers we recommended that where power to license is conferred the purpose of the power and the grounds upon which it is to be exercised should be carefully determined and then expressed in legislation with as much clarity and objectivity as possible.[11]

RECOMMENDATIONS

1. The Ontario Food Terminal Act should be amended to declare the policy of the Act with respect to the powers conferred on the Board.

2. Standards should be set for the guidance of the Board and the protection of the public in the exercise of its powers to grant leases.

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[10] p. 1094ff. *supra*.
[11] p. 1106 *supra*.

3. Standards should be set for the guidance of the Board in the exercise of its powers to permit or refuse to permit persons to establish and operate within the City of Toronto and the Counties of York and Peel, markets for the sale by wholesale of fruit and vegetables, and to permit or refuse to permit the extension or enlargement of such markets which were operated on the 1st of April, 1955.

4. There should be a right of appeal to an appellate body against a refusal of the Board to grant a permit to operate or enlarge a market for the sale of fruit and vegetables by wholesale.

5. All rules passed by the Board which create offences or affect the public interest should be subject to the approval of the Lieutenant Governor in Council.

CHAPTER 121

The Ontario Highway Transport Board

INTRODUCTION

THE Ontario Highway Transport Board to which we shall hereafter refer as "the Board" is constituted under the authority of the Ontario Highway Transport Board Act.[1]

The main function of the Board is to issue certificates of public necessity and convenience under the Public Commercial Vehicles Act and the Public Vehicles Act. The approval of the Board is not required for the renewal of licences under either Act unless the application for renewal is referred to it by the Minister or the Registrar of Motor Vehicles. On such references the Board may grant its approval or refuse the certificate. The Board may be required by the Minister to conduct a hearing to determine if a vehicle is a public commercial vehicle or a public vehicle. It must approve of all transfers of operating licences of commercial and public vehicles and it may require that corporations who are holders of operating licences receive approval of transfers of shares of the capital stock of the corporations.[2]

The concept of the Board and its functions had their origins in the recommendations of the Royal Commission on Transportation which reported on December 23, 1938. At that time the extensive use of hard surface highways for

[1]R.S.O. 1960, c. 273, amended by Ont. 1960-61, c. 65 and Ont. 1961-62, c. 92.
[2]R.S.O. 1960, c. 319, s. 4, as amended by Ont. 1968, c. 105, s. 4; ss. 4a and 5, as enacted by Ont. 1961-62, c. 114, ss. 5, 6; and R.S.O. 1960, c. 337, ss. 2, 3.

the transportation of goods and passengers was just developing. The Commission found that a chaotic condition, which had developed by reason of severe and unrestricted competition, existed in the motor transport industry. It was recommended that a Board be appointed "clothed with the powers and authority to deal fully and completely with the problem of transportation in the Province in its varied and complex forms. The conditions of appointment and service should be such that the members of it can act with independence and security."[3]

The recommendation of the Commission was implemented by conferring regulatory duties on the Ontario Municipal Board.[4] In 1955 the jurisdiction exercised by the Ontario Municipal Board was transferred to the Ontario Highway Transport Board.[5]

The Board consists of a chairman, two vice-chairmen and three members appointed by the Lieutenant Governor in Council. One of the vice-chairmen and one other member are qualified lawyers.

HEARINGS

Two members of the Board constitute a quorum.[6] However, the chairman may authorize one member to conduct the hearing of an application and report to the Board. In the conduct of the hearing such member has all the powers of the Board. The report of such a member may be adopted by two members of the Board.[7] This procedure is in violation of the principle that he who decides should hear. This we discussed in Report Number 1.[8] We are advised by the chairman that this power is very seldom exercised and where it is exercised the matters heard are of a non-contentious nature. The provision is unobjectionable and useful if it is confined to uncontentious matters. The Board should have a rule that where a party to an application so requests he

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[3]See Report of Gordon Committee on the Organization of Government in Ontario (1959), 424.
[4]R.S.O. 1950, c. 304.
[5]Ont. 1955, c. 54.
[6]R.S.O. 1960, c. 273, s. 5 as amended by Ont. 1961-62, c. 92, s. 2.
[7]*Ibid.*, s. 5a as enacted by Ont. 1961-62, c. 92, s. 3.
[8]pp. 129 and 220 *supra*.

should be entitled to a hearing by a quorum of the Board. This is now the practice but not one laid down by rule. We think that in all cases a quorum of the Board should be three, except that one member may hear uncontested matters and, on consent of all parties, hear a contested matter.

INVESTIGATORY POWERS

The Board has the same power as is vested in any court in civil cases to summon any person as a witness and to require him to give evidence under oath and to produce documents and things as may be required.[9] This includes the power to commit for contempt. The chairman was asked if it would impede the work of the Board if the power to commit for failure to obey orders of the Board, e.g., to respond to a summons or answer questions, was vested in a judge of the Supreme Court and his answer was "no, absolutely no, provided we had recourse to someone . . . This would be perfectly acceptable as long as we are in a position to be able to enforce it. It is highly desirable because it would relieve us of that responsibility."

This was the practice we recommended in Report Number 1.[10] The Act should be amended accordingly.

ENFORCEMENT OF THE BOARD'S ORDERS

A certified copy of an order of the Board may be filed with the Registrar of the Supreme Court and thereupon it becomes a judgment or order of the Supreme Court enforceable in the same manner as a judgment of that court to like effect.[11] The effect of this provision is to make an order made by a tribunal appear to be an order of the Supreme Court which it is not. It would be sufficient if the section provided that orders of the Board should be filed with the secretary of the Board and be enforced by the sheriff in the same manner as an order or judgment of the Supreme Court. It is quite inconsistent with the practice and procedure of the Supreme Court to have orders made by tribunals other than the Supreme Court become judgments or orders of the Court.

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[9] R.S.O. 1960, c. 273, s. 9.
[10] p. 446 *supra*.
[11] R.S.O. 1960, c. 273, ss. 17, 24.

REASONS

There is no provision in the Act nor in the Rules of Procedure made by the Board requiring the Board to give reasons for its decisions. The Board should be required to give reasons if requested by an interested party.

APPEALS

Stated Case

The Board has power to state a case on a question of law for the opinion of the Court of Appeal.[12] The chairman of the Board agrees that this is a useful provision. It enables a question of law to be settled without waiting until the end of what may be a long hearing.

The provisions of the section are inadequate in three respects:

(1) The power is to state a case "upon any question that in the *opinion* of the Board is a question of law." The applicant should have a right to have a case stated on any question of law regardless of whether the Board is of the opinion that it is a question of law. If the question of law exists the right should exist.

(2) If the Board refuses to state a case the applicant should have the right to apply to the court for an order directing the Board to state a case on any question of law.

(3) The Board should be required to act on the opinion of the Court of Appeal.

Appeal to the Court of Appeal

An appeal lies from the Board to the Court of Appeal upon any question of jurisdiction or upon any question of law if leave is obtained from the court within one month of the making of the order or decision. The court has power to extend this time under special circumstances.[13]

The Registrar shall set the appeal down for the next sittings of the court after leave to appeal has been obtained and the party appealing shall within ten days give notice to the parties represented before the Board that the case has

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[12]*Ibid.*, s. 19.
[13]*Ibid.*, s. 21(1).

been so set down.[14] This provision is not consistent with the Rules of Practice and Procedure of the Supreme Court and is not a practical one, as the party appealing is required to give ten days' notice to the parties who were represented before the Board before the appeal may be heard. This practice should be made consistent with the rules of procedure governing appeals in the Supreme Court.[15]

The Board is entitled to be heard by counsel or otherwise upon the argument of an appeal. Neither the Board nor a member thereof is liable for costs on an appeal or an application for leave to appeal.[16] If the Board takes an active part in opposing an appeal and is unsuccessful there would not appear to be any reason why the costs should not be in the discretion of the court.

Appeal to the Lieutenant Governor in Council

Upon the petition of any party or person interested, filed within 60 days of an order or decision of the Board, the Lieutenant Governor in Council may confirm, vary or rescind the whole or any part of the decision or require the Board to hold a new public hearing of the matter.[17]

It is not clear what the scope of this provision is. The words used are "orders or decisions of the Board" while the words used in respect of the Board's powers of review are "decisions, orders, directions, certificates or approvals"[18] and the words used in respect of the application of the Regulations Act are "any order, decision, consent, approval, or certificate".[19]

The right of appeal to the Lieutenant Governor in Council by way of petition should be clearly defined. It should not include matters of law or interlocutory matters.

We discuss similar rights of appeal in Chapter 125 when dealing with the rights of appeal from orders of the Ontario Municipal Board.[20]

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[14] *Ibid.*, s. 21(2).
[15] This is fully discussed in Chapter 125, pp. 2037-38 *infra*.
[16] R.S.O. 1960, c. 273, s. 21(4)(6).
[17] *Ibid.*, s. 20.
[18] *Ibid.*, s. 16.
[19] *Ibid.*, s. 13.
[20] pp. 2039-40 *infra*.

PROCEEDINGS AGAINST THE BOARD

> "No action or other proceeding lies against the Board or any member of the Board or any officer, agent or employee of the Board for anything done or purporting to be done under or in pursuance of this or any other Act."[21]

The protection afforded by this section is unreasonably wide and unjust. Not only are the Board and its members protected from any action for anything done pursuant to the Act but anything *purporting* to be done pursuant to the Act. The members of the Board may act quite illegally and injure a citizen with impunity as long as they purport to act under the Act, but the protection goes even further than this. As long as they purport to act pursuant to "any other Act" they are protected.

It is hard to see on what basis this statutory protection from common law liability can be supported. But the protection does not end there. It is extended to "any officer, agent or employee of the Board". For example, this section would appear to give protection to an officer or employee of the Board who purported to act as an inspector under any Act of the Legislature whether he had power to do so or not, and render him immune from liability for damages arising out of any injury done by reason of an illegal order, merely because he purported to have authority to issue the order.

Not only do these provisions relieve the Board, its members, officers, agents and employees of liability for their wrongful acts but the Crown as well is relieved of liability. This we discuss at length in Chapter 131 when dealing with the provisions of the Proceedings Against the Crown Act.

The recommendations we make there apply to the Ontario Highway Transport Board Act.

RECOMMENDATIONS

1. Where a party affected by an application to the Board so requests he should be entitled to a hearing by a quorum of three members of the Board.
2. The Board should not have power to commit for contempt. The powers of compulsion should be exercised

[21]R.S.O. 1960, c. 273, s. 11.

by the Supreme Court as recommended in Report Number 1, Chapter 32.

3. The orders of the Board should not be filed with the Registrar of the Supreme Court but they should be filed with the secretary of the Board and be enforced in the same manner as an order or judgment of the Supreme Court.
4. The Board should be required to give reasons for its decisions if requested by a party to the proceedings before it.
5. The right to appeal to the Court of Appeal by way of a stated case should not be dependent on the subjective test that "in the opinion of the Board" the matter is a question of law.
6. If the Board refuses to state a case on a question of law the applicant should have a right to apply to the Court of Appeal for an order directing the Board to state a case.
7. Where the Court of Appeal has given an opinion on a stated case the Board should be required to act in accordance with the opinion of the Court of Appeal.
8. Where leave to appeal to the Court of Appeal has been granted under the provisions of the Act the practice and procedure governing the appeal should be consistent with the practice and procedure governing appeals in the Supreme Court.
9. If the Board takes an active part in opposing an appeal and is unsuccessful the Court should have a discretion to award costs against the Board.
10. The right of appeal by petition to the Lieutenant Governor in Council should be clarified. It should not include a question of law or interlocutory matters.
11. The common law rules of liability should apply where injury has been caused by reason of the wrongful acts of members of the Board, its officers, agents or employees with a right to indemnification by the Crown in proper cases. (See Chapter 131 for recommendations concerning proceedings against the Crown.)

CHAPTER 122

The Ontario Hospital Services Commission

INTRODUCTION

THE Ontario Hospital Services Commission has been established under the Hospital Services Commission Act.[1] It consists of no fewer than three persons and no more than seven appointed by the Lieutenant Governor in Council for no fixed term. A majority of the members shall form a quorum. The Act enables the Commission to establish six divisions performing different functions—administration, planning hospitals, furnishing consultant services, hospital accounting, providing hospital care, insurance and research including statistics.[2]

It reports annually to the designated Minister and through the Provincial Secretary to the Legislative Assembly.[3]

We are principally concerned with the administration of the Hospital Care Insurance Plan. The purpose of the Plan is to provide hospital insurance for members of the public.

[1]R.S.O. 1960, c. 176 as amended by Ont. 1961-62, c. 55; Ont. 1962-63, c. 58; Ont. 1965, c. 49; Ont. 1967, c. 36 and Ont. 1968, c. 53.
[2]R.S.O. 1960, c. 176, s. 8.
[3]*Ibid.*, s. 11.

SUBORDINATE LEGISLATIVE POWERS

Defining Words Used in the Act

Subject to the approval of the Lieutenant Governor in Council, the Commission is given power to make regulations.[4] This power includes power to make regulations "defining words used in the Act for the purposes of the Act and the regulations".[5] This is a power that ought not to be conferred on a subordinate body. It gives the subordinate body power to change the meaning of the Act as it was passed by the Legislature.[6]

The provision conferring this power should be repealed.

Discipline of Patients

Regulations may be passed "providing for the . . . discipline . . . of patients or any class of patients in hospitals in Ontario to which hospitals payments are made under the plan of hospital care insurance."[7] This power has not been exercised. We question that it is necessary for the effective administration of hospitals that patients who enter hospitals should be subject to the disciplinary powers of the Ontario Hospital Services Commission. The power to make regulations for the discharge of patients should be sufficient. The fact that the power has not been exercised would appear to indicate that it is an unnecessary one. The provision conferring this power should be repealed.

Subrogation

Subject to the approval of the Lieutenant Governor in Council, the Commission may make regulations "subrogating the Commission to any right of recovery of past hospital expenses and future hospital expenses by an insured person or by a hospital indigent described in the regulations in respect of any injury or disability, and providing the terms and conditions under which an action to enforce such rights may be begun, conducted and settled. . . ."[8]

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[4] *Ibid.*, s. 15.
[5] *Ibid.*, s. 15(1)(c).
[6] pp. 345-48 *supra*.
[7] R.S.O. 1960, c. 176, s. 15(1)(h).
[8] *Ibid.*, s. 15(1)(l) as re-enacted by Ont. 1968, c. 53, s. 3.

Under a predecessor provision a regulation has been passed which reads in part as follows:

"52. (2) "The Commission is subrogated to any right of an insured person to recover all or part of the cost of insured services from any other person, including future insured services, and the Commission may bring action in the name of the insured person to enforce such rights.

(3) Any insured person shall not release any right to which the Commission is subrogated without the consent of the Commission.

(4) An insured person, who commences an action to recover for loss or damages arising out of the negligence or other wrongful act of a third party to which the injury or disability in respect of which insured services have been provided is related, shall include a claim on behalf of the Commission for the cost of the insured services.

(5) Where an insured person commences an action referred to in sub-section 4, his solicitor shall so inform the Commission forthwith after issuing the writ *and shall act as solicitor for the Commission for the purpose of this section unless notified by the Commission that another solicitor is appointed by the Commission for the purpose.*

(6) Subject to subsection 8, where an insured person obtains a final judgment in an action in which he includes a claim on behalf of the Commission, the Commission shall bear the same proportion of the taxable costs otherwise payable by the insured person, whether on a party and party basis or on a solicitor and client basis, as the recovery made on behalf of the Commission bears to the total recovery of the insured person in the action or, where no recovery is made, as the assessed claim of the Commission bears to the total damages of the insured person assessed by the court.

(7) Where a claim is settled, the Commission shall bear the same proportion of the taxable costs otherwise payable by the insured person as is set out in subsection 6 in respect of a recovery made.

(8) The costs for which the Commission may be liable to bear a portion under subsection 6 are the costs of bringing the action to the conclusion of the trial

only and do not include the costs of any other proceeding without the written consent of the Commission."[9]

This regulation creates a strange statutory relationship of solicitor and client between the Commission and the solicitor acting for an insured person. A member of a mandatory group must be insured under the hospital insurance plan. If he is injured through the negligence of another and brings an action to recover damages, his solicitor must take instructions from two clients in the same cause. The relationship with the personal client is on a contractual basis and the relationship with the Commission is on a statutory basis. The right of recovery depends on whether there is negligence on the part of the defendant and in many cases the apportionment of negligence between the plaintiff and the defendant is important. That a solicitor should be put in the position of having to take instructions from and advise two clients — one on a contractual basis and the other on a statutory basis — is wrong in principle and an invasion of the true solicitor and client relationship.

A case was drawn to our attention where the solicitor had brought an action to recover substantial damages and the amount paid through the Commission for hospitalization was also substantial. In the solicitor's opinion there were degrees of fault which should be apportioned between the individual plaintiff and the defendant, and he so advised his personal client. A settlement of the claim for personal injuries was tentatively agreed upon on the basis of the agreed apportionment of fault and the personal client wished to accept settlement but the Commission refused to agree to it. By reason of the statute, the solicitor could not withdraw as solicitor for the Commission and leave it to carry on the action with risk as to costs. The client was left in the position that he had to carry on the action with risk as to costs. Eventually, the Commission, upon being requested to indemnify the client against this risk, capitulated and the action was settled.

In such cases the party has only two courses of action open to him: (1) to pay the Commission the full amount of

[9]O. Reg. 1/67, s. 52(2) (3) (4) (5) (6) (7) (8). Italics added.

the hospital bill to which it is not entitled because the insurance is not contingent on a claim against a third party being successful, or (2) to carry on the action with the risk of losing a part or the full amount of his claim. In the latter case the Commission only becomes liable for its proportion of the costs based on the assessed amount of the damages.

It is an unjust encroachment on the rights of an individual that he should be deprived of the right to act on the advice of his solicitor in the settlement of an action.

This regulation should be amended to permit a solicitor to withdraw as solicitor for the Commission where there is any difference between the instructions received from the individual client and the Commission and to permit the Commission to carry on the action for its claim on its own behalf with risk as to costs. In such case the individual plaintiff could conduct the case as he might be advised and the defendant would be able to pay such amount into court in satisfaction of the Commission's claim as he might be advised.

DISCLOSURE OF INFORMATION

The Act provides:

"21. (1) No member of the Commission and no employee thereof shall be required to give testimony in any civil suit with regard to information obtained by him in the discharge of his duties.

(2) No member of the Commission and no employee thereof is personally liable for anything done by it or him under the authority of this Act, any other Act or any regulation.

22. The Commission shall not be required to make available for evidence in any civil suit any information concerning a patient obtained by the Commission from,

(a) the records of a hospital, including a hospital under section 23; or

(b) a statement made to inform the Commission about an incident that caused an insured person to require care and treatment in a hospital."[10]

[10]R.S.O. 1960, c. 176, ss. 21, 22.

The provisions of these sections are strange when read with the regulation which we have just been considering. The Commission is subrogated to the rights of an insured person.[11] Where an action to recover damages is commenced the solicitor for the plaintiff is also by statute the solicitor for the Commission, but the Commission shall not be required to make available in any civil suit any information concerning the patient obtained by the Commission from "the records of a hospital" or "a statement made to inform the Commission about an incident that caused an insured person to require care and treatment in a hospital." The Commission is in reality if not in form a party to the action. Although it may have in its possession evidence to show that it has no right to recover, yet by statute it is entitled to conceal this evidence from the court. Under section 35a of the Evidence Act,[12] which we shall discuss later, hospital records, as well as other kinds of records, are admissible as evidence in a civil court of certain facts referred to therein. It is hard to see why relevant statements made to the Commission by a party to an action should not be made available especially when the Commission has a financial interest in the action. The Rules of Practice provide that "where an action is prosecuted or defended for the immediate benefit of a person or a corporation, such person or any officer or servant of such corporation may without order be examined for discovery."[13] Under this statute an examination for discovery would be futile as the Commission may conceal from the court relevant facts that might well defeat its claim. There is no reason why a party to an action in which the Commission is interested should not have a right to call witnesses from the Commission to produce any relevant evidence. Sections 21(1) and 22 should be repealed.

In any case, section 21(1) which we have quoted creates a privilege in favour of members of the Commission and its employees with respect to information obtained in the discharge of their duties in relation to giving testimony in a civil

[11] O. Reg. 1/67, s. 52.
[12] R.S.O. 1960, c. 125, s. 35a as enacted by Ont. 1966, c. 51, s. 1 and amended by Ont. 1968, c. 36, s. 1.
[13] Rules of Practice, Rule 333.

suit but no restraint is put on these persons from communicating the information to others. It is strange that while the Commission is not *required* to make available evidence with regard to information communicated to it in court it *may* communicate the information obtained to anyone. The members of the Commission and its employees should be required to give testimony in any civil suit with regard to information obtained in the discharge of their duties but they should be barred from giving information so obtained unless required to do so by legal process.[14]

PROTECTION FOR MEMBERS OF THE COMMISSION AND ITS EMPLOYEES

"No member of the Commission and no employee thereof is personally liable for anything done by it or him under the authority of this Act, any other Act or regulation."[15] This is an extraordinarily wide protection. Under section 12, which we shall discuss later, in the event of conflict between any provision of this Act and any provision of any other Act, the provision of this Act prevails. The effect of section 21 (2), when read with section 12, is to give members of the Commission protection from liability for acts done under other Acts or regulations that have no relation whatever to the operation of the Commission. The result is that if a member of the Commission or an employee of the Commission was made liable for a wrongful act done under another Act that had nothing to do with the administration of hospital services this section would appear to relieve him of liability. This sort of legislative enthusiasm for statutory protection is something that should be restrained.

Subject to proper provisions for indemnification we can see no reason why the members of the Commission and the employees of the Commission should have any greater protection for acts done under statutory authority than is given by the common law. We discuss liability of the Crown and Crown agents in Chapter 131.

[14]See Chapter 35 *supra*.
[15]R.S.O. 1960, c. 176, s. 21(2).

CONFLICT WITH THE PROVISIONS OF ANY OTHER ACT

An extraordinary feature of this Act is that "in the event of conflict between any provision of this Act and any provision of any other Act, the provision of this Act prevails".[16]

A statutory provision somewhat similar to this was dealt with in *Ellen Street Estates Ltd.* v. *Minister of Health.*[17] In this case it was held that such provisions only affect statutes then in force and do not affect statutes thereafter passed that might contain conflicting provisions.

Lord Justice Maugham said:

> "The Legislature cannot, according to our constitution, bind itself as to the form of subsequent legislation, and it is impossible for Parliament to enact that in a subsequent statute dealing with the same subject matter there can be no implied repeal."[18]

The result is that the provisions of the most recent statute would prevail. Legislation of this character puts the law in great confusion.

We have referred to the conflict between this Act and the Evidence Act. Under the amendment to that Act passed in 1966 hospital records are admissible as evidence in proper cases. Under the regulations passed pursuant to the Public Hospitals Act[19] a hospital board is permitted to exhibit hospital records in response to a subpoena issued out of a court[20] and such records may be admitted in evidence to the extent that they comply with the provisions of section 35a of the Evidence Act.[21]

Similar provisions with respect to conflict with other statutes are found in many Acts in the hospital field, and others, each claiming that in the event of "conflict between the provision of this Act and any provision of any other Act, the provision of this Act prevails," e.g. the Sanatoria for Consumptives Act,[22] and the Community Psychiatric Hospitals

[16] *Ibid.*, s. 12.
[17] [1934] 1 K.B. 590.
[18] *Ibid.*, 597.
[19] R.S.O. 1960, c. 322.
[20] R.R.O. 1960, Reg. 523, s. 41.
[21] *Adderly* v. *Bremner,* [1968] 1 O.R. 621.
[22] R.S.O. 1960, c. 359, s. 4.

Act.[23] The provisions in these two statutes extend to regulations passed thereunder while under the Hospital Services Commission Act the provisions do not extend to conflict between the regulations passed thereunder and regulations passed under any other Act. The permutations and combinations of legislative confusion raised by such provisions are great. They should be repealed.

When a bill is put before the Legislature for enactment it should be made clear to the legislators and the members of the public what statutes are being repealed. There should be no repeal by implication.

DISPOSITION OF FINES

Fines recovered for offences under the Act shall be paid over to the Commission.[24] In Report Number 1[25] we recommended that all fines imposed for the contravention of all laws shall be paid to the state and form part of the Consolidated Revenue Fund. Section 20 of the Act should be amended accordingly.

RECOMMENDATIONS

1. Section 15(1)(c) of the Act enabling regulations to be made defining words used in the Act for the purposes of the Act and the regulations should be repealed.

2. Section 15(1)(h), insofar as it enables regulations to be made providing for the discipline of patients, should be repealed.

3. O. Reg. 1/67, section 52 should be amended to permit a solicitor to withdraw as solicitor for the Commission where there is any difference between instructions received from the individual client and the Commission and in such case to permit the Commission to carry on any action for its claim on its own behalf.

4. Sections 21(1) and 22, respecting certain exemptions from giving evidence should be repealed.

[23]Ont. 1960-61, c. 9, s. 5.
[24]R.S.O. 1960, c. 176, s. 20.
[25]pp. 913 and 928 *supra*.

5. The members of the Commission should be barred from communicating information received with reference to a patient in a hospital to anyone unless with the consent of the patient or required to do so by legal process.

6. Section 21(2) of the Act exempting members and employees of the Commission from personal liability should be repealed.

7. Subject to proper provisions for indemnification no greater protection from civil liability should be provided for the members of the Commission and its employees than is provided at common law. See Chapter 131 for a discussion of Crown liability and agents of the Crown.

8. Section 12 which provides that the Act should prevail in the event of conflict with other statutes should be repealed, as should similar provisions in other statutes.

9. Section 20 should be amended to provide that fines levied under the Act should be paid into and form part of the Consolidated Revenue Fund.

CHAPTER 123

The Ontario Human Rights Commission

INTRODUCTION

THE provisions of the Ontario Human Rights Code establishing the Ontario Human Rights Commission can best be understood in the light of the historical development of the law. The first anti-discrimination legislation in Ontario was passed in 1944 with the enactment of the Racial Discrimination Act.[1]

That was purely a penal statute providing sanctions for the publication of notices, signs, symbols, emblems or other representations indicating discrimination or an intention to discriminate against any person or any class of persons for any purpose because of the race or creed of such person or class of persons.[2] This legislation was followed in 1951 by the Fair Employment Practices Act,[3] and the Female Employees Fair Remuneration Act[4] and in 1954 by the Fair Accommodation Practices Act.[5]

In 1958 the Ontario Anti-Discrimination Commission was established[6] to advise the Minister in the administration of the three Acts which we have just enumerated and to make recommendations to the Minister designed to improve the

[1]Ont. 1944, c. 51.
[2]*Ibid.*, s. 1.
[3]Ont. 1951, c. 24.
[4]Ont. 1951, c. 26.
[5]Ont. 1954, c. 28.
[6]Ont. 1958, c. 70, s. 2.

administration of such Acts and "to develop and conduct an educational programme designed to give the public knowledge of the Acts . . . and to promote the elimination of discriminatory practices."[7]

In 1962 all the antecedent legislation was repealed by an Act establishing the present Commission, a code of human rights and procedure for its enforcement.[8]

The Age Discrimination Act, which is administered by the Ontario Human Rights Commission, was passed in 1966.[9] The powers conferred on the Commission under that Act are similar to those conferred on it under the Ontario Human Rights Code.

The preamble to the Code declares in broad language its purpose—

> "Whereas recognition of the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world and is in accord with the Universal Declaration of Human Rights as proclaimed by the United Nations;
>
> And Whereas it is public policy in Ontario that every person is free and equal in dignity and rights without regard to race, creed, colour, nationality, ancestry or place of origin;
>
> And Whereas these principles have been confirmed in Ontario by a number of enactments of this Legislature;
>
> And Whereas it is desirable to enact a measure to codify and extend such enactments and to simplify their administration."

We adopt the language of the Prime Minister of Ontario: "the Ontario Human Rights Code is much more than a number of laws designed to deal with a prejudiced minority. It is, rather, a set of inviolable principles to be practised and lived from day to day by all of us; not just because the law requires it, but rather because enlightened social behaviour demands it."[10]

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[7] *Ibid.*, s. 3.
[8] Ont. 1961-62, c. 93.
[9] Ont. 1966, c. 3.
[10] 1969 Office Consolidation Ontario Human Rights Code, 1961-62—Preface.

THE COMMISSION

The Commission shall be composed of three or more members appointed by the Lieutenant Governor in Council. Its functions are stated to be,

> "(a) to forward the principle that every person is free and equal in dignity and rights without regard to race, creed, colour, nationality, ancestry or place of origin;
>
> (b) to promote an understanding of, acceptance of and compliance with this Act;
>
> (c) to develop and conduct educational programmes designed to eliminate discriminatory practices related to race, creed, colour, nationality, ancestry or place of origin."[11]

Apart from these general functions the Commission may itself, or through any person designated by it to do so, inquire into the complaint of any person that he has been discriminated against contrary to the Act and it shall endeavour to effect a settlement of the matter complained of.[12]

The Commission has no power to initiate complaints. It is a condition precedent to the exercise of its powers to investigate that there be a complaint by a person "that he has been discriminated against contrary to [the] Act." A person other than the victim cannot lay a complaint. The Commission may "inquire into the complaint" but it has no procedural powers. It cannot compel the attendance of witnesses, the production of documents nor can it take evidence.

It has been contended with some force that where possible a person investigating a complaint to determine whether there is probable cause for complaint ought not to conduct negotiations for settlement.[13]

We agree in principle that much depends, as Dean Tarnopolsky has pointed out, on the location of the parties in Ontario, and we would add the personality of the investi-

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[11]Ont. 1961-62, c. 93, s. 8.
[12]*Ibid.*, s. 12(1).
[13]Tarnopolsky, *The Iron Hand in the Velvet Glove: Administration and Enforcement of Human Rights Legislation in Canada*, 46 C.B.R. 565 (1968) at 577.

gator. We emphasize that the purpose of the Act can best be accomplished by an investigatory procedure rather than by an adversary one.

BOARDS OF INQUIRY

If the Commission is unable to effect a settlement of the matter complained of, the Minister may on the recommendation of the Commission appoint a board of inquiry to investigate the complaint.[14] Such a board has all the powers of a conciliation board under section 28 of the Labour Relations Act.[15] These powers are:

> "(a) to summon and enforce the attendance of witnesses and compel them to give oral or written evidence on oath, and to produce such documents and things as the board deems requisite to the full investigation and consideration of the matters referred to it in the same manner as a court of record in civil cases;
>
> (b) to administer oaths;
>
> (c) to accept such oral or written evidence as it in its discretion deems proper, whether admissible in a court of law or not;
>
> (d) to enter any premises where work is being done or has been done by the employees or in which the employer carries on business or where anything is taking place or has taken place concerning any of the matters referred to the board, and inspect and view any work, material, machinery, appliance or article therein, and interrogate any person respecting any such thing or any of such matters;
>
> (e) to authorize any person to do anything that the board may do under clause *d* and to report to the board thereon."[16]

We shall deal with these powers of compulsion later.

The function of the board is to conduct an inquiry at which the parties involved have full opportunity to present evidence and make submissions. It is empowered to make a finding as to whether a complaint is supported by evidence

[14]Ont. 1961-62, c. 93, s. 13(1).
[15]*Ibid.*, s. 13(2).
[16]R.S.O. 1960, c. 202, s. 28.

and if it so finds it shall recommend to the Commission the course that ought to be taken with respect to the complaint.[17]

After the board has made its recommendations the Commission may direct it to clarify or amplify any of them.[18]

No obligation is placed on the Commission to do anything after it has received the report of the board. Nor is there a statutory power conferred on it to make a recommendation to the Minister except by implication.

However, on the recommendation of the Commission, the Minister may issue whatever order he deems necessary to carry the recommendations of the board into effect, and such order is final and shall be complied with in accordance with its terms.[19]

It is to be observed that in the exercise of this power it is the recommendations of the board that define the substance of the Minister's order and not the recommendation of the Commission nor the wisdom of the Minister. He may make only such order as he deems necessary "to carry the recommendations of the board into effect."

ENFORCEMENT

In Part I of the Act specific prohibitions are set out. For example, "No person shall . . . deny to any person or class of persons the accommodation, services or facilities available in any place to which the public is customarily admitted; or discriminate against any person or class of persons with respect to the accommodation, services or facilities available in any place to which the public is customarily admitted, because of the race, creed, colour, nationality, ancestry or place or origin of such person or class of persons or of any other person or class of persons."[20] And no person shall deny to any person or class of persons occupancy of a commercial unit or any self-contained dwelling unit on like grounds.[21]

Every person who contravenes any provision of the Act or *any order made under the Act* is guilty of an offence and

[17] Ont. 1961-62, c. 93, s. 13(3).
[18] *Ibid.*, s. 13(5).
[19] *Ibid.*, s. 13(6).
[20] *Ibid.*, s. 2 as amended by Ont. 1965, c. 85, s. 1.
[21] *Ibid.*, s. 3, as re-enacted by Ont. 1967, c. 66, s. 1.

liable to a fine of not more than $500, or if a corporation, trade union, employers' organization or employment agency, to a fine of not more than $2,000.[22]

No prosecution may be instituted under the Act without the consent of the Minister.[23]

The scheme of the Act is four-fold:

(1) through education to develop and foster respect for human dignity irrespective of race, creed, colour, nationality, ancestry or place of origin;

(2) to establish standards to be observed to prevent discrimination;

(3) to provide means of conciliation and understanding where it is claimed that conduct falls below the prescribed standards; and

(4) to provide sanctions that may be imposed.

In the administration of the Act the emphasis has been rightly placed on education and conciliation. The area of human behaviour covered by the Act is a field for law enforcement that has many social aspects making it quite different from that covered by ordinary criminal law. Respect for the dignity of the individual human being is something that cannot readily be enforced by sanctions, although sanctions are necessary as a last resort to enforce compliance with minimum standards. "Human rights without effective implementation are shadows without substance."[24]

The inquiry process provided in the Act has recently come under some criticism with regard to the rights of the parties against whom complaints may be made. To meet any criticism further safeguards are required to protect the rights of all individuals affected by the Act.

As we have said, where a board of inquiry has been set up it has power to make a finding of fact "that a complaint is supported by the evidence." If it so finds it shall recommend to the Commission the course that ought to be taken with respect to the complaint. This recommendation may cover

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[22] *Ibid.*, s. 14, as amended by Ont. 1968-69, c. 83, s. 3. Italics added.
[23] *Ibid.*, s. 15.
[24] Professor John Humphrey: Report of the 53rd Conference The International Law Association (1968)—457.

a wide area. For example, it may recommend that the respondent in the proceedings provide accommodation for the complainant or give employment to the complainant or it may recommend that the respondent pay money as compensation to the complainant.

The power of the Minister to make whatever order he deems necessary to carry the recommendations of a board of inquiry into effect[25] is a wide power of a judicial nature. The power is limited only by what he deems necessary and what the board, not the Commission, recommends as "the course that ought to be taken with respect to the complaint."

When the Minister has issued the order it has the force of a penal enactment. Every person who contravenes such an order is guilty of an offence and liable to the prescribed fine. There is no right of appeal from the Minister's order. Where a charge is laid based on a failure to obey the Minister's order, it is not open to the trial judge to inquire into the circumstances on which the Minister's order is based or the justice of the findings of the board of inquiry. The only inquiry that the judge can conduct in such case would appear to be: did the Minister make the order and was it obeyed?

In *MacKay v. Bell and the Ontario Human Rights Commission*[26] Laskin, J. A. writing the judgment of the Court of Appeal referred to an argument based on the finality of the Minister's order and said: "these issues do not call for determination here and their importance makes it prudent to defer decision on them until they come squarely before the court."

This statement makes it quite clear that the rights of the persons concerned with the enforcement of the Act are at least obscure where they should be made clear.

The statute has set standards of behaviour, but as we have indicated it would not advance the purposes of the Act that in all cases prosecution should follow where there has been an alleged failure to meet those standards. The conciliation procedure is a procedure well designed to safeguard civil rights and to protect individuals from unnecessary prosecu-

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[25]Ont. 1961-62, c. 93, s. 13(6).

[26][1969] 2 O.R. 709; [1970] 2 O.R. 672, leave to appeal to the Supreme Court of Canada granted.

tion. However, where the conciliation procedure fails, the person accused of wrongdoing should have a clear right to resort to the ordinary courts where the issue of his guilt may be decided rather than his guilt being determined on the mere order of the Minister. It is elementary that one against whom a complaint has been made should have a right to have it established that the findings of the board were right both in fact and law.

If it is desirable to give to the Minister power to make an order in the nature of a cease and desist order, such order should be made enforceable by civil process and not by conferring on the Minister legislative power to create an offence for a specific case with no right of appeal. In the civil proceedings it should be open to the alleged offender to show that there was no foundation in fact or law for the Minister's order.

Proceedings in the civil courts for a restraining order are now available under the Act[27] but only after "conviction for a contravention of the Act."

Adequate safeguards should be provided against injustice to those who are the subject of a complaint. The principle of "an iron hand in a velvet glove" has no place in human rights legislation.

Dean Tarnopolsky, who has had great experience in the enforcement of the legislation, argues with much force that it should not be an offence under the Act to discriminate. He says: "Finally, the primary object of human rights legislation is to obtain compliance through an agreed settlement. This requires negotiation and conciliation. This process is foreign to criminal law. When the act of discrimination is made a crime, the whole process of negotiation, conciliation and settlement could be likened to compounding a criminal offence."[28]

Dean Tarnopolsky's conclusion is that provision should be made for filing recommendations of a board with the Supreme Court and they would thereupon be enforceable as orders of the Supreme Court.

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[27]Ont. 1961-62, c. 93, s. 17.

[28]Tarnopolsky, *The Iron Hand in the Velvet Glove: Administration and Enforcement of Human Rights Legislation in Canada*, 46, C.B.R. 565 (1968) at 586.

On other occasions we have criticized statutes which make provision for filing orders of boards with the Registrar of the Supreme Court and thereupon making them enforceable as orders of the Court. If orders are to be enforced as orders of the Supreme Court they should be orders made by the Supreme Court. We think the procedure we have recommended earlier is a better one.

Whether the act of discrimination should be an offence raises a different matter. We entirely agree that the primary object of the legislation is to promote conciliation, agreement and goodwill but we firmly believe that it makes the statute more meaningful to say in express terms "thou shalt not discriminate" and to provide that if you do sanctions will follow.

We do not think that the negotiation, conciliation and settlement procedures are analogous to compounding a criminal offence.

This legislation is more like health legislation than criminal legislation. There are a great many health statutes and by-laws designed to maintain health standards that are enforced by inspection, warning and agreement to improve facilities but these nevertheless make it an offence to fail to maintain prescribed standards.

No prosecution for an offence under the Act shall be instituted without the consent in writing of the Minister.[29]

Provisions such as this are not consistent with the historic functions of the Attorney General who is charged with the duty of law enforcement in the Province. The Minister of Labour should not have power to override the power of the Attorney General to institute proceedings for offences against provincial statutes. This is especially true since the Minister is involved in the decision-making process. Section 15 should be amended by adding thereto the words "or the Attorney General."

POWERS OF COMPULSION

Earlier we referred to the powers of compulsion conferred on the board of inquiry. The powers of compulsion

[29]Ont. 1961-62, c. 93, s. 15.

may be exercised in the same manner as those of a court of record in civil cases. These include power to commit for contempt which may be exercised by a layman if appointed to conduct a board of inquiry and by any person "authorized to do anything that the board may do." This matter was discussed fully in Report Number 1.[30] Section 13 (2) of the Act should be repealed and provision should be made for enforcement of the board's orders with respect to inquiries conducted by it by an application to the Supreme Court for an order of committal in accordance with our recommendation.

It has been contended that on an inquiry under the Act a person may be required to incriminate himself. This is true but if he is sufficiently advised, he may take advantage of the provisions of the Evidence Act.

If the recommendations made in Report Number 1[31] concerning public inquiries are implemented by statute this criticism will be fully met.

RECOMMENDATIONS

1. Power should be conferred on the Commission to consider the report of a board of inquiry.

2. Consideration of the report of the board of inquiry by the Commission should be a condition precedent to its recommendation to the Minister.

3. The Commission should have power to alter or rescind the recommendation of a board of inquiry.

4. Any person affected by the report of a board of inquiry should have a right to make submissions to the Commission.

5. The Minister's order should be enforceable in the civil courts where it should be open to the alleged offender to show that there was no foundation for it.

6. It should not be an offence punishable by a fine or imprisonment to disobey the Minister's order.

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[30]p. 441 *supra*.
[31]p. 440 *supra*.

7. Alternatively, if it is to be an offence to disobey the Minister's order, it should be clearly stated in the Act that the accused on his trial may avail himself of any defences he might have raised if charged with having committed a breach of the statute.

8. Section 13 (2) of the Act which confers powers on a board of inquiry and persons authorized to exercise its powers to make orders of committal should be repealed and provision made for the enforcement of the board's orders of compulsion in accordance with our recommendations made in Report Number 1 (p. 441).

9. Section 15 should be amended by adding the words "or the Attorney General."

CHAPTER 124

The Ontario Labour Relations Board

INTRODUCTION

THE Ontario Labour Relations Board is the principal agency through which the Province's policies respecting industrial relations are administered. Its responsibilities and powers are defined in the Labour Relations Act.[1]

The purpose of the Act is to minimize industrial conflict by means of collective bargaining, or in the language of the Report of the Royal Commission Inquiry Into Labour Disputes, by the introduction of "rational procedures whereby bargaining or negotiation between employer and employees of terms and conditions of employment can be effected with a minimum of difficulty or disturbance."[2] As has been recently stated the introduction of collective bargaining, ". . . can be described as the substitution of the rule of law for the rule of men in the work place."[3]

We are not concerned under our Terms of Reference with the policy of the Labour Relations Act, nor whether it is adequate to fulfil its purposes.

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[1]R.S.O. 1960, c. 202 as amended by Ont. 1961-62, c. 68; Ont. 1962-63, c. 70; Ont. 1964, c. 53; Ont. 1966, c. 76 and Ont. 1970, c. 3.

[2]Report of the Royal Commission Inquiry Into Labour Disputes, (Rand Report), 1968, 12.

[3]Canadian Industrial Relations; the Report of the Task Force on Labour Relations, Privy Council Office, (Ottawa 1968), 96.

In the year 1966 The Honourable Ivan C. Rand, C.C. (now deceased) was appointed a Royal Commissioner with terms of reference ". . . to inquire into the means of enforcement of the rights, duties, obligations and liabilities of employees and employers, individually and collectively, and of trade unions and their members, individually and collectively, with relation to each other and to the general public or any individual or section thereof, and the use of strikes, cessations of work, lock-outs, picketing, demonstrations and boycotts, whether lawful or unlawful, in labour disputes and to examine the use of and procedures for obtaining injunctions in relation thereto . . .".

The Commission reported in August, 1968 concerning those matters coming within the terms of reference. The operation of the Ontario Labour Relations Board was not dealt with. We are concerned particularly with the powers conferred on the Board under the Act and whether in conferring those powers there has been unjustified encroachment on civil rights.

The Board has been established for the purpose of guaranteeing freedom of association through the certification of trade unions as the exclusive bargaining agents of the appropriate bargaining units and compelling employers to bargain with the certified agents.

The parties are required by the Act to resort to conciliation procedures before a strike or a lockout can lawfully be used as economic weapons in a dispute. When a collective agreement is made it must provide for the settlement of disputes by arbitration without stoppage of work during the currency of the agreement.

In Report Number 1, in discussing the limits of our Terms of Reference, we made it clear that we did not deal with 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."[4] Our discussion of the Labour Relations Act must be read in the light of these limits.

[4]p. 10 *supra.*

STRUCTURE OF THE BOARD

The composition of the Board purports to reflect the interests that may be affected by its decisions—the public, labour and management. The members of the Board are appointed by the Lieutenant Governor in Council. "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 . . .".[5]

The Lieutenant Governor in Council designates one of the vice-chairmen to be the alternate chairman, and the chairman or in his absence the alternate chairman assigns the members of the Board to its various divisions, e.g., the construction industry division which deals with matters related to the specialized problems in collective bargaining peculiar to the construction industry.[6]

The Board is empowered to sit in two or more divisions simultaneously provided that a quorum of the Board is present in each division.[7] In accordance with the tripartite nature of the Board, the Act provides that 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 the jurisdiction and powers of the Board."[8] A decision of the majority of the members present and forming a quorum is the decision of the Board. Somewhat inconsistently it is provided that, in the event of a tie vote, the presiding member has a casting vote.[9]

Presumably this provision is intended to deal with the rare occurrences when the Board may be sitting in even numbers, there being no requirement of the kind sometimes found in the constitution of tribunals composed of more than one person, that hearings take place before an uneven number of members.[10]

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[5]R.S.O. 1960, c. 202, s. 75(2), as amended by Ont. 1966, c. 76, s. 28(1).

[6]*Ibid.*, s. 75(2a)(3)(3a), as amended by Ont. 1961-62, c. 68, s. 10(1) and Ont. 1966, c. 76, s. 28.

[7]*Ibid.*, s. 75(7).

[8]*Ibid.*, s. 75(6) as amended by Ont. 1966, c. 76, s. 28(5).

[9]*Ibid.*, s. 75(8).

[10]See for example the Judicature Act, R.S.O. 1960, c. 197, s. 40(1).

In expressing the representative aspect of the composition of the Board, the Act makes reference to representatives of employers and employees. The fact of public representation is indicated only by inference from the requirement that there must be a chairman and one or more vice-chairmen as well as the representatives mentioned.

The extent to which the chairman and the vice-chairmen can be said to be truly representative of the public is qualified. At the time of writing the Board is composed of 16 members, five representing employers, five representing employees, the chairman, the alternate chairman (one of the vice-chairmen so designated by the Lieutenant Governor in Council pursuant to the provisions of the Act) and four other vice-chairmen.[11] In actual practice the chairman and all the vice-chairmen, though full-time employees and thus civil servants, are members of the legal profession.

Whenever the Board sits in divisions, as it customarily does, each division is presided over by one of the chairmen or vice-chairmen thus assuring the presence of a lawyer during the hearings and deliberations of the divisions. We think this is a good practice. However, since the intention appears to be that there should be members on the Board to represent the public and not merely members of the public who are employers and employees, it may be said that by confining the third-party membership to members of the legal profession the public is not sufficiently represented. We do not think that this is a valid contention. In the first place the provision for a representative capacity of the members of the Board is not intended to bring to the Board biased judgment but to bring informed points of view so that an unbiased but informed collective judgment may be brought to bear in the decision-making process. A lawyer by education and training is uniquely equipped to discharge the responsibilities involved in presiding over hearings and deliberations required under the Act—when we bear in mind the principles relating to hearings and decision-making outlined in Report Number 1. The constant presence and participation of representatives of

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[11]R.S.O. 1960, c. 202, s. 75(2a) as enacted by Ont. 1966, c. 76, s. 28(2).

stated interests is a real safeguard against an unduly legalistic approach on the part of the legally-trained members.

Provision is made for the Board to have a seal[12] and a secretariat including a registrar who, under the Board's practice, is its chief administrative officer.[13] While the office of the Board is, by statute, in Toronto, it is empowered to sit at such other places as it deems expedient.[14] This power it exercises.

Each member of the Board is required to take an oath of office, in a prescribed form, that he will perform his office to the best of his judgment, skill and ability, and will maintain secrecy in matters brought before the Board.[15] This latter obligation is amplified by extensive provisions in the Act relating to secrecy and immunity from being required to reveal certain information obtained in discharge of duties under the Act. This we shall deal with in due course.

POWERS OF DECISION

Upon an application by a trade union at the times and under the circumstances set out in the Act, the Board[16] must consider and determine whether the applicant trade union shall be certified as the bargaining agent for the employees in a bargaining unit in respect of which the application is made. After certification the union is required to give the employer notice in writing of its desire to bargain with a view to making a collective agreement.[17] When this notice has been given, the parties are under a legal obligation to bargain in good faith and make every reasonable effort to make a collective agreement.[18]

The fundamental importance of the Board's function in certification proceedings lies in the result that flows from a successful application for certification followed by a collective agreement. The traditional law relating to the relationship

[12] *Ibid.*, s. 75(12).
[13] *Ibid.*, s. 75(10).
[14] *Ibid.*, s. 75(13).
[15] *Ibid.*, s. 75(5) as amended by Ont. 1966, c. 76, s. 28(4).
[16] *Ibid.*, s. 5 as amended by Ont. 1966, c. 72, s. 2.
[17] *Ibid.*, s. 11.
[18] *Ibid.*, s. 12.

between employer and employee is almost entirely displaced.[19] For example, for as long as the union continues to be entitled to represent the employees in a bargaining unit the employer may not bargain with or enter into a collective agreement with any person or another union which would bind any of the employees in the bargaining unit.[20]

Even where no collective agreement is in operation, but where notice to bargain has been given by a certified trade union under the provisions of the Act, the employer is prohibited from altering the rates of wages or any other term or condition of employment or any right, privilege or duty of any of the parties, without the consent of the union, until a specified period has elapsed after the report of a conciliation board or mediator or the Minister has indicated his decision not to appoint a conciliation board or until the representation right of the union has been terminated, whichever occurs first.[21]

The intervention of the Board is not an absolute condition precedent to the creation of a collective bargaining relationship between an employer and a union. Even in the absence of certification by the Board, it is open to an employer to confer recognition on a union as the bargaining agent of his employees voluntarily by concluding a collective agreement with the union.[22] The potential danger inherent in voluntary recognition has been pointed out recently. "One of the risks of voluntary recognition is that is is susceptible to abuse by the parties to the recognition for the purpose of precluding certification of another union; this in turn creates the risk of 'sweetheart' agreements."[23] It was undoubtedly with a view to averting this danger that the Act was amended

[19] *Syndicat Catholique des Employés de Magasins de Québec Inc. v. Cie Paquet Ltée* [1959] S.C.R. 206; *K.M.A. Caterers Ltd. v. Howie* [1969] 1 O.R. 131. The qualification introduced by the word "almost" results from a consideration of such decisions as *Re Grottoli v. Lock & Son Ltd.*, [1963] 2 O.R. 254 and *Hamilton Street R. Co. v. Northcott* [1967] S.C.R. 3. The limited nature of this qualification is demonstrated by the decisions in *Close v. Globe and Mail Ltd.* [1967] 1 O.R. 235; *R. v. Fuller et al, Exp. Earles and McKee* [1967] 1 O.R. 701 aff'd. [1968] 2 O.R. 564, and *Adcock et al v. Algoma Steel Corp. Ltd., et al* (1968), 70 D.L.R. (2d) 246.

[20] R.S.O. 1960, c. 202, s. 51(1).

[21] *Ibid.*, s. 59(1) as amended by Ont. 1964, c. 76, s. 22.

[22] *Ibid.*, s. 13(3).

[23] Report of the Task Force on Labour Relations. 142

in 1964 to add a provision[24] empowering the Board, where an agreement has been concluded between an employer and an uncertified union, upon the application of an employee or a union representing an employee, during the first year of the period of time that the first collective agreement is in operation, to declare that the union was not entitled to represent the employees in the bargaining unit at the time the agreement was made. Such a declaration may be made on an application by the second union for certification.[25]

The Act sets out various duties of the Board relating to the conduct of certification proceedings. These include the determination of the unit of employees that is appropriate for collective bargaining, the ascertaining of the number of employees[26] in the bargaining unit both at the time the application is made and the "terminal date" for the application, i.e. the date as of which evidence of membership in a union or of objection by employees to certification of the union must be presented to the Board, and the directing of a representation vote[27] if the Board is satisfied that not less than 45 percent and not more than 55 percent of the employees in the bargaining unit are members of the union.[28]

In addition to positive duties imposed on the Board in the certification process, the Act provides for duties of a negative kind. The Board shall not include security guards in a bargaining unit with other employees and the Board[29] shall not certify a union if an employer or employers' organization has participated in its formation or administration or has otherwise supported it or if the union discriminates against any person because of his race, creed, nationality, ancestry or place of origin.[30] In the exercise of its certification powers the Board has considerable discretion. For example, it may conduct a vote of employees for the purpose of ascertaining

[24]R.S.O. 1960, c. 202, s. 45a as enacted by Ont. 1964, c. 53, s. 5.

[25]*R. v. Ontario Labour Relations Board ex parte Lakehead Registered Nursing Assistants etc.*, [1969] 2 O.R. 597.

[26]R.S.O. 1960, c. 202, s. 6. See also s. 92 as enacted by Ont. 1961-62, c. 68, s. 16 for the specialized problem of the construction industry.

[27]*Ibid.*, ss. 7(1) and 77(2)(j) and see the Board's Rules of Procedure, O. Reg. 264/66, ss. 2, 48.

[28]*Ibid.*, s. 7(2). See Ont. 1970, c. 85, s. 5, not yet proclaimed (35 percent and 65 percent).

[29]*Ibid.*, s. 9.

[30]*Ibid.*, s. 10.

the wishes of the employees as to the appropriateness of the bargaining unit claimed by the applicant union.[31] Provided it is satisfied that more than 50 percent of the employees in the bargaining unit are members of the union and that the true wishes of the employees are not likely to be disclosed by a representation vote, it may certify a union without taking a representation vote[32] notwithstanding the general requirement that it shall direct such a vote where it is satisfied that not less than 45 percent and not more than 55 percent of the employees in the bargaining unit are members of the trade union.[33]

Since the prevention of discouragement of industrial conflict is one of the cornerstones of labour policy, the Act provides that every collective agreement must provide that the union is recognized as the exclusive bargaining agent of the employees in the bargaining unit defined in the agreement,[34] that during the term of the agreement there shall be no strikes or lock-outs[35] and that all differences between the parties arising from the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable shall be settled by arbitration. Any agreement which does not contain such an arbitration provision is deemed to contain one in the statutory form set out in the Act.[36] If an agreement omits a recognition provision or a provision against strikes and lock-outs or if the arbitration provision is inadequate or the statutory form unsuitable, the Board is empowered, on the application of either party, to add such a provision or, in the case of an arbitration provision, to modify it.[37]

Other duties of the Board include hearing applications of employers and employees in the bargaining unit for a declaration that a trade union no longer represents the employees in the bargaining unit,[38] applications respecting

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[31] *Ibid.*, s. 6(1).
[32] *Ibid.*, s. 7(5).
[33] *Ibid.*, s. 7(2). See Ont. 1970, c. 85, s. 5, not yet proclaimed (35 percent and 65 percent).
[34] *Ibid.*, s. 32.
[35] *Ibid.*, s. 33.
[36] *Ibid.*, s. 34(1) (2).
[37] *Ibid.*, ss. 32(2), 33(2), 34(3). See Ont. 1970, c. 85, not yet proclaimed, ss. 10, 11, 12.
[38] *Ibid.*, s. 43 as amended by Ont. 1966, c. 76, s. 16; s. 44; s. 45 as amended by Ont. 1964, c. 53, s. 4.

successor rights,[39] applications for a declaration that a strike or a lock-out is unlawful,[40] and applications for the consent of the Board to institute a prosecution for an offence under the Act.[41]

In considering the Ontario Human Rights Commission we made reference to the provision in the governing Act that a prosecution under it could be commenced only with consent in writing of the Minister (i.e. the Minister of Labour).[42] There we pointed out that such a provision is inconsistent with the historic functions of the Attorney General. In that case the Minister of Labour was put in a superior position to the Attorney General in law enforcement.

The provision that no prosecution may be instituted for an offence under the Labour Relations Act without consent in writing of the Board not only removes the Attorney General from the control of this field of law enforcement but all Ministers of the Crown. It is quite inconsistent with ministerial responsibility that the Board should have control over a segment of law enforcement in the Province. It may be that before an information may be laid charging an offence under the Act the consent of either the Minister of Labour or the Attorney General should be required. But if the Executive considers that a prosecution should be instituted, leave of the Board should not be required. In any case, if the Attorney General believes that a prosecution should be instituted in the public interest his power to act should be unrestrained.

The Board is given very important powers to act with respect to complaints of discrimination against, or the penalizing of, any person for exercising rights under the Act and with regard to jurisdictional disputes between unions.

Orders or directions of the Board in the exercise of these powers may be filed in the office of the Registrar of the Supreme Court "whereupon the determination shall be entered in the same way as a judgment or order of that court and is enforceable as such."[43]

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[39]*Ibid.*, ss. 47 and 47a. as enacted by Ont. 1962-63, c. 70, s. 1 and amended by Ont. 1966, c. 76, s. 18(1)(2).

[40]*Ibid.*, ss. 67, 68.

[41]*Ibid.*, s. 74(1).

[42]Chapter 123, pp. 1980-83 *supra*.

[43]R.S.O. 1960, c. 202 s. 65(5) as re-enacted by Ont. 1961-62, c. 68, s. 8(2); s. 66(4)(5) as re-enacted by Ont. 1966, c. 76, s. 25.

We have had occasion to criticize provisions of this sort in other statutes. The records books of the Supreme Court of Ontario are for the records of the Court, not for records of tribunals that have nothing to do with the Court. Board orders are not orders of the Court. They are orders of the Board or persons empowered to make them and should be enforced as such and not as orders of a court which did not make them.

Orders and directions made under the Act should be filed with the Registrar of the Board and when filed should be made enforceable. If an order is for the payment of money it should be enforced by filing it with the sheriff and it should have the same effect as an order or judgment of a court. If it is an order to do or refrain from doing anything, it should be enforced by a summary application to the court where the party affected should have an opportunity to present argument justifying his failure to obey the order.

POWERS OF INVESTIGATION

The Board has power to summon and enforce the attendance of witnesses, to compel them to give oral or written evidence on oath and to compel production of such documents and things as the Board considers requisite for the full investigation and consideration of matters within its jurisdiction in the same manner as a court of record in civil cases. It has power to administer oaths and to accept such oral or written evidence as it in its discretion deems proper, whether or not admissible in a court of law.[44]

This power gives the Board power to commit for contempt. The same power is conferred on a conciliation board,[45] a mediator,[46] an arbitrator[47] and on any person authorized by the Board.[48] We dealt with powers of committal such as this in Report Number 1[49] and there recommended the provision that should be made for the enforcement of orders of tribunals exercising powers of compulsion. The Public

[44] *Ibid.*, s. 77(2)(a)(b)(c).
[45] *Ibid.*, s. 28(a).
[46] *Ibid.*, s. 30(2)(3).
[47] *Ibid.*, s. 34(7).
[48] *Ibid.*, s. 77(2)(g).
[49] p. 441ff. *supra.*

Inquiries Act should be amended to make provision for the enforcement of orders of compulsion made by tribunals other than courts by an application to the Supreme Court for an order of committal.

The Labour Relations Act should be amended accordingly.

Certain more or less routine powers are conferred on the Board to enable it to discharge its principal functions. These include the power to require persons or unions to post notices to ensure that notice of proceedings is given to persons affected by these proceedings;[50] to enter places of employment to inspect work and equipment, to interrogate any person, and post notices;[51] and to conduct representation votes during working hours therein.[52]

POWERS OF DELEGATION

The Board may authorize any person to exercise certain of its powers.[53] This power of delegation in some respects is clear and in some respects it is unclear when conferred by cross-reference in the statute. The relevant provision of the Act reads: ". . . the Board has power . . . to authorize any person to do anything that the Board may do under clauses *a* to *f* [of section 77(2)] and to report to the Board thereon."

We are particularly concerned with the powers conferred under clauses *a* to *c* which read as follows:

> "Without limiting the generality of subsection 1, the Board has power,
>
> (a) to summon and enforce the attendance of witnesses and compel them to give oral or written evidence on oath, and to produce such documents and things as the Board deems requisite to the full investigation and consideration of matters within its jurisdiction in the same manner as a court of record in civil cases;
>
> (b) to administer oaths;
>
> (c) to accept such oral or written evidence as it in its discretion deems proper, whether admissible in a court of law or not."[54]

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[50]R.S.O. 1960, c. 202, s. 77(2)(d) as re-enacted by Ont. 1966, c. 76, s. 30(1).

[51]*Ibid.*, s. 77(2)(e) as amended by Ont. 1961-62, c. 68, s. 12(1) and further amended by Ont. 1966, c. 76, s. 30(2).

[52]*Ibid.*, s. 77(2)(f).

[53]*Ibid.*, s. 77(2)(g).

[54]*Ibid.*, s. 77(2).

It is far from clear what powers the Legislature intended the Board should have power to delegate to "any person".

As we have pointed out earlier, clause *a* includes a power to commit for failure to obey an order of the person to whom a power of compulsion is delegated.

The power of compulsion is to compel witnesses to produce "such documents and things as the Board deems requisite to the full investigation and consideration of matters within its jurisdiction." Under this power of delegation does the donee decide what is requisite or does the Board decide what is requisite and then authorize the donee of the power to exercise the Board's powers of compulsion?

In view of the broad terms of the power of delegation "to do anything the Board may do under clause *a*" it would appear that it is the donee of the power who may "deem" what is requisite. The result is that a person over whom the Executive has no direct control may decide the scope of his investigation and consideration for the purposes of production. This may involve disclosure of intimate business and personal relationships which may in fact have little or nothing to do with the matter under consideration.

The powers of compulsion to be exercised by a donee of the Board's powers should be clearly defined by the statute. We shall deal later with safeguards that ought to be provided with respect to a report to the Board and the procedure when a report is made.

In addition to the powers of delegation with which we have been dealing the Board may authorize a field officer to inquire into a complaint that a person has been refused employment, discharged, discriminated against, threatened, coerced, intimidated or otherwise dealt with contrary to the Act as to his employment, opportunity for employment or conditions of employment, or that a person has been suspended, expelled or penalized in any way because he has refused to engage in or continue to engage in a strike that is unlawful under the Act.[55]

A field officer who is authorized to make an inquiry shall report the results of his inquiry to the Board.[56] The primary

[55]*Ibid.*, s. 65 as re-enacted by Ont. 1966, c. 76, s. 24(1).
[56]*Ibid.*, s. 65(2).

purpose of this provision is to establish machinery for adjusting complaints. Where an adjustment cannot be made or where the Board deems it advisable to dispense with an inquiry by a field officer the Board may itself inquire into the complaint.[57]

According to the Board's Practice Notes the procedure to be followed by the Board with respect to the report of a field officer is to establish a screening panel to examine the field officer's report. If it decides that further inquiry into the complaint is warranted, the statements taken by the officer are to be sealed. The hearing panel of the Board or the hearing officer (members of the screening panel being disqualified in either capacity) are denied access to the information so sealed and the only evidence that the hearing panel of the Board or the hearing officer is to consider is that adduced through witnesses at the public hearing of the complaint.[58]

This is a commendable practice to safeguard the rights of the party to a full and fair hearing. Although the Practice Notes may be readily accessible for most practical purposes, we think, generally, their contents should be incorporated into the Rules of Procedure. The Rules of Procedure are law in regulation form published in the *Ontario Gazette*. The Practice Notes are not law and are not so published. In some respects the ease with which Practice Notes could be amended as compared with regulations may justify the continued treatment of some subjects by Practice Note rather than by regulation.

When the Statutory Powers Rules Committee is established as recommended in Report Number 1 it will be for that body to consider, after full consultation with the Board, what should be incorporated in the Rules and what should be mere Practice Notes for the guidance of those involved in the Board's proceedings.

The Board may,

". . . authorize the chairman or a vice-chairman to inquire into any application, request, complaint, matter or thing

[57] *Ibid.*, s. 65(4) as re-enacted by Ont. 1966, c. 76, s. 24(2).
[58] Practice Note No. 1.

> within the jurisdiction of the Board, or any part of any of them, and report to the Board thereon."[59]

This is a power to inquire and report but

> "Where the Board has authorized the chairman or a vice-chairman to make an inquiry under clause *h* of subsection 2 of section 77, his findings and conclusions on facts are final and conclusive for all purposes, but nevertheless he may, if he considers it advisable to do so, reconsider his findings and conclusions on facts and vary or revoke any such finding or conclusion."[60]

These provisions are a sort of distortion of the inquiry procedure discussed in Report Number 1.[61] The donees of the power may not only investigate and report but they have a power of final decision with respect to the facts for all purposes, but the Board which does not hear the evidence and before whom parties affected by the decision have not a right to appear must apply the facts as found and come to the final decision on the matter.

In Report Number 1 we discussed the subject of the delegation of a power of decision[62] and pointed out that the decision must be a decision of the members of the tribunal empowered to decide and unless expressly or impliedly authorized to do so, the members cannot delegate the making of the decision given to them by statute to any other person or persons. The power we have just quoted is an express power conferred on the Board to delegate to a chairman or vice-chairman power to inquire into anything within the jurisdiction of the Board, and to make the final decision. The findings and conclusions of fact made by the referee of the power are final and conclusive for all purposes, subject to his power to vary or revoke such findings or conclusions.

There is no provision that a copy of the report should be furnished to those affected.

The Act should require that the referee give reasons for his decision and that a copy of his report and reasons

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[59]R.S.O. 1960, c. 202, s. 77(2)(h) as re-enacted by Ont. 1961-62, c. 68, s. 12(2) and amended by Ont. 1966, c. 76, s. 30(3).

[60]*Ibid.*, s. 79(3) as enacted by Ont. 1961-62, c. 68, s. 13(2) and amended by Ont. 1966, c. 76, s. 32.

[61]pp. 113-14 and 194-200 *supra*.

[62]p. 86 *supra*.

should be furnished to the parties affected by it if requested and that any such parties have a right of appeal from the findings of the referee to the Board.

RULES

Subject to the approval of the Lieutenant Governor in Council the Board is given a broad power to make *rules*. Some confusion arises by reason of a power conferred on the Lieutenant Governor in Council to make *regulations*. No clear distinction is apparent between rules and regulations. The relevant powers conferred on the Board are:

> "75. (9) The Board shall determine its own practice and procedure but shall give full opportunity to the parties to any proceedings to present their evidence and to make their submissions, and the Board may, subject to the approval of the Lieutenant Governor in Council, make rules governing its practice and procedure and the exercise of its powers and prescribing such forms as are deemed advisable.
>
> (9a) The Board may, subject to the approval of the Lieutenant Governor in Council, make rules to expedite proceedings before the Board to which sections 90 to 96 [dealing with the specialized problems of the construction industry] apply, and such rules may provide that, for the purposes of determining the merits of an application for certification to which sections 90 to 92 apply, the Board shall make or cause to be made such examination of records and such other inquiries as it deems necessary, but the Board need not hold a hearing on such an application."[63]

The powers conferred on the Lieutenant Governor in Council to make regulations are:

> "The Lieutenant Governor in Council may make regulations,
>
> (f) prescribing forms and providing for their use, including the form in which the documents mentioned in sections 34, 65 and 66 shall be filed in the Supreme Court;

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[63]R.S.O. 1960, c. 202, s. 75(9) as amended by Ont. 1961-62, c. 68, s. 10(2) and s. 75(9a) as enacted by Ont. 1961-62, c. 68, s. 10(3) and amended by Ont. 1964, c. 53, s. 9.

(g) respecting any matter necessary or advisable to carry out the intent and purpose of this Act."[64]

In practice, the regulations made by the Lieutenant Governor in Council have been confined to those concerning the filing of financial statements respecting pension or welfare funds for the benefit of employees, the remuneration of chairmen and members of conciliation boards, the remuneration of mediators and the prescribing of a limited number of forms.[65] On the other hand, the rule-making power of the Board has been exercised in such a manner as to create what may be termed a comprehensive code of procedure.[66] Since some of the general principles set out in Report Number 1 have a direct bearing on these rules of procedure a brief consideration of the Board's practice is necessary.

PRACTICE OF THE BOARD

A distinguishing and commendable feature of the Board's practice is that there is no difficulty in discovering the procedure that an interested person must follow. The Board makes available, free of charge, in convenient form, its Rules of Procedure and related prescribed forms, the Regulations made under section 88 and related prescribed forms and the Board's Practice Notes. Little would be accomplished by a minute analysis of the Rules of Procedure. They are detailed and reasonably easy to understand, particularly when read with the accompanying prescribed forms. We are more concerned with some matters of practice.

The Board has attached importance to the necessity of giving adequate notice of the case to be met to the parties. Particulars must be given where it is intended to allege improper or unfair practices.

"47. (1) Where a person intends to allege, at the hearing of an application or complaint, improper or irregular conduct by any person, he shall,

(a) include in the application or complaint; or

(b) file a notice of intention that shall contain,

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[64]*Ibid.*, s. 88(f)(g).

[65]R.R.O. 1960, Reg. 399 as amended by O. Reg. 337/62, O. Reg. 295/66 and O. Reg. 468/69.

[66]O. Reg. 264/66.

a concise statement of the material facts, actions and omissions upon which he intends to rely as constituting such improper or irregular conduct, including the time when and the place where the actions or omissions complained of occurred and the names of the persons who engaged in or committed them, but not the evidence by which the material facts, actions or omissions are to be proved, and, where he alleges that the improper or irregular conduct constitutes a violation of any provision of the Act, he shall include a reference to the section or sections of the Act containing such provision."[67]

"47. (4) No person shall adduce evidence at the hearing of an application or complaint of any material fact that has not been included in the application or complaint or in any document filed under these Rules in respect of the application or complaint, except with the consent of the Board and, if the Board deems it advisable to give such consent, it may do so upon such terms and conditions as it thinks advisable."[68]

These provisions make it clear that ordinarily evidence may not be adduced on a material fact, even by a respondent, unless a written particularized allegation has been made. Although the right to cross-examine witnesses for an opposite party may be circumscribed, the rule is sound as it is based on the right of an interested party to know the case to be met.

Although under the Act the Board has power to determine its own practice and procedure it shall give full opportunity to the parties to any proceedings to present evidence and make their submissions.[69] The rules made by the Board provide,

"46. (1) Where an application or complaint does not, in the opinion of the Board, make out a *prima facie* case for the remedy requested, the Board may dismiss the application or complaint without a hearing and it shall in its decision state the reason for the dismissal.

(2) The applicant or complainant may within ten days after he is served with the decision of the Board

[67] O. Reg. 264/66, Rule 47(1).
[68] *Ibid.*, Rule 47(4).
[69] R.S.O. 1960, c. 202, s. 75(9), as amended by Ont. 1961-62, c. 68, s. 10(2).

under sub-section 1 request the Board to review its decision.

(3) A request for review under this section shall contain a concise statement of the facts and reasons upon which the applicant relies.

(4) Upon a request for review being filed, the Board may,

(a) direct that the application or complaint be re-opened and proceeded with by the Board in accordance with the provisions applicable thereto;

(b) direct the registrar to serve the applicant and any other person who in the opinion of the Board may be affected by the application or complaint with a notice of hearing to show cause why the application or complaint should be re-opened; or

(c) confirm its decision dismissing the application or complaint."[70]

Notwithstanding that there is recent authority for the proposition that the *audi alteram partem* rule does not require that there must always be a hearing, but only that the parties must be given an opportunity of putting forward their arguments,[71] it is doubtful that this authority applies where a statute expressly provides that the parties must be given "full opportunity . . . to present their evidence and to make their submissions."

There are, no doubt, cases where the application or claim may appear on the face of it to be without foundation in law or to be trivial or vexatious and in such cases the Board should have power to deal with such matters in a summary way. But we think the rule should be amended to read as follows:

> "Where it appears to the Board that an application or complaint is without foundation in law or is frivolous or vexatious the Board may dismiss the application without a hearing, giving its reasons in writing and notifying the applicant or complainant that he has a right to have the decision reviewed by the Board."

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[70]O. Reg. 264/66, Rule 46.

[71]*Quebec Labour Relations Board v. Canadian Ingersoll Rand Co. Ltd. et al* (1969), 1 D.L.R. (3d) 417; *Regina v. Quebec Labour Relations Board, ex parte Komo Construction Inc.*, (1969) 1 D.L.R. (3d) 125.

Adjournments

The Board may, if it thinks it advisable in the interests of justice, adjourn any hearing for such time and to such place and upon such terms as it thinks fit.[72] This rule, having the force of law, gives the Board a wide discretion without adequate standards to safeguard the rights of the individual.

In Report Number 1 we recommended that generally parties who may be specifically affected by a decision should be permitted such reasonable adjournments asked for in good faith as may be appropriate in the circumstances.[73] We think such a provision should apply to the Board.

Practice Notes

Apart from the question as to whether Practice Notes ought to be an integral part of the Board's Rules of Procedure the concept of publishing statements of the Board's practice is commendable. Until recently the only way in which it was possible to know about certain of the Board's practices was to appear before it repeatedly. This gave rise to the complaint that it might appear that a party was handicapped, if not prejudiced, if he was not represented by a member of the bar who had specialized in labour law.

When the Board first published practice notes, they were distributed to persons known to be interested in them and were available on request. Later the Board published these notes and amendments, as they were prepared, in a Monthly Report. They now have been consolidated and published along with the Rules of Procedure and the Regulations. This is a useful and commendable procedure.

Consultation with the Full Board

As a general practice the Board reserves its decision and notifies the parties by forwarding to them a copy of the decision and the supporting reasons.

We were advised by the former Chairman that the normal practice is for only those members who sit on the division at the hearing to participate in the deliberations prior to the

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[72] O. Reg. 264/66, Rule 57(1).

[73] p. 213 *supra*.

decision and in all cases only those members make the decision. From time to time, however, as, for example, when the matter involves a question of Board policy, and consistency is therefore desirable, or where an unusual or difficult question of law is involved, or it appears, when one of the members of the hearing division requests it, the matter is taken before the full Board in executive session for discussion. No vote is taken at the full meeting. The decision is made by those members who were present at the hearing. In Report Number 1 we pointed out that no person should participate in a decision of a judicial tribunal who was not present at the hearing and heard and considered the evidence and that all persons who had heard and considered the evidence should participate in the decision.[74]

The practice we have outlined violates that principle. To take a matter before the full Board for a discussion and obtain the views of others who have not participated in the hearing and without the parties affected having an opportunity to present their views is a violation of the principle that he who decides must hear.

In dealing with a similar matter in the *Mehr* case,[75] Cartwright, J., as he was then, writing the judgment of the Court, discussed the practice of the Discipline Committee of the Law Society of Upper Canada. In that case members participated in the deliberations who were not present throughout the hearing. The learned judge said that he was much impressed by the statement in *Rex v. Huntingdon Confirming Authority*[76] where the Court dealt with a case where justices who were not present throughout the hearing participated in the decision. Romer, L. J. said:

> "Further, I would merely like to point this out: that at that meeting of May 16 there were present three justices who had never heard the evidence that had been given on oath on April 25. There was a division of opinion. The resolution in favour of confirmation was carried by eight to two, and it is at least possible that that majority was induced to vote in

[74]p. 220 *supra*.

[75]*Mehr v. Law Society of Upper Canada*, [1955] S.C.R. 344.

[76][1929] 1 K.B. 698.

the way it did by the eloquence of those members who had not been present on April 25, to whom the facts were entirely unknown."[77]

Notwithstanding that the ultimate decision is made by those who were present at the hearing, where a division of the Board considers that a matter should be discussed before the full Board or a larger division, the parties should be notified and given an opportunity to be heard.

Reasons

The former Chairman advised us that there is an endorsement of the Board's decision in all cases but they do not always give reasons. He said: "We try in important cases where there is any policy of interpretation of the statute. Now we are exercising our discretion on anything of that sort." If requested the Board usually gives reasons.

The Board should be required to give reasons in all cases, if requested.

The Board publishes a Monthly Report which contains all the decisions rendered during the month. These are distributed free of charge. We referred with approval to this practice in Report Number 1.[78]

JUDICIAL REVIEW

There are two provisions in the Act which are designed to preclude judicial review.

"79.(1) 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 it, and the action or decision of the Board thereon is final and conclusive for all purposes, but nevertheless the Board may at any time, if it considers it advisable to do so, reconsider any decision, order, direction, declaration or ruling made by it and vary or revoke any such decision, order, direction, declaration or ruling."[79]

"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

[77] *Ibid.*, 717.
[78] p. 223 *supra*.
[79] R.S.O. 1960, c. 202, s. 79(1) as re-enacted by Ont. 1961-62, c. 68, s. 13(1).

> 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."[80]

We dealt with clauses such as these in Report Number 1.[81]

The words "and the action or decision of the Board thereon is final and conclusive for all purposes" should be struck out of section 79(1) and section 80 of the Act should be repealed.

PRIVILEGE

> "81. No member of the Board, nor its registrar, nor any of its other officers, nor any of its clerks or servants shall be required to give testimony in any civil suit respecting information obtained in the discharge of their duties under this Act."[82]
>
> "83. (1) The records of a trade union relating to membership or any records that may disclose whether a person is or is not a member of a trade union or does or does not desire to be represented by a trade union produced in a proceeding before the Board is (sic) for the exclusive use of the Board and its officers and shall not, except with the consent of the Board, be disclosed, and no person shall, except with the consent of the Board, be compelled to disclose whether a person is or is not a member of a trade union or does or does not desire to be represented by a trade union.
>
> (2) No information or material furnished to or received by a conciliation officer or a mediator,
>
> (a) under this Act; or
>
> (b) in the course of any endeavour that a conciliation officer may make under the direction of the Minister to effect a collective agreement after the Minister,
>
> (i) has released the report of a conciliation board or a mediator, or
>
> (ii) has informed the parties that he does not deem it advisable to appoint a conciliation board,

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[80]*Ibid.*, s. 80.
[81]pp. 277, 1267 *supra.*
[82]R.S.O. 1960, c. 202, s. 81.

shall be disclosed except to the Minister, the Deputy Minister of Labour or the chief conciliation officer of the Department of Labour.

(2*a*) No report of a conciliation officer shall be disclosed except to the Minister, the Deputy Minister of Labour or the chief conciliation officer of the Department of Labour.

(2*b*) The Minister, the Deputy Minister of Labour, the chief conciliation officer of the Department of Labour or any conciliation officer or mediator appointed under this Act or any person designated by the Minister to endeavour to effect a collective agreement is not a competent or compellable witness in proceedings before a court or other tribunal respecting any information, material or report mentioned in subsection 2 or 2*a*, or respecting any information or material furnished to or received by him, or any statement made to or by him in an endeavour to effect a collective agreement.

(2*c*) The chairman or any other member of a conciliation board is not a competent or compellable witness in proceedings before a court or other tribunal respecting,

(a) any information or material furnished to or received by him;

(b) any evidence or representation submitted to him; or

(c) any statement made by him,

in the course of his duties under this Act.

(3) No information or material furnished to or received by a field officer under this Act and no report of a field officer shall be disclosed except to the Board or as authorized by the Board, and no member of the Board and no field officer is a competent or compellable witness in proceedings before a court or other tribunal respecting any such information, material or report."[83]

These sections give an unusually wide testimonial privilege in favour of members of the Board and its employees. As we shall see presently a privilege is created in cases where there should be no privilege and security is not provided with

[83] *Ibid.*, s. 83 as amended by Ont. 1961-62, c. 68, s. 14 and Ont. 1964, c. 53, s. 11.

respect to information received where there should be security.

We deal first with the members of the Board. They are without exception not required to give testimony in any civil suit "respecting information obtained in the discharge of their duties" under the Act. Apart from the provisions of section 83, with which we shall deal later, there does not seem to be any reason why the members of the Board should not be compellable to give evidence in a civil suit with respect to information obtained in the discharge of their duties. The hearings of the Board are public and information obtained by members of the Board should be available to the courts unless there is special reason shown why it should be privileged. There are special reasons why certain information should not be made public and with that we shall deal later.

Although members of the Board are not required to give evidence in a civil suit disclosing information obtained by them in the discharge of their duties, there is no provision in the statute expressly prohibiting them from otherwise disclosing such information (other than that contained in the report of a field officer), except the oath of office the members of the Board are required to take.

> "Each member of the Board shall, before entering upon his duties, take and subscribe before the Clerk of the Executive Council and file in his office an oath of office in the following form:
>
> > I do solemnly swear that I will faithfully, truly and impartially, to the best of my judgment, skill and ability, execute and perform the office of chairman, (*or* vice-chairman, *or* member) of the Ontario Labour Relations Board and I will not, except in the discharge of my duties, disclose to any person any of the evidence or any other matter brought before the Board. So help me God."[84]

The registrar, other officers, clerks and servants of the Board are not required to subscribe to such an oath of office and hence there are no statutory prohibitions against their disclosing information obtained in the course of their duties to anyone, other than that contained in section 83 with which we now deal.

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[84]*Ibid.*, s. 75(5) as amended by Ont. 1966, c. 76, s. 28(4).

Under subsection 1 of section 83 the records of a trade union are given a limited privilege which can be overridden by an order of the Board. If good reason is shown why there should be disclosure, there may be some relief. Subsections 2, 2*a*, 2*b* and 2*c* create an absolute privilege with respect to information furnished to conciliation officers and others. The object of these provisions is to permit conciliation proceedings to be carried on on a "without prejudice" basis. This is desirable but the privilege extends to information or material not relevant to the proceedings. We think the Board should be permitted on application to it to determine whether information or material supplied is relevant to proceedings and where it determines that information or material disclosed is irrelevant the privilege should not extend to such information or material.

Subsection 3 gives the Board power to authorize the disclosure of information or material furnished to or received by a field officer but an inconsistency exists in the section. Even where the Board may authorize the disclosure, the field officer is rendered incompetent to give evidence before a court or other tribunal. The words "other tribunal" may be construed to include the Board. We think that where the Board has authorized the disclosure the field officer should be a competent and compellable witness.

The provisions for secrecy under the sections with which we have been dealing go to extremes and beyond what has been considered necessary under the federal Act.[85] In the first place, under the federal Act, the Minister may publish the report of a Conciliation Board.[86] In the second place, although the proceedings before a Conciliation Board are not receivable in evidence in any court except in the case of a prosecution for perjury,[87] such privilege does not extend to proceedings before the Canada Labour Relations Board, nor are the members of the Board and its officers rendered incompetent or non-compellable witnesses.

It is not to be overlooked that the testimonial restrictions in the provincial law have no effect in criminal cases.[88]

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[85]Industrial Relations and Disputes Act, R.S.C. 1952, c. 152.
[86]*Ibid.*, s. 36.
[87]*Ibid.*, s. 37.
[88]*Marshall v. The Queen* [1961] S.C.R. 123, discussed at p. 830 *supra.*

The result is that members of the Ontario Board and its officers are competent and compellable witnesses in any criminal case with respect to any information received by them in the performance of their duties, but not in civil cases. Consequently, if members of the Board or its field officers become possessed of information furnished to or received by a field officer that is relevant to a charge of arson they are competent witnesses and can be compelled to testify. But if the information is relevant to a claim for insurance made in the Ontario courts they are not competent witnesses and they cannot be compelled to testify. In the case of other information, the members of the Board are competent witnesses but cannot be compelled to testify. The benefits and the detriments that arise out of the privilege that we have been discussing must be balanced and we think the balance is in favour of the privilege being extended to conciliation proceedings but against its being extended to members and officers of the Board.

The testimonial privilege created under sections 81 and 83 should be limited to information obtained in proceedings before conciliation boards.

RECOMMENDATIONS

1. The Attorney General and the Minister of Labour should have power to institute a prosecution under the Act without the consent of the Board.

2. The orders of the Board made under section 65 of the Act should be made enforceable in the same manner as orders of the Supreme Court upon filing with the Registrar of the Board and without being filed with the Registrar of the Supreme Court and entered as judgments of that Court.

3. The Board, persons to whom its powers are delegated, a conciliation board, a mediator and an arbitrator should not have all the powers of a court of record in civil cases. The Act should be amended to provide for the enforcement of the Board's orders as recommended in Report Number 1, p. 441 *ff*.

4. The powers of compulsion to be exercised by a donee of the Board's powers should be clearly defined by statute. The donee of the powers should not have power to decide the scope of his powers.

5. Where the Board has authorized the chairman or vice-chairman to make an inquiry under section 77(2)(h) the Act should require,

   (a) that the referee give reasons for his decisions;

   (b) that a copy of the report and reasons of the referee be furnished to those affected, and

   (c) that parties affected by the report have a right of appeal from the findings of the referee to the Board.

6. Rule 46(1) (O. Reg. 264/66) should be amended to read:

   "Where it appears to the Board that an application or complaint is without foundation in law or is frivolous or vexatious the Board may dismiss the application without a hearing giving its reasons in writing and notifying the applicant or complainant that he has a right to have the decision reviewed by the Board."

7. Provision should be made giving parties who may be specifically affected by a decision of the Board a right to such reasonable adjournments asked for in good faith as may be appropriate in the circumstances.

8. Where a division of the Board considers that a matter should be discussed by the full Board or a larger division of the Board, the parties should be notified and given an opportunity to be heard.

9. The Board should be required to give reasons for its decisions in all cases, if requested.

10. The words "and the action or decision of the Board thereon is final and conclusive for all purposes" should be struck out of section 79(1) and section 80 should be repealed.

11. The testimonial privilege created by sections 81 and 83 should be limited to information obtained on proceedings before conciliation boards.

CHAPTER 125

The Ontario Municipal Board

INTRODUCTION

THE Ontario Municipal Board, to which we shall hereafter refer as "the Board", unless the context otherwise demands, was first established in 1932 under the Ontario Municipal Board Act[1] as the successor to the Ontario Railway and Municipal Board. The Act effected the repeal and amalgamation of three previous pieces of legislation — the Municipal and School Accounts Audit Act,[2] the Railway and Municipal Board Act,[3] and the Bureau of Municipal Affairs Act.[4]

The legislative roots of the Ontario Municipal Board go back to 1897 when the office of Provincial Municipal Auditor was created to establish rules for the proper keeping of accounts by municipalities and school boards under the Municipal and School Accounts Audit Act.[5] The auditor was empowered to inspect and audit the books of account of the various municipal corporations.

The Ontario Railway and Municipal Board was created in 1906 under the Railway and Municipal Board Act. It was comprised of three persons appointed by the Lieutenant Governor in Council who held office during pleasure.[6] Many provisions of the Ontario Municipal Board Act are

[1]Ont. 1932, c. 27.
[2]R.S.O. 1927, c. 243.
[3]R.S.O. 1927, c. 225.
[4]R.S.O. 1927, c. 232.
[5]Ont. 1897, c. 48.
[6]Ont. 1906, c. 31, s. 4.

similar to those which were contained in the Ontario Railway and Municipal Board Act. For example, the latter Act provided that the opinion of the Chairman on any question of law was to prevail;[7] that an appeal would lie to the Court of Appeal with leave of that Court, on questions of law and jurisdiction;[8] that the Board was required to enquire and report upon the request of the Lieutenant Governor in Council or the Legislature;[9] and that the Board was empowered to hear assessment appeals.[10]

When the Ontario Railway and Municipal Board was created in 1906 its principal powers related to provincial railways and it was not until about 30 years later that the emphasis shifted almost entirely to the sphere of municipal affairs.

The Bureau of Municipal Affairs Act passed in 1917[11] established, as a branch of the Public Service of Ontario, the Bureau of Municipal Affairs, which had four principal duties:

(1) to administer the Municipal and School Accounts Audit Act;

(2) to superintend the bookkeeping of public utilities;

(3) to issue bulletins to every municipality to secure the uniformity, efficiency and economy of municipal administration, and

(4) to collect statistical and other information from municipalities.

Since its creation in 1932 the Ontario Municipal Board, except for its numerical composition, has changed very little. The powers it possessed in 1932 it still possesses in 1970, although it is seldom called upon to exercise many powers vested in it by the Railways Act[12] with regard to provincial railways.

The time of the Board is now mainly devoted to the exercise of powers concerning municipal affairs.

[7] R.S.O. 1927, c. 225, s. 6.
[8] *Ibid.*, s. 43.
[9] *Ibid.*, s. 55.
[10] *Ibid.*, s. 51.
[11] Ont. 1917, c. 14.
[12] R.S.O. 1950, c. 331, unconsolidated and unrepealed.

In the field of municipal affairs the Board exercises three main functions:

(1) it hears appeals under the Assessment Act;

(2) it hears applications for approval of zoning by-laws, and

(3) it supervises the affairs of local municipalities and exercises powers delegated to it by the Lieutenant Governor in Council.

In the exercise of its powers with respect to assessment appeals the Board exercises "judicial" functions, while in the exercise of the balance of its powers its functions are mainly "administrative".

It is, perhaps, adequate for our purposes to refer first to these broad classifications of power. There are, however, certain powers that have been granted to the Board that are difficult to classify. These will be considered later. It should also be made clear that it is not only difficult to classify some powers of the Board but it is doubly difficult to discover all the powers that are conferred on the Board. If all that had been required was a reference to the Ontario Municipal Board Act, or perhaps to the Municipal Act,[13] our task would have been less difficult, but that is not the case. The Board itself was unable to furnish us with a complete list of the statutes from which it derives its powers. No catalogue or master index exists to which reference can be made to determine the jurisdiction of the Municipal Board. We have found in our research[14] that subject to the ultimate effect of the Expropriations Act 1968-69, the Board obtains jurisdiction from at least 30 different statutes; statutes as diverse as the Mining Tax Act,[15] the Cemeteries Act,[16] and the Trustee Act.[17] We are quite unable to say with assurance that in our research we have located all of the powers of the Board.

The situation cannot be permitted to continue where even the Board does not know the extent of its own jurisdiction and where there is no way to determine the extent

[13]R.S.O. 1960, c. 249.
[14]See Appendix to this Chapter, p. 2045ff. *infra*.
[15]R.S.O. 1960, c. 242.
[16]R.S.O. 1960, c. 47.
[17]R.S.O. 1960, c. 408.

of its jurisdiction except by a minute and detailed examination of virtually every statute passed and unrepealed since the creation of the Board in 1932. The granting of jurisdiction to the Board is almost invariably coupled with a remedy available to a municipal corporation, a private citizen or some other body. It would appear, from an examination of the Appendix to this Chapter, that it has often been the practice of successive legislatures, when faced with the necessity of creating a jurisdiction to cope with a particular problem, to assign the problem to the Municipal Board.

A complete catalogue of the powers conferred on the Board should be made available to the public.

In our analysis of the powers and jurisdiction of the Board we have not attempted to conduct an in-depth study of the day-to-day workings of the Board. Our Terms of Reference do not require us to do that. Our approach has been to examine certain of the powers vested in the Board by the Legislature and to analyze these powers in the light of the recommendations we have made in Report Number 1. However, we wish to make it clear that when we criticize the powers of the Board as failing to meet the standards set out in Report Number 1, we are not criticizing the manner in which the members of the Board perform their functions. We have emphasized throughout our Reports that it is no answer to a criticism that powers are excessive or proper safeguards have not been provided to say that the powers are seldom if ever used, or that a particular board or tribunal appears to be functioning well. The mere fact that a board or tribunal has been granted excessive powers or that there are no safeguards against misuse is sufficient in itself to recommend remedial legislative action.

CONSTITUTION OF THE BOARD

The Board is composed of as many members as the Lieutenant Governor in Council may from time to time appoint.[18] One of its members is appointed chairman, and one or more are appointed vice-chairmen. At present, the Board is composed of 14 members of whom one is the chair-

[18]R.S.O. 1960, c. 274, s. 5(1)(2).

man and four are vice-chairmen. It has a secretary and a registrar. The Lieutenant Governor in Council fixes the salaries of the members of the Board and the Province pays them.[19] The members hold office during the pleasure of the Lieutenant Governor in Council.[20]

Two members of the Board form a quorum and are sufficient for the exercise of all the jurisdiction and powers of the Board. At least two members shall attend at the hearing of every application.[21] However, the Chairman may authorize one member of the Board to conduct the hearing of an application and to report to the Board. For the purpose of such hearing the member has all the powers of the Board.[22] The report of the single member conducting the hearing may be adopted as the order or decision of the Board by the Chairman or by two other members of the Board one of whom shall be a vice-chairman, or may be otherwise dealt with as the Board deems proper.[23] This is not the proper procedure for the conduct of judicial hearings nor the method of reaching a decision complying with the judgment of the Supreme Court of Canada in *Mehr v. The Law Society of Upper Canada*.[24]

In its annual report of 1968,[25] the Board recommended that a study be made of the suggestion "that more effective use of the personnel of the Board might be achieved if power were given for one member to conduct less important or more routine hearings as this would make it possible to assign three members for more difficult hearings and for hearings of review of previous decisions provided for by Section 42 of *The Ontario Municipal Board Act*."

When present, the Chairman is required to preside at all sittings of the Board and his opinion upon any question of law shall prevail.[26]

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[19]*Ibid.*, s. 5(3), as enacted by Ont. 1964, c. 81, s. 1.
[20]*Ibid.*, s. 7.
[21]*Ibid.*, s. 12(1).
[22]*Ibid.*, s. 15(1).
[23]*Ibid.*, s. 15(2), as re-enacted by Ont. 1967, c. 68, s. 1.
[24][1955] S.C.R. 344. See Report Number 1, pp. 129 and 220 *supra* and recommendation concerning the Ontario Highway Transport Board, Chapter 121, pp. 1959-60 *supra*.
[25]Annual Report of the Ontario Municipal Board, (1968), 2.
[26]R.S.O. 1960, c. 274, s. 14.

The Government, in accordance with the Act, has provided in Toronto, premises for the conduct of hearings and offices for the members of the Board and its staff.[27] However, the Board does not restrict the hearings to Toronto. It sits at different places throughout Ontario as designated by the Chairman.[28]

The Lieutenant Governor in Council may appoint an expert to assist the Board in "an advisory or other capacity"[29] or to be an "acting member" of the Board.[30] The "acting member" must be a person specially qualified to assist the Board with respect to a particular application before it and such person is empowered to participate in the hearing of the particular application and the decision. He has all the powers of a regular member of the Board for the purposes of such application.

LIABILITY OF MEMBERS OF THE BOARD

> "No member of the Board or its secretary or any of its staff is personally liable for anything done by it or by him under the authority of this or any other Act."[31]

We discuss provisions such as these in relation to the liability of the Crown in Chapter 131. We there point out how they deprive the individual of the benefits which are purported to be conferred under the Proceedings Against the Crown Act.

GENERAL JURISDICTION AND POWERS

In addition to the jurisdiction and powers vested in the Board by the several statutes listed in the Appendix to this Chapter,[32] general and specific powers are vested in the Board by the Ontario Municipal Board Act.[33] These powers are mainly relative to the exercise of its powers, while the powers conferred in the other statutes are of a substantive nature.

[27] *Ibid.*, s. 21.
[28] *Ibid.*, s. 22.
[29] *Ibid.*, s. 26(1).
[30] *Ibid.*, s. 26(2).
[31] *Ibid.*, s. 32.
[32] See p. 2045ff. *infra*.
[33] R.S.O. 1960, c. 274.

For all purposes the Board has all the powers of a court of record and has an official seal.[34] It has the authority to hear and determine all questions of law and fact coming within its jurisdiction,[35] and exclusive jurisdiction in respect of all matters in which jurisdiction is conferred on it by the Ontario Municipal Board Act or by any other general or special Act.[36]

Section 36 serves as a legislative bridge between those statutes granting jurisdiction to the Board in a great variety of matters and the Ontario Municipal Board Act. This section reads, in part, as follows:

"(1) The Board has jurisdiction and power,

(a) to hear and determine all applications made, proceedings instituted and matters brought before it under this Act or any other general or special Act and for such purpose to make such orders, rules and regulations, give such directions, issue such certificates and otherwise do and perform all such acts, matters, deeds and things, as may be necessary or incidental to the exercise of the powers conferred upon the Board under such Act;

(b) to perform such other functions and duties as are now or hereafter conferred upon or assigned to the Board by statute or under statutory authority;

(c) to order and require or forbid, forthwith or within any specified time and in any manner prescribed by the Board, the doing of any act, matter or thing or the omission or abstention from doing or continuance of any act, matter or thing, which any person, firm, company, corporation or municipality is or may be required to do or omit to be done or to abstain from doing or continuing under this or any other general or special Act, or under any order of the Board or any regulation, rule, by-law or direction made or given under any such Act or order or under any agreement entered into by such person, firm, company, corporation or municipality;

(d) to make, give or issue or refuse to make, give or issue any order, directions, regulation, rule, permission, approval, certificate or direction, which it has power to make, give or issue.

[34] *Ibid.*, s. 33.
[35] *Ibid.*, s. 34.
[36] *Ibid.*, s. 35.

(2) Notwithstanding anything in any general or special Act, where land or other property has been expropriated under the authority of any general or special Act all claims for compensation or damages by reason of such expropriation shall, where the expropriating body so elects by notice in writing, be heard and determined by the Board, and where such election is made sections 28, 30, 31, 32 and 36 of *The Public Works Act,* except as otherwise provided in the Act authorizing the expropriation, *mutatis mutandis* apply."[37]

The provision that "notwithstanding anything in any general or special Act", where land has been expropriated the expropriating body may elect that all claims for compensation shall be heard and determined by the Board, has been drastically affected by the Expropriations Act 1968-69.[38] We shall deal later with the broad powers conferred under paragraph (c) of section 36(1) which we have quoted.

The Board has been given "all such powers, rights and privileges as are vested in the Supreme Court [of Ontario] with respect to the amendment of proceedings, addition or substitution of parties, attendance and examination of witnesses, production and inspection of documents, entry on and inspection of property, enforcement of its orders and all other matters necessary or proper therefor."[39] The power of the Board to commit for contempt of court together with other provisions in the Act for the enforcement of its orders will be dealt with in due course.[40]

The Act contains an extraordinary provision granting those issuing letters patent for the incorporation of a company power to confer upon the Board wide powers of investigation and decision.

"Where by the provisions of any letters patent or supplementary letters patent of any corporation, heretofore or hereafter issued under The Corporations Act or any other general or special Act, any jurisdiction is conferred upon the Board or it is provided that any matter in any way may be referred to the Board with respect thereto, it has power to inquire into, hear and determine all matters and things

[37] *Ibid.*, s. 36.
[38] Ont. 1968-69, c. 36.
[39] R.S.O. 1960, c. 274, s. 37.
[40] See *Ibid.*, s. 85.

> necessary or incidental to the due exercise of such jurisdiction and reference and to make and give orders, directions, regulations, rules, permissions, approvals, sanctions and certificates as to the Board may seem proper."[41]

These are powers that ought to be specifically conferred by statute or by the Lieutenant Governor in Council under a statute and not by the letters patent for the incorporation of companies. This provision has been in the Act for many years but we could discover no instance where it has been applied. We do not know what its purpose is and the Chairman of the Board advised us that he did not know either. The section should be repealed.

The Board, of its own motion, may and shall, at the request of the Lieutenant Governor in Council, inquire into, hear and determine any matter or thing "that it may inquire into, hear and determine upon application or complaint." In such case it exercises the same powers as upon any application or complaint.[42] It is further provided that "any power or authority vested in the Board under this or any other general or special Act may, though not so expressed, be exercised from time to time, or at any time, as the occasion may require."[43] This would appear to give the Board wide powers of its own motion to "inquire, hear and determine" where no one has applied to it to exercise its powers. Likewise the Lieutenant Governor in Council may require the Board to exercise its powers although no one has applied to it for relief.

The Board should not have power of its own motion to enter upon a determination of any matter in which it exercises a judicial function nor should the Lieutenant Governor in Council have power to require the Board to exercise its judicial functions unless the Government has an interest in the determination of the matter.[44]

On the other hand, there may be administrative powers that the Board should have power to exercise of its own motion and no doubt the Lieutenant Governor in Council should have power to ask the Board to determine certain

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[41] *Ibid.*, s. 38.
[42] *Ibid.*, s. 40(1).
[43] *Ibid.*, s. 40(2).
[44] See references to a similar provision in the Ontario Energy Board Act, Chapter 119, p. 1921 *supra*.

matters of an administrative nature. Such matters should be defined in the statute.

The Lieutenant Governor in Council is empowered to appoint counsel to appear before the Board to conduct an inquiry or hearing or to represent the Board in any appeal to the Court of Appeal or to any other court. In such case the Board "may direct that the costs of such counsel shall be paid by any party to the application, proceeding or matter, or by the Treasurer of Ontario."[45]

It does not seem right that the Lieutenant Governor in Council should have power to appoint counsel to appear before the Board in any inquiry and that a party to the inquiry might be ordered to pay the costs of such counsel. Mr. Kennedy, the Chairman, told us he knew of only one case where this had been done. In that case counsel was appointed to represent the Board on an appeal to the Court of Appeal. He said as far as he was concerned the section might be repealed.

There may well be cases coming before the Board in which the Government would wish to intervene because it has a direct or indirect interest in the result. These should be specifically provided for without any power in the Board to direct that any of the other parties should pay the costs of the Government.

The Board has power to rehear any application before making a final decision. It may also "review, rescind, change, alter or vary any decision, approval or order made by it."[46]

This section is frequently used, but only after the Board has reached a decision in the first instance. The Chairman outlined to us the procedure followed in determining whether a rehearing will be granted. One of the parties to the matter brings a motion before the Board, differently constituted than it was at the original hearing, for an order that a new hearing be granted. The usual grounds for seeking a new hearing are that the Board has come to a wrong decision, fresh evidence is available, or that certain witnesses who should have testified did not testify at the original hearing. Such motions are argued without the benefit of a record of the original hearing.

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[45]R.S.O. 1960, c. 274, s. 41.
[46]*Ibid.*, s. 42.

If the Board is of the opinion that a *prima facie* case for a new hearing has been made out an order will be made and the new hearing will proceed as a hearing *de novo*. In effect, therefore, the Board might determine a single issue several times. Provision is made for an appeal to the Court of Appeal from a decision of the Board on a question of jurisdiction or law with leave of the Court.[47] There may be cases where wide powers to grant a rehearing should be conferred on the Board especially in administrative matters but where the Board exercises its judicial powers there should be no power to grant a rehearing but wide rights of appeal should be given.

It should be made clear that there is no power to grant a rehearing of a rehearing except in exceptional and specified circumstances.[48]

The Lieutenant Governor in Council, the Assembly or any committee thereof, may require the Board to inquire into and report on any matters incident to any proposed change in the general law, or to any proposed Bill relating to a municipality or to a railway or to any corporation or person operating or proposing to operate a public utility.[49] This provision, which would appear to have the effect of constituting the Board a sort of Royal Commission at large, has been made use of a few times. There are other analogous provisions. The Lieutenant Governor in Council has power to refer to the Board for a report or other action, any question, matter or thing relating to a municipality, railway or public utility subject to the jurisdiction of the Board under any general or special Act.[50] At the request of the Lieutenant Governor in Council the Board shall inquire into and report on the establishment, organization, reorganization and methods of operation "of any two or more municipalities."[51] The Board has power to appoint any person to make an inquiry and report upon "any application, complaint, or dispute" before it, or upon "any matter or thing" over which it has jurisdiction.[52] This is a very wide power of delegation

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[47]*Ibid.*, s. 95.
[48]See *Regina v. Ontario Labour Relations Board,* [1964] 1 O.R. 173.
[49]R.S.O. 1960, c. 274, s. 43.
[50]*Ibid.*, s. 44.
[51]*Ibid.*, s. 45.
[52]*Ibid.*, s. 46(1).

and it would seem to overlap the power of the Board to authorize one of its members to conduct a hearing and report.

We have earlier referred to the jurisdiction and power conferred on the Board under section 36(1)(c) which we repeat for convenience.

> "to order and require or forbid, forthwith or within any specified time and in any manner prescribed by the Board, the doing of any act, matter or thing or the omission or abstention from doing or continuance of any act, matter or thing, which any person, firm, company, corporation or municipality is or may be required to do or omit to be done or to abstain from doing or *continuing under this or any other general or special Act,* or under any order of the Board or any regulation, rule, by-law or direction made or given under any such Act or *order or under any agreement entered into by such person, firm, company, corporation or municipality.*"[53]

Under section 47 the Board has power to "order and require any person or company, corporation or municipality to do forthwith or within or at any specified time, and in any manner prescribed by the Board, so far as is not inconsistent with this Act, any act, matter or thing that such person, company, corporation or municipality is or may be required to do under this Act, or *under any other general* or *special Act,* or under any regulation, order, direction, *agreement or by-law,* and may forbid the doing or continuing of any act, matter or thing that is in contravention of any such Act or of any such regulation, order, direction, agreement or by-law."[54]

The powers conferred under section 47 overlap with those conferred under section 36(1)(c) and other statutes. This is confusing and unnecessary. But that is not the most serious criticism.

The Legislature appears to have attempted to give the Board wide powers usually exercised by the Supreme Court to issue orders of compulsion or prohibition with respect to acts "which any person, firm, company, corporation or municipality is or may be required to do or omit to be done or to abstain from doing or continuing under this or any other general or special Act, or under any order of the Board or any

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[53]*Ibid.*, s. 36(1)(c). Italics added.
[54]*Ibid.*, s. 47. Italics added.

regulation, rule, by-law or direction made or given under any such Act or order or under any agreement entered into by such person, firm, company, corporation or municipality."[55]

This is an absurdly broad power and in its breadth it is unconstitutional. Sections 36(1)(c) and 47 should be redrafted so as to confine the compulsive powers of the Board to matters over which it has jurisdiction to exercise a power of decision.

"The Board may require any person, company, corporation or municipality, subject to its jurisdiction, to adopt such means and appliances and to take and use such precautions as the Board may deem necessary or expedient for the safety of life and property."[56]

This is an apparent relic of the days when the Board exercised wide jurisdiction over railways. These powers are no longer exercised. The section should be repealed. If it is to remain it should be entirely rewritten. It gives arbitrary powers limited only by what the Board may "deem necessary or expedient". The power to legislate as to what safety measures should be taken should be exercised by the Legislature and should not be delegated to the Board.

"49. (1) When the Board, in the exercise of any power vested in it, by any order directs any structure, appliances, equipment, works, renewals or repairs to be provided, constructed, reconstructed, altered, installed, operated, used or maintained, it may order by what person, company, corporation or municipality interested or affected by such order, as the case may be, and when or within what time, and upon what terms and conditions as to the payment of compensation or otherwise, and under what supervision the same shall be provided, constructed, reconstructed, altered, installed, operated used or maintained.

(2) The Board may order by whom, in what proportion and when, the costs and expenses of providing, constructing, reconstructing, altering, installing and executing such structures, equipment, works, renewals or repairs, or of the supervision, if any, or of the continued operation, use or maintenance of the same, or of otherwise complying with such order, shall be paid."[57]

[55] *Ibid.*, s. 36(1)(c) and see s. 37 discussed at pp. 2027 and 2032 *infra*.
[56] *Ibid.*, s. 48.
[57] *Ibid.*, s. 49.

This section is also a relic of the days when the Board exercised a jurisdiction over railways. Mr. Kennedy advises us it is no longer used. It should be repealed.

Section 50 is a complicated section. It provides that where default is made in complying with an order of the Board requiring something to be done, the Board may order that it be done by such person as it may see fit, and that the expense thereby incurred be recovered from the one in default as money paid for and at his request and the certificate of the Board of the amount so expended is conclusive evidence thereof. Under the provisions of this section one could be condemned to pay any amount fixed by the Board without a hearing. Mr. Kennedy agreed that if orders of that kind have to be enforced they should be enforced through the Courts with proper provisions for a hearing.

The Board[58] has power to enforce its orders and directions respecting any public utility in the manner and by the means provided in section 261 of the Railways Act.[59] This is a curious piece of cross-legislation. The Railways Act is almost, if not entirely, obsolete legislation. It is unrepealed but was not consolidated in the 1960 revision of the statutes.

The provisions of the Railways Act for enforcement of the Board's orders are related to the power of the Board to deal with alleged violations of an agreement with respect to the operation of a railway or a street railway upon or along a highway. Where the Board has made an order it may take such means and employ such persons as may be necessary for the proper enforcement of such order including entry upon and seizing the railway in whole or in part and assuming all or any of the powers of the directors and officers, etc. Elaborate provisions are made for the management of the railway by the Board.

A mere reading of the relevant section of the Railways Act demonstrates how inappropriate the powers set out there are for adaption with respect to "orders and directions respecting any public utility."

Section 51 should be repealed and an appropriate section enacted in the Ontario Municipal Board Act to confer only

[58]*Ibid.*, s. 51.
[59]R.S.O. 1950, c. 331.

such powers on the Board as may be necessary for the enforcement of its orders. We do not think that it is appropriate or necessary that the Board should have power to make orders for the seizure of property of public utilities.

"The Board, inspecting engineer, or person appointed under this Act to make *any inquiry or* report," are given under section 52 powers of entry and inspection of any place being the property or under the control of any company and power to require the attendance "of all such persons as it or he *thinks fit to summon*" and to examine them under oath, and to require them to answer all questions or make all returns and produce all documents as "it or he thinks fit". To enable the Board or person to exercise these powers they have the like powers of compulsion as are vested in any court in civil cases.[60] This gives to the Board or anyone appointed by the Board power to commit for contempt of court. We dealt with such provisions in Report Number 1[61] and recommended that they be repealed. Mr. Kennedy's view was that the powers of committal conferred under this section are not necessary and that the section might be amended. The powers of committal conferred under section 37 should be made to conform to our recommendation in Report Number 1.[62] Section 52 should be repealed.

General Municipal Jurisdiction

Section 53 is a "receiving-enabling" section and complements many statutes in the field of municipal law which require certain procedures followed by municipalities to be approved by the Municipal Board before becoming effective. The Board is given jurisdiction and power in relation to municipal affairs —

(a) to approve municipal borrowing;

(b) to approve municipal by-laws;

(c) to authorize the issue by a municipality of debentures and to certify the validity of debentures;

(d) to direct that the assent of the electors be obtained to certain municipal by-laws;

[60] R.S.O. 1960, c. 274, s. 52. Italics added.

[61] p. 441, ff. *supra*.

[62] p. 446 *supra*.

(e) to supervise, when deemed necessary, the expenditure of any moneys borrowed by a municipality;

(f) to require and obtain from any municipality statements in detail of any of its affairs, financial or otherwise;

(g) to inquire at any time into any or all of the affairs, financial and otherwise, of a municipality;

(h) when authorized by an agreement entered into by two or more municipalities to do so, to hear and determine disputes in relation to such agreement;

(i) to hear and determine the application of any municipality to confirm, vary or fix the rates charged or to be charged in connection with water or sewage service supplied thereto by any other municipality;

(j) to exercise, generally, such jurisdiction and powers as by or under the authority of the Act or the Municipal Act or any other general or special Act are conferred upon the Board.[63]

The general jurisdiction of the Board to supervise the borrowing powers of municipalities is not something that comes within the Terms of Reference of this Commission and we consider it only in relation to other powers that do come within the Terms of Reference.

Jurisdiction over Railways and Utilities

The Board has jurisdiction and power concerning railways and public utilities:

(a) to inquire into, hear and determine any applications made, proceedings instituted and matters brought before it under the provisions of any general or special Act relating to railways or public utilities;

(b) to hear and determine any application alleging that a railway or public utility is in breach of any statute, regulation, by-law, order or agreement;

(c) to hear and determine any application with respect to tolls charged in excess of those prescribed, or which are otherwise unlawful, unfair or unjust.[64]

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[63]R.S.O. 1960, c. 274, s. 53(1) as amended by Ont. 1961-62, c. 96, s. 1.
[64]*Ibid.*, s. 70.

The Act provides that wherever,

"(a) any power or authority is given to or duty imposed upon the Railway Committee of the Executive Council of Ontario by any Act or document;

(b) by any Act of the Legislature the location of any line of railway or the route and course thereof, or the maps, plans and specifications, or any part of the equipment are subject to the approval of the Lieutenant Governor in Council or of any of his Ministers,

such power or authority may be exercised and such duty shall be performed and such approval may be given by the Board."[65]

Except for the operations of public utilities for the development or distribution of power obtained from the Hydro-Electric Power Commission of Ontario, the Board is required to superintend the system of bookkeeping and keeping accounts of all railways and public utilities that are operated by or under the control of a municipality or local board (as defined in the Ontario Municipal Board Act) and may inquire and report as to whether they are being operated economically or whether they are charging excessive rates.[66]

As in the case of the powers of the Board to supervise the financial affairs of municipalities the powers of supervision of railways and utilities do not come within our Terms of Reference.

PRACTICE AND PROCEDURE

Unlike many other statutes creating tribunals, the Ontario Municipal Board Act contains many provisions for the procedure to be followed by the Board. It is not necessary for us to deal with these provisions in detail. We shall comment where we think comment is required.

> "Any rule, regulation, order or decision of the Board, when published by the Board, or by leave of the Board, for three weeks in *The Ontario Gazette*, and while the same remains in force, has the like effect as if enacted in this Act, and all courts shall take judicial notice thereof."[67]

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[65]*Ibid.*, s. 72(1).
[66]*Ibid.*, s. 74.
[67]*Ibid.*, s. 82.

The effect of this section is to delegate considerable legislative power of the Legislature to the Board. An order of the Board is to have the same effect as if it were enacted in the Ontario Municipal Board Act. A provision of a statute for the purposes of law enforcement is one thing and an order of the Board is another. The two should not be confused by giving the Board a power which in effect amends or extends a statute.

If the purpose of the section is to facilitate the proof of the Board's orders in evidence before the courts this purpose could be achieved in a much simpler way by an appropriate amendment to section 36 of the Evidence Act or by striking out the words "has the like effect as if enacted in this Act" in the section we have just quoted. We recommend that if the section is to remain these words be struck out and the appropriate amendment made.

Ten days notice of any application to the Board, or of any hearing by the Board is sufficient, but the Board may abridge or enlarge the time.[68] However, the Board is empowered, "upon the ground of urgency, or for other reason appearing to the Board to be sufficient", to proceed as if due notice to the parties had been given.[69] Where a person entitled to receive notice and not sufficiently notified is affected by an order of the Board made *ex parte*, he may apply to the Board which shall hear the application and either amend, alter or rescind its order or decision or dismiss the application.[70] The Chairman of the Board, in discussing this matter with us, stated that the power to make orders *ex parte* is not exercised but it does grant leave to abridge the 10-day period of notice. In view of the fact that the power does not appear to be necessary we recommend that the section be repealed.

> "85. (1) A certified copy of an order or decision made by the Board . . . may be filed in the office of the Registrar of the Supreme Court, and thereupon becomes and is enforceable as a judgment or order of the Supreme

[68] *Ibid.*, s. 83.
[69] *Ibid.*, s. 84(1).
[70] *Ibid.*, s. 84(2).

Court to the same effect, but the order or decision may nevertheless be rescinded or varied by the Board.

(2) It is optional with the Board to adopt the method provided by this section for enforcing its orders or decisions or to enforce them by its own action."[71]

Legislation providing that orders of boards or tribunals should be filed with the Registrar of the Supreme Court and are enforceable as "orders of the Court" has been the subject of criticism before this Commission. There does not appear to be any good reason why orders of the Board should be filed with the Registrar of the Supreme Court. The provision in this Act is especially objectionable. Since the Board has power to alter its own orders it has power to alter the records of the Court. We raise the question—if an order of the Board is filed with the Registrar of the Court, what happens if the Lieutenant Governor in Council alters or rescinds it? (See section 94.) There does not appear to be any provision for filing orders of the Lieutenant Governor in Council with the Registrar of the Supreme Court.

The Board should have charge of its own processes and records of the orders it makes and those made on appeal to the Lieutenant Governor in Council should be kept by its own Registrar. Proper provision should be made for their enforcement. The processes for enforcement of Court orders are not appropriate for enforcement of all the Board's orders.

It might well be that the sheriff should be authorized to enforce the Board's orders and that some of the provisions relating to enforcement of Court orders should be adopted, but not all.

The individual who does not comply with an order of the Board should not be subject in all cases to committal for contempt of court.

The powers conferred under this section appear to cover some of the matters covered by section 37 which we referred to earlier.[72] It provides that "the Board . . . has all such powers . . . as are vested in the Supreme Court with respect to . . . enforcement of its orders . . .". Mr. Kennedy has informed us

[71]*Ibid.*, s. 85.
[72]p. 2027 *supra*.

that since he has been Chairman of the Board it has never been asked to take proceedings to enforce any of its orders. We recommend that section 85 be repealed and the words "enforcement of its orders" be struck out of section 37, and appropriate legislation conforming to our recommendations in Report Number 1[73] be drafted providing for the enforcement of the Board's orders.[74]

Rules of Procedure

The Board is empowered to make rules regulating its practice and procedure.[75] The Board has exercised this power in an admirable manner.[76] The more significant rules provide the following procedural requirements:

(a) applications to the Board are to be by notice in writing and filed with the Board and served upon the respondent;[77]

(b) where the respondent is required to make a reply, it is to be in writing and filed with the Board and served upon the applicant;[78]

(c) at least 10 days after service upon the respondent of the notice of application, either party may apply to the Board for an order fixing the time, place and manner of hearing the application;[79]

(d) the Board may permit the parties to file affidavits and other documentary evidence at the hearing;[80]

(e) the Board may make orders for the production of documents, for inspection, for examinations for discovery, for examination of witnesses who for cause cannot attend the hearing, and for the examination of witnesses residing outside of Ontario;[81]

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[73]p. 446 *supra*.

[74]See specific recommendations concerning section 14 of the Ontario Energy Board Act, Chapter 119, pp. 1922-23 *supra*. See recommendation concerning the Labour Relations Act, Chapter 124, p. 1994ff. *supra*.

[75]R.S.O. 1960, c. 274, s. 90.

[76]R.R.O. 1960, Reg. 466.

[77]*Ibid.*, Rules 4 and 7.

[78]*Ibid.*, Rules 8 and 9.

[79]*Ibid.*, Rule 10.

[80]*Ibid.*, Rule 11.

[81]*Ibid.*, Rule 14.

(f) at the hearing of an application, the party commencing the proceedings shall begin and, after evidence in defence is given, has the right to reply;[82]

(g) the Board may direct an amendment to any document filed with it where, in its opinion, such an amendment is necessary to determine the real question at issue between the parties;[83]

(h) where any matter is not expressly provided for by Regulation 466, the Rules of Practice under the Judicature Act are to be followed as far as they are applicable, as determined by the Board.[84]

There are 10 forms set out in the regulation. These forms are prescribed for use with such variations as the circumstances or the nature of the application require, and where no form is prescribed, the forms prescribed by the Rules of Practice may be adopted.[85]

The forms contained in the regulation include: Notice of Application, Reply, Order for Production, Affidavit as to Production of Documents, Order for Examination for Discovery, Notice to Produce, Notice to Admit, and Summons to Witness.

The Board has prepared and published certain suggested procedures with regard to the filing of applications for the approval of by-laws under the Planning Act and applications for the approval of capital expenditures under setion 64 of the Ontario Municipal Board Act.

> "(1) In determining any question of fact the Board is not concluded by the finding or judgment of any other court in any action, prosecution or proceeding involving the determination of such fact, but such finding or judgment is, in proceedings before the Board, *prima facie* evidence only.
>
> (2) Except as otherwise provided in this Act, the pendency of any action, prosecution or proceeding in any other court involving questions of fact does not deprive the Board of jurisdiction to hear and determine the same questions of fact.

[82] *Ibid.*, Rule 17.
[83] *Ibid.*, Rule 21.
[84] *Ibid.*, Rule 2.
[85] *Ibid.*, Rule 26.

(3) The finding or determination of the Board upon any question of fact within its jurisdiction is binding and conclusive."[86]

These provisions would appear to give the highest precedence to proceedings before the Board and to findings of fact made by the Board. In stating that the Board is not bound by a finding of fact or judgment of any other court previously concerned with the same matters as those before the Board, the Act is negating a long established common law principle with respect to the finality of judicial proceedings if the parties are the same.[87] The purpose of the common law principle is to prevent inconsistent findings of fact on identical issues involving the same parties by two or more different tribunals. In this case, a tribunal is given power to override decisions of superior courts on findings of fact.

In effect the courts would be bound by the decisions of the Board on questions of fact but the Board would not likewise be bound by decisions of the courts. We think the principle of *res judicata* should apply to all proceedings before the Board and that the Board should be bound by the determination of facts in the courts where the parties and issues are the same.

Mr. Kennedy was asked if there was any reason why rules governing the Board should be any different than the rules governing the courts and he said: "I am not sure that I know of a reason except that I have a general impression or understanding that facts proven before administrative boards are not subject to review with the same facility as facts established before the court. There is, I think, a general principle of that nature somewhere in the law and this may be an expression of it but I can tell you what we do in fact. In fact where any issue is pending before a court we consider that any hearing of that issue before our Board would be a public discussion of an issue pending before the court and we refrain from dealing with it at all until the court has disposed of it."

The Act should give the Board power to order a stay of its proceedings in such cases.

[86]R.S.O. 1960, c. 274, s. 92.
[87]*Halsbury's Laws of England*, 3rd ed., Vol. 15, 182-4, 187, 212-4.

Where, however, proceedings are pending in a court or other tribunal with respect to a matter also pending before the Board, any party to the proceedings should be permitted to apply to the court or other tribunal for a stay of proceedings until the Board has made its decision.

APPEALS

Appeal by Way of Stated Case

The Board may state a case in writing to the Court of Appeal for its opinion on any question that, in the opinion of the Board, is a question of law.[88] The case may be stated at the request of the Lieutenant Governor in Council, of its own motion, or upon the application of any party and upon posting such security for costs as the Board may direct. The Court of Appeal is required to hear and determine the case and to "remit it to the Board with the opinion of the Court thereon."[89] This right is in addition to the right of appeal to the Court of Appeal on a question of jurisdiction or law with the leave of that Court.[90]

The provision for a stated case is a good provision if properly interpreted. If a question of law arises during a hearing upon which the parties cannot agree and which is crucial to the proper determination of the issue, the hearing may be adjourned to permit the Board to state a case to the Court of Appeal. This gives the Board an opportunity to have questions of law settled before the termination of the proceedings so that it may proceed in accordance with the opinion of the Court of Appeal. The parties are enabled to resolve a contentious issue of law early in the proceedings and obviate the necessity of a subsequent application for leave to appeal to the Court of Appeal.

However, the Act is silent as to the stage at which a case may be stated, as to whether the Board is compelled to act in accordance with the opinion of the Court of Appeal as it must do following an appeal, and[91] as to whether the opinion of the Court of Appeal is final and conclusive.

[88]R.S.O. 1960, c. 274, s. 93(1).
[89]*Ibid.*, s. 93(2).
[90]*Ibid.*, s. 95.
[91]*Ibid.*, s. 95(3).

All these matters should be clarified by proper amendment to the statute.

There is another area of uncertainty. If the Court of Appeal refuses to grant leave to appeal,[92] may the Board state a case for the opinion of the Court of Appeal? Such would appear to be possible. This power should not be exerciseable after a party has invoked either successfully or unsuccessfully the leave to appeal provisions.

The Board should not have the exclusive power to determine, as a condition precedent to stating a case, whether the issue involved is "a question of law." If the Board refuses to state a case any party to the proceedings should have a right to apply to the Court of Appeal for an order that the Board state a case as in the Public Inquiries Act.[93] In Report Number 1 we discussed the provisions of the Public Inquiries Act with reference to procedure by way of stated case and made recommendations for its amendment.[94] What we said there has application to the procedure we have been discussing.

The provision giving the Lieutenant Governor in Council power to request the Board to state a case to the Court of Appeal is too broad.[95] On the face of it, this power would appear to be exerciseable by the Lieutenant Governor in Council, even though no appeal is pending before the Council for hearing. This may not be the intended purpose of the provision but the power would appear to be there. The exercise of such a power would be to use the Court of Appeal to get an opinion, a purpose for which the Court ought not to be used except in constitutional matters.

The power should be restricted to those cases where an appeal has been taken from a decision of the Board to the Lieutenant Governor in Council.[96]

Appeal to the Court of Appeal

Subject to the provisions of Part IV of the Act, an appeal lies from the Board to the Court of Appeal, with the leave of

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[92]*Ibid.*, s. 95(1).
[93]R.S.O. 1960, c. 323, s. 5(2).
[94]p. 453, ff. *supra*.
[95]R.S.O. 1960, c. 274, s. 93(1).
[96]See *ibid.*, s. 94 as re-enacted by Ont. 1961-62, c. 96, s. 3(1) and amended by Ont. 1965, c. 89, s. 2.

that Court, upon a question of jurisdiction or upon any question of law.[97] The Court of Appeal is empowered to draw all such inferences as are not inconsistent with the facts expressly found by the Board and are necessary for determining the question of jurisdiction or law and the Court is required to certify its opinion to the Board, which must then make an order in accordance with such opinion.[98] The Board is entitled to be heard, by counsel or otherwise, upon the argument of the appeal before the Court.[99] The Supreme Court has the power to fix the costs and fees to be taxed, allowed and paid on appeals,[100] but neither the Board nor any of its members is liable for any costs by reason or in respect of any appeal or application under this section.[101]

What the words "subject to the provisions of Part IV" mean is obscure. The section concerns appeals but Part IV of the Act which is concerned with "General Municipal Jurisdiction" contains no provisions respecting appeals. The Chairman of the Board stated that he did not know the meaning of the restrictive words, but he suggested that they may mean that no appeal lies from any decision of the Board made under Part IV. If that is what the words mean the intention should be made clear by a simple statement that a right of appeal to the Court of Appeal does not lie from decisions of the Board made under Part IV of the Act.

Mr. Kennedy advised the Commission that in cases where a right of appeal exists under a statute the Board usually provides a reporter to transcribe the evidence. However, in those cases where there is no absolute right of appeal, but only an appeal with leave, no stenographic record is kept. This may present great hardship to the parties in exercising their right to appeal to the Court of Appeal. Provision should be made for a transcript of the evidence given at hearings before the Board where required by the parties.

Where the Court of Appeal grants leave to appeal "the Registrar shall set the appeal down for hearing at the next sittings, and the party appealing shall, within ten days, give

[97] *Ibid.*, s. 95(1).
[98] *Ibid.*, s. 95(3).
[99] *Ibid.*, s. 95(4).
[100] *Ibid.*, s. 95(5).
[101] *Ibid.*, s. 95(6).

to the parties affected by the appeal . . . and to the secretary, notice in writing that the appeal has been set down . . ."[102] This is a mandatory provision and if the applicant fails to take a step within the required time the Court cannot hear the appeal.[103] The Court should be given a discretion to relieve against hardship that may be created by this procedural rule.

The section just quoted is difficult, if not impossible, to apply in practice and is at variance with the Rules of Practice and Procedure of the Supreme Court. It obliges the Registrar to "set the appeal down for hearing at the next sittings." The Rules of Practice, relating to appeals to the Court of Appeal, require that an "appeal shall be set down for hearing by filing the notice of motion [by way of appeal] and proof of service within five days after service" (Rule 498(a)). Therefore an appeal cannot be set down until the notice of appeal has been served and filed with the Registrar. In view of this, one asks how can the Registrar set down an appeal for hearing at the next sittings if the notice of appeal has not been served and filed? Rule 500 provides that "unless otherwise provided, in an appeal under a statute where leave to appeal is necessary . . . if leave is given, notice of appeal shall be served and the appeal shall be set down for hearing within seven days after the granting of leave." Here again the statute and the Rules of Practice are at variance.

We recommend that section 95(2) of the Ontario Municipal Board Act be amended to conform to the Rules of Practice with respect to appeals.

The statute does not make it clear that the remedies by way of a rehearing and rights of appeal by way of stated case, appeal to the Court of Appeal and petition to the Lieutenant Governor in Council, may not be exercised by different parties to the same proceedings at the same time. A similar confusion was considered in *Re Martin and Brant*[104] and resolved by judicial decision which may have application to the provisions we have been discussing.

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[102] *Ibid.*, s. 95(2).
[103] *Re Langs and Town of Preston*, [1968] 1 O.R. 102.
[104] [1970] 1 O.R. 1.

Statutory rights of appeal should be made clear and precise so that persons affected may act with a reasonable degree of certainty, knowing in advance what their rights and remedies are.

Under the Assessment Act an appeal lies from the county judge to the Board[105] and from the Board to the Court of Appeal from a decision of the Board "upon all questions of law or the construction of a statute, a municipal by-law, any agreement in writing to which the municipality concerned is a party, or any order of the Board."[106] This is a right of appeal without leave and is in conflict with section 95 of the Ontario Municipal Board Act. There is like conflict with other statutes. For example, in the Highway Improvement Act[107] there is a provision that there shall be no right of appeal from a decision of the Board under the relevant section. On the other hand, under the Municipality of Metropolitan Toronto Act[108] a right of appeal is given upon leave of the Court of Appeal from an order of the Municipal Board concerning the closing of a road[109] and it is provided that section 95 of the Ontario Municipal Board Act shall not apply to such appeal.[110] The result is that from some decisions of the Board an appeal lies as of right and from some with leave of the Court of Appeal and from some there is no right of appeal. This creates confusion and unnecessary litigation.[111] Unless clear reason can be demonstrated to the contrary, the rights of appeal from decisions of the Board should be uniform irrespective of the statute under which powers of decision are conferred on it.

Appeal to the Lieutenant Governor in Council

Any party or person interested may within 28 days after any order or decision of the Board petition the Lieutenant Governor in Council with respect thereto. The Lieutenant Governor in Council may then either confirm, vary or rescind

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[105]Ont. 1968-69, c. 6, s. 63(2).
[106]*Ibid.*, s. 63(6).
[107]R.S.O. 1960, c. 171, s. 103(2).
[108]R.S.O. 1960, c. 260.
[109]*Ibid.*, s. 98(8).
[110]*Ibid.*, s. 98(11).
[111]See *Windsor v. Hiram Walker, Gooderham and Worts Ltd. et al*, [1944] O.W.N. 691.

the whole or any part of the order or decision, or require the Board to hold a fresh public hearing of the whole or any part of the application upon which the order or decision of the Board was made.[112]

A similar provision is found in section 14 of the Municipal Act,[113] which requires Municipal Board approval of amalgamations and annexations. Section 14(15)[114] provides that section 94 of the Ontario Municipal Board Act does not apply to a decision of the Board granting or refusing an application for amalgamation or annexation, but subsections (16) and (17) of section 14 enable a notice of objection to the decision of the Board to be filed with the Clerk of the Executive Council by 10% of the persons qualified to vote on money by-laws and resident in any of the municipalities affected by the order of the Board. Where such objection is filed, "the Lieutenant Governor in Council may by order,

(a) confirm the decision of the Municipal Board; or

(b) require the Municipal Board to hold a new public hearing of the annexation or amalgamation application before such members of the Board as the Lieutenant Governor in Council may designate."[115]

There are powers of the Board that should come under the appellate supervision of the Lieutenant Governor in Council but where the powers exercised by the Board are judicial or interlocutory there should be no right of appeal to the Lieutenant Governor in Council. In such cases a party to a proceeding before the Board should not be in jeopardy of having a favourable decision, which may have been confirmed by the Court of Appeal, set aside by the Lieutenant Governor in Council, and the decision of the executive substituted or a new hearing ordered.

The power vested in the Lieutenant Governor in Council to entertain appeals from decisions of the Board should not extend to judicial decisions.

[112]R.S.O. 1960, c. 274, s. 94 as re-enacted by Ont. 1961-62, c. 96, s. 3(1) and amended by Ont. 1965, c. 89, s. 2.

[113]R.S.O. 1960, c. 249.

[114]*Ibid.*, s. 14(15), as amended by Ont. 1968, c. 76, s. 1.

[115]*Ibid.*, s. 14(19).

JUDICIAL REVIEW

Every decision of the Board is final and no order, decision or proceeding of the Board shall be questioned or reviewed, restrained or removed by prohibition, injunction, *certiorari* or any other process or proceeding in any court, save as provided in section 95 and sections 42 and 94.[116]

We recommended in Report Number 1 that privative clauses in all statutes should be repealed.[117]

Section 95(7) should be repealed.

RECOMMENDATIONS

1. A complete catalogue of the powers conferred on the Board should be made available to the public.
2. A study should be made of ways and means to make more effective use of the personnel of the Board by giving power to one member of the Board to conduct less important or more routine hearings so as to make it possible to assign three members of the Board to more difficult hearings and to hearings for the review of previous decisions under section 42 of the Act.
3. The provisions of section 38 concerning references to the Board under letters patent issued under the Corporations Act or any general or special Act and power to conduct hearings should be repealed.
4. The Board should not have power on its own motion to enter upon the determination of any matter in which it exercises a judicial function.
5. The Lieutenant Governor in Council should not have power to require the Board to exercise its judicial functions unless the Government has an interest in the matter to be determined.
6. The statute should define the administrative powers that the Board should have to exercise on its own motion and those administrative matters that the Lieutenant Governor in Council should have the power to ask the Board to determine.

[116]R.S.O. 1960, c. 274, s. 95(7).

[117]pp. 277-79 and recommendation 74 at p. 1267 *supra*.

7. The Lieutenant Governor in Council should not have power to appoint counsel to appear before the Board on any matter in which the Government has no interest. Nor should the Board have power to award the costs of counsel appearing on behalf of the Government against other parties to a dispute before the Board. Section 41 should be repealed.

8. Where the Board exercises judicial functions there should be no right to a rehearing before the Board but wide rights of appeal should be provided.

9. There should be no power to grant a rehearing of a rehearing except in defined exceptional circumstances.

10. Sections 36(1)(c) and 47 should be redrafted so as to confine the compulsive powers of the Board to matters over which it has jurisdiction to exercise a power of decision.

11. Section 48 conferring on the Board wide powers to require any person, company, corporation or municipality subject to its jurisdiction to adopt such precautions as the Board may deem expedient for the safety of life or property should be repealed.

12. Section 49 should be repealed.

13. Section 50 should be repealed. If there is default with respect to orders coming within the section they should be enforced through the courts with proper provisions for a hearing.

14. Section 51 providing that the Board has power to enforce its orders and directions respecting any public utility in the manner and by the means provided in section 261 of the Railways Act should be repealed.

    An appropriate section should be enacted as part of the Ontario Municipal Board Act conferring on the Board only such powers as may be necessary for the enforcement of its orders and complying with our recommendations in Report Number 1 (p. 441ff.).

15. The Board should not have power to make orders for the seizure of public utilities.

16. Section 37 conferring on the Board such powers for the enforcement of its orders as are vested in the Supreme Court should be amended so as to conform to our recommendation in Report Number 1 (p. 446).
17. Section 52 conferring the powers vested in any court of civil jurisdiction on inspecting engineers or persons appointed under the Act to make an inquiry should be repealed.
18. Section 82 should be amended so that orders or decisions of the Board will not have "the like effect as if enacted in" the Act.
19. Section 84(2) conferring powers on the Board to make orders *ex parte* should be repealed.
20. Section 85 providing for filing orders of the Board in the Office of the Registrar of the Supreme Court and the enforcement of its orders as judgments of the Supreme Court should be repealed and provision made for filing all orders of the Board or those of the Lieutenant Governor in Council made on appeal from an order of the Board with the Registrar of the Board and for their enforcement.
21. The processes of the enforcement of orders of the Supreme Court are not generally appropriate for the enforcement of the Board's orders. Provision should be made for the enforcement of the Board's orders conforming to our recommendations in Report Number 1 (p. 446).
22. The principle of *res judicata* should apply to decisions of the Board. The Board should be bound by the determination of facts by the courts where the parties are the same.
23. The Board should have clear statutory power to order a stay of its proceedings where the issue before it is involved in a matter pending before the courts.
24. Where proceedings are pending in a court or other tribunal with respect to a matter pending before the Board any party to the proceedings should be permitted

to apply to the court or other tribunal for a stay of the proceedings until the Board has made its decision.

25. It should be made clear that an application for a stated case may be made at any stage of the proceedings before the Board.
26. Where judgment is given on a stated case the Board should be required to act in accordance with the judgment of the Court of Appeal.
27. When a case has been stated, the opinion of the Court of Appeal should be final and conclusive.
28. If the Board refuses to state a case any party to the proceedings should have a right to apply to the Court of Appeal for an order that the Board state a case.
29. The power vested in the Lieutenant Governor in Council to require the Board to state a case for the Court of Appeal should be restricted to those cases where an appeal has been taken to the Lieutenant Governor in Council from a decision of the Board.
30. It should be made clear that a right of appeal to the Court of Appeal does not lie from decisions made under Part IV of the Act if that is the legislative intention.
31. Provision should be made to provide a transcript of proceedings before the Board where required by the parties.
32. Section 95(2) making provision for a mandatory procedure concerning the setting down of appeals should be amended to make the procedure conform with that set down in the Rules of Practice and Procedure of the Supreme Court. The Court should have power to relieve against hardship in the enforcement of the rules.
33. The rights of appeal from decisions of the Board should be uniform irrespective of the statute under which the powers of decision are conferred.
34. There should be no right of appeal to the Lieutenant Governor in Council from a decision of the Board where the power of decision exercised is a judicial or interlocutory decision.
35. The privative clause of the statute, section 95(7), should be repealed.

APPENDIX TO CHAPTER 125

Statute Granting Power	Nature of Power
The Assessment Act, Ont. 1968-69, c. 6	
s. 29(3)	To hear and determine complaints against municipal by-laws exempting certain farm lands from taxation for certain expenditures.
s. 31(8)	To settle disputes between a municipality and the owner of a golf course over an agreement for a fixed assessment of land.
s. 63(1)(2)	To hear appeals from a decision of a county judge concerning complaints with relation to additions or omissions from the assessment roll, the amount of an assessment, or from the Department with respect to an equalization factor.
s. 63(3)	To hear appeals from the Assessment Review Court in assessments over $50,000.
The Cemeteries Act, R.S.O. 1960, c. 47	
s. 71	To make an order vesting land used for cemetery purposes in trustees.
s. 72	To make an order closing a road allowance and vesting the land in cemetery trustees.
The Conservation Authorities Act, Ont. 1968, c. 15	
s. 22(1)	To make an order approving a project of a conservation authority where the full cost is not to be recovered until subsequent years.
s. 23(2)	To vary or confirm the apportionment of benefit of a project to participating municipalities as determined by a conservation authority.

The Conservation Authorities Act, Ont. 1968, c. 15—*Cont.*

s. 31	To determine on appeal the value of land of a conservation authority for assessment purposes.
s. 36	To approve all salaries, expenses and allowances paid to members of conservation authorities.

The Damage by Fumes Arbitration Act, R.S.O. 1960, c. 86

s. 5	To hear and determine an appeal from the award of an arbitrator appointed under the Act.

The Department of Municipal Affairs Act, R.S.O. 1960, c. 98, Part III

s. 29	To conduct an inquiry into the affairs of any municipality and to make an order vesting in the Department of Municipal Affairs control and charge over the administration of the affairs of the municipality.
s. 31	To hear an appeal, on the direction of the Minister, from an order of the Department.
s. 33	To grant leave to commence or continue an action against a municipality under Part III.
s. 36	To give authorizations and directions with respect to the indebtedness of a municipality coming within Part III.

The Highway Improvement Act, R.S.O. 1960, c. 171

s. 37(2)	To approve the closing of any road as ordered by the Minister of Highways that intersects or runs into a controlled-access highway.
s. 62(2)	To determine any differences between adjoining municipalities with regard to the construction, repair and maintenance of bridges and roads which form boundary lines between the municipalities.

The Highway Improvement Act, R.S.O. 1960, c. 171—*Cont.*

s. 92 as re-enacted by Ont. 1967, c. 34, s. 7	To approve any municipal by-law designating any road as a controlled-access road.
s. 93	To approve any municipal by-law closing a municipal road that intersects or runs into a controlled-access road.
s. 103(2)	To determine the proportionate share of the costs of widening a highway or a road where the parties concerned are unable to so agree.

The Homes for the Aged and Rest Homes Act, R.S.O. 1960, c. 174

ss. 11, 21	To approve the issue of debentures to finance the purchase and construction of a home for the aged.
s. 22	To make orders concerning the financial affairs of any homes for the aged established in a territorial district before April 1, 1954.

The Local Improvement Act, R.S.O. 1960, c. 223

s. 6	To approve the opening, widening or extension of a street or the construction of a bridge the cost of which is to exceed $50,000.
s. 8	To approve by-laws for the construction of curbs, sidewalks, sewers, watermains, road surfaces, etc., as local improvements.
ss. 18, 19, 68	To approve the amendment or variation of certain local improvement by-laws.
s. 27	To approve by-laws for the assumption by a municipality of a larger share of the costs of certain specified works.
s. 30	To approve by-laws for the opening, widening, extension, grading or paving of a lane, or the construction of a sewer or drain in a lane.

The Local Improvement Act, R.S.O. 1960, c. 223—*Cont.*

s. 51(4)	To hear appeals from the decision of a county or district court judge affirming or varying a special assessment of lands benefitting from local improvements.
s. 72	To approve the form of by-laws, notices and other proceedings authorized by the Act.

The Mining Tax Act, R.S.O. 1960, c. 242

s. 10(3) as amended by Ont. 1968-69, c. 69, s. 3(2)	To hear appeals on reference from the Minister from assessments for provincial tax.

The Municipal Act, R.S.O. 1960, c. 249

s. 10 as amended by Ont. 1960-61, c. 59, s. 1	To incorporate the inhabitants of a locality as an improvement district, a township, a village or a town.
s. 11 as amended by Ont. 1966, c. 93, s. 1	To erect an improvement district to a village township or town, a village or township to a town, and a village, town or township to a city.
s. 13(2)(3), as re-enacted by Ont. 1962-63, c. 87, s. 1	To divide a municipality into wards.
s. 14(2)	To alter municipal boundaries by amalgamation and annexation.
s. 16(3)	To separate a township from a union of townships, or to establish a union of townships.
s. 24	To create inter-urban areas for the joint administration by two or more municipalities of such matters as education, fire and police protection, highways, sewers, public health, welfare and public utilities.
s. 25(2)	To dissolve municipalities and local boards and to detach from a municipality a part or parts thereof.
s. 252(1)	To authorize one municipality to raise the whole amount required for a joint undertaking by the issue of its debentures.

The Municipal Act,
R.S.O. 1960, c. 249—*Cont.*

s. 274(5)	To extend the time within which a local municipality must pass a by-law, after the proposed by-law has received the approval of the electors.
s. 282(8)	To extend the time within which a municipality is required to issue a debenture.
s. 284(1)	To approve the mode of the payment of the principal and interest of a debenture.
s. 285(3)	To approve any by-law for the issuance of debentures in sterling or in U.S. dollars.
s. 289(1)	To authorize the variance of interest rates on municipal debentures.
s. 290	To approve the repeal of any by-law providing for the raising of money where only part of the money has been raised.
s. 287(1)	To approve the duration of any contract by a municipal corporation for the supply of any services of a public utility to the inhabitants of the municipality.
s. 303(3)	To approve the application of funds raised from the sale of debentures for purposes other than those for which they were issued.
s. 306	To approve the application of any excess income derived from the investment of sinking funds where such income exceeds the requirements of the funds.
s. 307	To approve the exemption of a municipality from the requirement of raising any further sums with respect to a debt where there is a sufficient amount in a sinking fund.
s. 313	To approve certain investments of a municipal sinking fund.
s. 314	To direct the use of a sinking fund for the redemption of debentures.
s. 327(3)(b)	To approve the method of raising the amount required to pay a deficit incurred in the sale of debentures.
s. 329(3)	To approve a municipality's borrowing more than 70% of the uncollected balance of its estimated revenues.

The Municipal Act, R.S.O. 1960, c. 249—*Cont.*

s. 338(8)	To defer entry onto lands required for highway purposes.
s. 338(4)	To grant leave to repeal or amend municipal by-laws deferring entry onto lands for highway purposes.
s. 338(3)	To grant an order approving entry onto land for highway purposes prior to the date for entry set out in the by-law.
s. 339(2)	To approve, municipal by-laws, their amendment or repeal, fixing as a building line the minimum distance from the limit of a highway at which buildings may be erected or placed.
s. 377, para. 69(b)	To approve municipal by-laws concerning the location of commemorative monuments.
s. 379(1), para. 47	To approve municipal by-laws empowering a municipality to buy, store and sell fuel and food.
s. 379(1), para. 52(c)	To approve municipal by-laws authorizing the completion, improvement, alteration, enlargement or extension of any public utility undertaking owned by the corporation and for issuing debentures therefor.
s. 379(1), para. 76 as re-enacted by Ont. 1968, c. 76, s. 21(5)	To approve acquisition of land for purposes of establishing a system for collection, removal and disposal of garbage.
s. 379(1), para. 88	To increase or decrease fares on buses operated in a municipality by any company having the exclusive right to operate the buses.
s. 379(1), para. 118	To approve municipal by-laws prohibiting the carrying on or operation of a pit or quarry.
s. 379e, as enacted by Ont. 1965, c. 77, s. 29 and amended by Ont. 1966, c. 93, s. 25 and further amended by Ont. 1968-69, c. 74, s. 20	To approve municipal by-laws imposing special rates or charges on owners of buildings that may impose a heavy load on the sewer system or water system.

The Municipal Act, R.S.O. 1960, c. 249—*Cont.*

s. 380(2), as re-enacted by Ont. 1962-63, c. 87, s. 17	To approve the passing or repeal of municipal by-laws authorizing the construction of sewage works or water works and imposing a sewer rate or water rate to finance it.
s. 382, para. 11	To approve certain municipal by-laws requiring persons selling and delivering coal and coke within a municipality to have the load weighed before delivery.
s. 394, para. 3	To determine the terms pursuant to which one municipality can use the fire-fighting equipment of another municipality.
s. 430(3)	To approve the by-law of a county council abandoning the whole or any part of a toll road or any other road.
s. 443(10)	To relieve a municipality from the obligation of rebuilding a bridge that is destroyed or damaged.
s. 447	To approve municipal by-laws authorizing the issuance of debentures to finance the reflooring of certain bridges.
s. 456	To determine disputes concerning the deviation of county boundary lines.
s. 446(2)	To approve the laying out of certain highways.

The Municipal Corporations Quieting Orders Act, R.S.O. 1960, c. 251

s. 2	To make a quieting order respecting the legal existence or status of a municipality or respecting its boundaries.

The Municipal Franchises Act, R.S.O. 1960, c. 255

s. 4	To approve the granting of a franchise by a local municipality for a public utility upon any highway within a 5 mile radius of the boundary of any city where the city council objects.

The Municipal Tax Assistance Act, R.S.O. 1960, c. 258

s. 4(2)	To hear appeals by a municipality or the Department of Municipal Affairs, or a Crown agent, from a valuation of properties owned by the Province.

The Municipality of Metropolitan Toronto Act, R.S.O. 1960, c. 260

s. 39(4)	To approve by-laws assuming "any specific work or trunk distribution main".
s. 39(7)	To resolve any doubts as to the financial obligation of the Metropolitan Corporation to any municipality for works assumed by the Metropolitan Corporation.
s. 40(2)	To confirm, vary or fix the rates charged for the supply of water, where the Metropolitan Corporation assumes the liability of one municipality to supply water to another municipality.
ss. 52, 69	To make such orders as it deems advisable where the Metropolitan Corporation refuses to assume a local work, to maintain or increase the supply of water to the area municipality, etc.
s. 62(4)	To approve by-laws assuming specific treatment works.
s. 62(7)	To resolve any doubts as to the financial obligations of the Metropolitan Corporation to any municipality for any treatment works assumed by the Metropolitan Corporation.
s. 63(3)	To terminate and adjust rights and liabilities flowing from an agreement between two municipalities for sewage or land drainage where the Metropolitan council assumes the works for carrying it out.
s. 66(1)	To approve by-laws charging an area municipality with part of the capital costs of a sewer system provided by the Metropolitan Corporation.
ss. 66(3) and 70 (1)(3)	To approve by-laws of any area municipality or the Metropolitan Corporation imposing special sewage service rates.

The Municipality of Metropolitan Toronto Act, R.S.O. 1960, c. 260—*Cont.*

s. 73a(3)(b), as enacted by Ont. 1966, c. 96, s. 10	To approve the acquisition of land for the purposes of waste disposal.
s. 73a(8), as enacted by Ont. 1966, c. 96, s. 10	To approve by-laws assuming land, buildings equipment, etc. for waste disposal purposes.
s. 73a(11) as enacted by Ont. 1966, c. 96, s. 10	To resolve any doubts as to the financial obligation of the Metropolitan Corporation to a municipality for any property assumed for waste disposal.
s. 94(2)(3)	To settle any disputes between the Metropolitan Corporation and an adjoining county as to the maintenance and repair of bridges and highways crossing or forming boundary lines.
s. 98(2)	To approve the closing of a municipal road that intersects or runs into a metropolitan controlled-access road.
s. 92(1)	To approve the designation of a metropolitan road as a controlled-access road.
ss. 111, 113	To determine all issues arising out of the Toronto Transit Commission becoming the successor of the Toronto Transportation Commission and assuming its assets and liabilities.
s. 116a(1), as enacted by Ont. 1961-62, c. 88, s. 10	To approve contributions by the Metropolitan Corporation to the capital costs of the Toronto Transit Commission.
s. 117(2)	To approve by-laws of any municipality assessing deficits against ratable property, which deficits were incurred as a result of transportation services provided by the Toronto Transit Commission.
s. 121(4)	To resolve any doubts concerning the financial obligations of the Toronto Transit Commission to the Toronto Transportation Commission or to any municipality resulting from property acquired from them.
s. 139(7), as re-enacted by Ont. 1966, c. 96, s. 12	To hear appeals by an area board of education from the refusal of The Metropolitan Toronto School Board to approve its annual budget.

The Municipality of Metropolitan Toronto Act, R.S.O. 1960, c. 260—*Cont.*

Section	Power
ss. 145(2)(3), 145a(1), as re-enacted by Ont. 1966, c. 96, s. 12	To approve or require the issuance and sale of debentures to raise money for permanent improvements to school property.
s. 149d (8), as enacted by Ont. 1966, c. 96, s. 13	To resolve any doubts as to the obligations incurred by the Metropolitan Corporation in the assumption of the assets and liabilities of the libraries owned by the area municipalities.
s. 151(4), as re-enacted by Ont. 1966, c. 96, s. 14	To approve the composition of the councils of the area municipalities.
s. 152(10), as re-enacted by Ont. 1966, c. 96, s. 15	To resolve any doubts as to the obligations incurred by the Metropolitan Corporation in the assumption of the assets and liabilities of the public welfare services owned by the area municipalities.
s. 225(1)	To approve the assumption by the Metropolitan Corporation of any existing public park, zoological garden, recreation area, etc.
ss. 225(4), 226(6)	To resolve any doubts as to the obligations incurred by the Metropolitan Corporation in the assumption of the assets and liabilities of any park and recreation properties (including the Toronto Islands).
s. 233(2)	To approve the temporary borrowing of more than 70% of the total estimated annual revenue of the Metropolitan Corporation.
s. 239(1)	To authorize the varying of the rate of interest payable on debentures, etc.
s. 240	To approve the repeal of a by-law when part only of the sum of money provided for by the by-law has been raised.
s. 267(1)	To inquire into and adjust assets and liabilities between municipalities.
s. 267(2)	To direct the Metropolitan Corporation to pay to the County of York such amount as it deems just and equitable to relieve the County from the burden caused by the separation from the County of the municipalities set out in s. 149.

The Municipality of Metropolitan Toronto Act, R.S.O. 1960, c. 260—*Cont.*

s. 268	To recommend to the Lieutenant Governor in Council that he authorize the Metropolitan Corporation to do all such acts or things not specifically provided for in the Act deemed necessary or advisable to carry it out.
The Niagara Development Act, 1951 Ont. 1951, c. 55 s. 5	To fix compensation for property other than land taken under the Act.

The Ontario Municipal Board Act, R.S.O. 1960, c. 274

s. 38	To inquire into, hear and determine such matters as are reserved to it by the letters patent of any corporation.
s. 40(1)	To inquire into, hear and determine any matter or thing that it may inquire into, hear and determine upon application either upon its own initiative or at the request of the Lieutenant Governor in Council.
s. 43	To inquire into and report on any matters incident to any proposed change in the general law, or to any proposed Bill relating to a municipality, a railway or any corporation or person operating or proposing to operate a public utility.
s. 44	To report or act upon any question, matter or thing relating to a municipality, railway or public utility subject to its jurisdiction.
s. 45	To inquire into and report on the establishment, organization, re-organization and methods of operation of any two or more municipalities.
s. 46(1)	To appoint any person to make an inquiry and report upon any application, complaint or dispute before it, or upon any matter or thing over which it has jurisdiction.

The Ontario Municipal Board Act, R.S.O. 1960, c. 274—*Cont.*

s. 63(1)	To order the dispensing with the assent of the electors to the exercise by a municipality of any of its powers.
s. 64(1)	To approve the proceeding by a municipality with any undertaking the cost of which is to be raised in a subsequent year or provided by the issue of debentures.
s. 70	To inquire into, hear and determine applications made, proceedings instituted and matters brought before it relating to railways or public utilities.
s. 72(1)	To exercise certain powers, authority or duties and give approvals concerning railways conferred upon the Railway Committee of the Executive Council of Ontario and the Lieutenant Governor in Council or any of his Ministers.
s. 74	To superintend the system of bookkeeping and keeping accounts of all railways and public utilities operated by or under the control of a municipality or local board and, if necessary, to inquire and report as to whether they are being operated economically or whether they are charging excessive rates.

The Ontario Water Resources Commission Act, R.S.O. 1960, c. 281

s. 32(5) as re-enacted by Ont. 1966, c. 108, s. 5	To make an order stopping up and closing any highway and removing building restrictions where the Commission has authorized a municipality to extend an existing sewage works.
s. 32(8), as re-enacted by Ont. 1966, c. 108, s. 5	To settle differences between the parties where a sewage work is extended from one municipality into another.
s. 33	To inquire into, hear and determine complaints respecting the constructing, maintaining or operating of sewage works by a municipality.
s. 41(1)	To approve by-laws imposing sewer and water works rates on owners of land benefitting from an agreement with the Commission.

The Ontario Water Resources Commission Act, R.S.O. 1960, c. 281—*Cont*.	
s. 46a(10), as enacted by Ont. 1966, c. 108, s. 10	To determine compensation where in the implementation of an order making certain areas areas of public water or public sewage service the Commission orders that an existing contract with respect to water or sewage service be amended or terminated.
s. 46a(12), as enacted by Ont. 1966, c. 108, s. 10	To approve by-laws defining areas benefitted by an order of the Commission and imposing water or sewage rates in the area.
s. 46a(14), as enacted by Ont. 1966, c. 108, s. 10	To hear petitions referred by the Lieutenant Governor in Council seeking to vary a water or sewage rate or charge.
The Ottawa River Water Powers Act, Ont. 1943, c. 21	
s. 13	To determine the loss of revenue by any municipality from taxation upon lands acquired by the Province for the development of water power at certain cities named in the Act.
The Planning Act, R.S.O. 1960, c. 296	
s. 7(5)	To apportion the annual estimates of a planning board chargeable to each municipality in the case of a joint planning area.
s. 12a, as enacted by Ont. 1965, c. 98, s. 1	To approve the official plan of a planning area.
s. 14(3)(4)(5)	To reject a proposed amendment or direct that it be made to an official plan.
s. 15(3)	To declare that a by-law of a municipality shall be deemed to conform with the official plan.
s. 20(5)(7)(10)	To approve any redevelopment plan of a municipality, any amendments thereto, and any debentures issued to implement the plan.
s. 30(9)(10) and (23) as enacted by Ont. 1967, c. 75, s. 4(3)	To approve land use control by-laws and amendments thereto passed by a municipality.

The Planning Act,
R.S.O. 1960, c. 296—*Cont.*

s. 30(18)	To approve the amendment of by-laws extending non-conforming uses.
s. 30(19)	To hear an appeal from the refusal or failure of a municipal council to amend a land use control by-law.
s. 30a(4)(5), as enacted by Ont. 1964, c. 90, s. 4	To approve a by-law or the amendment or repeal thereof relating to housing conditions.
s. 30a(6), as enacted by Ont. 1964, c. 90, s. 4	To hear an appeal from the refusal or failure of a municipal council to amend a housing standards by-law.
s. 32b(12), as enacted by Ont. 1961-62, c. 104, s. 8	To hear an appeal from the decision of a committee of adjustment.
s. 34(1), as re-enacted by Ont. 1967, c. 75, s. 9(1)	To give approvals or consents which have been applied for from the Minister and referred by him to the Board.

The Power Commission Act,
R.S.O. 1960, c. 300

s. 48(11)	To hear an appeal by a municipality or the Hydro-Electric Power Commission from a valuation of properties owned by the Commission.

The Public Libraries Act,
Ont. 1966, c. 128

ss. 24(1), 43(1), 52(2)	To approve the raising of money by municipal debentures for the purposes of acquiring library sites, buildings, books and equipment.

The Public Schools Act,
R.S.O. 1960, c. 330

s. 58(13)	To hear an appeal from the decision of a district court judge affirming or varying the assessment of lands in a school section in territory without municipal organization.
s. 63(1), as amended by Ont. 1966, c. 129, s. 39(1)	To approve the issue of debentures by an urban, county, district or township school area board.

The Public Service Works on Highways Act, R.S.O. 1960, c. 333

s. 2(5), as enacted by Ont. 1965, c. 112, s. 2	To determine the amount of loss or expense incurred by a road authority in constructing, etc. a highway by reason of the failure of an owner of a utility to relocate its equipment.
s. 3	To apportion between a road authority and the owner of a utility the cost of relocating equipment.

The Public Utilities Act, R.S.O. 1960, c. 335

s. 37(3)	To approve the application of moneys for purposes of a capital nature, where a public utility sells, leases or otherwise disposes of a public utility undertaking.
s. 37(5)	To approve the sale, lease or other disposition of a portion only of the property of a public utility undertaking.
s. 56(1)	To authorize the laying of main pipes or conduits for carrying or conveying any public utility within six feet of existing ones.

The Public Works Act, R.S.O. 1960, c. 338

s. 39(2)	To determine any claim referred to it by the Minister arising out of a contract with the Government for the execution of a public work.

The Railways Act, R.S.O. 1950, c. 331

(This Act is unrepealed and unconsolidated. It applies to all railways "other than Government railways", and in certain respects to street railways and incline railways. (ss. 2, 6.) .)

To approve the following matters:

s. 10(1)	(1) An increase in the capital stock of a railway company.

The Railways Act,
R.S.O. 1950, c. 331—*Cont.*

s. 40(4)	(2) The issuance of preference shares of a railway company.
s. 46(1)	(3) The fixing of the rate of interest payable on bonds, debentures and other securities issued by a railway company.
s. 53(n)	(4) The diversion or alteration of a railway company of water or gas pipes, sewers, drains, or utility lines.
s. 53(o)	(5) The alteration, repair or discontinuance by a railway company of any of the works it is permitted to undertake pursuant to s. 53(a)-(N).
s. 55	(6) The sufficiency of the railway track and flooring on bridges passing over navigable waters.
s. 59(1)	(7) A railway company taking possession of, using or occupying any land, right of way, tracks, terminals or stations of another railway company.
s. 61(1)	(8) The construction by a railway company of telegraph and/or telephone lines through a city, town or village.
s. 61(3)	(9) The connection of a telegraph or telephone line owned by a third party with a telegraph or telephone line owned by a railway company.
ss. 62(1), 63	(10) The erection and placing of utility wires across a railway.
s. 64(2)	(11) The use by the trains of one company of the tracks of another company and several matters incidental thereto.
s. 65(2)	(12) Any agreement for the sale, leasing or amalgamation of a railway company.
ss. 68, 69, 70	(13) The location, route and specifications of a proposed main rail line and of any branch lines over 6 miles in length.
s. 73(1)	(14) The correction of any errors, mis-statements or omissions in the plans and specifications of a rail line.
s. 78(1)	(15) The deviation or alteration of the route of any railway, or any portion thereof.

The Railways Act,
R.S.O. 1950, c. 331—*Cont.*

s. 86(1)	(16) The expropriation by a railway company of more land than it is authorized to expropriate by s. 80.
s. 92(3)	(17) The construction of branch lines, switches and sidings to industries.
s. 97	(18) The use by a railway company of tracks smaller or greater than standard gauge.
s. 110(4)	(19) The construction of drainage works upon, along, under or across a railway line or railway land.
s. 111(1)	(20) The construction of canals, tunnels or ditches across, over or under railways.
s. 117(1)	(21) The construction of certain bridges, tunnels or viaducts.
s. 118(1)	(22) The construction of a railway upon, along or across a highway.
s. 129(1)	(23) The joining or crossing of the railway tracks of one company with those of another.
s. 132	(24) The location of a railway line which obstructs or interferes with the working of or access to a mine.
s. 134(1)	(25) The working of a mine lying under or within 40 yards of a railway line.
s. 160(1)	(26) The fares to be charged for accommodation and sleeping and parlor cars.
s. 166	(27) All by-laws passed by a railway company, except those of a private and domestic nature not affecting the public generally or imposing penalties.
s. 174(1)	(28) The opening of any railway or portion thereof for the carriage of traffic.
s. 177	(29) The tariffs and tolls to be charged by a railway.
s. 178	(30) Express tolls.
ss. 183(1), 214(1)	(31) Any contract, condition, by-law, regulation, declaration or notice limiting liability.

The Railways Act,
R.S.O. 1950, c. 331—*Cont.*

s. 187(8) — (32) The pooling by one railway company of its freights or tolls with those of another railway company or common carrier.

s. 194(1) — (33) Standard freight tariffs.

s. 198(1) — (34) Standard passenger tariffs.

s. 230 — (35) The carriage by street railways of freight traffic.

s. 232(1)(3) — (36) The operation by a municipal corporation of a street railway.

s. 250(1) — (37) The construction by a street railway company of a railway upon a highway or any part thereof.

s. 243(2) — (38) The deviation by a street railway company of its line from a highway to a right-of-way owned by the company.

s. 253(1)(5) — (39) Equipment to be used on electric street railway cars.

ss. 256, 257 — (40) The operation of a street railway car on a "pay as you enter system" where the duties of motorman and conductor are performed by a single person.

s. 260(f) — (41) The travelling of street railway cars on a highway at more than 15 miles per hour.

s. 265 — (42) The examination of motormen for street railway cars.

s. 266(1) — (43) The testing of employees for colour blindness.

To have general supervisory jurisdiction and power with regard to the following matters:

s. 75(1) — (1) To extend the time prescribed for the filing of a plan and profile of a completed railway with the Board.

ss. 76, 275(2) — (2) To prepare directions as to the preparation of railway plans and specifications.

s. 77 — (3) To require the filing, from time to time, of such further railway plans and profiles as it may deem necessary.

The Railways Act,
R.S.O. 1950, c. 331—*Cont.*

s. 78(4)	(4) To grant exemption from the filing of certain documents otherwise required where a railway applies for permission to deviate, alter or change a route.
s. 93(6)	(5) The operation and maintenance of branch lines built on the application of an industry or business.
ss. 98(5)-(9)(11), 100, 101(1), 102	(6) The nature and type of equipment used by a railway company.
s. 103	(7) Generally, to make orders and regulations regarding, *inter alia,* equipment, service, speed of trains, use of steam whistles, fire protection, railway patrols.
s. 104	(8) To order a railway to improve, *inter alia,* its regulations, practices, equipment, appliances, tracks, terminals, adequacy of its services, schedules.
s. 105	(9) The fixing of stopping places for electric railways.
s. 109(2)	(10) To order a railway to prevent drainage from its lands onto those of others.
s. 113	(11) To order a railway to construct suitable crossings across its tracks.
ss. 114(5), 115	(12) To relieve a railway from its statutory obligation to fence railway tracks, provide swing gates at farm crossings, and to provide cattle-guards.
s. 116	(13) To order the construction or reconstruction of bridges and tunnels to comply with s. 116, or to relieve a railway from compliance with this section.
s. 120(4)(5)	(14) The construction of a railway upon, along or across an existing highway.
s. 121	(15) To order a railway to construct foot bridges over its tracks.
s. 123	(16) To order that a railway be carried across or along a highway, or that it be diverted, and to apportion the cost thus incurred between the railway and a corporation or person.

The Railways Act,
R.S.O. 1950, c. 331—*Cont.*

s. 128(1)	(17) To order the repair of any level crossing.
ss. 130(1), 131	(18) To order the connection of intersecting railway lines of different companies.
s. 140	(19) To order that fire guards be established and maintained along the route of a railway.
s. 146(3)(5)(6)(8)	(20) To order a railway to provide suitable accommodation for its traffic and suitable arrangements to permit connections between railways for passengers and mails.
ss. 154(4), 156(3)	(21) To relieve trains of the statutory obligation of having to be brought to a full stop before crossing certain bridges and highways.
s. 157(4)(5)	(22) To prescribe the speed at which trains may travel under certain circumstances.
s. 161(1)(3)(5)	(23) To order a railway company to construct a railway station, to improve on existing stations and to prescribe the location of any new station.
s. 173	(24) To appoint inspecting engineers to inspect all of the mechanical aspects of the operation of a railway and to report to the Board.
s. 175(2)(3)	(25) To order the repair of a railway and to prohibit the use of any rolling stock considered unsafe.
s. 182	(26) To prescribe what is "carriage or transportation of goods by express".
s. 188(1)	(27) To prescribe and classify a tariff of tolls for freight traffic.
s. 190	(28) To order the disallowance or amendment of any tariff.
ss. 215, 216	(29) To prescribe the terms and conditions under which any traffic may be carried by a railway company.
ss. 254, 255	(30) To order street railway companies to provide washroom facilities for employees and members of the public.

The Railways Act, R.S.O. 1950, c. 331—*Cont.*

s. 260(1)	(31) To determine, by way of an appeal to it, whether street railway works constructed by a railway company pursuant to an agreement with a municipality, have been constructed to the satisfaction of the municipality's engineer.
s. 271(1)	(32) To order that all railways assisted by a Government subsidy be in a safe and efficient condition and that all necessary repairs and improvements be made.
s. 273(1)	(33) To regulate the hours of labour of street railway employees.
s. 278(1)(2)	(34) To require railway companies to provide information concerning, *inter alia,* assets and liabilities, issued shares, earnings and expenditures, leases and contracts.
s. 281(4)	(35) To hold an inquiry into the cause of accidents on the railways.
s. 302	(36) With the approval of the Lieutenant-Governor in Council, to enter upon the right-of-way of any railway for the purposes of construction facilities to transmit electrical or other power to municipalities.
	To settle and determine disputes in the following circumstances:
s. 64(6)	(1) Where there is disagreement as to the interchange of traffic pursuant to section 64.
s. 64(7)	(2) Where complaints have arisen with regard to the interchange of traffic.
s. 93(1)(2)(3)(8)	(3) Where a railway company refuses to construct a branch line to any industry or business located within 6 miles of a rail line.
s. 106(4)	(4) Where there is a dispute concerning the construction of open or summer cars as required by section 106.

The Railways Act, R.S.O. 1950, c. 331—*Cont.*

s. 135	(5) Where there is a dispute as to the amount of compensation to be paid to the owner or occupier of a mine where mine property has been severed by a railway or where a railway has interrupted or prevented the working of a mine.
s. 201(3)(4)	(6) Where there is a dispute as to the apportionment of joint tariffs.
s. 212(1)	(7) To determine whether there has been unjust discrimination, undue or unreasonable preference or advantage, or prejudice or disadvantage within the meaning of the Act.
s. 242(3)	(8) To amend or quash a municipal by-law authorizing the construction of a street railway upon a public highway in a municipality.
ss. 247(1), 252	(9) Where there is disagreement with the terms upon which a street railway is to be operated in a municipality.
s. 261	(10) Where a railway or street railway is operated upon a highway under an agreement with a municipal corporation, and it is alleged that the agreement has been violated, to hold a hearing and make such order as it deems necessary, including enabling the Board to assume control of the railway line and hire employees to run the line.
s. 263(3)	(11) To determine all matters where a street railway company and a municipality cannot agree to the entry of a second street railway company into the municipality.
	To fix compensation with regard to the following matters:
s. 246(2)	(1) Where a municipal corporation assumes the ownership of a street railway after the expiration of its franchise.
The St. Lawrence Development Act, 1952 (No. 2) Ont. 1952 (2nd session) c. 3 s. 15	To determine compensation for property other than land injuriously affected by the exercise of powers under the Act.

The Secondary Schools and Boards of Education Act, R.S.O. 1960, c. 362

s. 35(10)	To hear appeals from the decision on arbitration determining the liabilities of municipalities comprising a high school district.
s. 84(6), as enacted by Ont. 1968, c. 122, s. 8	To hear appeals from decisions of arbitrators determining the value of the assets and liabilities of public school boards, high school boards, etc. which become organized as divisional boards.

The Tile Drainage Act, R.S.O. 1960, c. 399

s. la(1), as re-enacted by Ont. 1968-69, c. 129, s. 1	To approve municipal by-laws for the borrowing of moneys for the purposes of drainage works.

The Trustee Act, R.S.O. 1960, c. 408

s. 19	To approve the dedication or sale by a trustee of land, or his interest therein, for municipal highway purposes.

CHAPTER 126

The Ontario Securities Commission

INTRODUCTION

The Ontario Securities Commission is charged with the supervision and regulation of trading in securities in Ontario. It derives its powers and existence from the Securities Act, 1966. [1] Under the provisions of the prior Securities Act,[2] the Commission was a branch of the Department of the Attorney General.[3] Although now the Minister of Financial and Commercial Affairs is responsible for the administration of the new Securities Act[4] and although the Commission is required to report to the Minister on certain aspects of its work, to a very large extent it is an independent body invested with wide powers of investigation and decision. The power to make regulations under the Act, however, rests in the Lieutenant Governor in Council.[5]

[1] Ont. 1966, c. 142 as amended by Ont. 1966, c. 41; Ont. 1967, c. 92 and Ont. 1968, c. 123.

[2] R.S.O. 1960, c. 363 as amended by Ont. 1962-63, c. 131; Ont. 1964, c. 107; Ont. 1965, c. 120, and repealed by Ont. 1966, c. 142, s. 147.

[3] This was the traditional situation which was formalized by express enactment in Ont. 1962-63, c. 131, s. 3.

[4] The Department of Financial and Commercial Affairs Act, Ont. 1966, c. 41, s. 4.

[5] Ont. 1966, c. 142, s. 107; s. 144 as amended by Ont. 1967, c. 92, s. 3; s. 115; and s. 61(3) as enacted by Ont. 1967, c. 92, s. 1(2).

COMPOSITION OF THE COMMISSION

The Commission is composed of a full-time Chairman, who is the chief executive officer, and not more than five part-time members who shall devote such time as may be necessary for the due performance of their duties.[6] Members of the Commission are appointed by the Lieutenant Governor in Council[7] but the Act is silent on the length of their tenure of appointment and also on the grounds on which and the method by which they may be removed.

The powers of decision exercised by the Commission are largely judicial in nature and should therefore, according to the recommendations contained in Report Number 1[8] be conferred on impartial persons who are independent of political control. Freedom from political control does not comprise only an absence of the control or direction of a Minister or other politically responsible person; it also comprises those conditions which permit independence and impartiality and we therefore recommend that members of the Commission be appointed for fixed terms and that they be removable only for cause.[9]

The Act is silent on the requisite qualifications of members of the Commission. Clearly the work of the Commission requires a close familiarity with the business of trading in securities and with the operation of the business world generally. This is sufficiently self-evident to make it unnecessary to spell out in the Act the requirement that members of the Commission possess such expertise. On the other hand, the Commission's powers of decision are so numerous and so significant, both to the investing public and to those engaged in trading in securities, as to make it essential that at least one member of the Commission, preferably the Chairman, have legal training. In Report Number 1 we made recommendations applicable to judicial tribunals[10] which are applicable to the Securities Commission.

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[6]*Ibid.*, s. 2 as amended by Ont. 1968, c. 123, s. 2; s. 3.
[7]*Ibid.*, s. 2(2).
[8]pp. 120-1 *supra*.
[9]p. 123 *supra*.
[10]pp. 122-3 *supra*.

The Director of the Commission, who is the Chief Administrative Officer and empowered to exercise many powers of decision, should be required to have legal training.

Two members of the Commission constitute a quorum.[11] This provision remained unchanged when in 1968[12] the membership of the Commission was increased from five to six. It is appreciated, that with the exception of the Chairman, some members of the Commission devote only part of their time to its work, but nevertheless, it is not satisfactory that the very important powers of the Commission, which include the hearing and deciding of appeals from decisions of the Director, may be exercised by one-third of its members. Two members of the Commission should not have the power to assign most of the powers of the Commission to one of its members (see section 3(2)).

We recommend that a quorum of the Commission be three, including the Chairman or a member with legal training.

PROCEDURAL PROVISIONS OF GENERAL APPLICATION

Since certain procedural provisions of the Act are generally applicable to the exercise of the different powers of the Commission, it is convenient to deal with procedure first and then examine the powers and their exercise.

Procedurally, the Securities Act, 1966 is a great improvement over its predecessor which contained virtually no procedural safeguards. Express provision is now made for hearings in a number of situations and general provisions applicable to all such hearings are contained in the Act. Our recommendations relate mainly to the need for additional safeguards where in our view need exists.

Hearings

Certain rules which apply to any hearing required or permitted by the Act are set out in section 5. They require some comment.

[11]Ont. 1966, c. 142, s. 2(3).
[12]*Ibid.*, s. 2(1) as amended by Ont. 1968, c. 123, s. 2.

Written Notice of Hearing

Written notice must be given not only to any person or company which, by the provisions of any particular section, is entitled to receive notice but also, generally, "to any person or company that, in the opinion of the Commission or the Director, is primarily affected by such hearing." The notice must set out the time, place and purpose of the hearing. It is sufficient if it is sent by prepaid mail to the last address of the person or company as it appears on the Commission's records or, if it does not appear on the records, "to such address as is directed by the Commission or the Director."

No provision is made stipulating the period of time which must elapse between the sending of the notice and the hearing. We have suggested in Report Number 1[13] that an appropriate and reasonable period in hearings before disciplinary bodies is ten days and we recommend that the same period should apply here except that a member of the Commission should have power to abridge the time where on reasonable grounds he deems it proper to do so. In any case, where a person or company involved wishes an earlier hearing there should be express provision for the waiver of the ten day notice period by such person or company.

There is no requirement in section 5 of the Act that the notice of hearing set out that persons appearing at the hearing have a right to be heard. There should be such a right and this should be set out in the notice.

Powers of the Presiding Officer

> "2. For the purposes of the hearing, any of the persons convening the hearing or before whom the hearing is held has the same power to summons 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 for the trial of civil actions, and the failure or refusal of a person to attend to answer questions or to produce such documents, records and things as are in his custody or possession makes the person liable to be committed for contempt by a judge of the Supreme Court as if in breach of an order or judgment of the Supreme Court."[14]

[13]p. 1193 *supra*.

[14]Ont. 1966, c. 142, s. 5 para 2 as re-enacted by Ont. 1968, c. 123, s. 4(2).

If persons conducting a hearing have the same power to enforce the attendance of witnesses and compel them to give evidence "as is vested in the Supreme Court for the trial of civil actions" they have power to commit for contempt of court and the right to apply to the Supreme Court for an order of committal might be construed as an alternative remedy. We dealt fully with this subject in Report Number 1.[15] There we recommended the repeal of all statutory provisions vesting in tribunals power to commit for contempt and the amendment of the Public Inquiries Act so as to vest the power to commit in relevant cases in the Supreme Court. The Act should be amended accordingly.

Reasons for Decision

At the request of any person or company whose right to trade in securities is adversely affected by a direction, decision, order or ruling made after a hearing, the presiding officer must furnish written reasons.[16] This provision is in accordance with our recommendation in Report Number 1.[17]

A difficult related question, and one which, to our knowledge, has troubled the members of the Commission, is whether a decision must be based solely on the record and on the evidence adduced at a hearing. In Report Number 1 we dealt in part[18] with this matter. There we made reference to technical, scientific facts or opinions within the tribunal's specialized knowledge and stated: "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."[19] We are aware that many of the matters which come before the Commission affect the investing public and we are also aware that the nature of those matters is such that information frequently comes to the members of the Commission in an informal way outside a hearing. Our position on this question is: the Commission is exercising judicial powers of decision and it is therefore

[15] pp. 441-6 *supra*.
[16] Ont. 1966, c. 142, s. 5, para. 5.
[17] p. 218 *supra*.
[18] p. 217 *supra*.
[19] See also pp. 173 and 199 *supra*.

essential that those powers be exercised judicially and that the person or company which might be affected by a decision must be given the opportunity to meet the evidence which might weigh against him or it. The principles to be applied should be those set out in the Statutory Powers Procedure Act recommended in Report Number 1 applicable to all judicial tribunals.

Notice of Decision

Any person or company to whom notice of a hearing has been given and any other person or company, which in the opinion of the presiding officer at the hearing, is primarily affected, is entitled to receive notice of the direction, decision, order or ruling made, together with a copy of the written reasons, if any.[20] The same rules as are applicable to the delivery of a notice of hearing are applicable here. This provision is satisfactory as far as it goes. There should be the additional requirement that the notice of decision should include a short statement of the rights of appeal which may be available.

Right to Counsel

Any person or company attending or submitting evidence at a hearing may be represented by counsel.[21] The Act, however, does not expressly provide any right to cross-examine witnesses. Neither is there any express right to make submissions or argument at a hearing. We are informed that, as a matter of the Commission's practice, such privileges are always afforded to counsel, but under the Act they cannot be insisted upon as rights. We recommend that there be a statutory right for counsel to examine and cross-examine witnesses and make submissions where the powers of decision are being exercised. Where mere investigatory powers are being exercised the provisions of the Public Inquiries Act should apply.

There should, in addition, be express powers to grant adjournments of hearings and to take official notice of matters.

The Act is also silent on the question whether hearings are to be held in public or in private. We are informed that

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[20]Ont. 1966, c. 142, s. 5, para. 6.

[21]*Ibid.*, s. 5, para. 7.

the practice has been to hold public hearings unless either the Commission or the person or company involved has good reason for wanting a private hearing. This practice is reasonable and acceptable and we recommend that it be given statutory recognition and sanction.

EVIDENCE

The presiding officer is not bound by the rules of evidence; any relevant evidence must be received regardless of whether the person or company tendering it was given notice of the hearing.

The criterion thus established for the admissibility of evidence is relevance.[22] This partially conforms with our general recommendation in Report Number 1.[23] There we expressed the view that a tribunal should have power to ascertain relevant facts by such standards of proof as are commonly relied on by reasonable and prudent men in the conduct of their own affairs and that the nature of proof should go to the weight rather than to the admissibility of the evidence. This we think is a better standard than that set out in the Act. Many of the decisions made by the Commission have far-reaching effects.

Transcript of Evidence

All oral evidence must be taken down in writing.[24] This transcript together with any documentary evidence and things received in evidence form the record.

It is not clear why the Act should stipulate that the evidence must be taken down in *writing*. The principle is correct that there should be a permanent, verbatim record of the proceedings, but for practical convenience it would clearly be equally satisfactory to record the proceedings electronically and the Act should provide for such alternate methods of preserving the proceedings. We recommend that the Act should be amended to provide that "oral evidence received shall be taken down in writing or by any other method authorized under the Evidence Act."[25]

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[22]*Ibid.*, s. 5, para. 3.
[23]pp. 216-17 *supra*.
[24]Ont. 1966, c. 142, s. 5, para. 4.
[25]Ont. 1960-61, c. 24, s. 1.

APPEALS

General appeal provisions are contained in sections 28 and 29 of the Act.

Section 28 provides that a person or company primarily affected by a direction, decision, order or ruling of the Director is entitled to a hearing and review by the Commission. A request for such hearing and review must be in writing and sent by registered mail to the Director within thirty days after the mailing of the notice of the direction, decision, order or ruling.

Under section 29, an appeal lies at the instance of any person or company primarily affected by a direction, decision, order or ruling of the Commission to the Court of Appeal. Such appeal is by notice of motion sent by registered mail to the Director of the Commission within thirty days after the mailing of the notice of the Commission's order. The practice and procedure on such appeal are the same as on an appeal from a judgment of a judge of the Supreme Court in an action. However, powers are given to the Rules Committee appointed under the Judicature Act[26] to vary or amend the procedure or prescribe the procedure applicable to appeals taken to the Court of Appeal under the Securities Act, 1966.[27]

Subject to our recommendation as to the appropriate forum for such appeals[28] and what we shall say hereafter, the appeal provisions of sections 28 and 29 are satisfactory. Even in those instances where the Director is empowered to make decisions without a hearing, a hearing is available as of right before the Commission with a further right of appeal to the Court of Appeal.

By the express provisions of section 29 there is no appeal from a ruling of the Commission under section 59. Section 59 empowers the Commission, in cases of doubt, to determine whether a proposed trade would be in the course of primary distribution[29] or to determine whether, in a given situation,

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[26]R.S.O. 1960, c. 197, s. 111.
[27]Ont. 1966, c. 142, s. 29(2) as amended by Ont. 1968, c. 123, s. 11(1).
[28]pp. 665-67 *supra*.
[29]Ont. 1966, c. 142, s. 59(1).

primary distribution has been concluded.[30] We discuss primary distribution later.[31]

It is not clear why there should be no appeal from such a decision, especially in view of the fact that section 59 does not require the Commission to hold a hearing before making its decision. We realize that in most cases such a right of appeal would not be exercised because the person affected would not wish to incur the delay in pursuing an appeal. However, that consideration should not result in there being no appeal. We recommend that this exception to the general appeal provisions of the Act be removed.

Although the appeal provisions of the Act are, with the exception just discussed, satisfactory, the question arises whether in some cases a right of appeal may be more apparent than real. For example, section 19(5) of the Act provides:

> " . . . the Commission may, *where in its opinion such action is in the public interest*
>
> (a) order that subsection 1 or 3 shall not, with respect to such of the trades referred to in that subsection as are specified in the order, apply to the person or company named in the order;"

The Commission, before exercising this power and making the order, must form an opinion that its action is in the public interest. There is, in other words, a subjective condition precedent to the exercise of the power.[32] The difficult question on which there is no clear authority, is whether, on an appeal to the Court of Appeal from an order made under section 19(5), the Court would be free to examine the validity of the Commission's opinion as to the public interest and, if it disagreed, substitute its own opinion for that of the Commission. Unless the Court can adopt such an approach, any right of appeal would be a limited one.

Section 29(5), which deals with the powers of the Court of Appeal on an appeal, does not clearly resolve the problem since the Court is not expressly empowered to make any order which the Commission could have made but it may direct the

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[30] *Ibid.*, s. 59(3).
[31] p. 2085ff. *infra.*
[32] pp. 90-93 *supra.*

Commission "to make such direction, order or ruling . . . as the Commission is authorized or empowered to make . . .".

The recommendation was made in Report Number 1 that subjective conditions precedent ought not to be included in a statutory power unless they are necessary to carry out the scheme of the statute.[33]

We appreciate that in many cases the action or decision of the Commission must be based on what in the Commission's opinion is necessary in the public interest. That is not to say, however, that the affected person must therefore be deprived of all rights of appeal. Where possible the criteria for action by the Commission should be more clearly specified than by a mere statement that it may act "where in its opinion such action is in the public interest." Where criteria have been specified, the Court of Appeal should have power to set aside the decision where the record does not warrant the action taken by the Commission.

Where it would frustrate the scheme of the Act to establish criteria for action, the Court of Appeal should have power to set aside the decision where there is no reasonable evidence to support the opinion of the Commission that its action is in the public interest.

POWERS OF THE COMMISSION

Licensing

All persons involved in the business of trading in securities must be registered by and with the Commission.[34] The Commission is therefore vested with the same kind of powers which we consider in Report Number 1 in the context of the self-governing professions,[35] i.e., the power to decide who may engage in a particular occupation and the power to decide when a person should not be permitted to continue to engage in that occupation. In the exercise of these powers it is essential that proper regard be had both to the public interest and to the legitimate interests of individuals who are engaged

[33] p. 275 *supra*.
[34] Ont. 1966, c. 142, s. 6 as amended by Ont. 1968, c. 123, s. 5.
[35] See Chapter 81.

or wish to become engaged in the occupation of trading in securities.

Granting and Renewing Registrations

The Director shall grant registration or renewal of registration where, in his opinion, an applicant is "suitable for registration" and where "the proposed registration is not objectionable."[36] The Director, in his discretion, may impose terms and conditions on a registration or may restrict a registration, either as to its duration or as to the securities or classes of securities in which the registrant is permitted to trade.[37] A valuable safeguard is provided by the stipulation that before refusing to grant or renew a registration, the Director must afford to the applicant an opportunity to be heard.[38] The general procedural provisions of the Act apply to such a hearing.

Certain terms of eligibility for registration are set out.[39] The Director may refuse registration where the applicant has not been a resident of Canada for at least one year immediately prior to the date of his application and if at the date of the application he is not a resident of Ontario, unless at the date of his application he is registered in a corresponding capacity under the securities laws of the jurisdiction of his last residence and had been so registered for at least one year immediately prior to the date of his application for registration in Ontario.

Registration is not required for certain enumerated kinds of trading.[40] However, the Commission may order that such exemptions from registration not apply to a named person or company where, in the Commission's opinion, such order is in the public interest.[41] A safeguard both for the individual concerned and for the public is provided by the requirement that no such order shall be made without a hearing having been held. Where, however, in the opinion of the Commission, the delay involved in scheduling and holding a hearing

[36]Ont. 1966, c. 142, s. 7(1).
[37]*Ibid.*, s. 7(3).
[38]*Ibid.*, s. 7(2).
[39]*Ibid.*, s. 14.
[40]*Ibid.*, ss. 18, 19.
[41]*Ibid.*, s. 19(5).

would be prejudicial to the public interest, a temporary order removing the exemption may be made which expires fifteen days from the date of its making.[42]

The major difficulty with the registration provisions of the Act is vagueness concerning the grounds for granting or rejecting an application. No criteria are stated by which to determine whether an applicant is "suitable for registration." It is not clear what facts or circumstances would make a proposed registration "objectionable."

Important licensing powers should not be exercised on the basis of the Director's opinion that such amorphous conditions exist. Standards should be set out in the Act. We realize that it may not be possible to foresee and enumerate every fact or circumstance which may be relevant to the granting or rejection of an application for registration. It may well be necessary to have an omnibus provision that an application shall not be granted if it would not be in the public interest that it should be granted, but the Act should, as far as possible, set out the facts and circumstances which will make an applicant "suitable" for registration and the facts and circumstances which would make a proposed registration "objectionable."[43]

Suspension or Cancellation of Registration

The Commission shall suspend or cancel a registration where, in its opinion, such action is in the public interest.[44] This provision is open to the same criticism as that which we made concerning the criteria for granting or rejecting an application for registration. The identical problem was discussed in Report Number 1 when dealing with the self-governing professions.[45] There, while recognizing that it may be necessary to include an undifferentiated heading of "professional misconduct" as a ground for suspending or cancelling the right to practise, we recommended that the professions identify, as precisely as possible, the kinds of activity which might lead to such suspension or cancellation. We make a similar recommendation here, *mutatis mutandis*.

[42] *Ibid.*, s. 19(6).
[43] See pp. 1104-06 *supra*.
[44] Ont. 1966, c. 142, s. 8.
[45] p. 1189 ff. *supra*.

The general rule in the Act is that a hearing must be held before any registration is cancelled or suspended. But again where in the opinion of the Commission a prior hearing would cause delay which would be prejudicial to the public interest, it may suspend a registration without a hearing. In such case it must forthwith notify the registrant of the suspension and give notice of a hearing and review to be held before the Commission within fifteen days of the date of the suspension.[46] These provisions properly safeguard the interests both of the public and of the registrant.

Powers of Investigation

Power to Order Investigations

Important powers of investigation are conferred on the Commission.[47] Some of these powers are subject to an express condition precedent which must be satisfied before the Commission's power to order an investigation may be exercised. For example, in order to hold an investigation under section 21(1) it must either appear probable to the Commission upon a statement made under oath that a person or company has either contravened provisions of the Act or the regulations or has committed an offence under the Criminal Code in connection with trading in securities.

On the other hand, under section 21(2) the Commission may "by order appoint any person to make such an investigation as it deems expedient for the due administration of [the] Act or into any matter relating to trading in securities" and in such order it "shall determine and prescribe the scope of the investigation." Under this clause the powers of investigation are not limited to matters which the Commission "deems expedient for the due administration of the Act." The conjunction "or" is used and power is conferred on the Commission to make an investigation into any matter relating to trading in securities and to determine and prescribe the scope of the investigation. Prior to 1968 the Commission's powers to appoint a person to make the investigation could only be

[46]Ont. 1966, c. 142, s. 8(2) as re-enacted by Ont. 1968, c. 123, s. 6.
[47]*Ibid.*, s. 21(1) and (2) as re-enacted by Ont. 1968, c. 123, s. 8.

exercised "with the consent of the Minister."[48] The reason given for the change was based on the principle that the Commission should be independent of the Minister. We agree that with respect to judicial decision-making power the Commission should be independent of the Minister but it violates the principle of ministerial responsibility to give to an appointed body uncontrolled powers of investigation "into any matter relating to trading in securities" and to "determine and prescribe the scope of the investigation."

In addition to the powers of the Commission which we have just discussed, the Minister may by order appoint any person to make such investigation as he deems expedient for the due administration of the Act or into any matter relating to trading in securities, in which case the person so appointed, for the purposes of the investigation, has the same authority, powers, rights and privileges as a person appointed under section 21.[49] In this case the Minister is not required to prescribe the scope of the investigation.

The language of the Act is ambiguous. Is the person appointed to make such an investigation as he deems necessary or such investigation as the Minister deems necessary? The scope of the investigation is important. It should be defined by the Minister.

We think the powers of the Commission to conduct an investigation should be subject to the approval of the Minister and that all investigations should be limited by the requirement that they are "expedient for the due administration of the Act." If in any particular case wider powers are necessary the provisions of the Public Inquiries Act should be invoked.

The Powers of the Investigator

The person appointed to investigate may investigate, inquire into and examine the complete financial affairs and the records, books, correspondence etc. of the person or company whose affairs are being investigated and he may seize any documents, records, securities or other property of such person or company subject only to their being made available

[48]Ont. 1966, c. 142, s. 21(2) as re-enacted by Ont. 1968, c. 123, s. 8.
[49]*Ibid.*, s. 23 as amended by Ont. 1968, c. 123, s. 9.

for inspection and copying by the person or company from which they were seized.[50] He has the same power as is vested in the Supreme Court for the trial of civil actions to summon and enforce the attendance of witnesses, to compel witnesses to give evidence on oath or otherwise, and to compel witnesses to produce documents, records and things.

A power to commit a person for contempt for refusal to attend, answer questions, produce documents etc. is vested in a judge of the Supreme Court not in the investigator, although this may not be clear.[51]

We dealt with a similar provision in section 5 paragraph 2 earlier.[52] What we said there applies equally here. If the investigator has the same powers of compulsion as are vested "in the Supreme Court for the trial of civil actions" he has power to commit. The power vested in a judge of the Supreme Court to commit may only be an alternative remedy. This should be clarified by legislation.

A person giving evidence at an investigation may be represented by counsel but the functions and rights of such counsel are not defined.[53] Our recommendations as to the rights of counsel in an inquiry are set out in Report Number 1.[54]

They are applicable to investigations under the Securities Act, 1966.

Reporting Results of Investigation

An investigator appointed by the Commission under section 21 of the Act must report the results of his investigation to the Commission and[55] an investigator appointed by the Minister under section 23 must report to the Minister.[56]

> "No person, without the consent of the Commission, shall disclose, except to his counsel, any information or evidence obtained or the name of any witness examined or sought to be examined under section 21 or 23."[57]

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[50] *Ibid.*, s. 21(3)(6)(7).
[51] *Ibid.*, s. 21(4).
[52] pp. 2071-72 *supra*.
[53] Ont. 1966, c. 142, s. 21(5).
[54] pp. 447-52 *supra*.
[55] Ont. 1966, c. 142, s. 21(9).
[56] *Ibid.*, s. 25.
[57] *Ibid.*, s. 24.

On the one hand this provision is much too narrow and on the other it is much too wide. The Commission and its officers and servants have the right to receive information of a highly confidential nature other than that obtained under sections 21 and 23. They should be restricted as to the disclosure of such information. Neither the Commission nor those employed by it should have a right to disclose information obtained in the course of their duties beyond that which is necessary for the purposes of the statute and the administration of justice.[58]

Powers to Make Interim Orders

"26. (1) The Commission may,

(a) where it is about to order an investigation under section 21 or during or after an investigation under section 21 or 23;

(b) where it is about to make or has made a direction, decision, order or ruling suspending or cancelling the registration of any person or company or affecting the right of any person or company to trade in securities; or

(c) where criminal proceedings or proceedings in respect of a contravention of this Act or the regulations are about to be or have been instituted against any person or company, that in the opinion of the Commission are connected with or arise out of any security or any trade therein or out of any business conducted by such person or company,

in writing or by telegram direct any person or company having on deposit or under control or for safekeeping any funds or securities of the person or company referred to in clause *a, b* or *c* to hold such funds or securities or direct the person or company referred to in clause *a, b* or *c* to refrain from withdrawing any such funds or securities from any other person or company having any of them on deposit, under control or for safekeeping or to hold all funds or securities of clients or others in his possession or control in trust for any interim receiver, custodian, trustee, receiver or liquidator appointed under the *Bankruptcy Act* (Canada), *The Judicature Act, The Corporations Act* or the *Winding-up Act* (Canada), or until the Commission in writing revokes the direction or consents to release any particular fund or

[58]See p. 462 *supra*.

> security from the direction, provided that no such direction applies to funds or securities in a stock exchange clearing house or to securities in process of transfer by a transfer agent unless the direction expressly so states, and in the case of a bank, loan or trust company the direction applies only to the offices, branches or agencies thereof named in the direction."[59]

These powers are wide and although strong measures may well be necessary to protect the investing public the powers conferred under this section require greater definition. When, for example, is the Commission "about to order an investigation . . ." or about to make a direction or decision ". . . suspending or cancelling the registration."? These provisions contemplate the preservation of the *status quo* while the Commission acts, but the Commission may never act. It would seem that such drastic powers should be exercised only where the Commission has decided to order an investigation or to make a direction, or someone has instituted criminal proceedings or proceedings in respect of a contravention of the Act.

It may be that a court would interpret this section to mean the Commission would only be "about" to act where it has in fact made a decision.

The section should be amended to make it clear that the powers conferred under it cannot be exercised unless the Commission has decided to order an investigation, or to make "a direction, decision, order or ruling suspending or cancelling the registration of any person or company . . ." or where some step has been taken to institute criminal proceedings. If these powers are necessary as interim powers it should only be possible to exercise them as such.

It is not to be overlooked that the Commission may apply to a judge of the Supreme Court for the appointment of a receiver or a receiver and manager or a trustee of the property of the person or company involved in precisely the same circumstances as the Commission may act under the powers conferred on it under section 26(1) which we have just been discussing. In such case the judge to whom the application is made must be satisfied that the appointment would be in the best interests of the creditors of the person or

[59]Ont. 1966, c. 142, s. 26(1).

company involved. Provision is made for an *ex parte* application to a judge by the Commission but any order made *ex parte* is only effective for a period not exceeding eight days.[60]

It is to be observed that there are greater safeguards for the right of the individual when the application is made to the judge than where the Commission makes a direction under section 26(1).

Miscellaneous Powers of Decision

Primary Distribution

Under section 59 where doubt exists as to whether a proposed or intended trade in a security would be a primary distribution, the Commission has power to determine the matter.[61] A condition precedent is attached to the exercise of the power: an interested party must apply for the question to be determined.

The Commission, apparently on its own motion, has power to determine whether a primary distribution to the public of a security has been concluded or is still in progress.[62]

In view of the stringent rules contained in the Act with respect to primary distribution, these powers are necessary. It is not clear why the Commission should be empowered to act on its own initiative under subsection (3) but not under subsection (1).

It is also unclear why these powers of decision should be stripped of all procedural safeguards. It is understood that, as a matter of practice, the Commission does hold a hearing before making any determination under section 59 but there is no provision in the statute requiring such a hearing. We recommend that the statute be amended to provide for an opportunity to be heard before any decision is made under section 59.

We have already referred to the absence of any right of appeal under this section. This should be provided.

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[60] *Ibid.*, s. 27(3).
[61] *Ibid.*, s. 59(1).
[62] *Ibid.*, s. 59(3).

Rules Concerning Primary Distribution

The Director may in his discretion issue a receipt for a prospectus required to be filed in the case of primary distribution unless certain facts appear to him,[63] e.g., the document required to be filed does not comply with the Act or regulations, or contains misleading statements. Before a ruling is made the person who filed a prospectus must have an opportunity to be heard. The ruling must be in writing.[64]

If, after a prospectus has been received, it appears to the Commission that any ground exists upon which a receipt could have been withheld under the Act, the Commission may act to order that all trading in the primary distribution shall cease.[65] No such order shall be made without a hearing but there is provision for an emergency order. If, in the Commission's opinion, the time required to hold a hearing would be prejudicial to the public interest, a temporary order may be made which shall expire fifteen days from the date of its making.[66]

Special provisions are made respecting the primary distribution of a security to which the prospectus of a finance company relates. The Director may require the finance company to furnish specific information to him from time to time, in order that he may satisfy himself that:

> "(i) the securities are being distributed in a manner acceptable to him,
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> (ii) the securities are secured in such manner, on such terms and by such means as are required by the regulations, and
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> (iii) as at such date as may be acceptable to the Director the finance company met such financial and other requirements and conditions as are specified in the regulations."[67]

If the Director reports to the Commission that he is not satisfied with any statement so furnished, the Commission may order that all trading in the primary distribution shall cease. The provisions of the Act concerning hearings and

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[63] *Ibid.*, s. 61(1) as amended by Ont. 1968, c. 123, s. 22.
[64] *Ibid.*, s. 61(2).
[65] *Ibid.*, s. 62(1).
[66] *Ibid.*, s. 62(2).
[67] *Ibid.*, s. 62a as enacted by Ont. 1967, c. 92, s. 2.

temporary orders applicable to the primary distribution of other securities apply to orders made respecting securities of finance companies.

Disclosure of Corporate Information

The Corporations Act provides[68] that a company may apply to a judge of the High Court for an order permitting it to omit from its interim financial statement and from its annual statement of profit and loss information as to sales or gross operating revenue where he is satisfied that the disclosure of such information would be unduly detrimental to the interest of the company.

Under the Securities Act, 1966 a person or company may apply to the judge of the High Court designated by the Chief Justice of the High Court for an order declaring a take-over bid to be an "exempt offer" under the requirements of the Act.[69] On such application the Commission is entitled to notice and to appear and be heard. An appeal lies to the Court of Appeal from any order made. On the other hand, a company to which Part XII (dealing with financial disclosure) of the Act applies may apply to the Commission for an order permitting the omission from financial statements of information as to sales or gross operating revenue.[70]

It is difficult to see why an application under the Corporations Act and under section 89 of the Securities Act should be made to a judge of the High Court, in the latter case with a right of appeal to the Court of Appeal, while an application under section 121(3) of the Securities Act, 1966 should be made to the Securities Commission. These applications would appear to be all of such a nature that they should be made to the Securities Commission with a right of appeal to the Court of Appeal.

Where an exempting order is made, a shareholder should have a right to apply to the Commission for reasons for its decision. The rights of shareholders and investors to adequate and proper information respecting the financial affairs of corporations should be adequately protected.

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[68]R.S.O. 1960, c. 71, s. 84(3) as amended by Ont. 1966, c. 28, s. 8(4).
[69]Ont. 1966, c. 142, s. 89.
[70]*Ibid.*, s. 121(3).

INSIDER TRADING

Section 109 of the Act requires that insiders report their trading to the Commission. Section 141a[71] provides that where it appears to the Commission that there has been a failure to comply with the reporting requirements the Commission may apply to a judge of the High Court for an order compelling compliance.

STOCK EXCHANGES

Under section 139(2) the Commission has broad powers, which are exercisable whenever it appears to be in the public interest, to make any direction, order, determination or ruling:

> "(a) with respect to the manner in which any stock exchange in Ontario carries on business;
>
> (b) with respect to any by-law, ruling, instruction or regulation of any such stock exchange;"

There is no requirement that a hearing be held before these wide powers are exercised. We recommend that there be such a requirement. Presumably the general appeal provisions are applicable.

MISCELLANEOUS PROVISIONS

Rule-making Power

Although section 144 confers on the Lieutenant Governor in Council the power to make regulations on a wide range of topics, the only reference to procedure is contained in paragraph (i) thereof which empowers the Lieutenant Governor in Council to make regulations prescribing the practice and procedure of investigations under sections 21 and 23. The power has not been exercised.

Immunity from Action

The Act provides restraint on the right of access to the courts of two kinds:

[71] *Ibid.*, s. 141a as enacted by Ont. 1968, c. 123, s. 40.

"(1) Except with the consent of the Minister, no action whatever and no proceedings by way of injunction, mandamus, prohibition or other extraordinary remedy lies or shall be instituted,

(a) against any person, whether in his public or private capacity, or against any company in respect of any act or omission in connection with the administration or the carrying out of the provisions of this Act or the regulations where such person is a member of the Commission, a representative of the Commission or the Director, or where such person or company was proceeding under the written or oral direction or consent of any one of them or under an order of the Minister made under this Act; or

(b) against any exchange auditor, district association auditor or association auditor, employed under clause *b* of section 30, in respect of the performance of his duties as such.

(2) No person or company has any rights or remedies and no proceedings lie or shall be brought against any person or company in respect of any act or omission of the last-mentioned person or company done or omitted in compliance or intended compliance with,

(a) any requirement, order or direction under this Act of,

(i) the Commission or any member thereof,

(ii) the Director,

(iv) any person appointed by order of the Minister,

(v) the Minister,

(vi) any representative of the Minister, the Commission, the Director or of any person appointed by the Minister; or

(b) this Act and the regulations."[72]

If this protection is necessary it is unnecessarily wide and much wider than is given to members of many other Commissions.

The first provision purports to deny access to the courts "except with the consent of the Minister" if the act or omission is in connection with the administration of the provisions of the Act or the regulations. This provision purports to deny to the individual the right to relief through the courts where

[72] *Ibid.*, s. 142(1)(2) as amended by Ont. 1968, c. 123, s. 41.

the persons referred to may have acted negligently in the performance of their duties. For example, where an investigation is ordered under section 21 the person appointed to make the investigation "may seize and take possession of any documents, records, securities or other property of the person or company whose affairs are being investigated."[73] If in the course of the investigation the person seizes records quite irrelevant to the investigation or omits to take proper care of securities seized and they are lost or destroyed the owner is barred from any right of action unless he obtains the consent of the Minister. If, in any case, there should be a provision requiring the consent of a Minister before an action may be brought, the Minister should not be the Minister who has the powers of the Minister charged with the administration of the Securities Act, 1966 and power to issue the orders thereunder. If a consent is to be required at all it should be the consent of the Attorney General, who is the chief law officer of the Crown.

The second provision we have referred to is an absolute bar to any right of action and is worded to include "any act or omission . . . done or omitted in compliance or *intended* compliance with" the Act or the regulations. The test is not whether the act was a lawful act and was done in compliance with the Act or the regulations but it is a subjective one. The subject has no relief for injury done no matter how mistaken or careless the person doing the injury had been as long as he "intended to act or omit to act in compliance with the Act." The legal rights of the individual are made subject to the condition of the mind of the wrongful actor.

These provisions in the Securities Act, 1966 are in violation of the spirit of the Proceedings Against the Crown Act[74] and in some respects they are contrary to the letter of the Act.

The Proceedings Against the Crown Act provides: "Where this Act conflicts with any other Act, this Act governs."[75] However, the provisions of the Securities Act, 1966 were enacted after the Proceedings Against the Crown Act and would therefore prevail.[76]

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[73]*Ibid.*, s. 21(6).
[74]Ont. 1962-63, c. 109.
[75]*Ibid.*, s. 26.
[76]See p. 1972ff. *supra*.

In dealing with the provisions of the Farm Products Marketing Act[77] which contains a somewhat similar protective section we said:

> "As we have said with respect to similar provisions in other statutes, we can see no reason why such members or employees should receive any wider protection than is afforded by the common law for those acting under statutory authority. The exemption from liability even extends to acts done without statutory authority as long as they are done in good faith and in the purported exercise of statutory authority. We believe that the Board and the local boards and their respective members and employees should be fully liable for all actionable wrongs committed by them and therefore recommend that section 4(6) should be repealed. Members and employees who have acted in good faith should be entitled to be fully indemnified by their boards with respect to any judgments obtained against them relating to acts intended to be done pursuant to the Act and regulations."

We think what we said there applies with equal force to the Securities Act, 1966. Section 142 should be repealed and the Proceedings Against the Crown Act should be left to apply to matters arising out of the administration of the Securities Act, 1966 with a provision that members, employees and those acting under the authority of the Act should be entitled to be fully indemnified by the Crown with respect to any judgments obtained against them relating to acts done in good faith intended to be performed pursuant to the Act and the regulations.

We discuss the Proceedings Against the Crown Act later in this Report with particular reference to statutory provisions similar to those we have been just considering.[78]

OFFENCES

The Act contains numerous provisions for offences and prescribes different penalties for different offences.[79] In addition, the Commission may make orders with penal consequences, e.g., cancellation of licences[80] and orders for suspen-

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[77]pp. 1797-98 *supra*.
[78]Chapter 131.
[79]Ont. 1966, c. 142, ss. 99, 111, 135, s. 136 as amended by Ont. 1968, c. 123, s. 38.
[80]*Ibid.*, s. 8.

sion of trading.[81] In certain cases the consent of the Commission is required before prosecutions may be commenced[82] and in other cases consent of the Minister is required.[83] These provisions are designed to control private prosecutions. That being the case, the consent or authority to prosecute should come from the Attorney General who is by tradition and by statute the law officer of the Crown in charge of public prosecutions.[84] It is incongruous that the Attorney General should have to seek the consent of the Commission or the Minister before he may institute a prosecution for an offence under the Act.

POWER TO EXEMPT FROM PROVISIONS OF THE ACT

1. "(1) The Commission may, where in its opinion such action is not prejudicial to the public interest, order, subject to such terms and conditions as it may impose, that sections 6 and 35 do not apply to any trade, security, person or company, as the case may be, named in the order.

   (2) A notice of each order made under subsection 1 and a summary of the facts relating thereto shall be published by the Commission as soon as practicable after such order is made, and such order shall be laid before the Assembly if it is in session."[85]

2. "(1) Upon the application of an interested person or company, the Commission may,
   (a) if a requirement of section 109 conflicts with a requirement of the laws of the jurisdiction in which a corporation is incorporated; or
   (b) if the laws of the jurisdiction to which the corporation is subject contain substantially similar requirements as contained in section 109; or
   (c) if otherwise satisfied in the circumstances of the particular case that there is adequate justification for so doing,

   make an order on such terms and conditions as seem to the Commission just and expedient exempting, in whole or in part, a person or company from the requirements of section 109.

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[81] *Ibid.*, s. 62, s. 141b as enacted by Ont. 1968, c. 123, s. 40.
[82] *Ibid.*, s. 111(4).
[83] *Ibid.*, s. 137(1), s. 142(1)(a) as amended by Ont. 1968, c. 123, s. 41(1).
[84] Ont. 1968-69, c. 27, s. 5(15)(h).
[85] Ont. 1966, c. 142, s. 20.

(2) An insider of a corporation who is subject to this Part by virtue only of subclause i of clause *a* of section 100 ceases to be subject to this Part if the corporation does not have owners of its equity shares whose last address as shown on the books of the corporation is in Ontario."[86]

3. "(1) Upon the application of a corporation, the Commission may,

   (a) if a requirement of this Part conflicts with a requirement of the laws of the jurisdiction in which a corporation is incorporated; or

   (b) if the laws of the jurisdiction to which the corporation is subject contain substantially similar requirements as contained in this Part; or

   (c) if otherwise satisfied in the circumstances of the particular case that there is adequate justification for so doing,

   make an order on such terms and conditions as seem to the Commission just and expedient exempting, in whole or in part, the corporation from the requirements of this Part.

   (2) A corporation that is subject to this Part by virtue only of subclause i of clause *b* of section 118 ceases to be subject to this Part if the corporation does not have owners of its equity shares whose last address as shown on the books of the corporation is in Ontario."[87]

These provisions give to the Commission wide legislative powers.

In the first case, the powers of exemption apply to the requirements of the Act with respect to registration of persons trading in securities and the requirements in respect of filing a prospectus before trading in the course of primary distribution of shares is permitted. A minimum safeguard is provided. The Commission must be of the opinion "such action is not prejudicial to the public interest."

The second case has to do with insider trading and the requirements to report such trading to the Commission. Two standards which are alternative conditions precedent are set out before the Commission may make an exempting order under clauses *a* or *b*, but there are no standards or limitations

[86] *Ibid.*, s. 116.
[87] *Ibid.*, s. 131.

with respect to the powers conferred in clause *c* a third alternative. The Commission is not even required to consider the public interest. All that is required is that it be "satisfied in the circumstances of the particular case that there is adequate justification for so doing." It is not required to publish an order made under the section nor to report to the Minister that it has made such an order. This is the sort of legislative act over which the Minister should have control. The Act should require,

(1) that such orders should only be made after consideration of the public interest;

(2) that such orders should be reported to the Minister who is responsible to the Legislature for the administration of the Act.

The third case has to do with the requirements of the Act for financial disclosure. In this case standards are set out in clauses *a* and *b* for the exercise of the power of exemption which are quite definite. Clause *c* gives to the Commission power to exempt if satisfied in the circumstances in the particular case that there is adequate justification for so doing. No finding is required that the public interest or the interest of shareholders will be adequately protected notwithstanding such exemption, nor is the Commission required to report the making of such an order to the Minister.

What we have said with respect to the second case applies with equal force to the third case.

RECOMMENDATIONS

1. The Act should provide that members of the Commission should be appointed for fixed terms and should be removable only for cause.
2. The Act should provide that the Chairman and Director of the Commission each have legal training.
3. Section 2(3) of the Act should be amended to provide that a quorum shall consist of three members including the Chairman or a member of the Commission with legal training.
4. Section 5, paragraph 1, should be amended to provide that (a) the notice of hearing be sent at least 10 days prior

to the hearing with power in a member of the Commission to abridge the time where on reasonable grounds he deems it proper; (b) persons or companies affected be permitted to waive the 10 day notice, and (c) persons appearing at the hearing have a right to be heard and this should be set out in the notice.

5. Section 5, paragraph 2 and section 21(4) should be amended to make it clear that neither the Commission nor any person other than a judge of the Supreme Court has power to commit for contempt.
6. Section 5, paragraph 3, should be amended to provide that in determining the relevance of evidence the presiding officer should employ such standards of proof as are commonly relied on by reasonable and prudent men in the conduct of their own affairs.
7. Section 5, paragraph 4, should be amended to read ". . . oral evidence received shall be taken down in writing or by any other method authorized under the Evidence Act."
8. Section 5, paragraph 5, should be amended to make it clear that findings of fact must be based exclusively on the evidence at the hearings and on matters officially noticed which have been disclosed to the parties.
9. Section 5, paragraph 6, should provide that the notice of decision should include a reference to the rights of appeal available from the decision.
10. Where powers of decision are being exercised, the Act should provide an express right of counsel to examine and cross-examine witnesses and make submissions. There should be express powers to grant adjournments and to take official notice. The Act should provide that hearings are to be in public unless the presiding officer decides that there is good reason for holding a private hearing.
11. Where powers of investigation are being exercised, the provisions of the Public Inquiries Act as recommended in Report Number 1 should apply.

12. Sections 29 and 59 should be amended to provide for a right of appeal from decisions under section 59.

13. Where possible the criteria for action by the Commission should be more clearly specified than by a mere statement that it may act "where in its opinion such action is in the public interest." Where criteria have been specified, the Court of Appeal should have power to set aside the decision where on the record the action taken by the Commission is not warranted.

    Where it would frustrate the scheme of the Act to establish criteria for action, the Court of Appeal should have power to set aside the decision where there is no reasonable evidence to support the opinion of the Commission that its action is in the public interest.

14. Standards should be set out in the Act for the exercise of the licensing powers.

15. Conduct which may give rise to the cancellation or suspension of registration should be specified as clearly as possible in the legislation.

16. Section 21(1) and (2) should be amended to provide that the Commission's power to conduct an investigation be conditioned on the approval of the Minister. All investigations under the Act should be subject to the approval of the Minister and be limited to matters "expedient for the due administration of the Act."

17. The Act should be amended to provide that on investigations, any person against whom specific allegations of misconduct have been made, has a right to be examined by his own counsel before he is examined by Commission counsel.

18. Section 24 should be amended to prohibit the communication of information obtained by the Commission, its officers, servants or agents in the exercise of their powers under the Act beyond that which is necessary for the purposes of the Act and the administration of justice.

19. Section 26 should be amended to make it clear that the powers which may be exercised thereunder may be exercised only when the Commission has decided to order

an immediate investigation or to make "a direction, decision, order or ruling suspending or cancelling" a registration or where some step has been taken to institute criminal proceedings or proceedings in respect of a contravention of the Act.

20. Section 59 should be amended to make it clear that an opportunity to be heard must be afforded before a decision can be made under the section.
21. Section 89 of the Act should be amended to provide that the application for an exempting order should be made in the first instance to the Securities Commission with a right of appeal to the Court of Appeal.
22. Section 84(3) of the Corporations Act should be amended to provide that the application for the order be made in the first instance to the Securities Commission with a right of appeal to the Court of Appeal.
23. Where an exempting order is made, a shareholder should have a right to apply to the Commission for reasons for its decision.
24. Section 139(2) should be amended to provide for a right to a hearing before the powers thereunder are exercised by the Commission.
25. Section 142(1) should be amended to substitute for the consent of the Minister the consent of the Attorney General to bring an action, or the section should be repealed.
26. Section 142(2) should be repealed.
27. Sections 111(4) and 137(1) should be amended to delete the requirements for consent to prosecute by the Commission or Minister. The consent or authority should come from the Attorney General.
28. Sections 116 and 131 should be amended to provide that,

    (1) orders thereunder should be made only after consideration of the public interest;

    (2) orders made thereunder be reported to the Minister who is responsible to the Legislature for the administration of the Act.

CHAPTER 127

The Ontario Telephone Service Commission

INTRODUCTION

THE Ontario Telephone Service Commission is a body corporate organized under the Telephone Act.[1] The Commission has jurisdiction and power to hear and determine "applications made, proceedings instituted and matters brought before it" under the Act.[2] These include differences that may arise between two or more telephone systems or municipalities concerning the establishment, operation and maintenance of telephone systems[3] and complaints made by individuals.[4] The Commission in the exercise of its powers has all the powers "that may be conferred upon a Commissioner under The Public Inquiries Act."[5]

INQUIRY PROCEDURE

"The chairman may authorize any one of the members of the Commission to report to the Commission upon any question or matter arising in connection with the business of the Commission and, when so authorized such member has all the powers of the Commission for the purpose of taking evidence and acquiring information for the purposes of the report. . . ."[6] The Act provides in such cases that the member

[1] R.S.O. 1960, c. 394, s. 2(1).
[2] *Ibid.*, s. 6(1).
[3] *Ibid.*, s. 11.
[4] *Ibid.*, s. 14.
[5] *Ibid.*, s. 6(2).
[6] *Ibid.*, s. 7.

reports to the Commission and upon the report being made it may be adopted as the order of the Commission or otherwise as the Commission deems proper.[7]

The procedure provided for inquiry and report by a member of the Commission is analogous to the inquiry system used in England but without the necessary safeguards. In Report Number 1 we discussed the inquiry system as applied to decisions required to be made by Ministers[8] and to compulsory purchase procedure.[9] Under the Telephone Act the power of final decision is not delegated to the member of the Commission authorized "to report". The power of decision is reserved to the Commission.

Where the Commission exercises its powers to authorize one of its members to investigate and report on any matter such member should be required to hold a hearing at which the parties affected will have an opportunity to make oral or written representations. The report should be made available to the respective parties and any party who has appeared at the hearing should be given an opportunity to make representations to the Commission with respect to the report before it comes to a final decision. The minimum rules of procedure which we recommended in Report Number 1[10] should apply to the proceedings of the Commission and the member authorized to investigate and report.

In addition to the delegation of its powers to a member of the Commission to inquire and report the Commission may direct any person to examine and report upon the construction, operation, or management of a telephone system.[11] In the exercise of these powers the person directed to make the examination and report "may exercise any of the powers set out in section 52 of the Ontario Municipal Board Act."[12] The powers set out in section 52 of the Ontario Municipal Board Act[13] include ". . . the like power to summon witnesses and enforce their attendance, and compel them to give evidence and to produce books, papers or things that they are

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[7]*Ibid.*
[8]p. 128ff. *supra.*
[9]p. 1005 *supra.*
[10]p. 212ff. *supra.*
[11]R.S.O. 1960, c. 394, s. 13(1).
[12]*Ibid.*, s. 13(2).
[13]R.S.O. 1960, c. 274.

required to produce, as is vested in any court in civil cases." This power unquestionably includes the power to commit for contempt of the orders of the person directed to make the inquiry. We dealt with powers such as this in Report Number 1[14] and there recommended the procedure that we think should be provided—that where it is necessary to enforce orders of the Commission or any one directed by it to examine and report, provision should be made for an application to the Supreme Court for an order of committal and that the Public Inquiries Act and other statutes conferring powers of compulsion should be amended accordingly.

What we have said with respect to the right to be heard where a hearing is conducted by a member of the Commission applies with equal force to an inquiry by a person directed by the Commission to examine and report. Before the Commission acts, the parties affected should be furnished with a copy of the report of the examining officer and the Commission should give them a right to be heard if they so desire.

The foregoing recommendations are based on the premise that the decisions of the Commission are administrative in their nature, i.e. are substantially based on grounds of policy.[15] If such decisions are of a judicial nature then the employment of an inquiry procedure, a report and a decision would be contrary to the principle that he who decides must hear the evidence.[16]

APPEALS

Three rights of appeal are provided in the Act.

Appeal by Way of Stated Case

> "The Commission may, of its own motion or upon the application of any party to proceedings before the Commission and upon such security being given as it directs, state a case in writing for the opinion of the Court of Appeal upon any question that, in the opinion of the Commission, is a question of law."[17]

[14]p. 441ff. *supra.*
[15]See pp. 126-30 *supra.*
[16]See p. 220 *supra.*
[17]R.S.O. 1960, c. 394, s. 17(1).

Where the Commission refuses to state a case there is no right given to the applicant to apply to the Court of Appeal for an order directing that the Commission state a case on a question of law as there is under the Public Inquiries Act.[18] The Commission is the sole judge of whether a question is a question of law and whether a case should be stated. While we criticized the language of the Public Inquiries Act in Report Number 1, we approved of the principle that there should be a right to apply to the Court of Appeal for an order directing the Commission to state a case on a question of law.[19]

It is unusual that the Commission should have power to order the applicant for a stated case to give security. In other civil matters the way of appeal is open without giving security. *A fortiori*, it should be open without giving security where a party concerned with an order of the Commission raises a question of law that ought to be settled by the Court of Appeal.

Appeal upon Questions of Law or Jurisdiction

> "An appeal lies from the Commission to the Court of Appeal upon any question of jurisdiction or upon any question of law, but no such appeal lies unless leave to appeal is obtained from the court within one month of the making of the order or decision sought to be appealed from or within such further time as the court under the special circumstances of the case allows after notice to the opposite party, if any, stating the grounds of appeal."[20]

It is not to be overlooked that in this case there is no power to order security and we think this is as it should be.

Appeal to the Lieutenant Governor in Council

> "The Lieutenant Governor in Council may at any time upon petition of any party, all parties first having been heard, vary or rescind any order or decision of the Commission whether the order or decision was made *inter partes* or otherwise, and any order that the Lieutenant Governor in Council makes

[18] R.S.O. 1960, c. 323, s. 5.
[19] p. 453ff. *supra*.
[20] R.S.O. 1960, c. 394, s. 19(1).

with respect thereto is binding upon the Commission and all parties."[21]

The right of appeal to the Lieutenant Governor in Council is similar to the right of appeal given under the Ontario Municipal Board Act[22] and under the Ontario Energy Board Act.[23] These appeal provisions could produce a strange result. On appeal to the Court of Appeal the Court may determine a question of jurisdiction or law and specify "its opinion to the Commission and the Commission shall make an order in accordance with such opinion."[24] The Lieutenant Governor in Council may vary or rescind the order of the Commission, i.e. the Lieutenant Governor in Council may overrule the Court of Appeal notwithstanding its interpretation of the law and the statute conferring powers on the Commission. This is inconsistent with the recommendations made in Report Number 1 and, particularly, with the principle that an appeal should not lie from the decision of a judicial tribunal to the Lieutenant Governor in Council or to a Minister.[25] The power of the Lieutenant Governor in Council to set aside an order of the Commission should not apply to questions of law.

SUBORDINATE LEGISLATIVE POWER

Subject to the approval of the Lieutenant Governor in Council, the Commission may make regulations concerning a wide area of subjects.[26] However, the Act provides,

> "The Regulations Act does not apply to any order, regulation or by-law made under the authority of this Act."[27]

It is difficult to see why the laws made by the Commission should not be subject to the Regulations Act. For example, a regulation passed on the 29th of October, 1962, effective November 8, 1962, dealing with the construction of telephone

[21]*Ibid.*, s. 18.
[22]R.S.O. 1960, c. 274, s. 94, as re-enacted by Ont. 1961-62 c. 96, s. 3(1) and amended by Ont. 1965, c. 89, s. 2.
[23]Ont. 1964, c. 74, s. 33.
[24]R.S.O. 1960, c. 394, s. 19(3).
[25]pp. 233-34 *supra*.
[26]R.S.O. 1960, c. 394, s. 26.
[27]*Ibid.*, s. 22.

lines contains certain requirements and prohibitions. These are part of the laws of the Province. They are nowhere to be found in the statutes or in the published regulations passed under the statutes. It is quite unnecessary that many specific orders of the Commission dealing with matters coming before it for decision on a day to day basis should be published as regulations but general regulations that the Commission is empowered to make in exercising its subordinate legislative powers should come under the Regulations Act and be published.

PENALTIES

Penalties are provided for failure to obey orders of the Commission.[28] Where an order of the Commission is not published, those required to act under it may not know of its existence and still may be subject to penalties. In any case, no one should be subject to a penalty unless he fails to do or perform an act required of him under an order of the Commission of which he has been notified.

RECOMMENDATIONS

1. Where a member of the Commission authorized to report to the Commission exercises the powers of investigation conferred under section 7 he should be required to notify the parties affected and give them an opportunity to be heard.
2. Where a member of the Commission makes a report to the Commission under the provisions of section 7 a copy of the report should be furnished to any party who has made representations to the member conducting the investigation and the Commission should give any such party an opportunity to be heard before coming to a final decision.
3. The minimum rules of procedure recommended in Report Number 1 should apply to those investigations conducted under the authority of the Commission which precede a decision affecting rights, and a code of rules of procedure should be formulated.

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[28] *Ibid.*, s. 83.

4. Where an inquiry is conducted under section 13 the parties affected should have an opportunity to be heard before any report is made and a copy of the report should be furnished to parties affected if required by them.
5. Before the Commission makes a decision with respect to a report made under section 13 the parties affected should have an opportunity to be heard.
6. The Commission should not have power to commit for contempt.
7. The provision requiring the applicant for a stated case to give security for costs should be repealed.
8. The Court of Appeal should have power to direct the Commission to state a case where the Commission refuses to do so.
9. The right of appeal to the Lieutenant Governor in Council should not apply to questions of law.
10. Regulations and orders in the nature of regulations made by the Commission should not be exempted from the Regulations Act.
11. No one should be subject to a penalty unless he fails to do something required of him under an order of the Commission of which he has been notified.

CHAPTER 128

The Ontario Water Resources Commission

INTRODUCTION

THE Ontario Water Resources Commission, to which we shall hereafter in this Chapter refer as "the Commission" unless the context otherwise requires, was orginally established in 1956 under the provisions of the Ontario Water Resources Commission Act, 1956.[1] The Commission was constituted a body corporate without share capital composed of no fewer than three and not more than five persons appointed by the Lieutenant Governor in Council.[2]

The functions and powers of the Commission were stated to be,

"(a) to develop and make available supplies of water;

(b) to construct and operate systems for the supply, purification and distribution of water and for the disposal of sewage;

(c) to enter into agreements with respect to the supply of water or the disposal of sewage;

(d) to conduct research programmes and to prepare statistics for its purposes;

(e) to perform such other functions or discharge such other duties as may be assigned to it from time to time by the Lieutenant Governor in Council."[3]

Wide powers were conferred on the Commission to enter into agreements and acquire land without consent of the owner.

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[1]Ont. 1956, c. 62.
[2]*Ibid.*, s. 3.
[3]*Ibid.*, s. 10.

According to the original concept, the Commission was a Crown corporation established to enter into the business of supplying water and making provision for the disposal of sewage.

It was required to report annually to the Minister designated by the Executive Council to administer the Act and a copy of its report was required to be laid before the Legislative Assembly.

The 1956 Act was repealed in 1957[4] by an Act which, with some amendments, is substantially the same as the present statute law governing the Commission.[5] The Commission was reconstituted with much wider powers which give it very complex characteristics. It continues to exercise the powers of a Crown corporation providing water supply and means for the disposal of sewage. But very extensive administrative and judicial powers were added to those formerly conferred on it. It was made the recipient of a conglomerate of powers of such a nature that the question arises as to whether such powers should be exercised by a body corporate that is engaged in the business of providing water supply and sewage disposal. As we shall see later, a conflict of interest may arise in the exercise of the Commission's administrative and judicial powers.

GENERAL POWERS OF THE COMMISSION

The present functions and powers of the Commission are stated to be,

"(a) to control and regulate the collection, production, treatment, storage, transmission, distribution and use of water for public purposes and to make orders with respect thereto;

(b) to construct, acquire, provide, operate and maintain water works and to develop and make available supplies of water to municipalities and persons;

(c) to construct, acquire, provide, operate and maintain sewage works and to receive, treat and dispose of sewage delivered by municipalities and persons;

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[4]Ont. 1957, c. 88, s. 49.

[5]R.S.O. 1960, c. 281 as amended by Ont. 1960-61, c. 71, Ont. 1961-62, c. 99, Ont. 1962-63, c. 99, Ont. 1964, c. 86, Ont. 1965, c. 91 and Ont. 1966, c. 108.

(d) to make agreements with any one or more municipalities or persons with respect to a supply of water or the reception, treatment and disposal of sewage;
(e) to conduct research programmes and to prepare statistics for its purposes; and
(f) to perform such functions or discharge such duties as may be assigned to it from time to time by the Lieutenant Governor in Council."[6]

There are additional powers conferred on the Commission, some of which we shall deal with specifically. It is to be observed that the legislative scheme respecting the purpose of the Commission is very different from the original concept. Under the present legislation, the power to control and regulate the collection, production, storage, transmission, distribution and use of water for public purposes have been added to the original basic purpose to develop and make available supplies of water and means of disposal of sewage. These powers are, for the most part, in addition to those of a business nature. They are, generally, administrative in character and are exercised, in the main, without that degree of political control that is consistent with the recommendations made in Report Number 1.[7]

We shall deal first with the business functions of the Commission, as distinct from its decision-making powers.

BUSINESS FUNCTIONS

"The Commission may for its purposes exercise any or all of the powers that are conferred by any general Act upon a municipality respecting the establishment, construction, maintenance or operation of water works or sewage works."[8]

These are very broad powers which are intended to be exercised for the purpose of carrying on the business of supplying water to municipalities and providing for the disposal of sewage.

"The Commission and its employees and agents may at any time for its purposes, without consent and without compensation, enter into the lands or buildings of the Province or of any municipality or of any person, or into any highway or

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[6]R.S.O. 1960, c. 281, s. 16(1) as amended by Ont. 1962-63, c. 99, s. 2.
[7]See pp. 126-130 and 234 *supra*.
[8]R.S.O. 1960, c. 281, s. 17 as amended by Ont. 1961-62, c. 99, s. 3.

road under the jurisdiction and control of any public authority, or into any boat or ship to which the regulations under clause *ha* of subsection 1 of section 47 apply, and may make such surveys, examinations, investigations, inspections or other arrangements as it deems necessary, and, except as provided in subsection 3, the Commission is liable for any damage occasioned thereby."[9]

Subsection 3 provides:

"Lands, buildings, highways, or roads disturbed by the exercise of any of the powers mentioned in subsection 1 or 2 shall be restored to their original condition without unnecessary delay."[10]

The words "and, except as provided in subsection 3, the Commission is liable for any damage occasioned thereby" which were added by an amendment in 1966[11] are most difficult to construe.

The Commission and its employees are given power of entry to the lands and buildings of any person and may do certain things "without compensation." But it is liable for damages except where the lands and buildings, etc. disturbed by the exercise of the powers "shall be restored to their original condition." The exception is not an exception from liability for damages but a duty to do something resulting in specific restitution. It should be made clear that the Commission is liable to restore the lands, buildings, etc. that may have been disturbed and the Commission should also be liable to pay compensation for any damage to property which cannot be repaired.

RIGHT TO ACQUIRE LAND

"The Commission may for its purposes acquire by purchase, lease or otherwise or, without the consent of the owner, enter upon, take possession of, expropriate and use land . . . as may be deemed necessary for its purposes, and, upon such terms as it deems proper, may sell, lease or dispose of any land that in its opinion is not necessary for its purposes."[12]

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[9] *Ibid.*, s. 18(1) as re-enacted by Ont. 1966, c. 108, s. 1.
[10] *Ibid.*, s. 18(3).
[11] Ont. 1966, c. 108, s. 1.
[12] R.S.O. 1960, c. 281, s. 19(1).

Several provisions in this subsection conflict with the Expropriations Act, 1968-69.[13] Notwithstanding the paramountcy of that Act, the conflicting provisions should be repealed.

RIGHT TO USE WATER

"The Commission . . . may use the waters of any lake, river, pond, spring or stream as may be deemed necessary for its purposes."[14] We consider this provision quite apart and distinct from the powers conferred on the Commission to *supervise and control* surface and ground waters. These we shall discuss later. The Commission has power to make use of any lake, river, pond, spring or stream as may be deemed necessary for its purposes. This is an arbitrary power of confiscation of the rights of riparian owners. In the first place, the test is not "as may be necessary for its purposes" but "as may be *deemed* necessary for its purposes."

Where land is taken without the owner's consent there are all the safeguards of the Expropriations Act, 1968-69 but with respect to the power to use water there are no safeguards and no rights to compensation. This is unconscionable. Riparian rights are very important rights to those who enjoy them and they are rights that the common law has jealously guarded. The right is to have the natural flow of water in its natural state.[15]

Provision should be made for compensation for loss suffered by riparian owners arising out of the exercise of the power conferred on the Commission to use waters.

With respect to real or personal property acquired for the purposes of a project or for the provision of water or sewage service the provisions of the Public Works Act do not apply.[16] This places the Commission in a position superior, in some respects, to the Crown.

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[13]Ont. 1968-69, c. 36.
[14]R.S.O. 1960, c. 281, s. 19(1).
[15]*McKie* v. *The K.V.P. Co. Ltd.*, [1948] O.R. 398.
[16]R.S.O. 1960, c. 281, s. 19a as enacted by Ont. 1966, c. 108, s. 2.

THE SUPERVISION OF ALL WATERS: CONFLICTS WITH OTHER ACTS

The Commission has power of supervision of all surface waters and all ground waters used as a source of water supply.[17] This power is limited only by the interpretation that may be placed on the word "supervision", which is not defined in the Act. When considered with the power to "use the waters of any lake, river, pond, spring or stream" there is considerable conflict with provisions in other statutes.

Under the Conservation Authorities Act, 1968[18] a conservation authority has power to determine a program whereby the natural resources of the watershed may be conserved, restored, developed and managed and to control the flow of surface waters in order to prevent floods or pollution or to reduce the adverse effects thereof and "to alter the course of any river, canal, brook, stream or watercourse and divert or alter, as well temporarily as permanently, the course of any river, stream, road, street or way, . . ."[19].

Powers are given to an authority, subject to the approval of the Lieutenant Governor in Council, to make regulations applicable to the area under its jurisdiction restricting and regulating the use of water in or from rivers, streams, inland lakes, ponds, swamps and natural or artificially constructed depressions in rivers or streams and restricting and regulating the straightening, changing, diverting or interfering in any way with the existing channel of a river, creek, stream or watercourse.[20]

However, it is provided that no such regulation shall "interfere with any rights or powers . . . of any commission that is performing its functions for or on behalf of the Government of Ontario.[21]

Under the Lakes and Rivers Improvement Act[22] the Lieutenant Governor in Council may make regulations respecting generally the use under this Act of lakes and rivers

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[17]*Ibid.*, s. 26(1).
[18]Ont. 1968, c. 15.
[19]*Ibid.*, ss. 18, 19(k)(1).
[20]*Ibid.*, s. 26(1)(a)(b).
[21]*Ibid.*, s. 26(2)(c).
[22]R.S.O. 1960, c. 203.

and waters therein.[23] The Act provides that a dam shall not be constructed on any lake or river unless the location and plan and specifications thereof have been approved by the Minister of Lands and Forests.[24]

Where the Lieutenant Governor in Council has declared that any lake or river is subject to Part II of the Act all questions arising in relation to the lake or river,

> "(a) as to the right to construct or use works or improvements thereon;
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> (b) as to the respective rights of persons using the lake or river for the purpose of floating timber thereon;
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> (c) as to the right to interfere with, alter or obstruct in any manner the flow of the water in the lake or river,
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> shall be determined by the Minister . . ."[25]

Under the Municipal Act[26] councils of municipalities may pass by-laws for the purpose of preventing damage to any highway or bridge or to any property within the municipality by floods arising from the overflowing or damming back of a river, stream or creek flowing through or in the neighbourhood of the municipality and for deepening, widening, straightening or otherwise improving a river, stream or creek for such purpose.[27]

Under the Power Commission Act[28] the Hydro Electric Power Commission, with the authorization of the Lieutenant Governor in Council, may temporarily or permanently divert or alter the boundaries or course of any body of water.[29] Under the Public Utilities Act[30] the corporation of a local municipality may expropriate the right to divert[31] waters. Under the Water Powers Regulation Act,[32] where a right to develop or generate power is enjoyed or where there is a right of diversion or use of water defined wholly or in part by the character, location or dimensions of works, an inspector may fix in terms of cubic feet per second the amount of water that

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[23]*Ibid.*, s. 2(1)(b).
[24]*Ibid.*, s. 9(1) as re-enacted by Ont. 1962-63, c. 71, s. 1.
[25]*Ibid.*, s. 24(1).
[26]R.S.O. 1960, c. 249.
[27]*Ibid.*, s. 377, para. 16.
[28]R.S.O. 1960, c. 300.
[29]*Ibid.*, s. 24.
[30]R.S.O. 1960, c. 335.
[31]*Ibid.*, s. 2(1).
[32]R.S.O. 1960, c. 426.

it is necessary to use in order to develop or generate the relevant power or exercise the right.[33] The Lieutenant Governor in Council may limit, define or restrict the rights conferred upon the owner of a water power.[34]

We have made reference to the foregoing statutes merely as examples of conflict or potential conflict. Many others no doubt exist.

Section 16 of the Ontario Water Resources Commission Act, which we have already quoted, contains the introductory words, "Notwithstanding any other Act, it is the function of the Commission and it has power, . . .". These introductory words apply to the powers set out in that section but not to other powers conferred on the Commission under other sections. It is by no means clear that the powers conferred on the Commission "to control and regulate the . . . distribution and use of water for public purposes and to make orders with respect thereto" were intended to give the Commission paramount power over the use of all waters irrespective of whether, for example, the power resources of the Hydro-Electric Power Commission would be affected thereby. If the introductory words to section 16 are intended to give the Commission paramount control over waters this curious result would follow. Its powers of control would prevail over other powers conferred under statutes passed prior to 1957 but not powers conferred under statutes passed thereafter—for example, the Conservation Authorities Act, 1968.[35]

We recommend that a thorough review of all provincial legislation respecting the use of water should be conducted with a view to (a) determining a coherent policy on this subject and, (b) removing conflicting statutory provisions relating thereto.

THE PERMISSION TO POLLUTE

The Commission has wide powers designed for the protection against pollution of water supplies but, at the same time, it exercises equally wide powers, or wider powers, to permit pollution.

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[33]*Ibid.*, s. 7.
[34]*Ibid.*, s. 10(1).
[35]See *Ellen Street Estates v. Minister of Health*, [1934] 1 K.B. 590.

"Every municipality or person that discharges or deposits or causes or permits the discharge or deposit of any material of any kind into or in any well, lake, river, pond, spring, stream, reservoir or other water or watercourse or on any shore or bank thereof or into or in any place that may impair the quality of the water of any well, lake, river, pond, spring, stream, reservoir or other water or watercourse is guilty of an offence and on summary conviction is liable to a fine of not more than $1,000 or to imprisonment for a term of not more than one year, or to both."[36]

These penal provisions are clear and unambiguous and there are no exceptions. However, the Act goes on to provide:

"The discharge into any lake, river, stream or other water or watercourse of sewage from sewage works that have been constructed and are operated in accordance with the approval of the Department of Health or the Commission or in conformity with any order of the [Ontario Municipal] Board is not a contravention of subsection 1."[37]

The result is that the Department of Health, the Commission or the Ontario Municipal Board may give "approval" which has the effect of exempting the person obtaining it from the penal consequences of the Act.

This legislation may well be necessary and unavoidable but we are here particularly concerned with the powers of the Commission to grant an approval. There are no procedural provisions contained in the Act.

The penal provisions are for the benefit of users of the water, but notwithstanding this, an approval may be given without any publicity and without any opportunity for those affected to be heard. Take, for example, the water of a well or a pond. It is difficult to understand why any approving authority should have power to grant an approval of a discharge into the well or pond "which may impair the quality of the water" so as to escape the penalties provided by the Act. The least one would expect would be that a person who would be affected by the approval granted should have an opportunity to be heard before a decision is made.

A person who would be affected by an approval or order permitting the discharge of sewage into a lake, river, stream

[36]R.S.O. 1960, c. 281, s. 27(1) as re-enacted by Ont. 1961-62, c. 99, s. 5.
[37]*Ibid.*, s. 27(2).

or other watercourse granted under section 27(2) should have an opportunity to be heard before such order is made.

> "No person shall add any substance to the water of any well, lake, river, pond, spring, stream, reservoir or other water or watercourse for the purpose of killing or affecting plants, snails, insects, fish or other living matter or thing therein without a permit issued by the Commission."[38]

This provision "does not apply to any person or to substances or any quantity or concentration thereof exempted . . . by the regulations made under this Act."[39]

> "The Commission may in its *discretion* issue, refuse to issue or cancel a permit, may impose such terms and conditions in issuing a permit as it deems proper, and may alter the terms and conditions of a permit after it is issued."[40]

It is made an offence to contravene these provisions or any of the terms and conditions of a permit.[41] The result is that regulations may permit acts forbidden by the statute except under a permit and the Commission may grant a permit to do those things which would otherwise be prohibited.

There are no standards laid down to indicate for what purpose a regulation may be passed, nor when a permit should or should not be granted. This is in the discretion of the Commission and the conditions that may be imposed are as the Commission may "deem proper". The powers of cancellation are likewise in the discretion of the Commission.

There is no right of appeal from a refusal to grant a permit and no right of appeal from a cancellation of a permit or the terms or conditions imposed after a permit has been granted.

There are no procedural provisions controlling the exercise of the powers of the Commission in this regard. Those for whose benefit prohibitions have been provided are not given any means by which they can be heard or any right of appeal.

[38]*Ibid.*, s. 28b(1), as enacted by Ont. 1961-62, c. 99, s. 7.
[39]*Ibid.*, s. 28b(2), as enacted by Ont. 1961-62, c. 99, s. 7.
[40]*Ibid.*, s. 28b(3), as enacted by Ont. 1961-62, c. 99, s. 7. Italics added.
[41]*Ibid.*, s. 28b(4), as enacted by Ont. 1961-62, c. 99, s. 7.

THE DEFINITION OF SOURCES OF PUBLIC WATER SUPPLY

The Commission may define an area that includes a source of public water supply wherein no person shall swim etc. When an area has been so defined the municipality or person who has a right to use the water from such source for the purpose of a public water supply "shall give notice of the area so defined by publication, posting or otherwise as the Commission deems necessary for the protection of the source of public water supply."[42] Penal consequences follow under the Act for any contravention of the terms of a definition respecting the use of water. Publication of the notice of the area so defined should be mandatory. It should not be an alternative to publication of notice to have it given "otherwise as the Commission deems necessary." The definition should be by way of a regulation approved by the Lieutenant Governor in Council so that those within the area may know what they are permitted to do with water on land that they own and provision should be made that they be furnished with a copy of the regulation.

CONTROL OF WATER SUPPLY

Generally, and without discussing the detailed exceptions, no person shall take more than a total of 10,000 gallons of water in a day without a permit from the Commission.[43]

> "The Commission may in its discretion issue, refuse to issue or cancel a permit, may impose such terms and conditions in issuing a permit as it deems proper and may alter the terms and conditions of a permit after it is issued."[44]

This is a discretionary power conferred on the Commission to make exemptions to the scheme of the statute. We deal first with the requirement for a permit. The Act does not purport to make it an offence to take an excessive amount of water in certain conditions and it would not be practical for

[42] *Ibid.*, s. 28(1) as re-enacted by Ont. 1962-63, c. 99, s. 3 and amended by Ont. 1964, c. 86, s. 4(1).
[43] *Ibid.*, s. 28a(2) as enacted by Ont. 1960-61, c. 71, s. 3, and amended by Ont. 1961-62, c. 99, s. 6(1) and Ont. 1964, c. 86, s. 5(1).
[44] *Ibid.*, s. 28a(4), as enacted by Ont. 1960-61, c. 71, s. 3.

it to do so. The offence is taking it without a permit. The obvious purpose of these provisions is to provide safeguards against the waste of water in critical areas. But no standards are laid down for the issue of permits, not even "where in the opinion of the Commission it is necessary to conserve the water supply in a certain area." The Commission may dispense or withhold permits and impose terms and conditions "in its discretion". There are no rights of appeal given to the applicants, nor to those who may be interested in the conservation of the water supply.

The powers with respect to the cancellation of permits or the alteration of their terms or conditions are equally arbitrary and possibly more so. There is no provision that the holder of a permit shall have notice of an intention to cancel or alter it, nor for a hearing and there is no right of appeal.

Where by means of a hole in the ground or an excavation made for any purpose other than the taking of water, leakage is caused which "in the opinion of the Commission" interferes with any public or private interest in any water, the Commission may by notice require the responsible person or the owner of the land in question to "stop or regulate such flowing, leaking, diversion or release of water in such manner and within such time as the Commission directs, or require such person or owner to take such measures in relation to the flowing, leaking, diversion or release of water as the notice requires".[45]

Anyone who contravenes such a notice is guilty of an offence and is liable to a fine of not more than $200 per day for every day the contravention continues. The powers here conferred on the Commission are a curious mixture. The power given is to form an "opinion"—not to "find on proven facts". It is a legislative power, applicable to a particular situation. There is no right of appeal. Once the Commission has formed an opinion and issued a notice the penal consequences follow from the notice issued by the Commission. The person accused of the act cannot contend in the courts that he did not cause the leakage. The only defences would be that he had complied with the notice or that there was no leakage.

[45] *Ibid.*, s. 28a(5) as enacted by Ont. 1964, c. 86, s. 5(3) and amended by Ont. 1966, c. 108, s. 4.

But one who has not caused the leakage might well have difficulty, to say the least, complying with a notice directing him to stop the leakage. There is no redress available where the Commission may err in its "opinion".

The powers given to the Commission in this regard are much greater than those given to a Supreme Court judge in an action where it is claimed that an excavation has caused leakage with respect to a neighbouring water supply. In such case the judge would have to try the case on notice to all parties, facts would have to be forthcoming to prove the allegations and there would be a right of appeal.

Under the provisions we have been discussing all that is required before the Commission issues a notice is that it form an opinion.

LICENSING

No person may carry on the business of boring or drilling wells for water without a licence issued by the Commission.[46] The Commission "may suspend or cancel a licence at any time."[47] The purpose of licensing is not set out in the Act. It may be to assure that those who bore or drill wells are competent or it may be for the purpose of having a register of those engaged in the business so that logs may be obtained and water patterns developed.

Whatever the purpose may be, where the Commission refuses to issue a licence the applicant should have a right to be heard and it should be compelled to give reasons for a refusal. The Commission should not have power to suspend or cancel a licence without the licensee having an opportunity to be heard and to know the reasons alleged as to why his licence should be suspended or cancelled.

Approval of Water Works and Sewage Works

With certain exceptions, where a municipality or a person wishes to establish a water works the approval of the Commission must be first obtained. The only standard set to guide

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[46] *Ibid.*, s. 29(1).
[47] *Ibid.*, s. 29(4).

the Commission is "where in the opinion of the Commission it is in the public interest to do so . . .".[48]

There is no right of appeal from decisions of the Commission.

> "Where any person undertakes or proceeds with the establishment of any water works, or the extension of or change in any existing water works, without having first obtained the approval of the Commission, the Commission may order the person to afford at his own expense such facilities as the Commission may deem necessary for the investigation of the works and the source of water supply and may direct such changes to be made in the source of water supply and in the works as the Commission may deem necessary, and any changes directed by the Commission to be made in the works shall be carried out by the person at his own expense."[49]

Here again, there is no right of appeal and the Commission's powers are limited only by what "it may deem necessary".

The Commission has approximately the same powers with respect to sewage works as it has respecting water works and there is the same lack of safeguards for the rights of the individual who may be affected by the exercise of such powers.[50]

CLOSING ROADS

Where the Commission has approved of the establishment of or the extension of a sewage works in or into another municipality, the municipality undertaking the establishment or extension may apply to the Ontario Municipal Board for an order,

> "(a) stopping up and closing any highway, road or road allowance, temporarily or permanently, for the purpose of allowing the establishment or extension to be carried on and vesting it in the municipality undertaking the establishment or extension, and providing for the opening of another highway, road or road allowance in lieu of the highway, road or road allowance so stopped up and closed, and section 91 of *The Registry Act* does not apply;

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[48] *Ibid.*, s. 30(3).
[49] *Ibid.*, s. 30(2).
[50] *Ibid.*, s. 31 as amended by Ont. 1961-62, c. 99, s. 9; Ont. 1964, c. 86, s. 8 and Ont. 1965, c. 91, s. 3.

(b) ordering that any building restrictions, covenants running with the land or any limitations placed upon the estate or interest of any person in any lands upon or through which it is proposed that the establishment or extension may be constructed shall be terminated and shall be no longer operative or binding upon or against any person, and directing that any such order be registered under *The Registry Act;* and

(c) fixing the compensation for lands taken or injuriously affected in the construction, maintenance or operation of the establishment or extension."[51]

The power to close roads under these provisions suffers by comparison with the power conferred on the Ontario Municipal Board under the Highway Improvement Act.[52] Under this Act the Board may give its approval to a by-law closing a municipal road that intersects or runs into a controlled-access road. Provisions governing procedures are laid down in the statute for the protection of the rights of those who may be affected and a right of appeal is given with leave of the Court of Appeal. There is an express provision that the municipality shall make due compensation to the owner of the land injuriously affected by the closing.[53] There are no specified rights of appeal under the Ontario Water Resources Commission Act. However, the provisions of the Ontario Municipal Board Act giving a right of appeal with leave of the Court of Appeal on any question of jurisdiction or law would be applicable.[54] This is a more restricted right of appeal than is given under the Highway Improvement Act to which we have just referred. It seems illogical that where proceedings are taken under one Act to close a road there should be a general right of appeal and where proceedings are taken under another Act there is a limited right of appeal. We think there should be a general right of appeal from any order of the Board closing a road.

Although there is a provision giving power to the Ontario Municipal Board to fix compensation for lands taken or injuriously affected "in the construction, maintenance or operation of the establishment or extension" of sewage

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[51]*Ibid.*, s. 32(5) as re-enacted by Ont. 1966, c. 108, s. 5.
[52]R.S.O. 1960, c. 171, s. 93.
[53]*Ibid.*, s. 93(6).
[54]R.S.O. 1960, c. 274, s. 95(1).

works[55] there is no express provision for compensation for those injuriously affected by orders of the Board with respect to the closing of roads. There should be such a provision. The Act specifically provides that "the registration of an order under clause *b* of subsection 5 [with respect to the termination of covenants and restrictions] is a bar to any action or proceeding taken by any person claiming any right or benefit under or by reason of any such restrictions, covenants, interests, estate or title in the lands described in the order."[56] This denies a right of action for damages suffered by the beneficiaries of covenants running with the land or limitations placed upon the estate or interest in the lands.

ADJUDICATION OF COMPLAINTS

> "The Board may inquire into, hear and determine any application by or on behalf of any municipality or person complaining that any municipality constructing, maintaining or operating sewage works or having the control thereof,
>
> (a) has failed to do any act, matter or thing required to be done by an Act or regulation, order or direction, or by any agreement entered into with the municipality; or
>
> (b) has done or is doing any such act, matter or thing improperly,
>
> and that the same is causing deterioration, loss, injury or damage to property, and the Board may make any order, award or finding in respect of any such complaint as it deems just."[57]

The powers conferred under this section are strictly judicial and do not involve any matters of policy, yet the remedy is confined to what the "Board deems just". It may make "any order, award or finding . . . as it deems just." Very important claims may be affected by the exercise of these powers. There are no procedural provisions in the Act but the rules of procedure made by the Board (the Ontario Municipal Board) would be applicable[58] and the right of appeal is dependent upon obtaining leave of the Court of Appeal and it is limited to matters of law and jurisdiction.[59]

[55]R.S.O. 1960, c. 281, s. 32(5)(c) as re-enacted by Ont. 1966, c. 108, s. 5.
[56]*Ibid.*, s. 32(6) as re-enacted by Ont. 1966, c. 108, s. 5.
[57]*Ibid.*, s. 33.
[58]R.R.O. 1960, Reg. 466.
[59]R.S.O. 1960, c. 274, s. 95.

Where a person suffers damage by reason of acts done in the construction of or the maintenance of the operation of a sewage works and the Board conducts a hearing and makes an award, it is difficult to see why he should not have the same rights of appeal as he would have had if he had brought an action and judgment was given. The right to compensation should be a right to compensation for the loss or damage and not a right to be compensated "as the Board deems just."

Since the powers of the Board with respect to awarding compensation in expropriation cases have now been conferred on the Land Compensation Board[60] any application under the section we have been discussing should be heard by that Board.

EXPROPRIATIONS

All the provisions of the Act dealing with expropriation and related matters, and particularly section 34, should be revised to eliminate conflict with the Expropriations Act, 1968-69.

POWERS OF ENTRY

"(1) Where a local municipality, a county or a local board of health or the local board of a health unit undertakes under section 47*a* or the regulations made under section 47 or under an agreement to inspect plumbing, the municipality or local board, as the case may be, may pass by-laws,

(a) providing for such inspections and for appointing one or more inspectors for such purpose;

(b) for charging fees for such inspections and fixing the amounts thereof;

(c) for requiring the production of plans of plumbing that is to be constructed, repaired, renewed or altered and of the location of drains, pipes, traps and other works or appliances that are or are to be part of or connected with the plumbing, and for charging fees for the inspection and approval of such plans, and fixing the amount of the fees; and for the issuing of a permit certifying to such approval and requiring that without such permit no such plumbing may be constructed, repaired, renewed or altered;

[60]*The Expropriations Act*, 1968-69, c. 36, s. 28.

(3) An inspector may at all reasonable hours enter any premises to inspect plumbing to which the regulations made under section 47 are applicable and every person who prevents or obstructs or attempts to prevent or obstruct any such entry or inspection is guilty of an offence and on summary conviction is liable to a fine of not more than $25."[61]

The powers of entry here given are no doubt necessary but they are unnecessarily wide and should not be conferred under any statute. The only restriction is that the entry should be exercised at "reasonable hours" and for the purpose of inspecting the premises to which the regulations apply. Not only should the entry be at reasonable hours but it should be restricted to entries that are reasonably necessary. A statement of the conditions precedent which should be satisfied before such an entry is made should be confirmed in the legislation. The inspector should, before exercising his power of entry, be required to produce proper identification. The occupant of premises should have the right, without incurring liability for the penalties provided in the Act, to prevent the entry of any person purporting to be a plumbing inspector, unless proper identification is presented.

SUBORDINATE LEGISLATIVE POWER

The Commission is given power, with the approval of the Lieutenant Governor in Council, to exempt any persons, or any substance or quantity or concentration thereof from the provisions of the Act prohibiting the addition of substances to wells, lakes, rivers, ponds, springs, streams, reservoirs or watercourses for the purpose of killing or affecting plants, fish or other living matter without a permit.[62]

Likewise, the Commission is given power to exempt sewage works and water works from the provisions of the Act which give to the Commission control over the construction and operation of such works.[63]

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[61] R.S.O. 1960, c. 281, s. 47b as enacted by Ont. 1961-62, c. 99, s. 15.

[62] *Ibid.*, s. 47(1)(ja) as enacted by Ont. 1961-62, c. 99, s. 14(1) and s. 28b as enacted by Ont. 1961-62, c. 99, s. 7.

[63] *Ibid.*, s. 47(1)(ka) as enacted by Ont. 1961-62, c. 99, s. 14(2); s. 30 as amended by Ont. 1961-62, c. 99, s. 8 and Ont. 1964, c. 86, s. 7; and s. 31 as amended by Ont. 1961-62, c. 99, s. 9, Ont. 1964, s. 86, s. 8 and Ont. 1965, c. 91, s. 3.

In Report Number 1 we said:

> "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. . . .
>
> 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."[64]

If the subordinate legislative powers to which we have just referred can be said to be of urgent necessity, the Act should set standards for their exercise.

The Commission may, by regulation, set up a grievance board and confer on it any powers that may be conferred "upon a commission under the Public Inquiries Act."[65]

In Report Number 1 we recommended that powers of investigation should not be conferred by regulation.[66] If such powers are required they should be conferred by amendment to the Act.

RECOMMENDATIONS

1. Section 18 of the Act should be amended to make it clear that the Commission is liable to restore the lands, buildings, etc of a person that may have been disturbed. The Commission should also be liable to pay compensation for any damage to property which cannot be repaired.
2. The provisions in sections 19(1), 34 and all other provisions in the Act dealing with matters related to expropriation which conflict with the Expropriations Act, 1968-69 should be repealed.
3. Section 19(1) should also be amended to provide that the Commission may use the waters of any lake, river, etc. "as may be necessary for its purposes" and not "as may be deemed necessary for its purposes."
4. Provision should be made for compensation for loss

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[64]p. 348 *supra.*
[65]R.S.O. 1960, c. 281, s. 47(1)(kb) as enacted by Ont. 1962-63, c. 99, s. 7(1).
[66]p. 408 *supra.*

suffered by riparian owners arising out of the exercise of the power conferred on the Commission to use waters.

5. A thorough review of all provincial legislation respecting the use of water should be conducted with a view to (a) determining a coherent policy on this subject and, (b) removing conflicting statutory provisions relating thereto.
6. A person who would be affected by an approval or order permitting the discharge of sewage into a lake, river, stream or other watercourse granted under section 27(2) should have an opportunity to be heard before such order is made.
7. The definition of an area that includes a source of water supply under section 28(1) should be by way of regulation approved by the Lieutenant Governor in Council and provision should be made that those within the area affected should be furnished with a copy of such regulation.
8. Section 28a should be amended to provide standards concerning the granting, refusal and cancellation of permits thereunder and should provide for procedural safeguards to those affected and a right of appeal from decisions made thereunder. These recommendations are equally applicable to section 28b which should also contain a provision setting out the standards concerning the purposes for which a regulation may be passed exempting persons or substances from the application of section 28b(1).
9. Section 28a(5) should be amended to require that the Commission must find, as a fact, that the flowing or leaking of water as referred to in the section, interferes with any public or private interest in any water. On a charge of violating a notice under the section the accused should have the right to challenge the Commission's finding. Alternatively, there should be a right of appeal to the Court from the finding of the Commission prior to the issuance of a notice under the subsection.
10. Section 29 should be amended to set the standards which should affect the granting or refusing and cancellation

of a licence, to provide procedural safeguards with respect to licensing proceedings under it, and to provide a right of appeal from decisions made under it.

11. Sections 30 and 31 should be amended to particularize in greater detail the standards which should be applicable to approvals by the Commission of water works and sewage works and should provide for an appeal from decisions of the Commission thereunder to the Minister.

12. There should be a general right of appeal, i.e., one not restricted to questions of jurisdiction or law, from decisions of the Ontario Municipal Board under section 32 (closing a road).

13. Section 32 should contain an express provision for compensation for those injuriously affected by orders of the Ontario Municipal Board with respect to the closing of roads.

14. Section 32(6) should be amended insofar as it bars a right of action for damages suffered by the beneficiaries of covenants running with the land or limitations placed upon the estate or interest in the lands. The section should provide for compensation for such persons.

15. Section 33 of the Act should be amended to provide that the determination thereunder should be made by the Land Compensation Board. The right to compensation should be for the loss or damage caused and not a right to be compensated "as the Board deems just". There should be a right of appeal to the Court of Appeal from a judgment thereunder.

16. The powers of entry conferred by section 47b of the Act should be revised so that they become exercisable only upon defined conditions precedent being satisfied and the inspectors should be required to produce proper identification when acting under the section.

17. The powers to make exemptions from the Act by regulation should either be repealed or standards set for their exercise in emergencies.

18. The power to investigate referred to in section 47(1)(kb) should be conferred by the statute and not by regulation.

CHAPTER 129

The Police Act

THE provisions of the Police Act[1] which we shall consider fall under three headings:

(1) The Ontario Police Commission

(2) Boards of Commissioners of Police

(3) Police Discipline

ONTARIO POLICE COMMISSION

The Ontario Police Commission was established in 1961.[2] It is composed of three persons who are appointed by the Lieutenant Governor in Council.[3] The powers and functions of the Commission are many and varied. They include power to request the commissioner of the Ontario Provincial Police Force to secure the proper policing of a municipality that does not maintain a police force and is not provided with police services pursuant to agreements authorized under the Act;[4] to request a municipality to take such steps as the Commission deems necessary to provide or maintain an adequate police force complying with the Act and the regulations;[5] to approve, in certain circumstances, of the establishment or maintenance of a police force by any county, township or village

[1]R.S.O. 1960, c. 298 as amended by Ont. 1960-61, c. 77; Ont. 1961-62, c. 105; Ont. 1962-63, c. 106; Ont. 1964, c. 92; Ont. 1965, c. 99; Ont. 1966, c. 118; Ont. 1967, c. 76; Ont. 1968, c. 97; and Ont. 1968-69, c. 96.

[2]*Ibid.*, s. 39a as enacted by Ont. 1961-62, c. 105, s. 6.

[3]*Ibid.*, s. 39a(1) as enacted by Ont. 1961-62, c. 105, s. 6.

[4]*Ibid.*, s. 4 as re-enacted by Ont. 1961-62, c. 105, s. 2 and amended by Ont. 1964, c. 92, s. 4.

[5]*Ibid.*, s. 5(1) as re-enacted by Ont. 1964, c. 92, s. 5(1) and amended by Ont. 1967, c. 76, s. 3(1).

and the revocation of such approvals;[6] to maintain a system of statistical records and research studies of criminal occurrences and matters related thereto for the purpose of aiding the police forces in Ontario;[7] to assist in co-ordinating the work and efforts of the police forces in Ontario;[8] to operate the Ontario Police College;[9] to conduct investigations in accordance with the provisions of the Act;[10] and to hear and dispose of appeals in disciplinary matters by members of police forces in accordance with the Act and the regulations.[11]

We are concerned in this Report with certain aspects only of these powers.

Investigatory Powers

Investigatory powers are conferred by three provisions in the Act.

(1) The Commission may "hold an inquiry into the conduct of any member of the Ontario Provincial Police Force or of any employee connected therewith."[12] Upon such an inquiry it "has and may exercise all the powers and authority that may be conferred upon a person appointed under *The Public Inquiries Act*".[13]

(2) The Commission, or any member thereof designated by the chairman of the Commission, "may investigate, inquire into and report upon the conduct of or the performance of duties by any chief of police, other police officer, constable, special constable or by-law enforcement officer, the administration of any police force, the system of policing any municipality and the police needs of any municipality" either with or without the request of the council of the municipality.[14] In such an inquiry the Commission, or the

[6] *Ibid.*, s. 18(1) as enacted by Ont. 1965, c. 99, s. 5 and amended by Ont. 1967, c. 76, s. 5 and s. 18(3) as enacted by Ont. 1967, c. 76, s. 5.
[7] *Ibid.*, s. 39b(1)(a) as enacted by Ont. 1962-63, c. 106, s. 4.
[8] *Ibid.*, s. 39b(1)(e) as enacted by Ont. 1962-63, c. 106, s. 4.
[9] *Ibid.*, s. 39b(1)(f) as enacted by Ont. 1962-63, c. 106, s. 4. And see s. 61 as amended by Ont. 1965, c. 99, s. 13.
[10] *Ibid.*, s. 39b(1)(g) as enacted by Ont. 1962-63, c. 106, s. 4.
[11] *Ibid.*, s. 39b(1)(h) as enacted by Ont. 1962-63, c. 106, s. 4 and amended by Ont. 1966, c. 118, s. 11(4).
[12] *Ibid.*, s. 40(3) as re-enacted by Ont. 1961-62, c. 105, s. 7.
[13] *Ibid.*
[14] *Ibid.*, s. 48(1) as amended by Ont. 1961-62, c. 105, s. 9(1); Ont. 1965, c. 99, s. 10(1, 2); Ont. 1966, c. 118, s. 16; and Ont. 1968, c. 97, s. 12(1).

member designated, has the powers and authority that may be conferred on a person appointed under the Public Inquiries Act.[15]

(3) The Commission may be directed by the Lieutenant Governor in Council to inquire into and report upon any matter relating to,

"(a) the extent, investigation or control of crime, or

(b) the enforcement of law . . ."[16]

In the performance of its investigatory duties under this provision the Commission, subject to subsection 9 of section 48a, "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."[17] Under that subsection, the Commission shall not exercise its power to penalize any person except upon an application to a judge of a county or district court.[18]

We considered these provisions and criticized them in Report Number 1[19] and it is unnecessary to repeat what we said there. There is, however, an incongruity respecting the conferment of investigatory powers in the Police Act and in Ontario legislation generally. Boards of commissioners of police have power to enforce their orders by order of committal under section 12 of the Act while the Commission that sits in appeal from them has no such powers when exercising its investigatory powers. It may be reasonably thought that investigations relating to the extent and control of crime and the enforcement of law would require the use of more stringent investigatory powers than the disciplinary power of a board. In fact, the Commission's powers under section 48a are considerably more fettered than most of the other investigatory powers conferred by Ontario legislation which we have tabulated in Report Number 1.[20]

Subsections 6 and 7 of section 48a provide a form of procedure whereby the Commission may state a case for the

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[15]*Ibid.*, s. 48(2) as amended by Ont. 1961-62, c. 105, s. 9(3).
[16]*Ibid.*, s. 48a(1) as enacted by Ont. 1964, c. 92, s. 17.
[17]*Ibid.*, s. 48a(3) as enacted by Ont. 1964, c. 92, s. 17.
[18]*Ibid.*, s. 48a(9) as enacted by Ont. 1964, c. 92, s. 17.
[19]pp. 443-44 *supra*.
[20]pp. 466-81 *supra*.

opinion of the Court of Appeal. The language used therein is substantially imported from the Public Inquiries Act.[21] We discussed and criticized this language in Report Number 1.[22] The comments and recommendations we made there respecting contempt powers and stated cases have equal application to section 48a of the Police Act.

Sections 12, 40(3), 48(2) and 48a (3), (6), (7) and (9) should be repealed and replaced by legislation conferring powers on the respective bodies by reference to the Public Inquiries Act redrafted as recommended in Chapter 36 of Report Number 1.

BOARDS OF COMMISSIONERS OF POLICE

The chief police responsibilities of a board of commissioners of police (hereinafter referred to as "a board") are to appoint the members of the police force in the municipality in which it has jurisdiction and to be "responsible for the policing and maintenance of law and order in the municipality."[23] The members of a police force are "subject to the government of the board and shall obey its lawful directions."[24]

The Composition of Boards of Commissioners of Police

Except in the case of joint boards and in the Municipality of Metropolitan Toronto, a board of commissioners of police shall consist of:

"(a) the head of the [municipal] council;
(b) a judge of any county or district court designated by the Lieutenant Governor in Council; and
(c) such person as the Lieutenant Governor in Council designates."[25]

A joint board of two or more municipalities shall consist of:

"(a) the head of the council of each of the municipalities;

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[21]R.S.O. 1960, c. 323, s. 5.
[22]pp. 453-57, and 463-65 *supra*.
[23]R.S.O. 1960, c. 298, ss. 14 and 16(1).
[24]*Ibid.*, s. 16(1).
[25]*Ibid.*, s. 7(2).

(b) such judge and such other persons as the Lieutenant Governor in Council designates."[26]

In the Municipality of Metropolitan Toronto the board is composed of:

"(a) the chairman of the Metropolitan Council;

(b) one member of the Metropolitan Council appointed by the Metropolitan Council;

(c) a judge of the county court of the County of York designated by the Lieutenant Governor in Council;

(d) one provincial judge under the Provincial Courts Act, 1968 designated by the Lieutenant Governor in Council; and

(e) one person, who is not qualified to be appointed or designated under clause b, c or d, appointed by the Lieutenant Governor in Council."[27]

The result is that in Ontario generally, and in Metropolitan Toronto, one member of the board must be a judge of a county or district court and in Metropolitan Toronto one member must be a provincial court judge. Outside of Metropolitan Toronto wide resort has been made to the appointment of provincial court judges as members of boards.

In Report Number 1 we criticized the employment of judges for extra-judicial duties and questioned the propriety and legality of county or district court judges being paid for their services as members of boards of commissioners of police.[28]

We think that there is a basic incompatibility between the position of a judge as a member of a board of commissioners of police and his position as a member of the judiciary. On the one hand the judge is in what may be broadly considered the position of an employer of all police officers appointed by the board, while on the other, he is required to be an impartial adjudicator in cases involving the police as prosecutors and witnesses on the one side and accused persons on the other. It is not necessary for us to affirm our confidence in the ability of judges in criminal cases to free themselves from any influences flowing from their dual position. This is

[26]*Ibid.*, s. 8(2) as amended by Ont. 1965, c. 99, s. 3.

[27]Municipality of Metropolitan Toronto Act, R.S.O. 1960, c. 260, s. 196(1) as amended by Ont. 1968, c. 80, s. 12, and Ont. 1968-69, c. 77, s. 10.

[28]See Chapters 45 and 46 *supra*.

not the point. The point is that neither legislation nor executive action should require that judges be put in a position where an allegation can be made that they are subject to a conflict of interest or they may be made to appear to be not impartial.

The Police Act and the Municipality of Metropolitan Toronto Act should be amended to delete the requirement that judges be appointed to boards of commissioners of police and to provide expressly that judges shall be ineligible for such appointments.[29]

Subordinate Legislative Powers

For the implementation of their duties, boards have conferred on them legislative,[30] judicial[31] and investigatory powers.[32]

> "A board may by by-law make regulations not inconsistent with the regulations under section 62 for the government of the police force, for preventing neglect or abuse, and for rendering it efficient in the discharge of its duties."[33]

Section 62 confers on the Lieutenant Governor in Council power to make regulations covering a wide area of subjects affecting the government of police forces and relevant matters. Later we shall discuss in some detail the regulations that have been made.

By reason of the definition of "regulation" in the Regulations Act,[34] no regulation or by-law passed by a board under the section just quoted is subject to the filing and publication provisions of that Act. The result is that regulations and by-laws passed by boards of commissioners of police which are part of the law of Ontario are not available to the members of the public affected by them.

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[29]By Ont. 1961-62, c. 105, s. 3 clauses *b* and *c* of section 7(2) of the Police Act, set forth in the text hereof, were repealed and the following substituted therefor: "(b) two persons designated by the Lieutenant Governor in Council." This amendment was never proclaimed in force and was subsequently repealed: Ont. 1965, c. 99, s. 15(1).

[30]R.S.O. 1960, c. 298, s. 15.

[31]O. Reg. 451/69.

[32]R.S.O. 1960, c. 298, s. 12.

[33]*Ibid.*, s. 15.

[34]R.S.O. 1960, c. 349, s. 1(d).

We are advised by the Chairman of the Commission that these regulations for the most part are in the nature of standing orders having to do with dress, working conditions and matters of internal discipline. However, the power conferred under the statute is a broad one. The only limitation on its exercise is that the regulations be not inconsistent with those approved by the Lieutenant Governor in Council and that they be "for the government of the police force, for preventing neglect or abuse, and for rendering it efficient in the discharge of its duties."

No doubt, it would not be practical to have all regulations governing all police forces approved by the Lieutenant Governor in Council. Nevertheless, there should be some control over regulations made by a by-law of a board of commissioners of police passed under section 15 and some central place where they may be seen by members of the public. We have been advised that at least one board has refused public access to such by-laws. They are part of the law of Ontario and should be open to the public.

We recommend that all regulations made by boards of commissioners of police under section 15 of the Act be approved by the Ontario Police Commission, be filed with it and be open for public inspection.

POLICE DISCIPLINE

The Lieutenant Governor in Council may make regulations "for the government of police forces and governing the conduct, duties, suspension and dismissal of members of police forces."[35] This provision is in marked contrast to the provisions of the Royal Canadian Mounted Police Act[36] in which the basic provisions respecting the discipline of police officers are set out in the Act. The power to make basic laws respecting police discipline ought not to be delegated as it is in the Police Act. These laws should be set out in the statute.

As we stated earlier, the Lieutenant Governor in Council has made regulations relating to police discipline, applying to

[35]R.S.O. 1960, c. 298, s. 62(1)(a).
[36]Can. 1959, c. 54, Part II.

all organized police forces in Ontario. A "Code of Offences" has been formulated setting out some fifty-one offences.[37]

There are two basic procedural provisions in the regulations. The first relates to the trial of minor offences and the second to the trial of major offences.

All disciplinary proceedings are commenced by the laying of a complaint by any constable or other police officer before a chief of police or any officer designated by him for this purpose under section 3 of the regulation, alleging an offence in accordance with the code. If the chief of police or designated officer considers that the allegations so warrant he shall sign the charge sheet.[38]

Minor offences and major offences are not defined. The charge shall specifically designate whether the offence is a minor offence or a major offence.[39]

"A person found guilty of a minor offence is liable to,

(a) an admonition; or
(b) forfeiture of leave or days off not exceeding five days; or
(c) forfeiture of pay not exceeding three days' pay."[40]

"A person found guilty of a major offence is liable to,

(a) dismissal; or
(b) be required to resign, and in default of resigning within seven days, to be summarily dismissed from the force; or
(c) reduction in rank or gradation of rank; or
(d) forfeiture of leave or days off not exceeding twenty days; or
(e) forfeiture of pay not exceeding five days' pay; or
(f) a reprimand, which may be imposed in lieu of or in addition to any other punishment imposed."[41]

A charge sheet must be prepared in accordance with Form 1 to the regulation. It must set out the charge in writing and a true copy shall be served upon the person charged together with a statement of the allegations upon which the charge is founded.[42]

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[37]O. Reg. 451/69.
[38]*Ibid.*, s. 6.
[39]*Ibid.*, s. 5(11) and s. 40(11).
[40]*Ibid.*, ss. 16(4), 51(4).
[41]*Ibid.*, ss. 20(2), 52(8).
[42]*Ibid.*, s. 5(1)(2).

Trial of Minor Offences

The procedure relating to the trial of minor offences is less elaborate than that relating to the trial of major offences but in several significant respects it is identical. Where a person is charged with a minor offence,

> "(a) the evidence shall be given under oath but need not be taken down in writing; and
>
> (b) the person charged shall have an opportunity of,
>
> (i) hearing the evidence against him,
>
> (ii) calling witnesses, whether members of a police force or any other persons, in his defence and,
>
> (iii) giving evidence as a witness on his own behalf."[43]

Normally the presiding officer at the hearing is the chief of police. But the hearing may be presided over by an acting chief of police or an officer designated by the chief of police. "The chief of police may designate the deputy chief of police, or, where the rank of inspector is established, any other officer of the rank of inspector or higher" to hear and dispose of charges.[44]

"The decision of the presiding officer, including the punishment imposed, if any, shall be in writing and a copy shall forthwith be served upon the person charged."[45] We do not construe this provision as imposing any obligation on the presiding officer to give reasons for his decision. The presiding officer should be required to give reasons.

An appeal lies from the decision of the presiding officer to a board of commissioners of police or to a committee of the relevant municipal council where there is no board. Such appeal is by way of a hearing *de novo* and a verbatim record of every such hearing shall be kept.[46]

A person convicted of a minor offence may appeal his conviction or the punishment imposed or both, as confirmed or altered by the board or committee of council to the Ontario Police Commission.[47]

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[43]*Ibid.*, s. 16(1).
[44]*Ibid.*, ss. 2(i), 3.
[45]*Ibid.*, s. 16(5).
[46]*Ibid.*, s. 16(9)-(13).
[47]*Ibid.*, s. 16(15).

Trial of Major Offences

Where a person is charged with a major offence,

"(a) the witnesses shall be sworn;

(b) the evidence shall be recorded verbatim by some reliable means; and

(c) the person charged shall have the opportunity of,

(i) hearing the evidence against him,

(ii) calling witnesses, whether members of a police force or any other persons, in his defence, and

(iii) giving evidence as a witness on his own behalf."[48]

In the case of major offences:

"The chief of police may refer the charge for hearing before the board, or where there is no board, the committee of council and the provisions of this Part that apply to the hearing of a charge by the chief of police or a presiding officer designated by him apply *mutatis mutandis* to the hearing of a charge by the board or committee of council."[49]

"Upon notice to the person charged, other than a chief of police, a board, or where there is no board, a committee of council, may designate a county court judge, a district court judge or a provincial court judge (criminal division) who consents to the designation to hear a charge or appeal that the board or committee of council may hear."[50]

A significant aspect of these provisions is their bearing on the possible issue of the legal bias of a presiding officer. It is not uncommon for a chief of police, because of his knowledge of, or connection with, events giving rise to disciplinary proceedings, to be accused of legal bias when he sits as a tribunal to hear the charges.[51]

In *Regina* v. *Peterborough Police Commissioners, ex parte Lewis*,[52] a chief constable laid a charge against one of

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[48]*Ibid.*, s. 17(1).

[49]*Ibid.*, s. 17(6).

[50]*Ibid.*, s. 18(1). See also ss. 2(i), 3 and 17(5).

[51]For recent cases see *Regina* v. *Peterborough Police Commissioners, ex parte Lewis*, [1965] 2 O.R. 577 (C.A.); *Regina* v. *Cookson, ex parte Magee* (1969), 2 D.L.R. (3d) 67 (Sask. Q.B.) and *Regina* v. *Carroll and Johnson, ex parte Sutherland*, [1970] 1 O.R. 66 (High Ct.).

[52]*Ibid.*

his police officers on facts which the chief constable had personally observed and he then proceeded to preside at the hearing of the charge. It was argued that as he acted as accuser, witness and judge he was disqualified for bias. This argument prevailed before the lower court but the Court of Appeal reversed the judgment and held that the argument based on bias should not succeed. McGillivray, J.A., writing the judgment of the Court said:

> "The Chief of Police in the present case was required by the Regulations to sit and hear the charge as laid and he had no option but to do so. It is almost inevitable that one in the office of the Chief of Police must frequently find himself in the very position which here existed; circumstances which called upon him to exercise his authority first in an administrative capacity and later in a semi-judicial one. Notwithstanding this fact, Parliament saw fit to direct disposal of all such offences in the manner stated and any allegation that natural justice has been denied must be reviewed in the light of such legislation."[53]

The Court stated that it would hesitate to say that "a Police Chief, or an officer in the army, who witnesses what he considers to be an infraction of the Regulations and directs that a charge be laid, is incapacitated, if he is in charge of that unit, from hearing and adjudicating upon the charge, or is to be accused of bias if he acts in the matter."[54]

In Report Number 1 we stated that "impartiality is a necessary attribute not only of courts of justice but of all bodies holding the power of decision."[55] As indicated in the judgment of the Court of Appeal the rule against bias is inapplicable where the deciding tribunal and no other, is required to hear the case.[56]

In a later case the Chief Justice of the High Court held, in granting an order prohibiting a chief constable and a deputy chief constable from hearing charges under the Police Act on the ground of bias, that section 7 of the regulations,

[53]*Ibid.*, 584.
[54]*Ibid.*, 583.
[55]p. 47 *supra*. See also pp. 76-79 *supra*.
[56]See S. A. de Smith, *Judicial Review of Administrative Action* (2nd ed., 1968) 262-63: "If it is possible to constitute a different tribunal unaffected by interest or bias, no difficulty arises."

as they then stood, enabled the chief constable to designate an inspector to hear the case.[57] The Chief Justice said that "it is contemplated by the Regulations that there may be actions where it would be improper for the Police Chief to hear the matter".[58]

We think the matter should be cleared up by legislation. It is inconsistent with the fundamental principles of a fair trial that the presiding officer, who must render the decision, should be cast in the role of accuser, witness and judge. This is true notwithstanding that there is a right of appeal from the decision of the presiding officer. One should not be put to the necessity of appealing in order to get a trial free from the appearance of bias.

We recommend that where the presiding officer has previous knowledge of matters relating to a charge he should be required to disclose it and the person charged should have a right to require the presiding officer to refer the matter to another officer for trial or to the board of commissioners of police or, where there is no board, to a committee of council.

Neither a chief of police nor any other officer should be permitted to adjudicate in disciplinary matters where he is either the accuser or a witness against the person charged.

A person convicted of a major offence may appeal to the board, where there is a board, or where there is none, to the committee of council.[59] On the appeal the board, or the committee, shall decide the appeal on the record but may, in special circumstances, hear such evidence as the board or committee of council deems advisable.[60] On an appeal, the board or committee may,

> "(a) confirm the conviction;
> (b) quash the conviction;
> (c) alter the punishment imposed as it deems just; or
> (d) order a new hearing of the charge."[61]

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[57]R.R.O. 1960, Reg. 486, s. 7(1) as remade by O. Reg. 200/64, s. 1. See now s. 3 of O. Reg. 451/69.

[58]*Regina* v. *Carroll and Johnson, ex parte Sutherland*, [1970] 1 O.R. 66 at 71.

[59]O. Reg. 451/69, s. 19(1).

[60]*Ibid.*, s. 19(4).

[61]*Ibid.*, s. 19(5).

An appeal lies from the board or committee of council to the Ontario Police Commission.[62]

The procedure is the same on appeals to the Ontario Police Commission from conviction for minor or major offences.[63]

The Commission decides the appeal on the record but it may, "in special circumstances, hear such evidence as the Commission deems advisable."[64]

On the hearing the Commission may,

"(a) dismiss the appeal;
(b) allow the appeal and quash the conviction and punishment imposed;
(c) vary the punishment imposed as it deems just;
(d) affirm the punishment imposed;
(e) substitute a decision that in its opinion should have been reached; or
(f) order a new hearing of the charge."[65]

There is no provision that the presiding officer, the board, a committee of council or the Commission must give reasons for decisions. There should be a requirement that reasons, in writing, be given in all cases if requested.

Power to Summon Witnesses

There is no express power given to compel the attendance of witnesses at the hearing of a charge, other than those who are members of the police force.

Members of the police force may be ordered to attend[66] and a person charged shall have the opportunity of calling witnesses whether members of a police force or other persons.[67] But no method is provided by which witnesses who are not members of the force may be compelled to attend either for the prosecution or the defence.

It is an unjust procedure that does not give to the one charged with an offence means by which he can compel witnesses to attend to give relevant evidence.

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[62] *Ibid.*, s. 20(3).
[63] *Ibid.*, s. 24.
[64] *Ibid.*, s. 24(6).
[65] *Ibid.*, s. 24(9).
[66] *Ibid.*, s. 10.
[67] *Ibid.*, ss. 16, 17.

Provision should be made for power to summon witnesses at a disciplinary hearing either for the prosecution or defence in accordance with our recommendation made in Report Number 1.[68]

Witness Fees

Provision is made for the payment to witnesses other than those who are members of a police force of fees at the rate of $6.00 per day, together with travelling expenses, while in attendance at a hearing.[69] In Report Number 1 we recommended that witnesses attending before statutory tribunals should be paid at the rate of $15.00 per day.[70] This rate should apply to hearings under the Police Act.

RECOMMENDATIONS

1. Sections 12, 40(3), 48(2), and 48a (3), (6), (7) and (9) should be repealed and replaced by legislation conferring powers of investigation on the respective bodies by reference to the Public Inquiries Act recast as recommended in Report Number 1.
2. Provision should be made requiring that all regulations made by boards of commissioners of police under section 15 of the Act shall be approved by the Ontario Police Commission and filed with that body. Such regulations should be open for public inspection.
3. The Police Act and the Municipality of Metropolitan Toronto Act should be amended to delete the requirement that judges be appointed to boards of commissioners of police and to provide expressly that judges shall be ineligible for such appointments.
4. The basic provisions relating to police discipline should be contained in the Act and not in the regulations.
5. The presiding officer, a board of commissioners of police, a committee of council and the Ontario Police Commission should be required to give reasons, if requested, in

[68]p. 408 *supra*.
[69]O. Reg. 451/69, s. 25.
[70]p. 863 *supra*.

the disposition of charges involving major or minor offences.

6. Where the officer presiding at the hearing of a charge involving a minor or major offence has previous knowledge of the matters relating to the charge he should be required to disclose it to the person charged and such person should have a right to require the presiding officer to refer the matter to another officer for trial or to the board of commissioners of police or, where there is no board, to a committee of council.

   Where the presiding officer is either the accuser or witness against the person charged he should be disqualified from hearing the charge.

7. The respective bodies having power to hear disciplinary matters should have power to summon witnesses either for the prosecution or defence in accordance with our recommendations in Report Number 1.

8. Provision should be made for the payment of witness fees in accordance with our recommendations in Report Number 1.

CHAPTER 130

The Workmen's Compensation Board

INTRODUCTION

THE Workmen's Compensation Board, to which we shall hereafter refer as "the Board" unless the context otherwise requires, is a body corporate consisting of three members appointed by the Lieutenant Governor in Council to administer the Workmen's Compensation Act.[1]

To appreciate fully the nature of the functions of the Board it is necessary to examine briefly the development of the present law in Ontario relating to compensation for injuries sustained and disabilities suffered by workmen in the course of their employment and to discuss some of the underlying philosophy of the Act.

Under the common law the liability of the employer to compensate an employee for injuries sustained in the course of his employment rested mainly, if not entirely, on fault or negligence. In such cases, unless it could be proved that the employer had failed in his duty to take reasonable care in the circumstances, there was no liability and no recovery. Even in the event that an employee could establish a breach of duty to take care on the part of his employer many defences were open to the employer. Generally speaking, if it was shown that the employee was guilty of contributory negligence or that he had voluntarily assumed the risk of injury or that the injury was caused by a fellow servant, the employer was freed of liability.

[1]R.S.O. 1960, c. 437, s. 54.

In addition to the legal defences available to the employer, the employee was faced with many practical obstacles. The defences available created intricate legal problems and an employer against whom a judgment was obtained at trial, or his insurance company, was usually in a much more favourable financial position to carry appeals to the appellate courts thus exposing the employee to the possibility of prohibitive legal costs. Even where the employee obtained a final judgment his recovery would depend on the financial responsibility of the employer.

As a result of recommendations made by a Royal Commission presided over by the late Sir William Meredith, former Chief Justice of Ontario, the first Workmen's Compensation Act was passed in 1914. The purpose of the Act was to give greater security to workmen with respect to injury sustained while at work and loss suffered through industrial diseases. This was done by largely removing the concept of fault and basing the right to compensation on the existence of the employer-employee relationship and placing collective liability on industry as a whole.

The underlying philosophy of the Act is that compensation for injury sustained in production is a legitimate cost that should ultimately be borne by the consumer and not the primary producer — the employee. With certain exceptions, to which we shall refer, the common law liability of the particular employer has been abolished.

The liability under the Act may be a collective one or an individual one. For industries falling within Schedule 1 of the regulations the liability is a collective one; for those falling within Schedule 2, the liability is an individual one. Most industries and services fall within Schedule 1. Those industries falling within Schedule 2 are of such character that there is little likelihood that they would not meet their obligations under the Act, e.g. railways, construction or operation of telephone lines and works, employment under the Crown in the right of Ontario, or employment by a permanent board or commission appointed by the Crown, etc.

The jurisdiction of the courts to entertain claims for compensation against employers for injuries sustained by

employees to which the Act applies is removed.[2] All claims for compensation must be determined by the Board.[3]

Certain changes are made in the substantive law applicable to cases where employees who do not come within the benefits of the Act are injured in the course of their employment.[4] With these changes we are not concerned.

The principle of collective liability is not applied uniformly to all industries falling within Schedule 1. An accident fund is established from which compensation is paid. The Board is given power to establish separate classes and sub-classes or industrial groups[5] and it may assess the respective classes or sub-classes for contributions to the accident fund to the extent to which claims for compensation are made for each class.[6] The applicability of the principle of collective liability is further qualified by a power conferred on the Board to vary the assessment for each individual industry or plant in relation to the hazards of the work.[7]

In addition, the Board may reward or penalize particular employers according to their safety record.[8]

The result is that the Board has two main functions:

(1) to determine what compensation should be paid to employees who have suffered injury or disability, and

(2) to determine the assessment that should be levied on employers and the method of assessment.

However, as we shall see, the Board performs many other functions.

There are two exceptions to the principle of compensation without fault:

(1) where the injury does not disable the workman for a period of at least three calendar days from earning the full wages at the work at which he was employed;

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[2]*Ibid.*, s. 15.
[3]*Ibid.*, s. 13.
[4]*Ibid.*, s. 123.
[5]*Ibid.*, s. 86(1)(2).
[6]*Ibid.*, s. 86(2).
[7]*Ibid.*, s. 99(2).
[8]*Ibid.*, s. 86 as amended by Ont. 1964, c. 124, s. 9 by adding subsec. (6a), and further amended by Ont. 1968, c. 143, s. 18.

(2) where the injury is attributable solely to the serious and wilful misconduct of the workman, unless the injury results in death or serious disablement.

If either of these exceptions is applicable there is no right to compensation.[9]

We now consider the powers of the Board and the safeguards that are necessary to protect the rights of the individual.

POWERS OF DECISION

For convenience, we broadly classify the powers of decision of the Board into three groups:

(a) Powers concerning Compensation

(b) Powers concerning Assessment of Employers

(c) Powers concerning Classification of Employers

Compensation

In determining entitlement to compensation the Board exercises judicial power. The basis of entitlement is set out in the Act.[10] The function of the Board is to determine whether or not the facts justify the application of the law. This function has been characterized in Report Number 1 as clearly "judicial".[11] Conditions precedent to entitlement are clearly expressed.

> "Where in any employment, to which this Part applies, personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer is liable to provide or to pay compensation . . ."[12]

The terms "accident", "employment", "employer" and "workman" are defined and it is clear that the Board's function is to ascertain the existence of these conditions. There are other objectively limited conditions precedent to the power of the Board to award compensation such as in the case where the employee is injured outside of the province and is

[9] *Ibid.*, s. 3(1), as amended by Ont. 1968, c. 143, s. 2.

[10] *Ibid.*, s. 3 as amended by Ont. 1968, c. 143, s. 2.

[11] p. 19ff. *supra*.

[12] R.S.O. 1960, c. 437, s. 3(1).

connected in one way or another with the province.[13] The power of the Board to award compensation depends on a finding that the required conditions precedent have been satisfied.

In addition to the power to award compensation for injury sustained in the course of employment, there is power to award compensation for disability due to industrial disease. The right to compensation in such case is objectively limited[14] but, subject to the approval of the Lieutenant Governor in Council, the Board may determine what is an industrial disease.[15] This power is purely a legislative one.

With respect to the initial question of entitlement to compensation under the Act the powers of decision granted to the Board meet the requirements set out in Report Number 1. Rules or standards to govern the exercise of the power are stated clearly in the statute conferring the power.

The power of decision concerning entitlement however, involves more than a determination of the circumstances out of which the injury arose and that they come within the Act. When these matters have been decided it becomes necessary to make three further decisions:

(1) the destination of the compensation;
(2) the amount of compensation; and
(3) the manner of its payment.

Destination of Compensation

In the case of a non-fatal injury the compensation is usually paid to the workman but in three circumstances the Board may direct that it be paid otherwise. The first two circumstances are set out in section 49 of the Act as follows:

> "Where a workman is entitled to compensation and it is made to appear to the Board,
>
> (a) that the workman is no longer residing in Ontario but that his wife or child or children under sixteen years of age are still residing therein without adequate means of support and are, or are apt to become, a charge upon the municipality where they reside, or upon private charity; or

[13] *Ibid.*, s. 7.
[14] *Ibid.*, s. 116.
[15] *Ibid.*, s. 116(13) and s. 1 (1)(i).

> (b) that the workman although still residing in Ontario is not supporting his wife and children as aforesaid and an order has been made against the workman by a court of competent jurisdiction for the support or maintenance of his wife or family, or for alimony,
>
> the Board may divert such compensation in whole or in part from the workman for the benefit of his wife or children."[16]

The safeguards set out for the exercise of the powers conferred under this section are objectively stated and the Board would not appear to have power arbitrarily to deprive a workman of any compensation to which he is entitled.

The third circumstance involves the situation where a workman or a dependant is an infant or a person with some other legal disability.

> "If a workman or a dependant is under the age of twenty-one years or is of unsound mind or in the opinion of the Board is incapable of managing his own affairs, any benefits to which he is entitled may be paid on his behalf to his parent, spouse or committee or to the Public Trustee or may be paid to such other person or applied in such manner as the Board deems in the best interest of such workman or dependant, and when paid to the Public Trustee, it is the duty of the Public Trustee to receive and administer any such money for the benefit of the workman or dependant."[17]

This section confers on the Board a power usually exercised by the Court—to determine if a person entitled to compensation is incapable of managing his own affairs. In addition, if a person falls within a class of persons specified, the Board may determine what in its opinion is in the best interest of the workman or dependant. One curious aspect of this section is that if compensation is paid to the Public Trustee it is his duty to receive and administer the money for the benefit of the workman or dependant but if the money is paid to any other person no such obligation is expressly imposed on him.

It is difficult to understand why a person under twenty-one who enters into a contract for his labour and is entitled to be paid wages should not be primarily entitled to receive

[16] *Ibid.*, s. 49.

[17] *Ibid.*, s. 50 as re-enacted by Ont. 1968, c. 143, s. 12.

compensation if he is injured. The Act should give the Board authority to pay the compensation to the infant unless a reasonable cause is shown why it should be paid to some other person.

Likewise, generally the compensation is something that belongs to the injured workman or dependant and should be paid to him unless it is demonstrated that for his protection or the protection of his dependants it should be paid to some other person. The final decision as to what is for the benefit of the injured workman in this regard ought not to rest with the Board. There should be a right of appeal. We shall discuss appeals later.

The most serious problems concerning the destination of compensation arise in the case of fatal injuries. In such cases the Board must determine what is the proper destination of the award. Where the workman is survived by a widow, invalid husband (where the "workman" was a woman) or dependant children their entitlement is clear.[18] However, there are many other contingencies where compensation may be awarded. For instance, entitlement is established for persons acting as foster mothers to dependant children.[19] This entitlement is conditioned on the Board's first determining that it is desirable to continue the existing household and that the person acting as foster mother has kept up the household in a manner that the Board deems proper. This power of decision is both an objective one and a subjective one. The criteria for concluding that it is desirable to continue the existing household or that the household has been kept up in a satisfactory manner are not laid down specifically. They appear to be open to formulation by the Board. Some attempt is made to set out the objective limitations on the power but there are real difficulties in interpreting the language. The section reads:

> "Where the workman leaves no widow or the widow subsequently dies, or where there is a mother of a dependant illegitimate child, and it seems desirable to continue the existing household and an aunt, sister or mother of an illegitimate child, or other suitable person, acts as foster-mother in keeping up such household and

[18] *Ibid.*, s. 37(1)(c)(d)(e) as re-enacted by Ont. 1968, c. 143, s. 7(1).
[19] *Ibid.*, s. 37(4).

> maintaining and taking care of the children entitled to compensation in a manner that the Board deems satisfactory, such foster-mother while so doing is entitled to receive the same monthly payments of compensation for herself and the children as if she were the widow of the deceased . . ."[20]

The lack of clarity in this section arises by reason of the attempt to provide in one section entitlement for foster-mothers of both illegitimate children and legitimate children whose mother has either pre-deceased the workman or who has died subsequent to the workman's death. If it is intended to draw a distinction between the rights to compensation for legitimate and illegitimate children it should be clearly stated. However, we do not think there should be any difference. If the illegitimate child has, by reason of an industrial accident to a workman, been deprived of maintenance which it was entitled to receive from the workman, it should be entitled to compensation under the Act.

The Board also has a discretionary power to direct that any payment in respect of a child should not be made directly to its parent but that it should be applied in such manner as the Board may deem most advantageous for the child. This power may be exercised when the Board is of the opinion that for any reason it is necessary or desirable.[21] Although this provision is commendable it nonetheless leaves the Board with a wide power to determine the scope of its own power. By objectively limiting it to circumstances when the Board "has reasonable grounds to believe that payment to a parent would not be in the best interests of the child" the purpose could be accomplished without any potential infringement on civil rights.

The identification of dependant children as beneficiaries is circumscribed by the requirement that they be under the age of sixteen years.[22] The Board may, however, extend the period for which compensation may be paid if it is of the opinion that furnishing a further or better education to a child appears advisable.[23] This provision purports to give the

[20] *Ibid.*, s. 37(4).
[21] *Ibid.*, s. 37(10).
[22] *Ibid.*, s. 37(1)(e) as re-enacted by Ont. 1968, c. 143, s. 7(1).
[23] *Ibid.*, s. 37(2) as amended by Ont. 1964, c. 124, s. 4(2).

Board the duty of acting as a wise parent to all dependant children, a position it obviously cannot fill. We think the philosophy underlying the section should be reversed. It can surely be assumed that in most cases further education of a sixteen-year old child would be advisable and necessary. The section should provide that on application the Board "shall" not "may" extend the period of compensation unless on reasonable grounds it is of the opinion that the furnishing of further or better education would not be advisable. The section gives the Board a very wide power to discriminate between the dependant children.

Amount of Compensation

The determination of the amount of compensation to be awarded involves two separate decisions:

(1) it is necessary to determine the extent of the injury:

(2) it is necessary to determine the amount of money or other aid that will be awarded for the injury.

Decisions under the first heading involve no discretion in the case of death resulting from an injury. Where the injury results in disability the Board must determine the nature and extent of the disability.

The Act recognizes three types of disability: temporary total disability, temporary partial disability and permanent disability,[24] but nowhere in the Act are these defined. The determination of the criteria that constitute these three classes of disability is a matter of fact for the Board. We think this is as it must be.

Decisions concerning the amount of the award leave very little to the discretion of the Board. In respect of death they are limited quantitatively by amounts stated in the Act[25] or by maximum limits;[26] in respect of temporary disability they are limited by reference to a percentage of average earnings. The manner in which average earnings are to be calculated and the matters that are to be taken into account in fixing

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[24] *Ibid.*, s. 40 as re-enacted by Ont. 1968, c. 143, s. 8; s. 41 as amended by Ont. 1962-63, c. 145, s. 5; s. 42 as re-enacted by Ont. 1968, c. 143, s. 10.

[25] *Ibid.*, s. 37(1)(c)(d)(e), as re-enacted by Ont. 1968, c. 143, s. 7(1).

[26] *Ibid.*, s. 37(1)(a)(f) and s. 37(3), as re-enacted by Ont. 1968, c. 143, s. 7.

payments are set out in the Act.[27] Minimum limits on the amount of disability compensation that may be awarded are set out.[28] Therefore, in many respects the Act, by setting these objective and indeed quantifiable limits, has reduced the discretion of the Board. Such a reduction effects a corresponding reduction in any fears that one might have concerning the possibility of infringement on civil rights. In this case safeguards against any infringements are written into the Act.

With respect to permanent disability it is provided that the impairment of earning capacity *shall* be estimated from the nature and degree of the injury and again both maximum[29] and minimum[30] limits are placed on the amount that may be awarded. Although average weekly earnings are again set as a yardstick against which the maximum limit is determined provision is made for taking into account what the workman could earn in alternative employment.[31] Although any decision to award compensation on this latter basis is dependent on whether the Board considers it more equitable, the Board is directed to take into account the workman's fitness to continue in the employment in which he was injured or to adapt himself to some other suitable occupation.

It may, therefore, be concluded that the Act circumscribes decisions concerning the amount of compensation to be paid, by objective limitations.

In addition to monetary compensation, an injured workman is entitled[32] to whatever medical aid is necessary as a result of the injury. Questions as to the necessity, character and sufficiency of any medical aid and as to payment for medical aid are to be determined by the Board.[33] The question arises as to whether a decision in respect of medical aid is subject to any control. It would appear that it is a decision which must be made judicially. The laying down of further standards would not be practicable or possible. There would

[27] *Ibid.*, s. 44, as amended by Ont. 1962-63, c. 145, s. 6, and further amended by Ont. 1968, c. 143, s. 11; s. 45.
[28] *Ibid.*, s. 43 as amended by Ont. 1968-69, c. 140, s. 1(1).
[29] *Ibid.*, s. 42(1) as re-enacted by Ont. 1968, c. 143, s. 10(1).
[30] *Ibid.*, s. 43(b) as re-enacted by Ont. 1968-69, c. 140, s. 1(1).
[31] *Ibid.*, s. 42(4).
[32] *Ibid.*, s. 51(1) as re-enacted by Ont. 1968, c. 143, s. 13(1).
[33] *Ibid.*, s. 51(6).

seem to be sufficient objectivity in the word "necessary" itself to satisfy any objections that might be raised regarding the exercise of this particular power of decision.

Manner of Payment of Compensation

Commutation of Periodical Payments

Payments of compensation may be made periodically. Normally, they are paid monthly. However, the Board is given power to commute periodical payments to a lump sum.[34] Prior to 1964 the consent of the workman was required before periodical payments to a Schedule 2 employee might be commuted under section 27. In that year such consent was dispensed with.[35]

There are no procedural provisions which require that a workman be given a hearing before an order of commutation is made. This is a matter that vitally affects the interest of a workman. There should be a statutory provision requiring the consent of the workman or, in the alternative, that such an order be made after written notice has been given to the workman and he has been given an opportunity to be heard.

If an order of commutation is made by any body or person legally authorized to exercise the power of the Board by delegation there should be an express right of appeal to the Board.[36]

Application of a Lump Sum Where Payments are Commuted

Although the workman or dependant may direct how the lump sum is to be applied[37] the Board is not compelled to act on his direction. It is given broad power over the disposition of the lump sum.

> "The lump sum may be,
> (a) applied in such manner as the workman or dependant may direct;
> (b) paid to the workman or dependant;

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[34]*Ibid.*, s. 27, as amended by Ont. 1964, c. 124, s. 3; ss. 28, 29, 30, 46, 47.
[35]Ont. 1964 c. 124, s. 3.
[36]For a discussion of delegation of powers of the Board, see p. 2162 ff. *infra*.
[37]R.S.O. 1960, c. 437, s. 27(3)(a).

(c) invested by the Board and applied from time to time as the Board may deem most for the advantage of the workman or dependant;

(d) paid to trustees to be used and employed upon and subject to such trusts and for the benefit of such persons as, in case it is payable by the employer individually, the workman or dependant directs and the Board approves, or, if payable out of the accident fund, as may be desired by the workman or dependant and approved by the Board;

(e) applied partly in one and partly in another or others of the modes mentioned in clauses *a, b, c* and *d,*

as the Board may determine."[38]

This gives the Board power to override the workman's direction and do what it deems best for him by applying the lump sum in the several ways set out in the section. Here again, no procedural safeguards are provided which would give the workman a right to be heard before the Board makes a direction to pay the lump sum in some way other than according to the workman's direction. Neither is there any right of appeal.

There should be a statutory provision that an order directing the lump sum to be applied in any way other than that directed by the workman only be made after reasonable notice in writing to the workman. If such an order is made by any body or person legally authorized to exercise the powers of the Board by delegation there should be an express right of appeal to the Board.[39]

Assessment of Employers

Penalties

The Board is given power to levy penalty assessments and allow merit reductions. The Act provides:

"(4) Where in the opinion of the Board sufficient precautions have not been taken for the prevention of accidents to workmen in the employment of an employer or where the working conditions are not safe for workmen or where the employer has not complied with the regulations respecting first aid,

[38] *Ibid.*, s. 27(3).

[39] For a discussion of delegation of powers of the Board, see p. 2162 ff. *infra*.

the Board may add to the amount of any contribution to the accident fund for which the employer is liable such a percentage thereof as the Board may deem just and may assess and levy the same upon the employer.

(5) Any additional percentage levied and collected under subsection 4 shall be added to the accident fund or applied in reduction of the assessment upon the other employers in the class or sub-class to which the employer from whom it is collected belongs as the Board may determine."[40]

These powers have a twofold purpose. It is intended that their exercise will improve safety and impose additional burdens on those who have had bad safety records. The levying of a penalty assessment is the exercise of a judicial power. It involves a decision as to whether a particular employer has met the required standards of conduct and having made that determination, a decision as to what action should be taken. That being so there should be objective standards.

In the provision there is a mixture of subjective and objective standards. "Where in the opinion of the Board sufficient precautions have not been taken . . ." the standard is subjective but "where the working conditions are not safe for workmen" or "where the employer has not complied with the regulations . . ." the standards are objective. The determination of the amount of the penalty is subjective.

The power of the Board to add to the contribution of an employer to the accident fund "such a percentage thereof as the Board may deem just" is a power that may be exercised as a disciplinary measure or for the protection of the accident fund and the fair distribution of the burden thereof.

When the power is to be exercised as a disciplinary measure the Board ought not to have an unlimited discretion. The amount of a penalty that may be levied in a court is always limited.

We think that the exercise of the power should be limited to considerations affecting the fair distribution of the burden of assessment for the purposes of the accident fund. The accident fund is an insurance fund and the power of the

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[40]R.S.O. 1960, c. 437, s. 86(4)(5).

Board should be exercised for the maintenance of the fund as such having regard to the nature of the risk.

The imposition of penalties for the violation of standards of conduct belongs to law enforcement. It is in its nature, although not strictly, criminal law. Penalties are provided under many Acts to enforce safety measures, e.g., the Industrial Safety Act, 1964,[41] the Mining Act,[42] etc. The administration of the penal law is not a power that should be conferred on a Board. It should be left to the ordinary processes of the courts where appropriate rights of appeal are provided.

The view we have taken is reinforced by the language used in the 1964 amendment to the Act, as further amended in 1968:

> "Where the work injury frequency and the accident cost of the employer are consistently higher than that of the average in the industry in which he is engaged, the Board, as provided by the regulations, may increase the assessment for that employer by such a percentage thereof as the Board may deem just, and may assess and levy the same upon the employer, and may require the employer to establish one or more safety committees at plant level."[43]

Apart from the determination of the amount of the assessment the conditions are objective. Standards are set out which must be met before the powers may be exercised and their purpose is clear.

The power of the Board to reduce assessments is open to the criticism that the test is subjective.

> "Where, in the opinion of the Board, the ways, works, machinery and appliances in any industry conform to modern standards in such manner as to reduce the hazard of accidents to a minimum and the Board is convinced that all proper precautions are being taken by the employer for the prevention of accidents, and where the accident record of the employer has in fact been consistently good, the Board may reduce the amount of any contribution to the accident fund for which such employer is liable."[44]

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[41] Ont. 1964, c. 45.
[42] R.S.O. 1960, c. 241.
[43] R.S.O. 1960, c. 437, s. 86(6a), as enacted by Ont. 1964, c. 124, s. 9 and amended by Ont. 1968, c. 143, s. 18.
[44] *Ibid.*, s. 86(6).

We suggest that this section should be redrafted to read:

> "Where the Board finds that the ways, works, machinery and appliances in any industry conform to modern standards in such manner as to reduce the hazards of accidents to a minimum and all proper precautions are being taken by the employer for the prevention of accidents, and where the accident record of the employer has in fact been consistently good, the Board may reduce the amount of any contribution to the accident fund for which such employer is liable."

As we have redrafted this section the Board would be the arbiter of the facts and the section would be structurally similar to section 86(6a).

The policy that we suggest should be followed has been observed with respect to statements found to be inaccurate. The Act provides:

> "If a statement is found to be inaccurate, the assessment shall be made on the true amount of the payroll as ascertained by such examination and inquiry, or, if an assessment has been made against the employer on the basis of his payroll being as shown by the statement, the employer shall pay to the Board the difference between the amount for which he was assessed and the amount for which he would have been assessed if the amount of the payroll had been truly stated, and in addition a sum equal to such difference."[45]

Here the amount of the penalty is specifically laid down in the Act with a power in the Board to make a remission where there has been an honest error.[46]

Where there is failure to pay an assessment the defaulting employer is liable to pay and shall pay for his default such percentage of the amount unpaid as may be prescribed by the regulations or as may be determined by the Board.[47]

The Board should not have an unlimited power to determine the percentage of the amount unpaid which is to be assessed as a penalty. In the first place, the Act contemplates that such a percentage would be prescribed by regulations. We take it that it was intended that the percentage should be

[45]*Ibid.*, s. 95(1).
[46]*Ibid.*, s. 95(2).
[47]*Ibid.*, s. 108.

something in the nature of interest on the unpaid amount. If this is the case, it should be prescribed by regulations and not by a decision of the Board on an *ad hoc* basis.

Classification of Employers

As we have said, there are two broad powers of classification of employers—those falling within Schedule 1 and those falling within Schedule 2. Those falling within Schedule 2 are required to pay compensation individually.

All employers who come within Schedule 1 are required to contribute to the accident fund from which compensation is paid. Not all employers and all industries come within the Act nor do all industrial diseases. Those set out in Schedule 3 are the industrial diseases for which compensation is paid. Schedules 1, 2 and 3 were originally part of the statute. However, in 1950 the Board was authorized to make, subject to the approval of the Lieutenant Governor in Council, a consolidation and revision of these Schedules. The Board may now by regulation, subject to the approval of the Lieutenant Governor in Council, reclassify industries, establish other classes, add to classes and exclude trades, employments, occupations or callings for the time being included under the Act.[48] Subject to the approval of the Lieutenant Governor in Council, the Board may declare any disease to be an industrial disease and may amend Schedule 3 accordingly.[49]

We are not concerned here with how these powers are exercised. They are legislative powers and their exercise is subject to the approval of the Lieutenant Governor in Council. That being the case, regulations passed pursuant thereto will come under the scrutiny of the committee of the Legislature provided for by the amendment to the Regulations Act made in 1969.[50]

If the purpose of the legislative powers to classify and reclassify industries is to provide an equitable distribution of the liability to contribute to the accident fund according to the hazards of industry, this should be clearly stated in the Act.

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[48]*Ibid.*, s. 86(1).
[49]*Ibid.*, s. 116 (13).
[50]R.S.O. 1960, c. 349, as amended by Ont. 1968-69, c. 110.

The language of the Act with reference to the subdivision of classes is clear. "Where in the opinion of the Board the hazard to workmen" varies within the class, the class may be subdivided.[51] However, there is the provision that this may be done by the Board "where for any other reason it is deemed proper to do so." These words may have been intended to eliminate the application of the statutory guidelines laid down by the antecedent words. They may or may not have had this effect.[52]

This power to subdivide classes of industries into subclasses or groups is not subject to the approval of the Lieutenant Governor in Council. The subdivision of classes may be as important as the original classification and there seems to be no sound reason why the subdivision ought not to be subject to the control of the Lieutenant Governor in Council. This is especially true if the Board may exercise the power for any reason that it deems proper to do so.

We recommend that the power in the Board to subdivide classes of industries should be subject to the approval of the Lieutenant Governor in Council and that the words "for any other reason it is deemed proper to do so" be struck out.

POWERS OF INVESTIGATION

"(1) The Board may act upon the report of any of its officers and any inquiry that it deems necessary to make may be made by any member or officer of the Board or by some other person appointed to make the inquiry, and the Board may act upon his report as to the result of the inquiry.

(2) The person appointed to make the inquiry has for the purposes of the inquiry all the powers conferred upon the Board by section 65."[53]

The powers conferred under section 65 on the Board are:

"The Board has the like powers as the Supreme Court for compelling the attendance of witnesses and of examining

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[51]R.S.O. 1960, c. 437, s. 86(2).
[52]See *Brampton Jersey Enterprises Limited v. The Milk Control Bd. of Ont.*, [1956] O.R. 1 and *Re Ollmann* (1925), 57 O.L.R. 340.
[53]R.S.O. 1960, c. 437, s. 75.

them under oath, and compelling the production of books, papers, documents and things."[54]

We discuss the effect of these two sections later in another aspect. Read together they confer on the Board and "any member of the Board or officer of the Board or . . . some other person appointed to make the inquiry" extraordinary and far-reaching powers. The Board may act on "any inquiry that it deems necessary to make . . .". There is no limitation on the scope of the inquiry.

Curiously, the power to act is subsidiary to the inquiry. This should be reversed. The power to make an inquiry should be specifically conferred on the Board. It should be exerciseable if so authorized by the Board, by a member of the Board or officer of the Board or any person appointed by the Board to make the inquiry and the inquiry should be limited to the purposes of the Act.

We have commented repeatedly on the conferring of the powers of the Supreme Court on those conducting the inquiries contemplated by this Act. Merely to state that an officer of the Board or any other person appointed to conduct an inquiry should have power over the liberty of the subject and power to commit for contempt is sufficient to condemn the provision.

The recommendation we made in Report Number 1[55] with respect to powers of committal for contempt applies with emphasis here.

Sections 75 and 65 should be repealed and replaced by sections conferring proper powers of inquiry limited to the purposes of the Act with powers in the Board to delegate its powers of investigation in proper cases. A right to apply to the Supreme Court for an order to enforce the attendance of witnesses and compelling them to give evidence and to produce documents and things should be provided.

In addition to the powers of inquiry which we have been discussing, the Board may require statements with respect to wages earned by employees, etc. "and such additional information as the Board may require."[56]

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[54]*Ibid.*, s. 65.
[55]p. 446 *supra*.
[56]R.S.O. 1960, c. 437, s. 92(1).

Here again, this power to require information should be limited to the purposes of the Act as is the requirement to keep an accurate account of charges paid.[57]

If an employer fails to comply with the requirements to furnish information he is liable to a fine of not more than $500 and "default or delay in furnishing any such statement or insufficiency of estimate of expenditure for wages also renders the employer liable to pay an additional percentage of assessment or to pay interest, as fixed by the Board."[58]

Where there is default in providing the required information the Board should have power to make an assessment on the basis of such information as it may be able to get in the exercise of its powers and it should have power to require the delinquent employer to pay interest but the levy of "an additional percentage of assessment" is a double penalty. The employer may be punished in the ordinary courts by a fine of $500 on a summary conviction and he may, in addition, be penalized by the Board. The Board should not have power to levy an additional percentage of assessment for the same default.

We have already discussed the power of the Board to levy penalties.[59] As we have pointed out, the Board should not have an unlimited power to fix the additional percentage of assessment or the rate of interest. If the Board is to have power to levy an additional assessment or interest as an alternative to prosecution a standard should be set either in the Act or by regulation made by the Lieutenant Governor in Council limiting the power of the Board.

The Board or any member of it or any officer or person authorized by it for that purpose may examine books and accounts of the employer and make such other inquiry as the Board may deem necessary for the purpose of ascertaining whether any statement furnished to the Board under the Act is an accurate statement.[60]

The Board and the person so appointed have all the powers that may be conferred on a commissioner under the

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[57] *Ibid.*, s. 92(3).
[58] *Ibid.*, s. 92(6).
[59] p. 2152 ff. *supra*.
[60] R.S.O. 1960, c. 437, s. 94(1).

Public Inquiries Act.[61] These powers may or may not include powers of committal. This we discussed in Report Number 1.[62] But they do not include the wide powers of the Supreme Court conferred on the Board or a person appointed to conduct an inquiry under section 75 which we have already discussed.

Summons of Witnesses and Production

We discussed this subject fully in Report Number 1.[63] What we said there applies to the Act we are now considering. No specific form of summons or subpoena is provided in the Act or regulations. It is important that such a form be prescribed so that the person who is summoned will know the nature of the proceedings.

Similarly, a demand for the production of documents should specify the purpose of the inquiry and the nature of the documents required.

No right to witness fees is set out in the Act. There should be specific provision for witness fees as we recommended in Report Number 1.[64]

Power to Enter, Search and Seize

The power conferred by the Act to examine books may imply an intention that there is a right to enter premises for the purpose of the examination of the books.[65] A specific right to "enter and search" and "to seize" is conferred where authorized by an order of a judge of a county or district court. For convenience, the authority to grant such an order should be vested in a provincial judge. In Report Number 1 we recommended that unless the purposes of the statute would be frustrated judicial approval should be a condition precedent to a power to enter, search and seize.[66] The primary

[61] *Ibid.*, s. 94(1).
[62] pp. 385 and 432 *supra*.
[63] p. 401ff *supra*.
[64] pp. 405ff. and 861ff, *supra*.
[65] R.S.O. 1960, c. 437, s. 94.
[66] p. 422 *supra*.

purpose of the power to enter which we are now discussing is to get information from books. Therefore, the requirement that there should be judicial approval is a proper one.

However, the Act is silent as to what information must be put before the judge before he makes the order. In Report Number 1 we said: "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."[67] What we said with respect to powers of entry applies with greater force to powers of seizure.[68]

We doubt very much whether a power of seizure is at all necessary for the purposes of the Act. Where the Board has power to demand information and to enter and examine books and accounts, together with wide powers of assessment, it is hard to see why power to seize is necessary at all.

If copies of books and records made by the Board were made admissible as evidence any possible necessity for seizure would be eliminated.

If the power to seize is intended for the preservation of evidence, a provision such as that contained in the Ontario Energy Board Act[69] would be sufficient to accomplish the purpose. This provision gives permission to remove documents for the purpose of photographing them and requires their return with reasonable dispatch.

If it can be demonstrated that the power of seizure is at all necessary for the purposes of the Board there should be a requirement that it be made to appear to the judge issuing the order that there are reasonable grounds to believe that a sufficient examination of the books and accounts of the employer cannot be made unless they are seized and taken away or that there are reasonable grounds to believe that an offence under the Act has been committed and the books and records will afford evidence of the offence, and that the books and accounts are located on certain specific premises.

There should, in any case, be a statutory right to the return of the books within a reasonable time.

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[67]p. 413 *supra.*
[68]p. 419 *supra.*
[69]Ont. 1964, c. 74, s. 51.

USE OF INFORMATION OBTAINED ON AN INQUIRY

In Report Number 1 we said:

> "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, [which may be of a very private and secret character] there are no restrictions whatever on the communication of the information obtained."[70]

Where information is obtained pursuant to the exercise of statutory powers of investigation it is recognized that the communication of that information beyond the purposes of the relevant statute and the administration of justice should be restricted.[71]

The Act we are considering provides that no officer of the Board and no person authorized to make an inquiry shall divulge, except in the performance of his duties or under the authority of the Board, any information obtained by him in connection with the inquiry.[72] This is not a sufficient safeguard against the infringement on the civil rights of the individual that the disclosure of information might occasion. The prohibition "except in the performance of his duties" suggests that disclosure would be related to the administration of the Act. But there is a further exception—the disclosure may be authorized by the Board. The power to so authorize is nowhere qualified and would appear to permit the Board to authorize a disclosure that was not related to the administration of the Act.

The Act should be amended to prohibit such disclosures beyond the purposes of the administration of the Act and the administration of justice.

PROCEDURE

We have had occasion to comment from time to time on the lack of procedural provisions relative to certain decision-

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[70]p. 461 *supra*.
[71]p. 462 *supra*.
[72]R.S.O. 1960, c. 437, s. 97.

making powers. Throughout the Act there is a dearth of procedural safeguards for the rights of those affected by decisions made under it. There are certain provisions respecting the requirements that have to be met in order to have the Board consider the question of compensation[73] but there are no procedural provisions requiring information to be given to a workman or an employer of what rights he may have to make representations to those exercising powers of decision or requiring notice to be given before a decision is made.

By a purported delegation of its powers the Board has adopted a somewhat elaborate internal procedure making provision for four different levels in the decision- making process. In so doing the Board has relied on the following provision of the Act to which we referred earlier:

> "The Board may act upon the report of any of its officers and any inquiry that it deems necessary to make may be made by any member or officer of the Board or by some other person appointed to make the inquiry, and the Board may act upon his report as to the result of the inquiry."[74]

This is primarily an enabling provision. It does not confer an express power to delegate the power of decision to any of the various departments or persons concerned with the operations of the Board. The result is that all the decisions not made by the Board itself but made at a lower level in the hierarchy of the decision-making process are of doubtful legal validity, since there is no express power conferred on those making the decisions to make them. In claims matters this would comprise approximately 95% of the claims considered.

To comprehend properly the decision-making process and why its structure is as it is, one must consider the volume of claims. We were advised that the claims that must be considered in a year amount to over 375,000. These may involve approximately 2-million separate decisions. It is of utmost importance that the initial claim be dealt with promptly and that cheques for compensation, where payable, be got out promptly to the injured workman or his dependants.

The Board has set up for its own convenience and the convenience of those making claims a hierarchical pyramid of

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[73]*Ibid.,* ss. 21, 22 and s. 115, as amended by Ont. 1968, c. 143, s. 21.
[74]*Ibid.,* s. 75(1).

authority to consider and reconsider claims. There are four tiers in the hierarchy. On the following page we reproduce a descriptive chart taken from the recent Report of The Honourable Mr. Justice McGillivray.[75]

In the reproduction of the chart we have not adopted the caption originally attached to it: "Appeal Structure".

The Claims Department

A claim is first considered in the Claims Department, which is the first level of the tier. This department is broken up into ten units, each of which has a unit leader and chief medical adviser and approximately ten claims adjudicators. (We think they would more accurately be described as adjusters.)

When a claim comes before a claims adjudicator he attempts to make a decision as to what compensation, if any, the workman is entitled to under the Act. If the matter is a difficult one the adjudicator may refer it to a member of the legal staff or the medical staff of the Board or he may refer it to one or more of the experienced supervisors or assistant supervisors.

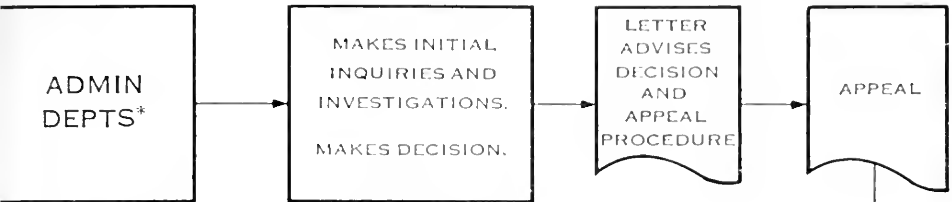
Twenty-two investigators are associated with the Claims Department to assist in gathering information concerning claims.

When a decision has been reached the claimant is advised of the decision and is advised of his right to appeal the decision, if adverse, to the Review Committee. Where an appeal is received with such additional evidence contained therein as will permit an immediate reversal of the decision, the Administrative Department (i.e. the original Claims Department) concerned readjudicates the matter in the light of the new evidence. Where the Administrative Department is unable to reach a favourable adjudication in spite of the additional evidence the matter is referred to the Review Committee for adjudication.

The two most frequent reasons for seeking review are the denial of the claim or the insufficiency of the amount allowed for compensation.

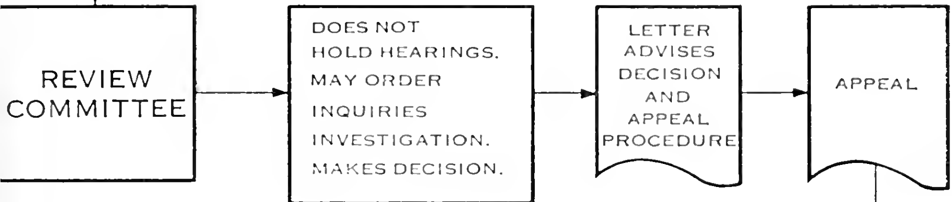
[75]September 15, 1967, 59.

1st LEVEL ADMINISTRATIVE DEPARTMENTS

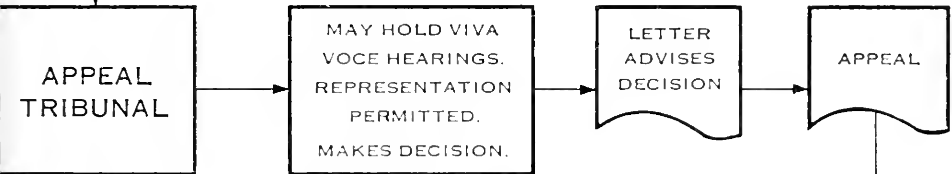


* ASSESSMENT, CLAIMS, MEDICAL & REHABILITATION MATTERS

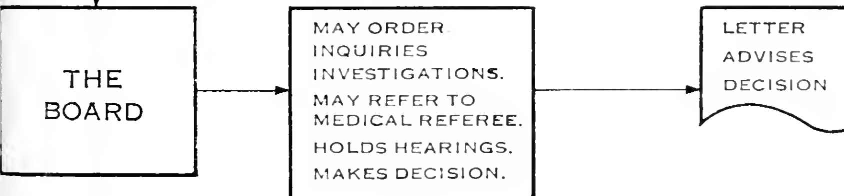
2nd LEVEL REVIEW COMMITTEE



3rd LEVEL APPEAL TRIBUNAL



4th LEVEL THE BOARD



The Review Committee

The Review Committee consists of nine members who have had long experience with the Board. Its powers are stated to be:

(1) Enquire into and determine any matter by way of appeal from the decisions of all administrative departments.

(2) Require the attendance before it of any employee of the Board on any matter coming within the purview of the Review Committee.

(3) On receipt of such additional information as will permit a reversal of the decision to reconsider any matter and to rescind, alter or amend any decision previously made by it in such matter.

The procedures laid down by the Board to be followed by the Review Committee are as follows:

(1) It shall be the responsibility of the Director to allocate matters coming before the committee to sub-committees of at least two members for adjudication.

(2) In the event of disagreement between sub-committee members, the Director or his Deputy shall act as a third member of the sub-committee and the decision of two members shall be binding.

(3) A dissenting member of a sub-committee shall state his reasons for such dissent in writing and the dissent shall be placed upon the file.

(4) The Review Committee shall have the right to use the investigatory facilities of one or more of the administrative departments in order to reach its decision. Normal correspondence, however, shall be carried on by the Secretary of the Review Committee.

(5) The Secretary of the Review Committee shall communicate the decisions of the Committee to all parties concerned with full explanation of the right and procedure of appeal.

The Appeal Tribunal

The Appeal Tribunal consists of:

a chief of the Tribunal,
a deputy chief of the Tribunal who will act as secretary,
a legal member, and
a medical member.

Purporting to act under section 75 of the Act the Board delegates the following powers to the Appeal Tribunal:[76] To

"(i) Hear and determine all appeals from Review Committee decisions.

(ii) Hear and determine any matter referred to it by the Board.

(iii) Adjudicate by way of viva voce hearings on—

(a) referral from Review Committee
(b) its own motion
(c) request of any party to a matter
(d) by order of the Board.

(iv) Compel the attendance of witnesses and to examine them under oath, and to compel the production of books, papers, documents and things.

(v) Order the attendance of any member of the staff before it with respect to any matter coming within its jurisdiction.

(vi) The Appeal Tribunal shall have the right to use the investigatory facilities of one or more of the administrative departments in order to reach its decision. Normal correspondence, however, shall be carried on by the Secretary of the Appeal Tribunal.

(vii) On receipt of such additional evidence as will permit a reversal of the decision to reconsider and alter, amend or rescind any order previously made by it."

The following procedure has been laid down and set out.

"(i) Viva Voce Hearings

(a) Location — These hearings shall be held at the Board's Head Office in Toronto or at such other location as the Tribunal may from time to time determine.

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[76]We have already referred to the frailty of the legal foundation for this purported delegation, p. 2163 *supra*.

(b) A quorum of the Tribunal shall be three and the Chief of the Tribunal shall designate the personnel for each hearing.

(c) All viva voce proceedings shall be recorded by a chartered shorthand reporter and the transcript obtained except where no witnesses are called it shall be in the discretion of the Tribunal as to the necessity of recording any argument which may be presented.

(d) All evidence shall be taken under oath.

(e) The purpose of a hearing is to arrive at the true facts with respect to the matter being adjudicated and the decisions of the Tribunal shall be upon the real merits and justice of the case and the Tribunal shall not be bound to follow strict legal precedent.

(f) All parties shall have the right to present argument.

(ii) Adjudication other than viva voce hearings

(a) It shall be the responsibility of the Chief to allocate matters coming before the Tribunal under this section to sub-tribunals of at least two members for adjudication.

(b) In the event of disagreement between sub-tribunal members, the Chief or his Deputy shall act as a third member of the sub-tribunal and the decision of two members shall be binding.

(iii) General

(a) Reasons for judgment shall be completed by the Tribunal with respect to each adjudication and the decision shall be signed by the Tribunal members sitting on the appeal.

(b) In the event of a dissenting vote, the dissenting member of the Tribunal shall state his reasons for the same in writing. The dissenting reasons shall be placed upon the file.

(c) The Secretary shall notify all parties of the decision of the Tribunal and shall forward the file for necessary action to the department concerned.

(d) The parties are to be advised of their right of appeal to the Board.

(e) The appointment of a medical referee under the provisions of Section 23 is specifically reserved to the Board."[77]

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[77]Statement of Appeal Procedures supplied by the Workmen's Compensation Board.

In the control of its own processes the Appeal Tribunal may decide to hold *viva voce* hearings, examine witnesses and consider the material in the file.

The practice is to take all the evidence at *viva voce* hearings under oath. It does not appear that a claimant may compel a *viva voce* hearing but if one is held he is given the right to be present and to present arguments.

Reasons for a decision are prepared and placed on file along with any dissent. The parties are notified of the decision and it is said that the practice is to advise them of the right to appeal to the Board. Representations have been made to us that this practice is not always followed. We are not concerned whether the complaints that are made are well founded or not. It is a practice that should be followed in every case.

The procedure before the Appeal Tribunal has been criticized on the ground that the workman is not permitted to have access to all the material on which the Appeal Tribunal may base its decision. He is given a summary of medical reports and other matters. We deal with this subject later when discussing medical reports and the statutory provisions with respect thereto.

The Board

On an appeal to the Board it may exercise any of the powers conferred on it. For convenience we set out in full the sections of the Act defining the relevant powers and those relating thereto.

> "13. No action lies for the recovery of compensation whether it is payable by the employer individually or out of the accident fund, but all claims for compensation shall be heard and determined by the Board."[78]

> "72. (1) The Board has exclusive jurisdiction to examine into, 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

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[78]R.S.O. 1960, c. 437, s. 13.

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.

(2) Without limiting the generality of subsection 1, such exclusive jurisdiction extends to determining,

(a) whether any industry or any part, branch or department of any industry falls within any of the classes for the time being included in Schedule 1, and, if so, which of them;

(b) whether any industry or any part, branch or department of any industry falls within any of the classes for the time being included in Schedule 2, and, if so, which of them;

(c) whether any part of any such industry constitutes a part, branch or department of an industry within the meaning of this Part.

(3) Nothing in subsection 1 prevents the Board from reconsidering any matter that has been dealt with by it or from rescinding, altering or amending any decision or order previously made, all of which the Board has authority to do.

(4) The decisions of the Board shall be upon the real merits and justice of the case, and it is not bound to follow strict legal precedent."[79]

Apart from the question of its legal validity, the administrative scheme adopted by the Board is generally consistent with the recommendations made in Report Number 1 concerning a hierarchy of tribunals.[80] There we discussed briefly and referred to the decision-making procedure with which we have just been dealing in greater detail. We said:

"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.

[79] *Ibid.*, s. 72.
[80] p. 124 *supra.*

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."[81]

When we have said that the principle of the hierarchy of tribunals is generally consistent with our recommendations we wish to make it clear that it does not come within the Terms of Reference of this Commission to consider complaints as to how the duties assigned to the different bodies are carried out. We are concerned, however, with whether sufficient safeguards are provided for the benefit of those affected by the decisions made.

In 1967 The Honourable Mr. Justice McGillivray dealt with the decision-making process in the Report of the Royal Commission over which he presided "In the Matter of the Workmen's Compensation Act"[82] and it is not our function to sit in review on what was said there.

We are particularly concerned, however, with two matters:

(1) that the processes of the Board continue to be investigatory in nature, and

(2) that in the decision-making process all workmen, whether literate or illiterate, union members or non-union members have equal opportunity to have all relevant matters considered and to have available to them all information necessary to make a full presentation of their cases before a final decision is made.

Some representatives of labour express concern that the formality of the hierarchy of tribunals will tend to develop an adversary system where the workman will be ill-matched with the employer. We think there is foundation for this

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[81]p. 125 *supra*.
[82]p. 60.

apprehension and that adequate safeguards must be provided. Mr. Justice McGillivray expressed a similar view in his Report.[83]

The whole purpose of the Act is to provide a means by which loss through accident caused to workmen while they are engaged in the process of production or rendering services should be borne as a cost of production or of the rendering of the services rather than by the unfortunate workman or his dependants. The loss occasioned by injury to the workman should be just as much a cost of production as the repair of a machine.

When we recognize this, the emphasis must be clearly on the investigatory character of the tribunal in the hierarchy in the process of determining what loss has been occasioned. Otherwise the volume of claims would cause such a congestion in the work of the Board as to destroy its usefulness.

It is most important that in the first consideration of a claim the investigation should be as full and complete as possible. Following the investigation there should be a recommendation, a copy of which, with written reasons, should be furnished to the workman together with a statement that the assistance of the Workmen's Adviser (which we shall discuss later) is available to him in considering whether he should accept the recommendation with respect to the claim.

If the recommendation is accepted, the acceptance should have the effect of a decision of the Board.

If the recommendation is not accepted by the claimant he should have a right to ask for a further investigation and a further hearing in the first instance in order to clarify or meet any ground on which his claim has not been recommended. On this investigation all matters should be open for full consideration and a final recommendation made which, if accepted, would have the effect of a decision of the Board.

If this process is followed, consideration should be given to abolishing the Review Committee and permitting a direct application from the Claims Department to the Appeal Tribunal. If the Review Committee is continued the claimant should have access to all material to be considered by it and

[83]p. 60ff.

the Review Committee should exercise wide powers of investigation. It should hear representations and witnesses and it should not confine its considerations to the file. The Review Committee should, in its turn, make its recommendation and if its recommendation is accepted the matter should end there unless reopened by the Board. If it is not accepted the matter should be heard by the Appeal Tribunal.

On a hearing before the Appeal Tribunal the claimant should have access to all matters that may be considered by the Appeal Tribunal. According to the present procedure the claimant may be given a summary of evidence that may be considered by the Appeal Tribunal. The summary of evidence may only be an interpretation of what has been said or what reports have been considered and may not be an accurate interpretation. We shall deal more fully with medical reports presently.

When the Appeal Tribunal has come to a decision it should give written reasons and the claimant should be notified of the reasons and that he has the right to apply to the Board for a decision. What we have said with regard to disclosure applies with equal force to a hearing before the Board.

Medical Reports

One area of difficulty arises with respect to the application of minimum rules of procedure concerning full disclosure insofar as they would apply to the contents of medical reports. Usually a hearing can only be meaningful if the claimant has a real opportunity to meet the case against him. If the dispute is over an accident or the nature of disability or whether the disablement was actually caused in the course of employment of the workman, the evidence against him may largely consist of medical reports. Therefore, the satisfaction of the requirement with respect to minimum procedural rules would dictate that these be made available to the claimant.

However, the co-operative relationship between the Board and the medical profession, without whose co-operation the activities of the Board would be seriously undermined, appears to be based on the Board's practice of regarding these reports as confidential communications and not open to

inspection. Complaints have been addressed to the Commission concerning this practice and arguments advanced contending that the prosecution of an appeal on behalf of a claimant is made difficult because of this. The difficulty appears to arise largely out of an apprehension on the part of the members of the medical profession that they may be exposed to vexatious actions for malpractice arising out of reports made to the Board.

In order to mitigate this risk the Act was amended in 1968-69 to provide:

> "97a. Every report made under section 52 and every other report made or submitted to the Board by a physician, surgeon, hospital, nurse, dentist, drugless practitioner, chiropodist or optometrist is for the use and purposes of the Board only, is deemed to be a privileged communication of the person making or submitting the same, and unless it is proved that it was made maliciously, is not admissible as evidence or subject to production in any court in an action or proceeding against such person."[84]

The effect of this amendment is by no means clear. It provides that the report made or submitted to the Board by a physician ". . . is deemed to be a privileged communication of the person making or submitting" it. Does this mean that no report received by the Board from a member of any of the professions named in this section with respect to a patient who has consulted him may be released to the patient without the consent of the person making the report? For example, if a workman has consulted his own physician and his physician has made a report to the Board is the workman not to be entitled to have a copy of the report unless the physician desires to release it? Or take another case. A workman is injured in a plant and he is attended by a plant doctor who is in the employ of his employer. The plant doctor makes his report to the Board. Is the workman not to be entitled to have a copy of the report of the plant doctor who has attended him so that he may consult an independent physician?

We have read the debates in the Legislature when this amendment to the Act was passed and there seemed to be a

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[84]R.S.O. 1960, c. 437, s. 97a as enacted by Ont. 1968-69 c. 140, s. 2.

considerable confusion there as to its effect. In the course of the debate the Minister supporting the amendment stated: "The claimant's doctor receives the report."[85] That may or may not be true. Under the legislation the claimant's doctor has no right to see the report because it is by statute the privilege of the doctor making it. Where the report is made by a plant doctor the effect of the statute is to virtually make the report the privilege of the employer. The amendment appears to be based on a recommendation of Mr. Justice McGillivray, but the legislation is not in accordance with his Report.

Mr. Justice McGillivray discussed the matter of access to Board files and medical reports at some length.[86] After examining a number of summaries of information as supplied to claimants with respect to their claims and on which the Board had based decisions he concluded that those examined contained all the information required for the claimant to prosecute his claim. We quote in part from Mr. Justice McGillivray's Report:

> "The union representatives complained that these summaries were not sufficient, partly because they contain medical language difficult for the layman to understand but chiefly because the furnishing of a summary falls short of that which is felt to be the right of the claimant, namely, to have made available when presenting his appeal the exact information upon which the claim has been decided.
>
> Under an adversary system, which this is not, disclosure would be required. If directed here it would tend to open the door, partly at least, to the system to which all say they are opposed. The claimant would query the opinions expressed in the medical reports and management's representative in turn might seek to answer such queries or might himself object to the medical opinions expressed. As matters stand at present there is, as between the Board and the medical profession, the friendliest of relations. The lack of confidence and co-operation in British Columbia, referred to in the report of Mr. Justice Tysoe, is not experienced here. All members of the medical profession, I think it is safe to say, are overworked yet they appear to render their services willingly at the request of the Board and to accept therefor the minimum fee provided by the schedule of fees of the

[85]Legislature of Ontario Debates, 1969, 6275.

[86]Report of the Royal Commission in the Matter of the Workmen's Compensation Act (1967), 71-3.

Ontario Medical Association. The doctor practising in a 'company town' or any doctor, for that matter, might be less than frank in his report to medical confreres on the Board if he knew that his report was later to be furnished to the patient. To a lesser extent the same applies to the specialist who might resent being exposed to a possible subsequent controversy with the person whom he had examined or with that person's lawyer. The result would be twofold—a report that was less than complete and a possible reluctance by physicians to accept compensation cases. Either result would be unfortunate. It would seem to me that these considerations outweigh the reasons advanced for change.

Unfortunately many claimants look upon the Board as if it were an adversary and opposed to paying claims. Some talked of the Board seeking to preserve its fund. I am satisfied on this score that the Board sits judicially and seeks only to weigh the scales between the claimant and those who provide the funds for payment. It can for itself have no concern about the amount awarded. While it is true that the Board has a fund, it can hardly be influenced thereby as current payments will be taken care of by an assessment against industry rather than from the fund. A substantial support for this view is that the Board reports, as I have mentioned before, that about 96 per cent of all claims are paid, which must indicate that claimants are being given every possible consideration.

In its brief the Ontario Medical Association extended its disapproval to the furnishing even of summaries. I would not give effect to that submission. The present practice appears to furnish a suitable compromise in these matters. It should also be pointed out that any claimant is free to consult on his own whatever professional advice he chooses. Reports from such sources can be adduced by the claimant and considered on appeal. *The reasons which lead me to recommend against the production of medical reports do not seem to apply to x-ray plates and reports or to reports on post-mortem examinations. They should be made available upon request of the claimant. With these exceptions I recommend no change in the present practice.*"[87]

"The case mentioned raises the point, however, emphasized by the Ontario Medical Association, namely *the necessity for giving protection to the doctor if reports are to be made available. Should my recommendation regarding medical reports not meet with approval* and should they be made available at some time in the future I cannot emphasize too

[87]*Ibid.*, 71-72. Author's italics.

> strongly that accompanying legislation at that time should give protection to the physician by making his report privileged. A failure to do so would, I believe, seriously handicap the Board in securing medical services for its injured claimants."[88]

It is quite clear that Mr. Justice McGillivray considered that the legislation making a physician's report privileged was only to be considered if the reports were to be shown to claimants. He clearly recommended that the present practice of showing the claimant only a summary of the medical report be continued. But if that recommendation was not adopted then he recommended that there should be legislation making the reports privileged.

If it was only intended that physicians, hospitals, nurses, dentists, drugless practitioners, chiropodists and optometrists should be safeguarded against actions for malpractice the statute could well have been framed to say so in clear terms.

We do not question the right of a professional man making a report to the Board without negligence and in good faith to the protection the law affords him. But we ask the question: Why should a member of any of the enumerated professions be protected against actions based on negligence with respect to reports to the Board while they are not protected in making a report to the patient or his insurance company? The exception in this section "unless it is proved that it was made maliciously" is not very meaningful. It would be most difficult for a workman to prove that a report was made maliciously unless he was permitted to see it.

Under this section as it now is the Board would appear to have no power to release any medical reports to a workman or any other person, including another physician, without the consent of the reporting physician. This not only could militate against proper treatment of the workman and his rehabilitation, but against proper assignment of work.

If it is thought necessary to give the relevant professions protection against malpractice suits arising out of their reports to the Board the legislation should so state in clear language and not by way of creating a statutory privilege. On

[88]*Ibid.*, 73. Italics added.

the other hand, in the decision-making process, the workman should be entitled to know on what material a decision involving his rights is based.

APPEALS

For the purpose of discussing appeals, the decision-making powers of the Board may be dealt with conveniently under the following heads:

(1) the workman's entitlement to compensation;

(2) the amount of compensation;

(3) the destination of compensation, and

(4) classification and assessment of employers.

The first three categories involve judicial decisions. The fourth is substantially an administrative decision.

Workman's Entitlement to Compensation

The workman's entitlement usually concerns the question as to whether the injury was sustained by accident arising out of and in the course of his employment or whether the workman suffered from a relevant industrial disease, and, in some cases, whether the injury was attributable solely to the serious and wilful misconduct of the workman. Coupled with this is the determination of the question as to whether the workman may bring an action in the ordinary courts with respect to the injury sustained.

> "Any party to an action may apply to the Board for adjudication and determination of the question of the plaintiff's right to compensation under this Part, or as to whether the action is one the right to bring which is taken away by this Part, and such adjudication and determination is final and conclusive."[89]

These matters are so essentially matters of pure law based on the relevant facts that there should be some recourse to the courts for final determination. If there be such a recourse the Board and those affected by its decisions will have

[89]R.S.O. 1960, c. 437, s. 16.

the guidance of jurisprudence in deciding cases. There would always be the legislative safeguard that if the decisions of the courts are inconsistent with the intended policy of the Act, the Act could be amended accordingly.

We, therefore, recommend that the Act should provide that where compensation is refused on grounds other than a question of disability, the Board should be empowered to state a case for the opinion of the Divisional Court of the High Court of Justice[90] on any question of law with respect to any claim by a workman. If the Board refuses to state a case the applicant should have a right to apply to the Court for an order directing that it do so.

Amount of Compensation

The existence of a disability and the extent of a disability are essentially matters for decision based on medical evidence and often require continuing observation. That being so, the Board with its experience is in a better position to make a final decision than the courts. If the safeguards against error which we have recommended are adopted, we think there should be no appeal to the courts against a decision of the Board concerning the existence or extent of a disability.

Destination of Compensation

Matters falling under this head are only incidentally related to compensation. They have to do with the administration of infants' estates, the estates of incompetents and the maintenance of dependants.

We referred earlier[91] to the provisions of the Act giving the Board broad powers to direct how compensation may be paid to others than the workman.[92] The Board is given power to pay compensation to a parent, spouse, committee, the Public Trustee or "such other person" or it may be applied "in such manner as the Board deems in the best interest of such workman or dependant . . .". If the workman or his dependants are dissatisfied with an order of the Board concerning the

[90]See Bill 183, 1970, 3rd session and see recommendations Chapter 44 *supra* re Appellate Division of the High Court of Justice.
[91]p. 2145 ff. *supra*.
[92]R.S.O. 1960, c. 437, s. 50 as re-enacted by Ont. 1968, c. 143, s. 12.

method of paying the compensation there is no relief. There should be a right of appeal on such a question to the Divisional Court of the High Court of Justice for Ontario:

Classification and Assessment of Employers

Classifications and assessments of employers are essentially rating matters. They concern fair apportionment of the cost of injuries sustained by workmen in the production of goods or in rendering services. They concern the maintenance of the accident fund. In this area an appeal to the courts would not be appropriate. The question remains: Should there be a right of appeal to the Lieutenant Governor in Council or the Minister?

The Lieutenant Governor in Council now has a supervising control over the accident fund. He may direct the Superintendent of Insurance to examine into the affairs and business of the Board for the purpose of determining the sufficiency of the accident fund[93] and he may direct the Board to make supplementary assessments.[94]

We think, notwithstanding that it is desirable in principle that the Board should be independent of political interference, these provisions for supervision are wise and necessary. Likewise, we think that justice demands that there should be a right of appeal to the Minister by an employer against his classification or any special assessment imposed on him.

RESTRICTIONS ON JUDICIAL REVIEW

Three sections of the Act require particular consideration with respect to the restrictions purported to be placed on the control by the courts over the decision-making powers conferred under the Act.

> "16. Any party to an action may apply to the Board for adjudication and determination of the question of the plaintiff's right to compensation under this Part, or as to whether the action is one the right to bring which is taken away by this Part, and such adjudication and determination is final and conclusive."[95]

[93]*Ibid.*, s. 80.
[94]*Ibid.*, s. 106.
[95]*Ibid.*, s. 16.

"72. (1) The Board has exclusive jurisdiction to examine into, 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."[96]

"23. (2) The medical referee to whom a reference is made under subsection 1, or who has examined the workman by the direction of the Board under subsection 1 of section 22, shall certify to the Board as to the condition of the workman and his fitness for employment, specifying where necessary the kind of employment and, if unfit, the cause of such unfitness, and his certificate unless the Board otherwise directs is conclusive as to the matters certified."[97]

We discussed the subject of statutory restrictions on judicial review fully in Report Number 1.[98] As we pointed out there, statutory provisions of the sort we have just quoted do not necessarily prevent access to the courts to determine questions of *ultra vires*. A tribunal cannot act beyond the powers conferred on it under the statute and at the same time claim the benefit of the provisions which purport to oust the jurisdiction of the court.

In Report Number 1 we said: "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."[99] If our recommendations with respect to the right of appeal by way of stated case are accepted this safeguard will be substantially assured.

In Report Number 1 we recommended that all clauses restricting judicial review ought to be repealed and that none should be enacted unless it can be demonstrated that most exceptional circumstances demand it.[100]

[96]*Ibid.*, s. 72(1).
[97]*Ibid.*, s. 23(2).
[98]p. 267ff. *supra*.
[99]p. 279 *supra*.
[100]p. 1267 *supra*.

We think this recommendation applies to the first two sections above quoted. The provisions with respect to the conclusive character of a medical certificate do not fall within this recommendation. Such a certificate is an evidentiary matter. It is not part of the decision-making process and the Board may accept it or reject it.

WORKMEN'S ADVISER

Representations were made to us concerning the inequality of the position of the workman and the employer before the four decision-making bodies—the Claims Department, the Review Committee, the Appeal Tribunal and the Board. Some employers engage special representatives who are skilled in the arrangement and presentation of material for consideration. On the other hand, usually the workman has to depend on the representative of the union he belongs to or if he does not belong to a union (in Ontario over two-thirds of employees covered by the Act are not members of unions) he has to do the best he can in preparing and presenting his own case. Many workmen are illiterate and cannot speak the English language and if they can they are unskilled in the meaning of special terms used with respect to illnesses or injuries.

It was stated to us that formerly the Vice-Chairman of the Board did much to meet the need created by this situation and, in addition, he acted as a sort of Ombudsman with respect to complaints that workmen had concerning the processing of their claims. In an effort to meet an apparent need the office of Workmen's Adviser was created in 1966.

Mr. Justice McGillivray discussed this office in his Report.

> "The present adviser is an employee of the Board and has his quarters at the head office of the Board in Toronto. He is available to workmen for consultation and advice by correspondence or personal interview in connection with rejected claims and the preparation of appeals. He has access to all files and medical reports in the possession of the Board. He may not disclose actual reports to the workman but advises him with regard to the substance thereof. The adviser may not appear at an appeal hearing to represent the

workman or to question witnesses. The unions apparently make no use of the adviser and there was no evidence of the extent to which his services are called upon by others."[101]

The matter of a workmen's representative was considered by Chief Justice Sloan in British Columbia in 1952 when sitting as a Royal Commissioner reviewing the operation of the Workmen's Compensation Act of that Province. He recommended the appointment of an "advocate" at Vancouver and a "deputy advocate" at Victoria who would be members of the Bar and who would perform duties similar to the pensions advocate in the Department of Veterans Affairs. This recommendation was partially implemented by the appointment of a "Compensation Counsellor" who was not required to be a member of the Bar. The Compensation Counsellor's duties as defined by the Order in Council appointing him were "to advise and assist workmen's compensation claimants."

The operation of the Workmen's Compensation Act of British Columbia was again considered in 1966 by a Royal Commission[102] presided over by Mr. Justice Tysoe. He found that a great number of the dissatisfied claimants who were in touch with the Commission had no knowledge of the existence of a person who could assist them in establishing their claims and even a few union officers were not aware that a Compensation Counsellor existed. The Commissioner recommended that an office of Compensation Consultant be established. The holder of the office would be responsible to a member of the Cabinet and be a member of the Bar.

It was recommended that the Compensation Consultant and his assistants, as well as the Compensation Counsellor, should have access at all reasonable times to the complete files and records of the Board and other material pertaining to every injured workman. It was stressed that the holder of the office should be completely independent of the Board and of industry. It was proposed that the Compensation Counsellor should be subject to the direction and control of the Compensation Consultant.

[101]Report of the Royal Commission in the Matter of the Workmen's Compensation Act (1967), 67.

[102]Commission of Inquiry, Workmen's Compensation Act, Report of the Commissioner, The Honourable Mr. Justice Charles W. Tysoe (1966).

This recommendation was implemented in 1968.[103]

For convenience we quote the relevant statutory provisions.

"77. (1) The Lieutenant Governor in Council may,

(a) upon the recommendation of the Attorney-General, appoint a Compensation Consultant, who shall be a barrister and solicitor in good standing as a member of the Law Society of British Columbia;

(b) either fix the remuneration to be paid to the Compensation Consultant or provide for the basis of remuneration and for the fixing of actual amounts thereof by the Attorney-General; and

(c) prescribe any duties, rights or privileges attaching to the office of Compensation Consultant in addition to those imposed and conferred by Statute, by-law, canon of ethics, regulations, or rule.

(2) The Minister of Finance shall pay to the Compensation Consultant out of the Consolidated Revenue Fund such remuneration as may be fixed by the Lieutenant Governor in Council or, where appropriate provision is made in the order of appointment under subsection (1), by the Attorney-General.

(3) There may be appointed, pursuant to the *Civil Service Act*, a Compensation Counsellor and such professional and other advisers and staff as are necessary to enable the Compensation Consultant and the Compensation Counsellor to carry out their duties effectively.

(4) The Compensation Consultant shall

(a) give or cause to be given assistance to any workman or dependents having a claim under this Act, except where, in the opinion of the Compensation Consultant, the claim is unjustified;

(b) appear before the Board or any other tribunal or before any Court or Judge on behalf of workmen or dependents whose claims are of such complexity or importance that, in his opinion, his appearance is required;

[103]B.C., 1968, c. 9, ss. 77, 78.

(c) render advice to workmen and dependents with regard to the interpretation and administration of this Act and any regulations made hereunder; and

(d) direct and supervise the Compensation Counsellor and the staff appointed under this section in the performance of their functions.

(5) The Compensation Counsellor shall

(a) assist workmen and dependents in the formulation of claims under this Act and in the gathering of evidence in support thereof;

(b) assist workmen and dependents in the preparation of cases for review; and

(c) assist and carry out the directions of the Compensation Consultant."

"78. (1) No officer of the Board and no person authorized to make an examination or inquiry under this Part shall divulge or allow to be divulged, except in the performance of his duties or under the authority of the Board, any information obtained by him or which has come to his knowledge in making or in connection with an examination or inquiry under this Part.

(2) Every person who violates the provisions of subsection (1) is guilty of an offence against this Part.

(3) The Compensation Consultant and the Compensation Counsellor shall have access at any reasonable time to the complete files and records of the Board and other material pertaining to each and every injured or disabled workman, including any statement prepared under subsection (16) of section 55."

Since 1953 provision has been made in Manitoba for the appointment of an officer of the Department of Labour who shall,

"(a) when requested by an injured workman, represent him and assist him in the preparation and presentation of his case in hearings before the board in matters being dealt with under subsection (3) of section 44;

(b) as may be prescribed by the Lieutenant-Governor-in-Council, discharge the duties of, and hold, any office authorized by law."[104]

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[104]R.S.M. 1954, c. 297, s. 80.

In Nova Scotia provision was made in 1957 for the appointment of a Workmen's Counsellor who shall,

"(a) when requested by an injured workman, represent him and assist him in the preparation and presentation of his claim for compensation;

(b) discharge such other duties as may be prescribed by the Governor in Council."[105]

Mr. Justice McGillivray in his Report made the following observations and recommendations:

"Bearing in mind that from two-thirds to three-quarters of the workmen in Ontario covered by the Act are not members of a recognized trade union, it seems to me that somewhat greater assistance to workmen would be rendered by revising the function and method of appointment of the workmen's adviser so that his role would more closely resemble that of the pensions advocate who handles servicemen's claims before the Pension Board. *I recommend that the status of the workmen's adviser be elevated and that the following considerations apply to his appointment and duties:*

(a) *He should be appointed by and be responsible to the Attorney-General and payment of his salary and that of his staff and the expenses of his office should be made by that Department. If possible, his offices should be separate from those of the Board. It is fundamental that he be completely independent of the Board and of industry.*

(b) *He must be a person of high standing who will command the respect and confidence of workmen and of the Board and maintain the independence required of him. It is therefore important that the salary be high enough to attract a competent person to the position. I do not feel it essential, as did Mr. Justice Tysoe in his report, that the adviser be a lawyer and it may be better that he is not, so long as he is well qualified and possesses the attributes I have mentioned.*

(c) *He should be provided with such assistants as the volume of work he is called upon to perform requires.*

(d) *He need not, in my view, have complete access to the Board files and reports and it should be sufficient to enable him to assist in the preparation and presentation of an appeal if he has the same degree of access, including the right to the summaries of information referred to*

[105]R.S. N.S. 1957, c. 343, s. 82.

below, as has an individual workman. I do not feel therefore that a provision for the type of access to files as is contained in section 76(3) of the British Columbia statute is required.

(e) *He should be entitled to be present at and participate in Appeal Tribunal and Board hearings on behalf of the workman to assist him in the presentation of his case.*

(f) *The fact that the adviser's services are available on request and without expense should be stated in the advisory letters to workmen already referred to.*

(g) *The appeal regulations should contain due provision for the foregoing.*

It is not my intention in making this recommendation to create an adversary system where employer will be pitted against employee but rather to encourage the service of free guidance and assistance to workmen so that none may feel at a disadvantage in the face of any formality that may, of necessity, exist in the proceedings before the Appeal Tribunal and the Board."[106]

These recommendations have not been implemented by legislation. We agree with the principle of Mr. Justice McGillivray's recommendations but have reservations in some matters.

If the members of the medical profession are to have the protection provided for them concerning malpractice arising out of their reports there is no reason why such reports should not be made available to the Workmen's Adviser as they are in British Columbia. Without this it would be most difficult for the Workmen's Adviser to give an injured workman full assistance.

We agree that the status of the Workmen's Adviser should be raised and that he should be independent of the Board but we do not think that the analogy of the advocate who handles servicemen's claims is appropriate.

Mr. Justice McGillivray was quite alert to the danger of an inquiry conducted by the Workmen's Compensation Board taking on the characteristics of an adversary system of determining rights. This must be avoided, but we think it can be avoided if the Board recognizes that in the inquiry it conducts

[106]Report of the Royal Commission in the Matter of the Workmen's Compensation Act (1967), 67-68. Author's italics.

a Workmen's Adviser has a real function to assist the Board in coming to the right conclusion and that he shall have full opportunity to participate in the inquiry.

We do not think that there is any need for two officers, a Compensation Consultant and a Compensation Counsellor as is provided for in the British Columbia Act. Such a system would tend to promote an adversary system in the Board's proceedings. One such officer with adequate staff should be sufficient. When called upon, his most important function should be to assist the workman in getting his case properly prepared for consideration in the first instance and to assist in the first reference where a claim has not been allowed. It is essential that he should have full access to all the files pertaining to a claimant who has consulted him, and that he should be put in a position to advise and explain to dissatisfied workmen what rights they have and the reasons for the decisions given.

In the administration of the Act it is of first importance that claimants should have no reason to feel that they have not been fairly dealt with in the decision-making process.

Our recommendation is that a Workmen's Adviser or Consultant should be appointed by Order in Council. He should be independent of the Board; his function should be to assist and advise the workman with respect to his claim and where he thinks it necessary to assist him at any hearing. For that purpose he should have access to all relevant files and material. He should not be considered as an advocate of special interests but rather as one who assists in promoting justice. He should be provided with sufficient staff. His salary and that of his staff should be paid out of the Consolidated Revenue Fund.

RECOMMENDATIONS

1. Section 50 should be amended to provide that the Board pay the compensation directly to infant employees unless a reasonable cause is shown why it should be paid to some other person.

2. Section 37(4) should be clarified so as to provide that compensation should be paid wherever by reason of an

industrial accident to a workman an illegitimate child has been deprived of maintenance which it was entitled to receive from the workman.

3. Section 37 (10) should be amended to provide that payment in respect of a child may be made to a person other than a parent when the Board has reasonable grounds to believe that payment to a parent would not be in the best interests of the child.

4. Section 37 (2) should be amended to provide that the Board shall on application extend the period of compensation to dependent children after the age of 16 for further or better education unless on reasonable grounds the Board is of the opinion it is not advisable.

5. There should be statutory provision requiring the consent of the workman to commutation of periodic payments of compensation, or in the alternative, the workman should be given an opportunity to be heard on written notice before an order for commutation is made.

6. The statute should provide that an order directing application of a lump sum in a manner other than as directed by the workman be made only after reasonable notice in writing to the workman.

7. There should be a right of appeal from an order of commutation or order directing payment of a lump sum in a manner other than as directed by the workman where the order is made by a person or body exercising the powers of the Board by delegation.

8. Section 86 (4) should be amended to provide that the additional percentage levied must be based on considerations affecting the fair distribution of assessment; in other cases the imposition of penalties should be left to the ordinary courts.

9. Section 86 (6) should be redrafted to read:

"Where the Board finds that the ways, works, machinery and appliances in any industry conform to modern standards in such manner as to reduce the hazards of accidents to a minimum and all proper precautions are being taken by the

employer for the prevention of accidents, and where the accident record of the employer has in fact been consistently good, the Board may reduce the amount of any contribution to the accident fund for which such employer is liable."

10. Section 108 should be amended to provide that the percentage penalty be prescribed by regulation.

11. If the purpose of the legislative powers to classify and reclassify industries is to provide an equitable distribution of the liability to contribute to the accident fund according to the hazards of industry, this should be clearly stated in the Act.

12. Section 86 (2) should be amended to provide that the power of the Board to subdivide classes of industries be subject to the approval of the Lieutenant Governor in Council and the words "for any other reason it is deemed proper to do so" be deleted.

13. Sections 75 and 65 should be repealed and replaced by provisions:

    (1) conferring on the Board powers of inquiry limited to the purposes of the Act;

    (2) conferring on the Board power to delegate its powers of inquiry in proper cases;

    (3) conferring a right to apply to the Supreme Court for an order enforcing the attendance of witnesses and compelling them to give evidence and produce documents and things.

14. Section 92 (1) should be amended to provide that the power to require information is limited to the purposes of the Act.

15. Section 92 (6) should be amended to delete the power of the Board to levy an additional percentage of assessment for a default punishable on summary conviction. If the power of the Board to levy an additional assessment or interest is made an alternative to prosecution, a standard should be set in the Act or regulations passed by the Lieutenant Governor in Council limiting the amount that may be assessed.

16. Provisions for the summons to witness, demand for production of documents and payment of witness' fees should conform to our recommendations in Report Number 1.

17. Section 94 (2) should be amended to provide that applications for orders to enter, search and seize be made to a provincial judge.

18. If the power of seizure is not necessary it should be repealed. If it is necessary, the Act should provide that before the judge issues an order for seizure it should be shown that there are reasonable grounds to believe that a sufficient examination cannot be made in the absence of seizure or that there are reasonable grounds to believe that an offence under the Act has been committed, that the material seized will afford evidence of the offence and that it is located on specified premises. The Act should provide for a right to return of the material seized within a reasonable time.

19. Section 97 should be amended to prohibit disclosure of information gained on an inquiry except for the purposes of the administration of the Act and the administration of justice.

20. The procedure for considering claims should be set out in the statute.

    (a) The first step in the consideration should be in the nature of an investigation and recommendation which can be accepted in whole or in part by the claimant.

    (b) The claimant should receive a copy of the recommendation, with written reasons together with a statement that the Workmen's Adviser is available to him to assist in his decision whether to accept the recommendation.

    (c) If the recommendation is accepted it should have the effect of a decision of the Board.

    (d) If the recommendation is not accepted, the claimant should have a right to a further investigation and a further hearing in the first instance.

(e) On this investigation all matters should be open for full consideration and a final recommendation made which, if accepted, would have the effect of a decision of the Board.

(f) If the final recommendation is not accepted there should be a right to apply to the Review Committee if it is continued. Consideration should be given to abolishing the Review Committee and if this is done the application should be direct to the Appeal Tribunal.

(g) If the Review Committee is retained, the claimant should have access to all material which it will consider. The Review Committee should exercise wide powers of investigation; it should hear representations and witnesses and not confine its considerations to the file.

(h) If the recommendation of the Review Committee is accepted, the matter should be final unless reopened by the Board.

(i) If the recommendation is not accepted there should be a right to apply to the Appeal Tribunal.

(j) The claimant should have access to all material that will be considered by the Appeal Tribunal. The Appeal Tribunal should prepare written reasons for its decision which should be made available to the claimant. The claimant should be advised of his right to apply to have the decision of the Appeal Tribunal reconsidered by the Board.

21. Section 97a should be repealed and if it is desired to give members of the medical profession, etc. protection against malpractice suits in making reports, properly framed legislation should be enacted.

22. The Act should provide that where compensation is refused on grounds other than a question of disability, the Board should be empowered to state a case for the opinion of the Divisional Court of the High Court of Justice on any question of law. The claimant should have a right to apply to the Court for an order directing the Board to state a case if it refuses to do so.

23. Where the Board has made an order under section 50 directing payment of compensation otherwise than to a workman there should be a right of appeal to the Divisional Court of the High Court.

24. Employers should have a right of appeal to the Minister from Board decisions on classifications or special assessments.

25. Sections 16 and 72 (1) should be repealed insofar as they purport to restrict judicial review.

26. A Workmen's Adviser or Consultant should be appointed by Order-in-Council to assist and advise workmen with respect to claims and to assist them at hearings where he deems it advisable. He should have access to all relevant files and materials. He should not be considered to be an advocate of special interests but one who assists in promoting justice.

    He should be independent of the Board and should have sufficient staff. His salary and that of the staff should be paid out of the Consolidated Revenue Fund.

Section 2

THE PROCEEDINGS AGAINST THE CROWN ACT, 1962-63

INTRODUCTION

In Report Number 2 we discussed the administrative courts of France and made considerable reference to the remedies available to citizens who have suffered loss through the negligence or improper acts of public servants. In many cases remedies are available where none exist in Ontario because the Crown enjoys certain special privileges.

It is not within our Terms of Reference to engage in an elaborate consideration of Crown liability and Crown privilege, but our task would not be complete if we did not enter upon some discussion of the Proceedings Against the Crown Act, 1962-63 and point out how the benefits for the individual purported to be conferred under that Act have been taken away by special statutory provisions. This we shall do briefly in this Section.

CHAPTER 131

The Proceedings Against the Crown Act, 1962-63

INTRODUCTION

PRIOR to the enactment of the Proceedings Against the Crown Act[1] the Crown enjoyed immunities from liability and procedural shields that were not available to the subject of the Crown. The Crown was not liable in tort and any action against the Crown could only be brought by petition of right and a fiat of the Lieutenant Governor in Council was required to permit the action to proceed. The fact that a fiat was granted did not in any way affect the liability of the Crown.

We are particularly concerned with the provisions of the Proceedings Against the Crown Act as they may affect the rights of the individual to obtain redress for wrongs suffered by reason of acts of servants or agents of the Crown with particular reference to tribunals of the nature of those considered in this Report, their officers and servants.

The Act is a successor to the Proceedings Against the Crown Act, 1952[2] which although passed was not proclaimed. The present Act is in the same terms subject to some additional exceptions that are irrelevant to this discussion.

In introducing the 1952 Bill the late Honourable Dana Porter, Q.C., the then Attorney General, said:

> "Mr. Speaker, this Bill, as I said on first reading, removes for the first time the necessity of applying for a fiat or a consent of the Government when actions are brought against any Government Department or any organization that might be described as an emanation from the Crown.

[1]Ont. 1962-63, c. 109.
[2]Ont. 1952, c. 78.

It really does more than that because under the law as it now stands, no action in damages, no action based upon a wrong or, what is called in law, a "tort"—for the benefit of the hon. member for Brant (Mr. Nixon) this is sort of a mediaeval French word this time—now may be brought against the Crown. At the present time in the case of an act by a Department of the Government, as a result of which some person has been injured either as the result of negligence or as the result of something that might be, in law, wrong, may be brought, and it is entirely up to the Government to decide whether some voluntary payment should be made. That has been the law and is the law in most parts of the British Commonwealth, except where an Act as now proposed has been passed.

This Act entirely changes the whole position and provides that from the time this Act comes into force, an action in tort may be brought against the Crown, without the necessity of applying for the consent of the Crown to the bringing of that action. As a result of this legislation, any citizen who feels he is wronged, and thinks that he has grounds for action, may proceed in the ordinary way, by issuing a writ just as any ordinary citizen may do against any other citizen or against a corporation. He may proceed, in the ordinary course, to bring an action against the Department concerned whether that action may be in contract or in tort or based upon any other civil right of action.

This Act introduces a principle that is entirely new in Ontario and removes for the first time the somewhat archaic principles that have always applied to any claim against the Crown throughout the ages, based, I suppose, upon the ancient legal theory that the 'Crown can do no wrong.' We, being a Government of enlightened members and realizing that perfect as we may be, there still may be certain cases where mistakes are made, are prepared to submit all such cases to the courts, and if a citizen in this country suffers a wrong at the hands of any Crown official or department or employee, we think he should not be put in a worse position than he would be if that unlawful act had been committed by some ordinary individual or by a servant of some private corporation."[3]

In introducing the Bill which became the present Act, the Honourable F. M. Cass, Q.C., the then Attorney General, said:

[3]Legislature of Ont. Debates, 1st Session 1952, Vol. 33, p. C-5.

"This bill, subject to the exceptions mentioned—and the exceptions are mainly to provide for procedures for actions against the Crown under other statutes—removes all the immunities and privileges heretofore enjoyed by the Crown and enables any person to sue the *Crown and its servants and agents* in the courts as of right, and in the same manner that he may sue a person."[4]

THE EFFECT OF THE ACT

The main thrust of the Act is in section 5(1) and (3):

"5. (1) Except as otherwise provided in this Act and notwithstanding section 11 of *The Interpretation Act*, the Crown is subject to all liabilities in tort to which, if it were a person of full age and capacity, it would be subject,

(a) in respect of a tort committed by any of its servants or agents;

(b) in respect of a breach of the duties that a person owes to his servants or agents by reason of being their employer;

(c) in respect of any breach of the duties attaching to the ownership, occupation, possession or control of property; and

(d) under any statute, or under any regulation or by-law made or passed under the authority of any statute.

(3) Where a function is conferred or imposed upon a servant of the Crown as such, either by a rule of the common law or by or under a statute, and that servant commits a tort in the course of performing or purporting to perform that function, the liability of the Crown in respect of the tort shall be such as it would have been if that function had been conferred or imposed by instructions lawfully given by the Crown."[5]

There are, however, certain exemptions which cut down the effect of the Act and deprive the victim of wrongful acts of any remedy.

"5. (2) No proceedings shall be brought against the Crown under clause *a* of subsection 1 in respect of an act or omission of a servant or agent of the Crown unless

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[4]Legislature of Ont. Debates, 1962-63, p. 2272. Italics added.

[5]Ont. 1962-63, c. 109, s. 5(1)(3).

proceedings in tort in respect of such act or omission may be brought against that servant or agent or his personal representative.

(4) In proceedings against the Crown under this section, an enactment that negatives or limits the liability of a servant of the Crown in respect of a tort committed by that servant applies in relation to the Crown as it would have applied in relation to that servant if the proceedings against the Crown had been proceedings against that servant."[6]

Subsection 2 of section 5 is designed to narrow the liability of the Crown for tortious acts of its servants beyond that which exists for employers under the common law. At common law there are some cases where the employer may be liable for damage suffered by reason of the tortious acts of the servant notwithstanding that no action may be brought against the servant. *Broom v. Morgan*[7] and *Smith v. Moss*[8] were such cases. It is not necessary for our purposes to enter into a discussion as was done in *Broom v. Morgan* as to whether the liability of an employer for the torts of his employees is a vicarious liability or a joint liability. What we are concerned with is that the loss caused by negligent servants or agents of the Crown should not fall to be borne by the innocent victim.

In referring to a provision similar to section 5(2) in the British Act[9] Glanville Williams said

> "It is thought that this proviso was inserted in order to make it plain that the Crown was to participate in the defence of 'act of state' that is open to the servant under the rule in *Buron v. Denman* (1848), 2 Ex. 167. But if this was the intention the proviso uses a bludgeon to kill a fly—and the fly was already dead, because where the servant has the defence of 'act of state' it cannot be said that he has committed a tort within the words of section 2(1)(a), and thus there is nothing for which the Crown could in any event be liable. On the other hand, in the *Smith v. Moss* situation it is, as said before, arguable that the servant has committed a tort, though one

[6] *Ibid.*, s. 5(2)(4).
[7] [1953] 1 Q.B. 597. For discussion see *Salmond on Torts* (15th ed.), 606.
[8] [1940] 1 K.B. 424.
[9] 10-11 Geo. 6, c. 44, s. 2(2).

> for which he cannot be sued by his wife owing to the personal relationship between them; this situation the bludgeon effectively hits, though there is no reason in point of policy why it should."[10]

Subsection 4 of section 5 of the Ontario Act (there is no similar provision in the British Act) relieving the Crown of liability where the liability of a servant of the Crown in respect of a tort committed by that servant has by statute been negatived or limited, makes it clear that the bludgeon is intended for other things than killing dead flies.

Eight of the statutes creating the tribunals which we have considered in this Report contain provisions purporting to exempt the members, officers and servants of the tribunals from liability with respect to wrongful acts. The result is that no action can succeed against the tribunal (if a legal entity and liable in tort) or its members, officers or servants. If the servant who has done the wrongful act is not a servant of the tribunal but a servant of the Crown, section 5(2) and (4) relieves the Crown of liability that would otherwise be created under the Act.

We set out later in detail the statutory provisions to which we refer. The exempting provisions are not consistent and the exemption in some cases is wider than in others. In other statutes creating tribunals dealt with in this Report there are no provisions exempting the members, officers, or servants from tortious liability.

It is hard to know why some Crown servants have been by statute relieved of liability for tort and some have not. It is equally hard to know why the Crown should not be liable in tort in any of those cases where it has been exempt by reason of statutory provisions relieving its servants or agents of liability.

It is not necessary for the purposes of this Report to enter upon an extensive discussion of the law respecting Crown agencies or who are Crown agents. The Crown Agency Act[11]

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[10]G. Williams, *Crown Proceedings,* 44-45. See criticism of section 2(2) by J. W. Gordon as the section appeared in the 1921 draft Bill (1929) 45 L.Q.R. 186, 189-90.

[11]R.S.O. 1960, c. 81.

purports to define a Crown agency. For convenience, we quote its provisions:

> "1. In this Act, 'Crown agency' means a board, commission, railway, public utility, university, manufactory, company or agency owned, controlled or operated by Her Majesty in right of Ontario, or by the Government of Ontario, or under the authority of the Legislature or the Lieutenant Governor in Council.
>
> 2. A Crown agency is for all its purposes an agent of Her Majesty and its powers may be exercised only as an agent of Her Majesty.
>
> 3. This Act does not affect The Hydro-Electric Power Commission of Ontario."

When this legislation was introduced the then Attorney-General stated that its purpose was to obtain exemption from excise tax for "the various commissions and boards that are covered by it as does the Crown now in departments of the Crown."[12] The words of section 1 defining a Crown agency were copied almost verbatim from the Excise Tax Act.[13] The apparent hope was that by the simple process of defining bodies as Crown agents the express provisions of the Excise Tax Act making them liable to tax would be frustrated. This was not the result.

However, quite apart from the purpose of the Act as declared when the legislation was introduced, it is not to be disregarded in determining whether a body of the sort named in section 1 is a Crown agent. It is simply to be taken into consideration in deciding a particular case.[14] In *Regina v. Ontario Labour Relations Board ex parte Ontario Food Terminal Board*[15] Laidlaw, J. A. applied the common law tests in determining whether the Ontario Food Terminal Board is a Crown agent. In this task the learned Justice of Appeal did not appear to find any help in the definition of a Crown agency contained in section 1 of the Act. He said:

> "It is not possible for me to formulate a comprehensive and accurate test applicable in all cases to determine with cer-

[12]Legislature of Ont. Debates, 1959, (5th session) 25th Leg., Vol. 1, 805-6.
[13]R.S.C. 1952, c. 100, s. 46(2)(b) as re-enacted by Can. 1959, c. 23, s. 9.
[14]See *B.C. Power Corporation Ltd. v. Attorney-General of British Columbia and British Columbia Electric Co. Ltd.* (1962), 34 D.L.R. (2d) 25.
[15][1963] 2 O.R. 91.

tainty whether or not an entity is a Crown agent. The answer to that question depends in part upon the nature of the functions performed and for whose benefit the service is rendered. It depends in part upon the nature and extent of the powers entrusted to it. It depends mainly upon the nature and degree of control exercisable or retained by the Crown."[16]

And later,

" . . . The question must be determined in each particular case by a consideration of all the relevant provisions contained in the Act that creates such a board or other entity and amendments thereto."[17]

The conclusion we come to is that Crown agencies may exist that do not come within the provisions of the Crown Agency Act and that bodies which may appear to come within the language of the Act may not be agents of the Crown because of the character of the operation or the control exercised by Her Majesty.

What we are concerned with here is not what are or are not Crown agencies but the statutory immunity from liability for tort that is given to Crown agents and Crown servants and how the individual has been thereby deprived of the benefits he would otherwise obtain from the Proceedings Against the Crown Act.

SPECIAL STATUTORY PROVISIONS

The relevant statutory provisions concerning those tribunals dealt with in this Report are:

Farm Products Marketing Act

"No member of the Board or of a local board and no officer, clerk or employee of the Board or of a local board is personally liable for anything done or omitted to be done by it or by him in good faith in the exercise of any power or the performance of any duty under the authority, or purporting to be under the authority, of this Act or the regulations."[18]

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[16]*Ibid.*, 95.
[17]*Ibid.*, 102.
[18]R.S.O. 1960, c. 137, s. 4(6) as re-enacted by Ont. 1968-69, c. 37, s. 1(5).

Hospital Services Commission Act

"No member of the Commission and no employee thereof is personally liable for anything done by it or him under the authority of this Act, any other Act or any regulation."[19]

Milk Act, 1965

"No member of the Commission and no officer, field-man or other employee of the Commission is personally liable for anything done by him in good faith under or purporting to be under the authority of this Act or the regulations."[20]

"No member of a marketing board or any of its officers or employees is personally liable for anything done by it or by him in good faith under or purporting to be under the authority of this Act or the regulations."[21]

Ontario Energy Board Act, 1964

"No member of the Board or its secretary or any of its staff is personally liable for anything done by it or by him under the authority of this or any other Act."[22]

Ontario Highway Transport Board Act

"No action or other proceeding lies against the Board or any member of the Board or any officer, agent or employee of the Board for anything done or purporting to be done under or in pursuance of this or any other Act."[23]

Ontario Municipal Board Act

"No member of the Board or its secretary or any of its staff is personally liable for anything done by it or by him under the authority of this or any other Act."[24]

Power Commission Act

"Without the consent of the Attorney General no action of any kind whatsoever shall be brought against the Commission, and without the consent of the Attorney General

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[19]R.S.O. 1960, c. 176, s. 21(2).
[20]Ont. 1965, c. 72, s. 3(8).
[21]*Ibid.*, s. 7(6).
[22]Ont. 1964, c. 74, s. 6(2).
[23]R.S.O. 1960, c. 273, s. 11(1).
[24]R.S.O. 1960, c. 274, s. 32.

no action of any kind whatsoever shall be brought against any member of the Commission for anything done or omitted by him in the exercise of his office."[25]

Securities Act, 1966

"(1) Except with the consent of the Minister, no action whatever and no proceedings by way of injunction, mandamus, prohibition or other extraordinary remedy lies or shall be instituted,

(a) against any person, whether in his public or private capacity, or against any company in respect of any act or omission in connection with the administration or the carrying out of the provisions of this Act or the regulations where such person is a member of the Commission, a representative of the Commission or the Director, or where such person or company was proceeding under the written or oral direction or consent of any one of them or under an order of the Minister made under this Act; or

(b) against any exchange auditor, district association auditor or association auditor, employed under clause *b* of section 30, in respect of the performance of his duties as such.

(2) No person or company has any rights or remedies and no proceedings lie or shall be brought against any person or company in respect of any act or omission of the last-mentioned person or company done or omitted in compliance or intended compliance with,

(a) any requirement, order or direction under this Act of,

(i) the Commission or any member thereof,

(ii) the Director,

(iv) any person appointed by order of the Minister,

(v) the Minister,

(vi) any representative of the Minister, the Commission, the Director or of any person appointed by the Minister; or

(b) this Act and the regulations."[26]

It is unnecessary for our purposes to enumerate other statutes which contain provisions similar to those which we

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[25]R.S.O. 1960, c. 300, s. 7(5). See discussion p. 1822 ff. *supra*.
[26]Ont. 1966, c. 142, s. 142(1)(2) as amended by Ont. 1968, c. 123, s. 41(1)(2)(3).

have just set out. It is of interest, however, to find that the Elevators and Lifts Act[27] was amended during the current session of the Legislature to add to that Act section 24a:

> "No inspector or engineer of the Department is personally liable for anything done or omitted to be done by him in the performance of his duties under this Act or the regulations."[28]

As a result of this amendment not only was the liability of inspectors and engineers removed but that of the Crown as well.

Generally speaking, in the absence of a special statutory provision the servants and agents of the Crown are not immune from personal liability for torts committed by them.[29]

Under the common law a police constable does not exercise his authority as a servant of the state. "His authority is original, not delegated, and is exercised at his own discretion by virtue of his office. . . ."[30]

Special provisions have been enacted under the Police Act to protect the rights of the individual who may suffer damage by reason of tortious acts of police constables. These provisions are the reverse of the exempting provisions that we have been discussing. They impose liability on the chief of police and the Commissioner of the Ontario Provincial Police Force where no liability previously existed and provide for indemnification of police officers held personally liable in proper cases.

> "23. (1) The chief of police is liable in respect of torts committed by members of the police force under his direction and control in the performance or purported performance of their duties in like manner as a master is liable in respect of torts committed by his servants in the course of their employment, and shall in respect of any such torts be treated for all purposes as a joint tortfeasor.

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[27] R.S.O. 1960, c. 119.

[28] *Ibid.*, s. 24a as enacted by Ont. 1970, c. 29, s. 6.

[29] *MacKenzie-Kennedy v. Air Council,* [1927] 2 K.B. 517 at 532; *Raleigh v. Goschen,* [1898] 1 Ch. 73.

[30] *Attorney General for New South Wales v. Perpetual Trustee Co. (LD.) and Others,* [1955] A.C., 457, 489. See also *Fisher v. Oldham Corporation,* [1930] 2 K.B. 364.

(2) Where a chief of police is liable in respect of a tort committed by him in the performance or purported performance of his duties, he is also liable and may be sued separately in his capacity as chief of police for the purposes of subsection 4.

(3) Where the office of chief of police is vacant or where there is no chief of police, the chairman of the board or, where there is no board, the head of the council shall be deemed to be the chief of police for the purposes of this section.

(4) The municipality shall pay,

(a) any damages or costs awarded against the chief of police in any proceeding brought against him by virtue of this section and any costs incurred by him in any such proceeding so far as not recovered by him in the proceedings; and

(b) subject to the approval of the council, any sum required in connection with the settlement of any claim made against the chief of police by virtue of this section.

(4a) Where damages and costs are awarded under this section in respect of the tort of a member of an amalgamated police force, each municipality participating in the amalgamation is jointly and severally liable for the damages and costs referred to in subsection 4.

(5) The council of a municipality may, in such cases and to such extent as it thinks fit, pay any damages or costs awarded against a member of the police force maintained by them or any special constable in any civil or criminal proceedings brought against him, any costs incurred and not recovered by him in any such proceedings, and any sum required in connection with the settlement of any claim that has or might have given rise to such proceedings."[31]

As to the Provincial Police:

"43a. (1) The Commissioner is liable, in respect of torts committed by members of the force in the performance or purported performance of their duties, in like manner as a master is liable in respect of torts committed by his servants in the course of their

[31] R.S.O. 1960, c. 298, s. 23 as re-enacted by Ont. 1965, c. 99, s. 6 and amended by Ont. 1966, c. 118, s. 5 and Ont. 1967, c. 76, s. 7.

employment, and shall in respect of any such torts be treated for all purposes as a joint tortfeasor.

(2) The Treasurer of Ontario shall pay out of the Consolidated Revenue Fund,

(a) any damages awarded against the Commissioner in any proceeding brought against him by virtue of this section and any costs incurred by him in any such proceeding so far as not recovered by him in the proceedings; and

(b) subject to the approval of the Lieutenant Governor in Council, any sum required in connection with the settlement of any claim made against the Commissioner by virtue of this section."[32]

There is no apparent philosophy of justice in the legislation of this Province concerning damage suffered by individuals by reason of the wrongful acts of public servants. The Crown accepts full liability for the wrongful acts of police officers but for a large segment of those serving the Crown in other capacities no liability is accepted and the servants themselves are relieved of personal liability. In such cases the victim of the wrongful act is left without a remedy. To state that if a person is injured by the negligent act of an engineer of the Department of Public Works in the performance of his duties, both the engineer and the Crown are liable to pay damages, but if the injury is caused by an engineer performing duties under the Elevators and Lifts Act neither the Crown nor the engineer is liable for anything, is sufficient to demonstrate the irrational injustice of the law.

In introducing the respective "Proceedings Against the Crown" Acts both the Honourable Mr. Porter and the Honourable Mr. Cass made clear statements of their purposes which we repeat. ". . . If a citizen in this country suffers a wrong at the hands of any Crown official or department or employee, we think he should not be put in a worse position than he would be if that unlawful act had been committed by some ordinary individual or by a servant of some private corporation."[33]

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[32]*Ibid.*, s. 43a as enacted by Ont. 1966, c. 118, s. 12.

[33]Legislature of Ont. Debates, First Session 1952, Vol. 33, C-5.

"This bill, subject to the exceptions mentioned . . . removes all the immunities and privileges heretofore enjoyed by the Crown and enables any person to sue the Crown and its servants and agents in the courts as of right, and in the same manner that he may sue a person."[34]

That declared purpose has been defeated repeatedly by the subtle method of merely enacting legislation relieving servants of the Crown of liability.

No doubt the nature of the service rendered by officers or servants of the Crown is sometimes of such a character that it is unreasonable that they should be asked to assume the risk of being held liable for injury done by reason of their wrongful acts. In such cases provision should be made for their indemnification as has been done in the case of police officers. In the alternative, provision could be made relieving the officer or servant of liability but not relieving the Crown of liability as employer. The solution in no case should be the one adopted now—to leave the victim of wrongdoing to suffer the loss.

In another aspect the Act appears to dilute the safeguards proclaimed for it as a statute that "removes all the immunities and privileges heretofore enjoyed by the Crown and enables any person to sue the Crown and its servants and agents in the courts as of right and in the same manner as he may sue a person". It contains the following provision:

> "Nothing in this Act . . . (b) subjects the Crown to proceedings under this Act in respect of a cause of action that is enforceable against a corporation or agency of the Crown".[35]

It is difficult to know the purpose of this section and exactly what it means.

The common law may be concisely stated as follows:

(1) the Crown is not liable in an action based on tort;

(2) an agent of the Crown is not liable in his official capacity as an agent of the Crown in an action based on tort;

(3) an agent of the Crown is not liable for wrongful acts of its servants unless the act has been done pursuant to an order or direction of the agent;

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[34] Legislature of Ont. Debates, 1962-63, 2272.
[35] Ont. 1962-63, c. 109, s. 2(2)(b).

(4) an agent of the Crown is liable in his personal capacity in an action based on tort where the agent has been a party to the wrongful act, i.e., directing that the act be done;

(5) servants of the Crown are personally liable for their wrongful acts.[36]

If but for the provisions of section 2(2)(b) the common law has been so changed by the other provisions of the Act that an action based on tort would lie against the Crown, a Crown corporation or Crown agent that would not lie at common law, why should there be a statutory provision relieving the Crown from liability in cases where a cause of action is enforceable against a corporation or agency of the Crown?

If the Crown is to stand in the same position as any person with respect to claims based on wrongdoing it should not be relieved of liability because there is a right of action against some other person or corporation. In some cases the other person or corporation might be worthless.

No similar provision is contained in the federal Crown Liability Act[37] nor in the British Act.[38]

Section 2(2)(b) should be repealed.

PROCEDURE

No proceedings shall be brought against the Crown in respect of a breach of the duties attaching to the ownership, occupation, possession or control of property unless the claimant has served on the Crown a notice of the claim containing sufficient particulars to identify the occasion out of which the claim arises, within 10 days after the claim arose.[39]

This provision creates an absolute limitation. The claim arises when the breach of duty occurs but the person who has a right to claim may not know of the breach until after the 10-day period has expired or the claimant may be ill or incapacitated. This is a harsh law. A 10-day period is too short. There should be a right to apply to the court for an

[36] *Raleigh v. Goschen*, [1898] 1 Ch. 73; *Bainbridge v. Postmaster General*, [1906] 1 K.B. 178; *Quebec Liquor Commission v. Moore*, [1924] S.C.R. 540, 550ff.

[37] Can. 1952-53, c. 30.

[38] 10-11 Geo. 6, c. 44.

[39] Ont. 1962-63, c. 109, s. 6a(3) as enacted by Ont. 1965, c. 104, s. 1.

extension of time in proper cases. This right is provided under the federal Crown Liability Act.[40]

The procedure with respect to discovery and production is not the same as that which applies to an action brought against a corporation.

The relevant section originally read:

> "In proceedings against the Crown, the rules of the court in which the proceedings are pending as to discovery and inspection of documents and examination for discovery apply in the same manner as if the Crown were a corporation, except that the Crown may refuse to produce a document or to answer a question on the ground that the production or answer would be injurious to the public interest."[41]

This was amended in 1965 to read:

> "In proceedings against the Crown, the rules of the court in which the proceedings are pending as to discovery and inspection of documents and examination for discovery apply in the same manner as if the Crown were a corporation, except that,
>
> (a) the Crown may refuse to produce a document or to answer a question on the ground that the production or answer would be injurious to the public interest;
>
> (b) the person who shall attend to be examined for discovery shall be an official designated by the Deputy Attorney General; and
>
> (c) the Crown is not required to deliver an affidavit on production of documents for discovery and inspection, but a list of the documents that the Crown may be required to produce, signed by the Deputy Attorney General, shall be delivered."[42]

The provision giving the Crown a right to refuse to produce a document or answer a question on discovery on the ground that the production or answer would be against the public interest goes further than the common law rules of Crown privilege applicable at trial in an action brought by one individual against another or by an individual against the Crown.

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[40]Can. 1952-53, c. 30, s. 4(4)(5).
[41]Ont. 1962-63, c. 109, s. 10.
[42]*Ibid.*, s. 10 as re-enacted by Ont. 1965, c. 104, s. 2.

The ordinary rule is that relevant evidence must be excluded if its reception would be contrary to the state interest. What is meant by "the state interest" is a matter to be determined by case law but it can be broadly said that the decisions fall under two heads:

1. those in which evidence has been excluded because its disclosure would be injurious to national security, and

2. those in which evidence has been excluded because its reception would be injurious to some other national interest.[43]

It is unnecessary here to enter upon an elaborate discussion of the application of the common law rules and who should decide what is privileged—the Minister or the judge. For our purposes it is sufficient to say that the common law rules as to Crown privilege should apply throughout to actions against the Crown. It is contrary to the announced spirit of the Proceedings Against the Crown Act that the individual suing the Crown should be under any more evidentiary handicaps than where he is suing a corporation.

Section 10(a) should be repealed.

Although the Act provides that a plaintiff in an action against the Crown has a right to examine for discovery, the person who shall be examined is the official designated by the Deputy Attorney General.

Originally the rules of court applied in the same manner as if the Crown were a corporation.[44] Under the rules of court in the case of a corporation any officer or servant of such corporation may be examined for discovery. However, a corporation may apply to the court to have examined an officer or servant in lieu of the officer or servant selected to be examined. After the examination of an officer or servant a party is not at liberty to examine any other officer or servant without an order.[45]

Generally, in order to succeed in an action for tort against the Crown the plaintiff must show that he has a cause of action against the servant of the Crown. In many cases a

[43]See Cross, *Evidence* (3rd ed., 1967) 252.
[44]Ont. 1962-63, c. 109, s. 10.
[45]*Rules of Practice and Procedure*, Rule 326.

plaintiff may be gravely handicapped by the decision of the Deputy Attorney General if he names for an examination an official other than the one whose negligence gives rise to the cause of action.[46]

Section 10(b) should be repealed and the rules of court respecting examinations for discovery should be made to apply in all actions against the Crown as if the Crown were a corporation.

RECOMMENDATIONS

1. All statutory provisions relieving officers and servants of the Crown from liability for tortious acts should be repealed.
2. Where by reason of the nature of the employment of officers or servants of the Crown it is considered just that they should be relieved of liability for damage caused by their wrongful acts, provision should be made,
   (a) for their indemnification for loss suffered, or
   (b) relieving them of liability while maintaining the liability of the employer be it the Crown, Crown agent or Crown corporation, notwithstanding that the officer or servant is by statute not liable.
3. In no case should the victims of tortious acts of officers or servants of the Crown, Crown agents or Crown corporations be left without a remedy.
4. Section 2(2)(b) providing that nothing in the Act subjects the Crown to proceedings under the Act in respect of a cause of action that is enforceable against a corporation or other agency of the Crown should be repealed.
5. There should be a right to apply to the court for an order extending the 10-day period for giving notice under section 6a(3).
6. The provision that in an action against the Crown the Crown may refuse to produce a document or answer a

[46]For discussion of such a situation see *The Cleveland-Cliffs Steamship Co. v. The Queen*, [1957] S.C.R. 810, 813 per Kerwin, C. J. See also statement by Lord Dunedin concerning the Scottish system quoted by J. W. Gordon (1929), 45 L.Q.R. 186, 193-94.

question on examination for discovery on the ground that the production or answer would be against the public interest should be repealed. The common law rules of Crown privilege should apply as in any other action.

7. Section 10(b) should be repealed and the rules of court respecting examinations for discovery should be made to apply in all actions against the Crown as if the Crown were a corporation, subject to the application of the common law rules as to Crown privilege.

Consolidated Summary of Recommendations

(Continued)

Recommendations 1-559 appear in Report Number 1, Vol. 3, p. 1257*ff*.

Recommendations 560-596 appear in Report Number 2, Vol. 4, p. 1655*ff*.

Part V

VOLUME 5

Section 1

THE APPLICATION OF GENERAL PRINCIPLES TO SPECIFIC STATUTORY TRIBUNALS

THE AIR POLLUTION CONTROL ACT, 1967

597. Section 10(1) of the Act should be amended to provide that the Minister's opinion shall be based on reasonable and probable grounds. (p. 1744)
598. Section 11(10) of the Act should be amended to state expressly that the proceedings of the board of negotiation shall be without prejudice to subsequent proceedings of any type, administrative or judicial. (p. 1745)
599. If the provisions of section 6(2) of O. Reg. 449/67 are to form part of the law, they should be contained in the statute and not the regulations made under the Act. (p. 1745)

THE ARCHAEOLOGICAL AND HISTORIC SITES PROTECTION ACT

600. Provision should be made for proper compensation of owners of land for the rights over the land required for archaeological or historic sites. (p. 1747)
601. Procedure should be provided for notice to the owner of land before the Minister's decision is made and an opportunity to be heard should be given. (p. 1747)
602. Procedure should be provided to fix compensation for injury suffered by the owner as a result of the Minister's order. (p. 1747)

THE ATHLETICS COMMISSIONER

603. The power in section 5(2) of the Athletics Control Act to declare moneys forfeited should be expressed in objective, and not subjective, terms. (p. 1750)
604. The powers exercisable under subsections 2 and 3 of section 5 should be exercised by a person holding a position of independence, and not by the Minister. (p. 1750)
605. Subsections 2 and 3 of section 5 should be amended to provide that the person hearing the evidence should make the decision and the charge initiating the proceedings should be made by some person other than the person on whom the power to hear and decide is conferred. (p. 1751)
606. There should be an appeal to the courts from decisions made under subsection 2 of section 5. (p. 1751)
607. Section 9(1) should be amended to provide that an independent judicial tribunal exercise the powers conferred thereunder and that there be a right of appeal from the decision of this tribunal. (p. 1752)
608. Section 12(1)(h) should be amended by deleting the power to make regulations authorizing the Commissioner to levy fines or other pecuniary penalties. If fines or pecuniary penalties are to be levied the Act and not a regulation passed thereunder should provide a maximum limit for the fine or penalty. (p. 1753)
609. Section 12(1)(n) enabling regulations to be made defining certain words in the Act, should be repealed. (p. 1753)
610. The licensing provisions in section 12 of the Act should afford guidance by setting standards or factors governing the decision to license. The subjective power of the Commissioner to refuse licences should be abolished. (p. 1754)
611. There should be a right of appeal from licensing decisions. (p. 1754)

THE FARM PRODUCTS MARKETING BOARD

612. Section 3(2) of the Act should provide that the Farm Products Marketing Board shall consist of at least three

members, the number of persons fixed for a quorum in section 3(4a). (p. 1758)

613. Section 6(4) should be amended so as to relieve only against the consequences of technical or minor defects in the qualifications, appointments or election of a member or officer of a local board. (p. 1760)
614. The provision enabling the Board to define "farm product" should be repealed. (p. 1761)
615. Consideration should be given to deleting "dairy products" from the definition of "farm product". (p. 1762)
616. The definition of "marketing" should be amended to confine the various acts or activities defined as marketing to a process intended to result in a sale of the regulated product in question. (p. 1763)
617. The Act should contain general definitions of the words "producing" and "processing". (p. 1764)
618. The Act should be amended to provide that the Lieutenant Governor in Council shall authorize the real plan to be formulated with respect to specified products and the constitution of the local boards and the method of electing their members. (p. 1768)
619. Paragraph 12 of section 8(1) should be repealed and replaced by a section in more precise language. (p. 1770)
620. Paragraph 22 of section 8(1) should be repealed. (p. 1770)
621. The general provisions in the opening part of section 9(1) should be repealed. (p. 1770)
622. The Lieutenant Governor in Council should not have power under section 6(1)(f) and (g) to put a local board into trusteeship. Where a local board is to be put into trusteeship it should be by the exercise of judicial power and not legislative power. (p. 1771)
623. Both Board regulations and local board regulations should be subject to the approval of the Lieutenant Governor in Council—which would make them subject to the provisions of the Regulations Act. (p. 1773)

624. Paragraph 3 of section 8(1) should be amended to set out the grounds on which a licence to a producer may be refused as distinct from the grounds on which a licence may be refused to those engaged in marketing and processing. (p. 1775)
625. The words "or for any other reasons the Board may deem sufficient" should be deleted from paragraph 3 of section 8(1). (p. 1776)
626. The words "for any reasons that the Board deems proper" in section 18(2)(a) and in other sections of the Act should be deleted and appropriate standards inserted in their place. (p. 1777)
627. The recommendations which were made in Chapter 76 respecting procedure to govern licensing applications and other licensing proceedings should apply to all licensing under the Farm Products Marketing Act and its subordinate legislation. (p. 1778)
628. Those regulations which provide that a person whose licence has been refused, suspended or revoked or not renewed, may show cause why such licence should not be refused, suspended or revoked or why such renewal should not be refused, should be repealed and a proper appeal procedure provided. (p. 1779)
629. The statute should clearly provide the purpose for which licensing fees may be charged. (p. 1780)
630. The General Regulations of February 7, 1970 of the Ontario Greenhouse Vegetable Producers' Marketing Board, should be amended to conform to this Report and Report Number 1. (p. 1782)
631. Licensing through the method of agreements containing privative clauses, as provided for in the General Regulations of the Ontario Greenhouse Vegetable Producers' Marketing Board, should not be permitted. (p. 1782)
632. Section 10a should not require two hearings before the local board before a matter may be brought before the Board. If it is intended to give a right to ask for a rehearing as an alternative to an appeal the Act should so provide. (p. 1785)

633. Section 10a should be amended to state that "an appeal lies" rather than "he may appeal". (p. 1785)
634. The provisions of the recommended Statutory Powers Procedure Act and of any appropriate detailed rules of procedure should apply to proceedings under section 10a. (p. 1785)
635. Appeals based substantially on matters of law should lie from the Board to the Divisional Court of the High Court of Justice. Where decisions are predominantly of an administrative nature a right of appeal should lie from the Board to the Minister of Agriculture and Food. (p. 1786)
636. The power of investigation in section 4(1)(a) should be amended so as not to depend upon vague or imprecise language. (p. 1788)
637. The wide powers of investigation under section 4(1)(a) and section 4(1)(b) should be subject to the control of the Lieutenant Governor in Council. (p. 1788)
638. The recommendations which we have made with respect to the powers of a commissioner under the Public Inquiries Act and the procedure to govern investigations should be applicable to investigations under the Farm Products Marketing Act. (p. 1788)
639. The investigative provisions in section 7 should not permit entry and inspection of a private dwelling without the consent of the occupier except under the authority of a search warrant issued under section 14 of the Summary Convictions Act. (p. 1789)
640. The statute should place a restriction on the use of information obtained in investigations and inspections. (p. 1790)
641. Persons being investigated should not be obliged to supply extracts from books and records. It should be sufficient if books and records are temporarily removed for the purpose of having copies made. (p. 1790)
642. The Act should define expressly what are the orders and directions referred to in section 13, and provide that they should be in writing, that they should be brought

to the attention of the person concerned before their contravention can constitute an offense, and that orders and directions should state on their face that a violation thereof constitutes an offence which may be prosecuted on summary conviction. (p. 1792)

643. The penal aspects of the legislation should be completely reviewed to determine how the obligations and duties it imposes can be best enforced. Section 14(1) of the Act should be repealed and replaced by legislation providing a simple summary application by a local board to a county court judge for an order for the relief given by section 14. (pp. 1792-93)
644. Section 14(2)(b) should be repealed. (p. 1793)
645. Section 17(1) should be replaced by legislation similar to section 4(2) of the Agricultural Products Marketing Act (Canada). (p. 1795)
646. Section 17(2) should be repealed. (p. 1795)
647. Section 18(2)(d) should be amended to provide that regulations made thereunder should provide for just procedure for the exercise of the powers that may be conferred. A person whose tobacco is sought to be destroyed should be heard before such an order is made. Alternatively, if it is considered that the powers in question are of an emergency nature, then they should be exercisable only on a warrant being obtained from a justice of the peace after showing on reasonable and probable grounds that the Act or the regulations have been violated. A person whose product has been seized, removed, destroyed or otherwise disposed of, who can establish that the product was not being produced or marketed in violation of the legislation should have a statutory claim for compensation for any loss. (p. 1797)
648. Section 4(6) should be repealed. (p. 1798)

THE FIRE MARSHAL

649. Rules should be made for the exercise of the judicial powers of the Fire Marshal and his officers. (p. 1804)
650. The right of appeal from the decisions of the Fire Marshal made in the first instance should be clarified.

Section 19(6) should be amended by deleting the words "If the party appealing is dissatisfied with the . . ." and substituting therefor the words "If a party is dissatisfied with a . . ." so that the subsection, in part, will read: "If a party is dissatisfied with a decision of the Fire Marshal, he may within five days after the service of the decision, apply by way of originating notice according to the practice of the court, to the judge of the county or district court. . . ." (p. 1805)

651. The right to retain goods and material removed from premises under the provisions of section 12(c) should be based on "reasonable grounds to believe" that the goods or material "may be of assistance in connection with any matter under investigation." (p. 1806)
652. An owner of goods or material removed from premises pursuant to the powers conferred under section 12(c) should have a right of repossession within a reasonable time. (p. 1806)
653. The investigatory powers should be made to conform to our recommendations made in Report Number 1. (p. 1806)
654. Provision should be made for the payment of adequate witness fees to witnesses so as to compensate them for loss of time and expenses while attending to give evidence before the Fire Marshal or any of his officers. (p. 1807)

THE HYDRO-ELECTRIC POWER COMMISSION OF ONTARIO

655. The definition of land in relation to expropriation should be the same in the Power Commission Act as that used in the Expropriations Act, 1968-69. (p. 1812)
656. The rights of riparian owners to compensation for injuries suffered by reason of the construction and operation of works of the Commission and the procedure by which it is to be obtained should be clearly stated in the Act. (p. 1815)
657. The right to compensation for personal property taken without the owner's consent should be clearly stated in

the Act and the procedure by which the compensation is to be determined should be set out. (p. 1816)

658. The conflict between the procedure prescribed for fixing compensation for "easements, rights to, over or affecting land" acquired under section 33 and that provided by the Expropriations Act, 1968-69 should be resolved. (p. 1817)

659. A simple procedure should be provided to fix compensation where small claims are made in respect of the powers exercised under section 33. The right of appeal should be to the Land Compensation Board. (p. 1817)

660. Where substantial damage arises out of the exercise of powers conferred under section 33 the compensation should be fixed by the Land Compensation Board. (p. 1817)

661. Where any person or municipality has been assessed for a portion of the construction of a work under section 42 he or it should have a right of appeal irrespective of the consent of the Commission. The words "with the consent in writing of the Commission" should be struck out. (p. 1819)

662. The provision in section 42 that the judge fixing the proportion of the cost of a work shall be paid fees should be repealed. (p. 1820)

663. A party affected by an order made under section 42 should have a right to apply to the Land Compensation Board or the tribunal making the order for a review of the order where owing to the change of circumstances or conditions it is equitable that there should be a readjustment of the proportions. Whether there is a change of circumstances or conditions ought not to be a matter to be decided by the Commission. (p. 1821)

664. An unregistered claim for a lien under section 42 should not be enforceable against innocent purchasers for value without notice. (p. 1820)

665. In case of dispute as to the cost of the work under section 42(5) the Commission should be required to prove to the satisfaction of the tribunal fixing the cost what "the expenditures, charges and expenses" were. (p. 1821)

666. Section 42 should be completely revised. (p. 1822)
667. Fines recoverable under the Act should not be paid over to the Commission but should form part of the Consolidated Revenue Fund. (p. 1822)
668. Section 7(5) requiring the consent of the Attorney General before an action may be brought against the Commission or any member of the Commission for anything done or omitted by him in the exercise of his office should be repealed. (p. 1823)
669. All conflict between the Power Commission Act, the Power Control Act and the Ontario Energy Board Act should be resolved by appropriate legislation. (p. 1825)
670. Section 96(1) should be amended to provide that the power thereunder should be exercised by the Commission or if it is to be exercised by one member thereof that there be a right of appeal to the Commission. (p. 1824)
671. Where applicable the recommendations made with reference to the exercise of powers by the Commission under the Power Commission Act apply with equal force to the provisions of the Niagara Development Act, 1951. (p. 1818)
672. Section 8(2)(d) of the St. Lawrence Development Act, 1952 (No. 2) should be repealed. (p. 1819)
673. The St. Lawrence Development Act, 1952 (No. 2) should be completely revised if powers are to be exercised under it in the future to be consistent with our recommendations concerning the Power Commission Act and to remove inconsistencies with the Expropriations Act. (p. 1819)

THE LIQUOR CONTROL BOARD OF ONTARIO

674. If the power of the Board under section 8(2) of the Act to exempt products from the Act is not essential the subsection should be repealed. If it is essential, such an order of the Board should be subject to the approval of the Lieutenant Governor in Council. (p. 1830)

675. The power of the Board to make regulations prescribing taxes and assessments by regulation should be abolished. (p. 1831)
676. The licensing provisions in sections 47, 53 and 53a should be amended by the insertion of standards or factors concerning the licensing decisions made thereunder and the arbitrary features of sections 29 and 55 should be repealed. (p. 1832)
677. The licensing powers exercisable pursuant to these sections should not be subject to the control of a Minister. (p. 1833)
678. Section 28 of the Act requiring the holder of a licence for the sale of liquor to give security should be repealed. (p. 1833)
679. The Board should be required to give reasons for the refusal or the cancellation of a licence. (p. 1833)
680. The Act should provide for a right of appeal from the refusal of a licence. (p. 1833)
681. Appeals from licensing decisions under section 55a should not lie to the county or district court judge but to the Divisional Court of the High Court of Justice. (p. 1834)
682. Guidelines should be laid down for the exercise of the Board's powers respecting interdiction under section 84(1). (p. 1835)
683. Provision should be made in the Act for the right of a person against whom an order has been made under section 84(1) to apply to the Board to have the order reconsidered. (p. 1836)
684. Section 8(1)(g) should be amended to strike out the words "by any manner whatsoever". (p. 1836)
685. Section 101 of the Act providing that the contravention of any provision in it or the regulations constitutes an offence whether so declared or not, should be repealed. If a section of the Act or regulations is intended to create an offence it should specifically so state. (p. 1837)
686. Section 78 of the Act should be amended to provide that a person can be convicted thereunder only if he *knowingly* consumed liquor which has not been "acquired under the Act or regulations. . . ." (p. 1837)

687. There should be a complete revision of the offences created under the Act and the powers of arrest without a warrant. (p. 1838)
688. The powers conferred on police officers to search the person should be repealed. (p. 1839)
689. Section 122 of the Act should be amended to provide that fines imposed under the Act should be paid to the Province. (p. 1839)
690. The privative portions of section 26(2) should be repealed. (p. 1840)
691. Section 26(2) should be amended to make it clear that a party has a right to apply to the Court for an order directing the Board to state a case, in cases where the Board has refused to do so. (p. 1840)
692. Section 140 of the Act should be amended to remove the requirements that a person convicted of an offence under the Act deposit a sum as security for costs and enter into a recognizance or deposit a sum of money in lieu of entering into a recognizance. In any event, subsections 5 and 6 thereof should be amended to delete the requirement of approval by the Crown attorney respecting the amount of the recognizance or the deposit of money in lieu thereof. (p. 1841)
693. Consideration should be given to completely revising the Liquor Control Act so as to create a board with powers to merchandise liquor in Ontario on behalf of the government and at the same time transfer the regulatory powers and licensing powers now exercised by the Board to a board which will regulate, control and license the liquor trade in all its aspects. (pp. 1842-43)
694. If the Liquor Control Board is to continue to exist there should be a statutory requirement that it keep minutes of all its decisions. (p. 1829)

THE LIQUOR LICENCE BOARD OF ONTARIO

695. The legislation governing meetings of the Liquor Licence Board of Ontario and the exercise of its powers should be completely reviewed. The Board should act

only through a quorum of its members, except when it renews licences where no objections have been made. In such case it should have power to delegate its powers to a member. (p. 1849)

696. If it is necessary for a member to hold a meeting relevant to a matter that must be decided by the Board the member's powers should be clearly defined and he should be required to make a written report which should be furnished to the party affected who should have an opportunity to be heard by the Board with respect thereto if he so desires. (p. 849)

697. To the extent that the Board exercises judicial powers it should hear evidence directly and it should not rely upon the report of a delegate. (p. 1850)

698. The power of the Board to limit the number of licences that may be issued in any municipality should be subject to the approval of the Lieutenant Governor in Council. (p. 1850)

699. Standards relating to a person's entitlement to a licence should be contained in the Act. (p. 1851)

700. The provision in section 41(1) requiring "the holder of a licence to show cause why the licence should not be cancelled or suspended" should be repealed. (p. 1851)

701. Before a licence may be revoked or cancelled the holder of the licence should be given notice of the hearings setting out the allegations made against him and a reasonable opportunity to meet them. (p. 1851)

702. The Board should be required to give reasons in all cases where it cancels a licence. (p. 1852)

703. The privative clause contained in section 20 should be repealed. (p. 1852)

704. The right of appeal by way of stated case conferred by section 20, incorporating provisions of the Criminal Code, is not appropriate for application to orders, decisions and rulings of the Board. In any event, it should extend to "a person affected by a decision, order or ruling" of the Board. (p. 1853)

705. The right of appeal to a district or county court judge, now conferred by the Act, should lie to the Divisional Court of the High Court of Justice. (p. 1854)
706. The Act should provide for a right of appeal from decisions refusing to issue or renew a licence or suspending a licence. (p. 1854)
707. The power to commit for contempt of the Board's orders should be exercised by the Supreme Court of Ontario as recommended in Report Number 1. (p. 1855)
708. The power of search and seizure of the Board should be limited by some objective standards. The Board should not have power to have its accountant examine the books and records of persons other than licensees. (p. 1856)
709. The power of search and seizure under section 18(1) of the Act should be confined to licensed establishments. (p. 1857)
710. All witnesses compelled to attend for the purpose of proceedings under the Act should be paid proper witness fees. (p. 1857)
711. The Act should provide for an appeal from arbitration decisions respecting compensation under section 48. (p. 1858)
712. Where the Board wrongfully disqualifies premises it should be compelled to compensate the owner for loss suffered. (p. 1858)
713. The body to fix compensation under section 48 should be the Land Compensation Board. (p. 1858)
714. Section 56 imposing liability on a parent or guardian for leaving a child under the age of eight years unattended should be reconciled with the Child Welfare Act. (p. 1859)
715. Section 59 enabling the arrest of a person without a warrant who is found committing an offence against the Act or the regulations should be completely reviewed and the provisions not coming within the recommendations contained in Report Number 1 (p. 741 *supra*) should be repealed. (p. 1860)

716. Section 11 should be recast so as to restrain the Board, its members, or its staff from communicating information obtained in the course of their duties otherwise than may be necessary for the purposes of the Act or as required by legal process. (p. 1860)

THE MILK COMMISSION OF ONTARIO

717. All regulations made by the Commission or by a board under the Act should be approved by the Lieutenant Governor in Council before they come into effect. (p. 1870)

718. The Lieutenant Governor in Council should approve the actual plans made under the Act. (p. 1870)

719. The scope of the Act should be determined by the Legislature and the sections conferring power on subordinate bodies to extend the scope of the Act by the definition of "milk products" should be repealed. (p. 1872)

720. All words of definition including "marketing", "producer", "processor" and "transporter" should be restricted to the relative necessities and purposes of the Act. (p. 1873)

721. Section 8(1), paragraph 13 giving the Commission power to make regulations "providing for the control and regulation of the marketing of any regulated product, including the times and places at which the regulated product may be marketed" should be repealed or the powers restricted by proper guidelines confining the power to the express purposes of the Act. (p. 1874)

722. Section 8(1), paragraph 32 empowering the Commission to make regulations authorizing any marketing board to prohibit the marketing of any class, variety, grade or size of any regulated product should be amended so as to define strictly the powers of prohibition that may be exercised. These should be set out in the Act and limited to the necessary purposes of the Act. (p. 1874)

723. Section 4(2)(j) conferring power on the Commission to "authorize any officer or field-man to exercise such of its powers as it deems necessary . . ." should be amended to

limit the powers of delegation to minor matters. (p. 1875)

724. The powers conferred on the Commission under section 18, paragraph 63 to exempt from the Act or regulations, or any part thereof, any plant or class of plants, any person or class of persons, or any milk product or any class, variety or grade of milk product should be limited by guidelines laid down in the Act for their exercise. (p. 1875)

725. Section 8(1), paragraph 9 giving power to the Commission to make regulations "for the exemption from any or all of the regulations under any plan of any class, variety, grade or size of regulated product or of any person or class of persons engaged in the producing or marketing of the regulated product or any class, variety, grade or size of regulated product" should be repealed or restricted in its scope to that which is essential for the purposes of the administration of the Act and such regulations should be approved by the Lieutenant Governor in Council. (pp. 1875-76)

726. Section 25(1) providing that "any word or expression used in the Act or the regulations may be defined in the regulations for the purpose of the regulations" should be amended to limit the power of definition of words used in the Act for the purpose of the regulations so that the definition is within the ambit of the meaning of the words as used in the Act. A word used in the Act should not be given a meaning by regulation at variance with its meaning as used in the Act. (p. 1876)

727. Where the Lieutenant Governor in Council makes regulations under section 7(1)(f) and (g) providing for the carrying out by the Commission or a trustee of any or all of the powers of a marketing board, or the vesting of the assets of a marketing board in the Commission or a trustee, or disposing of any or all of the assets of a marketing board, or dissolving a marketing board on terms and conditions prescribed, those affected by such a regulation should be given a statutory right to be heard in accordance with the provisions of the Statutory

Powers Procedure Act recommended in Report Number 1 and the exercise of the powers should be subject to statutory conditions precedent. (p. 1877)

728. The Commission should not be responsible to the Minister in the exercise of its licensing powers. (p. 1878)

729. The words "or for any other reason that the Commission deems proper" in section 8(1), paragraph 3 should be repealed. (p. 1879)

730. The grounds entitling a person to a licence should be set out in the Act and not in the regulations as in R.R.O. 1960, Reg. 432, section 46c(c). Section 18, paragraph 3 of the Act should set out the basic terms and conditions for holding a licence. R.R.O. 1960, Reg. 432, section 46c(c) should be amended to delete the words "in the opinion of the Commission." (pp. 1879-80)

731. Proper standards should be laid down in the Act governing the licensing powers in accordance with our recommendations in Report Number 1 at page 1132. (p. 1880)

732. There should be a defined legal basis on which the power to fix quotas is to be exercised. (p. 1883)

733. Rights of appeal should be provided in cases where a licence is refused or revoked. (p. 1884)

734. Rights of appeal and appeal procedure in the quota fixing policy should be set out in the regulations and not in a policy statement of the Ontario Milk Marketing Board. (p. 1884)

735. Appeals from decisions under the Act involving questions of law should lie to the Divisional Court of the High Court and appeals involving matters of policy should lie to the Minister of Agriculture and Food. (p. 1885)

736. The powers of a field-man as set out in R.R.O. 1960, Reg. 432, section 97(3) and (4) should be contained in the Act. The field-man should be required to give written reasons for his decision on demand. (p. 1886)

737. Where milk graders reject milk based on findings of fact, there should be a procedure for further tests at the request of a party affected. (p. 1886)

738. When the Public Inquiries Act is redrafted as recommended in Report Number 1, section 4(3) should be amended to use the formula "the provisions of the Public Inquiries Act shall apply to investigations under this Act." (p. 1887)

739. The powers of investigation under sections 9 and 10 of the Act are much broader than necessary. These sections should be amended to provide:
   (1) that where it is sought to enter a private dwelling, a warrant must be obtained;
   (2) that information obtained on the inspection shall not be disclosed except for the purposes of the Act and the administration of justice, and
   (3) that where books cannot be properly inspected on the premises, there be provision for the person investigating to make copies and return the books within a reasonable time. (See p. 422.) (p. 1888)

740. Section 18, paragraph 59 should be restricted to aspects of the milk industry. (p. 1889)

741. The power in section 5(b) to stop and inspect should be conditioned on reasonable grounds to believe that the conveyance stopped contains milk or a milk product in respect of which a contravention of the Act or regulations has taken place. (p. 1889)

742. Section 20 should be repealed and penalties enacted only if appropriate to particular contraventions. No one should be liable to punishment unless it can be shown that he knowingly contravened the Act or the regulations. (p. 1889)

743. Section 22 should be repealed and in its place provision should be made for a summary application to a judge of the county or district court for an order requiring a party who has not paid the minimum price for a milk product to make good the deficiency. (p. 1890)

744. The words "or a judge thereof" should be deleted from section 21. Under section 21 the court should be given express power to enjoin the respondent from continuing

the commission of the offence without necessarily enjoining the carrying on of the business absolutely. (p. 1891)

745. Section 7(2) should be amended so as to relieve against minor defects only in the appointment, election, or choosing of a member or officer of a marketing board. (p. 1893)

THE MINING COMMISSIONER

746. Security of tenure should be provided for the Commissioner. (p. 1898)
747. The Lieutenant Governor in Council should have power to appoint a person to perform all the duties of the Commissioner if for any reason he is unable to act. (p. 1899)
748. Rules of practice suitable for the practice before the Commissioner should be prepared and be available in pamphlet form. (p. 1900)
749. Provision should be made that in forfeiture proceedings a person claiming under the licensee and any person holding an adverse interest should have a right to be heard. (p. 1901)
750. Section 157 should be repealed. (p. 1902)
751. Provision should be made giving a right to apply to a judge of the Supreme Court for an order of committal where a person has refused to obey the orders of the Commissioner. (p. 1903)
752. Where the Commissioner or recorder makes an order affecting rights he should be required to give written reasons if requested. (p. 1903)
753. Provision should be made for filing all orders in a central place and when so filed that they may be enforced in the same manner as orders of the Supreme Court. They should not be filed with the Registrar or local registrar of the Supreme Court. (p. 1904)
754. Provision should be made that adequate notice be given to parties affected by an order of a recorder. (p. 1904)

755. The Commissioner should have a right to extend the time, on terms, for appealing from an order of a recorder after the thirty days period provided in the Act has expired. (p. 1905)

756. Provision should be made requiring the Commissioner to furnish parties to proceedings before him with copies of opinions or reports received by him under section 142, and requiring that an opportunity be given to the parties to make submissions relevant thereto. (p. 1905)

757. Where the Commissioner receives evidence in addition to that adduced by the parties or a report of a person appointed as provided in section 143(1), he should be required to furnish the parties with a statement of the evidence he has received and in the case of a report, a copy of the report. (p. 1905)

758. Where the Commissioner proceeds partly on a view or any special knowledge or skill possessed by him he should be required to furnish the parties with a copy of the written statement he is required to make under section 143(2) of the Act. (p. 1906)

759. Sections 149 and 150 should be repealed and provision made conferring on the Commissioner the same jurisdiction with respect to costs as is vested in a Supreme Court or county court judge subject to a provision that where in the opinion of the Commissioner the amount or value of the property in question is not more than $7,500 the costs should not be awarded on a scale higher than the tariff of costs applicable in county court proceedings. (p. 1906)

760. Provision should be made for a proper form of formal order. (p. 1907)

761. There should be a provision that a record be made of the evidence taken before the Commissioner in the same form as is required in the Supreme Court. (p. 1907)

762. The following should be the procedure on an appeal to the Court of Appeal:

(1) The appeal shall be commenced by filing a notice of appeal with the recorder and the payment of the prescribed fee within 15 days from the date of the decision.

(2) The notice of appeal with proof of service shall be filed with the Registrar of the Supreme Court forthwith after service.
(3) A certificate of the Registrar certifying that the notice of appeal and proof of service have been filed shall be filed with the recorder within 20 days of the commencement of the appeal.
(4) Unless the notice of appeal and the certificate of the Registrar are filed with the recorder within the required time the appeal shall be deemed to have been abandoned.
(5) The Commissioner or a judge of the Supreme Court shall have power to extend the time for filing the notice of appeal and the certificate notwithstanding that the time for filing may have expired.
(6) An order extending the time shall not be made unless the Commissioner or the judge is satisfied that no substantial wrong or miscarriage of justice will result. (pp. 1908-09)

763. The statute should set out the hours that the offices of the Mining Commissioner and the recorders shall be open for business. (pp. 1909-10)

THE ONTARIO ENERGY BOARD

Unless otherwise indicated references in these recommendations are to the Ontario Energy Board Act.

764. Members of the Board should have security of tenure. (p. 1916)
765. There should be restrictions on those eligible for membership in the Board similar to those contained in the National Energy Board Act. (p. 1916)
766. The Act should provide that the Board be presided over by at least one legally qualified member. (p. 1916)
767. The power conferred on the Board under section 13(4a) to act on its own motion to inquire into and determine any matter that may be raised on an application should be repealed. (p. 1921)
768. Section 36 should be amended to define the forms of energy which come within its scope. (p. 1922)

769. Section 14 should be amended so as to,
    (a) set out the procedural powers of the Board without reference to the powers of the Supreme Court;
    (b) delete the Board's powers of committal to jail. The enforcement of the Board's orders for attendance of witnesses and production should be made by application to a judge of the Supreme Court. (p. 1923)
770. Section 15(3) should be amended to provide that reasonable notice of the Board's hearings (by service or publication) shall be given to those who will be affected by the Board's decisions rather than "to such persons as the Board directs". (p. 1925)
771. Section 15(2) should be amended so as to require that before the Board has power to proceed *ex parte*, it be made to appear to the Board that the delay necessary to give notice of the hearing of an application would likely entail serious mischief. (p. 1925)
772. Provision should be made for payment of witness fees. (p. 1926)
773. Section 53(2) should be repealed. (p. 1926)
774. Section 29(1) should be amended to provide that the decisions of the Board shall be filed with the secretary of the Board and be enforceable in the same manner as orders of an ordinary court. (p. 1927)
775. The penal sections of the Act should be completely revised to create penalties only where no other remedy would be adequate. Minimum penalties should be abolished. (pp. 1927-28)
776. Section 19(3) should be amended to delete the words "which is not bound by the terms of any contract entered into prior to the day upon which this Act comes into force". (p. 1929)
777. Section 35(1)(f) should be amended to set out the purpose for which fees may be charged by the Board. (p. 1929)
778. Simple procedures should be provided to fix compensation for small claims with respect to the acquisition of rights over land or rights of entry on land with a right of appeal to the Land Compensation Board. (p. 1931)

779. There should be no power to grant a rehearing where the Board has exercised judicial powers but there should be a right of appeal to the Court of Appeal. (p. 1932)

780. There should be no power to grant a rehearing of a rehearing except in exceptional and specified circumstances. (p. 1932)

781. Section 31 should be amended to provide a right in a party to a proceeding before the Board to apply to the Court of Appeal for an order that the Board state a case on any question of law where the Board refuses to state a case. The words "in the opinion of the Board" should be deleted. (p. 1932)

782. Where an appeal has been taken to the Court of Appeal the Board should be required to proceed in accordance with the opinion of the Court of Appeal. (p. 1932)

783. Section 32(6) should be amended to provide that either the Board or the Court of Appeal has power to suspend a rate-making order pending an appeal. (p. 1933)

784. Section 33 should be amended to provide that the right of appeal to the Lieutenant Governor in Council,
    (a) does not apply to interlocutory matters;
    (b) does not extend to matters involving questions of law and jurisdiction. (p. 1934)

785. Where an appeal lies to the Lieutenant Governor in Council there should be defined rules of procedure providing for a hearing of the parties affected by a decision of the Board. (p. 1934)

786. Section 45 providing that the decision of the Board on an application made to it under Part II of the Act is final and conclusive should be repealed. (p. 1935)

787. Section 10 of the Municipal Franchises Act should be repealed as it is inconsistent with section 32 of the Ontario Energy Board Act with respect to rights of appeal to the Court of Appeal. (p. 1936)

788. There should be a clear right of appeal from declarations of the Board under section 66(3) of the Public Utilities Act. (p. 1937)

789. All statutes conferring power on the Board should be amended to provide uniform rights of appeal. (p. 1941)

790. The Lieutenant Governor in Council should not have power to reverse a decision of the Court of Appeal. (p. 1941)

791. An application under section 23 for a permit to bore, drill or deepen a well in a designated gas storage area should be made to the Board. (p. 1942)

792. Unless there is some good reason not apparent in the statute an application under section 6 of the Energy Act to repressure, maintain pressure in or flood a gas or oil horizon should be made to the Board. (p. 1943)

793. Section 6(2) of the Energy Act should be amended to require that a copy of the Board's report be sent to the applicant and that it be deemed a decision of the Board from which there is a right of appeal to the Lieutenant Governor in Council under section 33 of the Ontario Energy Board Act. (p. 1943)

794. Standards should be provided for the exercise of the discretionary powers conferred on the Minister under section 10 of the Energy Act. (p. 1944)

795. Before refusing a licence, permit or registration under section 10 of the Energy Act the Minister should hold a hearing or require the Board to hold a hearing. (p. 1944)

796. Section 10(1)(2)(3) of the Energy Act should be amended to require that the person affected receive the report of the Board and to provide for a right of appeal to the Lieutenant Governor in Council. (p. 1944)

797. The Ontario Energy Board Act and the Energy Act together with the relevant sections of the other statutes under which powers are conferred on the Ontario Energy Board should be completely revised with a view to eliminating the procedural inconsistencies that exist with respect to the exercise of the powers of the Board and the rights of appeal from decisions or orders of the Board. (p. 1945)

798. Section 32(4) should be amended to provide that rules made thereunder be made by the Rules Committee constituted under the Judicature Act. (p. 1933)

THE ONTARIO FOOD TERMINAL BOARD

799. The Ontario Food Terminal Act should be amended to declare the policy of the Act with respect to the powers conferred on the Board. (p. 1956)

800. Standards should be set for the guidance of the Board and the protection of the public in the exercise of its powers to grant leases. (p. 1956)

801. Standards should be set for the guidance of the Board in the exercise of its powers to permit or refuse to permit persons to establish and operate within the City of Toronto and the Counties of York and Peel, markets for the sale by wholesale of fruit and vegetables, and to permit or refuse to permit the extension or enlargement of such markets which were operated on the 1st of April, 1955. (p. 1956)

802. There should be a right of appeal to an appellate body against a refusal of the Board to grant a permit to operate or enlarge a market for the sale of fruit and vegetables by wholesale. (p. 1956)

803. All rules passed by the Board which create offences or affect the public interest should be subject to the approval of the Lieutenant Governor in Council. (p. 1954)

THE ONTARIO HIGHWAY TRANSPORT BOARD

804. Where a party affected by an application to the Board so requests he should be entitled to a hearing by a quorum of three members of the Board. (p. 1960)

805. The Board should not have power to commit for contempt. The powers of compulsion should be exercised by the Supreme Court as recommended in Report Number 1, Chapter 32. (p. 1960)

806. The orders of the Board should not be filed with the Registrar of the Supreme Court but they should be filed with the secretary of the Board and be enforced in the

same manner as an order or judgment of the Supreme Court. (p. 1960)

807. The Board should be required to give reasons for its decisions if requested by a party to the proceedings before it. (p. 1961)

808. The right to appeal to the Court of Appeal by way of a stated case should not be dependent on the subjective test that "in the opinion of the Board" the matter is a question of law. (p. 1961)

809. If the Board refuses to state a case on a question of law the applicant should have a right to apply to the Court of Appeal for an order directing the Board to state a case. (p. 1961)

810. Where the Court of Appeal has given an opinion on a stated case the Board should be required to act in accordance with the opinion of the Court of Appeal. (p. 1961)

811. Where leave to appeal to the Court of Appeal has been granted under the provisions of the Act the practice and procedure governing the appeal should be consistent with the practice and procedure governing appeals in the Supreme Court. (p. 1962)

812. If the Board takes an active part in opposing an appeal and is unsuccessful the Court should have a discretion to award costs against the Board. (p. 1962)

813. The right of appeal by petition to the Lieutenant Governor in Council should be clarified. It should not include a question of law or interlocutory matters. (p. 1962)

814. The common law rules of liability should apply where injury has been caused by reason of the wrongful acts of members of the Board, its officers, agents or employees with a right to indemnification by the Crown in proper cases. (See Chapter 131 for recommendations concerning proceedings against the Crown.) (p. 1963)

THE ONTARIO HOSPITAL SERVICES COMMISSION

815. Section 15(1)(c) of the Act enabling regulations to be made defining words used in the Act for the purposes of the Act and the regulations should be repealed. (p. 1966)

816. Section 15(1)(h), insofar as it enables regulations to be made providing for the discipline of patients, should be repealed. (p. 1966)
817. O. Reg. 1/67, section 52 should be amended to permit a solicitor to withdraw as solicitor for the Commission where there is any difference between instructions received from the individual client and the Commission and in such case to permit the Commission to carry on any action for its claim on its own behalf. (p. 1969)
818. Sections 21(1) and 22 respecting certain exemptions from giving evidence should be repealed. (p. 1970)
819. The members of the Commission and its employees should be barred from communicating information received with reference to a patient in a hospital to anyone unless with the consent of the patient or required to do so by legal process. (p. 1971)
820. Section 21(2) of the Act exempting members and employees of the Commission from personal liability should be repealed. (p. 1971)
821. Subject to proper provisions for indemnification no greater protection from civil liability should be provided for the members of the Commission and its employees than is provided at common law. See Chapter 131 for discussion of Crown liability and agents of the Crown. (p. 1971)
822. Section 12 which provides that the Act should prevail in the event of conflict with other statutes should be repealed, as should similar provisions in other statutes. (p. 1973)
823. Section 20 should be amended to provide that fines levied under the Act should be paid into and form part of the Consolidated Revenue Fund. (p. 1973)

THE ONTARIO HUMAN RIGHTS COMMISSION

824. Power should be conferred on the Commission to consider the report of a board of inquiry. (p. 1979)
825. Consideration of the report of the board of inquiry by the Commission should be a condition precedent to its recommendation to the Minister. (p. 1979)

826. The Commission should have power to alter or rescind the recommendation of a board of inquiry. (p. 1979)
827. Any person affected by the report of a board of inquiry should have a right to make submissions to the Commission. (p. 1979)
828. The Minister's order should be enforceable in the civil courts where it should be open to the alleged offender to show that there was no foundation for it. (p. 1982)
829. It should not be an offence punishable by a fine or imprisonment to disobey the Minister's order. (p. 1982)
830. Alternatively, if it is to be an offence to disobey the Minister's order, it should be clearly stated in the Act that the accused on his trial may avail himself of any defences he might have raised if charged with having committed a breach of the statute. (p. 1982)
831. Section 13(2) of the Act which confers powers on a board of inquiry and persons authorized to exercise its powers to make orders of committal should be repealed and provision made for the enforcement of the board's orders of compulsion in accordance with our recommendations made in Report Number 1 (p. 441). (p. 1984)
832. Section 15 should be amended by adding the words "or the Attorney General." (p. 1983)

THE ONTARIO LABOUR RELATIONS BOARD

833. The Attorney General and the Minister of Labour should have power to institute a prosecution under the Act without the consent of the Board. (p. 1994)
834. The orders of the Board made under section 65 of the Act should be made enforceable in the same manner as orders of the Supreme Court upon filing with the Registrar of the Board and without being filed with the Registrar of the Supreme Court and entered as judgments of that Court. (p. 1995)
835. The Board, persons to whom its powers are delegated, a conciliation board, a mediator and an arbitrator should not have all the powers of a court of record in civil cases. The Act should be amended to provide for the

enforcement of the Board's orders as recommended in Report Number 1, p. 441*ff*. (p. 1996)

836. The powers of compulsion to be exercised by a donee of the Board's powers should be clearly defined by statute. The donee of the powers should not have power to decide the scope of his powers. (p. 1997)

837. Where the Board has authorized the chairman or vice-chairman to make an inquiry under section 77(2)(h) the Act should require,
    (a) that the referee give reasons for his decisions;
    (b) that a copy of the report and reasons of the referee be furnished to those affected, and
    (c) that parties affected by the report have a right of appeal from the findings of the referee to the Board. (pp. 1999-2000)

838. Rule 46(1) (O. Reg. 264/66) should be amended to read:

    "Where it appears to the Board that an application or complaint is without foundation in law or is frivolous or vexatious the Board may dismiss the application without a hearing giving its reasons in writing and notifying the applicant or complainant that he has a right to have the decision reviewed by the Board." (p. 2003)

839. Provision should be made giving parties who may be specifically affected by a decision of the Board a right to such reasonable adjournments asked for in good faith as may be appropriate in the circumstances. (p. 2004)

840. Where a division of the Board considers that a matter should be discussed by the full Board or a larger division of the Board, the parties should be notified and given an opportunity to be heard. (p. 2005)

841. The Board should be required to give reasons for its decisions in all cases if requested. (p. 2006)

842. The words "and the action or decision of the Board thereon is final and conclusive for all purposes" should be struck out of section 79(1) and section 80 should be repealed. (p. 2007)

843. The testimonial privilege created by sections 81 and 83 should be limited to information obtained on proceedings before conciliation boards. (p. 2011)

THE ONTARIO MUNICIPAL BOARD

844. A complete catalogue of the powers conferred on the Board should be made available to the public. (p. 2016)
845. A study should be made of ways and means to make more effective use of the personnel of the Board by giving power to one member of the Board to conduct less important or more routine hearings so as to make it possible to assign three members of the Board to more difficult hearings and to hearings for the review of previous decisions under section 42 of the Act. (p. 2017)
846. The provisions of section 38 concerning references to the Board under letters patent issued under the Corporations Act or any general or special Act and power to conduct hearings should be repealed. (p. 2021)
847. The Board should not have power on its own motion to enter upon the determination of any matter in which it exercises a judicial function. (p. 2021)
848. The Lieutenant Governor in Council should not have power to require the Board to exercise its judicial functions unless the Government has an interest in the matter to be determined. (p. 2021)
849. The statute should define the administrative powers that the Board should have to exercise on its own motion and those administrative matters that the Lieutenant Governor in Council should have the power to ask the Board to determine. (pp. 2021-22)
850. The Lieutenant Governor in Council should not have power to appoint counsel to appear before the Board on any matter in which the Government has no interest. Nor should the Board have power to award the costs of counsel appearing on behalf of the Government against other parties to a dispute before the Board. Section 41 should be repealed. (p. 2022)
851. Where the Board exercises judicial functions there should be no right to a rehearing before the Board but wide rights of appeal should be provided. (p. 2023)
852. There should be no power to grant a rehearing of a rehearing except in defined exceptional circumstances. (p. 2023)

853. Sections 36(1)(c) and 47 should be redrafted so as to confine the compulsive powers of the Board to matters over which it has jurisdiction to exercise a power of decision. (p. 2025)
854. Section 48 conferring on the Board wide powers to require any person, company, corporation or municipality subject to its jurisdiction to adopt such precautions as the Board may deem expedient for the safety of life or property should be repealed. (p. 2025)
855. Section 49 should be repealed. (p. 2026)
856. Section 50 should be repealed. If there is default with respect to orders coming within the section they should be enforced through the courts with proper provisions for a hearing. (p. 2026)
857. Section 51 providing that the Board has power to enforce its orders and directions respecting any public utility in the manner and by the means provided in section 261 of the Railways Act should be repealed.

     An appropriate section should be enacted as part of the Ontario Municipal Board Act conferring on the Board only such powers as may be necessary for the enforcement of its orders and complying with our recommendations in Report Number 1 (p. 441ff.). (pp. 2026-27)
858. The Board should not have power to make orders for the seizure of public utilities. (p. 2027)
859. Section 37 conferring on the Board such powers for the enforcement of its orders as are vested in the Supreme Court should be amended so as to conform to our recommendation in Report Number 1 (p. 446). (p. 2027)
860. Section 52 conferring the powers vested in any court of civil jurisdiction on inspecting engineers or persons appointed under the Act to make an inquiry should be repealed. (p. 2027)
861. Section 82 should be amended so that orders or decisions of the Board will not have "the like effect as if enacted in" the Act. (p. 2030)
862. Section 84(2) conferring powers on the Board to make orders *ex parte* should be repealed. (p. 2030)

863. Section 85 providing for filing orders of the Board in the office of the Registrar of the Supreme Court and the enforcement of its orders as judgments of the Supreme Court should be repealed and provision made for filing all orders of the Board or those of the Lieutenant Governor in Council made on appeal from an order of the Board with the Registrar of the Board and for their enforcement. (p. 2031)

864. The processes for the enforcement of orders of the Supreme Court are not generally appropriate for the enforcement of the Board's orders. Provision should be made for the enforcement of the Board's order conforming to our recommendations in Report Number 1 (p. 446). (p. 2032)

865. The principle of *res judicata* should apply to decisions of the Board. The Board should be bound by the determination of facts by the courts where the parties and issues are the same. (p. 2034)

866. The Board should have clear statutory power to order a stay of its proceedings where the issue before it is involved in a matter pending before the courts. (p. 2034)

867. Where proceedings are pending in a court or other tribunal with respect to a matter pending before the Board any party to the proceedings should be permitted to apply to the court or other tribunal for a stay of the proceedings until the Board has made its decision. (p. 2035)

868. It should be made clear that an application for a stated case may be made at any stage of the proceedings before the Board. (pp. 2035-36)

869. Where judgment is given on a stated case the Board should be required to act in accordance with the judgment of the Court of Appeal. (pp. 2035-36)

870. When a case has been stated the opinion of the Court of Appeal should be final and conclusive. (pp. 2035-36)

871. If the Board refuses to state a case any party to the proceedings should have a right to apply to the Court of Appeal for an order that the Board state a case. (p. 2036)

872. The power vested in the Lieutenant Governor in Council to require the Board to state a case for the Court of Appeal should be restricted to those cases where an appeal has been taken to the Lieutenant Governor in Council from a decision of the Board. (p. 2036)

873. It should be made clear that a right of appeal to the Court of Appeal does not lie from decisions made under Part IV of the Act if that is the legislative intention. (p. 2037)

874. Provision should be made for a transcript of proceedings before the Board where required by the parties. (p. 2037)

875. Section 95(2) making provision for a mandatory procedure concerning the setting down of appeals should be amended to make the procedure conform with that set down in the Rules of Practice and Procedure of the Supreme Court. The Court should have power to relieve against hardship in the enforcement of the rules. (p. 2038)

876. The rights of appeal from decisions of the Board should be uniform irrespective of the statute under which the powers of decision are conferred. (p. 2039)

877. There should be no right of appeal to the Lieutenant Governor in Council from a decision of the Board where the power of decision exercised is a judicial or interlocutory decision. (p. 2040)

878. The privative clause of the statute, section 95(7), should be repealed. (p. 2041)

THE ONTARIO SECURITIES COMMISSION

879. The Act should provide that members of the Commission should be appointed for fixed terms and should be removable only for cause. (p. 2069)

880. The Act should provide that the Chairman and Director of the Commission each have legal training. (pp. 2069-70)

881. Section 2(3) of the Act should be amended to provide that a quorum shall consist of three members including the Chairman or a member of the Commission with legal training. (p. 2070)

882. Section 5, paragraph 1 should be amended to provide that (a) the notice of hearing be sent at least 10 days prior to the hearing with power in a member of the Commission to abridge the time where on reasonable grounds he deems it proper; (b) persons or companies affected be permitted to waive the 10 day notice, and (c) persons appearing at the hearing have a right to be heard and this be set out in the notice. (p. 2071)

883. Section 5, paragraph 2 and section 21(4) should be amended to make it clear that neither the Commission nor any person other than a judge of the Supreme Court has power to commit for contempt. (p. 2072)

884. Section 5, paragraph 3 should be amended to provide that in determining the relevance of evidence the presiding officer should employ such standards of proof as are commonly relied on by reasonable and prudent men in the conduct of their own affairs. (p. 2074)

885. Section 5, paragraph 4 should be amended to read ". . . oral evidence received shall be taken down in writing or by any other method authorized under the Evidence Act." (p. 2074)

886. Section 5, paragraph 5 should be amended to make it clear that findings of fact must be based exclusively on the evidence at the hearings and on matters officially noticed which have been disclosed to the parties. (p. 2073)

887. Section 5, paragraph 6 should provide that the notice of decision should include a reference to the rights of appeal available from the decision. (p. 2073)

888. Where powers of decision are being exercised, the Act should provide an express right of counsel to examine and cross-examine witnesses and make submissions. There should be express powers to grant adjournments and to take official notice. The Act should provide that hearings are to be in public unless the presiding officer

decides that there is good reason for holding a private hearing. (pp. 2073-74)

889. Where powers of investigation are being exercised, the provisions of the Public Inquiries Act as recommended in Report Number 1 should apply. (p. 2073)

890. Sections 29 and 59 should be amended to provide for a right of appeal from decisions under section 59. (p. 2076)

891. Where possible, the criteria for action by the Commission should be more clearly specified than by a mere statement that it may act "where in its opinion such action is in the public interest." Where criteria have been specified, the Court of Appeal should have power to set aside the decision where on the record the action taken by the Commission is not warranted.

 Where it would frustrate the scheme of the Act to establish criteria for action, the Court of Appeal should have power to set aside the decision where there is no reasonable evidence to support the opinion of the Commission that its action is in the public interest. (p. 2077)

892. Standards should be set out in the Act for the exercise of the licensing powers. (p. 2079)

893. Conduct which may give rise to the cancellation or suspension of registration should be specified as clearly as possible in the legislation. (p. 2079)

894. Section 21(1) and (2) should be amended to provide that the Commission's power to conduct an investigation be conditioned on the approval of the Minister. All investigations under the Act should be subject to the approval of the Minister and be limited to matters "expedient for the due administration of the Act." (p. 2081)

895. The Act should be amended to provide that on investigations any person against whom specific allegations of misconduct have been made, has a right to be examined by his own counsel before he is examined by Commission counsel. (p. 2082)

896. Section 24 should be amended to prohibit the communication of information obtained by the Commission, its officers, servants or agents in the exercise of their powers

under the Act beyond that which is necessary for the purposes of the Act and the administration of justice. (p. 2083)

897. Section 26 should be amended to make it clear that the powers which may be exercised thereunder may be exercised only when the Commission has decided to order an immediate investigation or to make "a direction, decision, order or ruling suspending or cancelling" a registration or where some step has been taken to institute criminal proceedings or proceedings in respect of a contravention of the Act. (p. 2084)

898. Section 59 should be amended to make it clear that an opportunity to be heard must be afforded before a decision can be made under the section. (p. 2085)

899. Section 89 of the Act should be amended to provide that the application for an exempting order should be made in the first instance to the Securities Commission with a right of appeal to the Court of Appeal. (p. 2087)

900. Section 84(3) of the Corporations Act should be amended to provide that the application for the order be made in the first instance to the Securities Commission with a right of appeal to the Court of Appeal. (p. 2087)

901. Where an exempting order is made, a shareholder should have a right to apply to the Commission for reasons for its decision. (p. 2087)

902. Section 139(2) should be amended to provide for a right to a hearing before the powers thereunder are exercised by the Commission. (p. 2088)

903. Section 142(1) should be amended to substitute for the consent of the Minister the consent of the Attorney General to bring an action, or the section should be repealed. (p. 2090)

904. Section 142(2) should be repealed. (p. 2091)

905. Sections 111(4) and 137(1) should be amended to delete the requirements for consent to prosecute by the Commission or Minister. The consent or authority should come from the Attorney General. (p. 2092)

906. Sections 116 and 131 should be amended to provide that,
(1) orders thereunder should be made only after consideration of the public interest;
(2) orders thereunder be reported to the Minister who is responsible to the Legislature for the administration of the Act. (p. 2094)

THE ONTARIO TELEPHONE SERVICE COMMISSION

907. Where a member of the Commission authorized to report to the Commission exercises the powers of investigation conferred under section 7 he should be required to notify the parties affected and give them an opportunity to be heard. (p. 2099)

908. Where a member of the Commission makes a report to the Commission under the provisions of section 7 a copy of the report should be furnished to any party who has made representations to the member conducting the investigation and the Commission should give any such party an opportunity to be heard before coming to a final decision. (p. 2099)

909. The minimum rules of procedure recommended in Report Number 1 should apply to those investigations conducted under the authority of the Commission which precede a decision affecting rights, and a code of rules of procedure should be formulated. (p. 2099)

910. Where an inquiry is conducted under section 13 the parties affected should have an opportunity to be heard before any report is made and a copy of the report should be furnished to parties affected if required by them. (p. 2100)

911. Before the Commission makes a decision with respect to a report made under section 13 the parties affected should have an opportunity to be heard. (p. 2100)

912. The Commission should not have power to commit for contempt. (p. 2100)

913. The provision requiring the applicant for a stated case to give security for costs should be repealed. (p. 2101)

914. The Court of Appeal should have power to direct the Commission to state a case where the Commission refuses to do so. (p. 2101)

915. The right of appeal to the Lieutenant Governor in Council should not apply to questions of law. (p. 2102)

916. Regulations and orders in the nature of regulations made by the Commission should not be exempted from the Regulations Act. (p. 2103)

917. No one should be subject to a penalty unless he fails to do something required of him under an order of the Commission of which he has been notified. (p. 2103)

THE ONTARIO WATER RESOURCES COMMISSION

918. Section 18 of the Act should be amended to make it clear that the Commission is liable to restore the lands, buildings, etc., of a person that may have been disturbed. The Commission should also be liable to pay compensation for any damage to property which cannot be repaired. (p. 2108)

919. The provisions in sections 19(1), 34 and all other provisions in the Act dealing with matters related to expropriation which conflict with the Expropriations Act, 1968-69 should be repealed. (pp. 2109 and 2121)

920. Section 19(1) should also be amended to provide that the Commission may use the waters of any lake, river, etc., "as may be necessary for its purposes" and not "as may be deemed necessary for its purposes." (p. 2109)

921. Provision should be made for compensation for loss suffered by riparian owners arising out of the exercise of the power conferred on the Commission to use water. (p. 2109)

922. A thorough review of all provincial legislation respecting the use of water should be conducted with a view to (a) determining a coherent policy on this subject and, (b) removing conflicting statutory provisions relating thereto. (p. 2112)

923. A person who would be affected by an approval or order permitting the discharge of sewage into a lake, river,

stream or other watercourse granted under section 27(2) should have an opportunity to be heard before such order is made. (pp. 2113-14)

924. The definition of an area that includes a source of water supply under section 28(1) should be by way of regulation approved by the Lieutenant Governor in Council and provision should be made that those within the area affected should be furnished with a copy of such regulation. (p. 2115)

925. Section 28a should be amended to provide standards concerning the granting, refusal and cancellation of permits thereunder and should provide for procedural safeguards to those affected and a right of appeal from decisions made thereunder. These recommendations are equally applicable to section 28b which should also contain a provision setting out the standards concerning the purposes for which a regulation may be passed exempting persons or substances from the application of section 28b(1). (pp. 2114-16)

926. Section 28a(5) should be amended to require that the Commission must find, as a fact, that the flowing or leaking of water as referred to in the section, interferes with any public or private interest in any water. On a charge of violating a notice under the section the accused should have the right to challenge the Commission's finding. Alternatively, there should be a right of appeal to the Court from the finding of the Commission prior to the issuance of a notice under the subsection. (p. 2117)

927. Section 29 should be amended to set the standards which should affect the granting or refusing and cancellation of a licence, to provide procedural safeguards with respect to licensing proceedings under it, and to provide a right of appeal from decisions made under it. (p. 2117)

928. Sections 30 and 31 should be amended to particularize in greater detail the standards which should be applicable to approvals by the Commission of water works and sewage works and should provide for an appeal from

decisions of the Commission thereunder to the Minister. (p. 2118)

929. There should be a general right of appeal, i.e., one not restricted to questions of jurisdiction or law, from decisions of the Ontario Municipal Board under section 32 (closing a road). (p. 2119)

930. Section 32 should contain an express provision for compensation for those injuriously affected by orders of the Ontario Municipal Board with respect to the closing of roads. (p. 2120)

931. Section 32(6) should be amended insofar as it bars a right of action for damages suffered by the beneficiaries of covenants running with the land or limitations placed upon the estate or interest in the lands. The section should provide for compensation for such persons. (p. 2120)

932. Section 33 of the Act should be amended to provide that the determination thereunder should be made by the Land Compensation Board. The right to compensation should be for the loss or damage caused and not a right to be compensated "as the Board deems just". There should be a right of appeal to the Court of Appeal from a judgment thereunder. (p. 2121)

933. The powers of entry conferred by section 47b of the Act should be revised so that they become exercisable only upon defined conditions precedent being satisfied and the inspectors should be required to produce proper identification when acting under the section. (p. 2122)

934. The powers to make exemptions from the Act by regulation should either be repealed or standards set for their exercise in emergencies. (p. 2123)

935. The powers to investigate referred to in section 47(1) (kb) should be conferred by the statute and not by regulation. (p. 2123)

THE POLICE ACT

936. Sections 12, 40(3), 48(2), and 48a (3), (6), (7) and (9) should be repealed and replaced by legislation conferring powers of investigation on the respective bodies

by reference to the Public Inquiries Act recast as recommended in Report Number 1. (p. 2129)

937. Provision should be made requiring that all regulations made by boards of commissioners of police under section 15 of the Act shall be approved by the Ontario Police Commission and filed with that body. Such regulations should be open for public inspection. (p. 2132)

938. The Police Act and the Municipality of Metropolitan Toronto Act should be amended to delete the requirement that judges be appointed to boards of commissioners of police and to provide expressly that judges shall be ineligible for such appointments. (p. 2131)

939. The basic provisions relating to police discipline should be contained in the Act and not in the regulations. (p. 2132)

940. The presiding officer, a board of commissioners of police, a committee of council and the Ontario Police Commission should be required to give reasons, if requested, in the disposition of charges involving major or minor offences. (pp. 2134 and 2138)

941. Where the officer presiding at the hearing of a charge involving a minor or major offence has previous knowledge of the matters relating to the charge he should be required to disclose it to the person charged and such person should have a right to require the presiding officer to refer the matter to another officer for trial or to the board of commissioners of police or, where there is no board, to a committee of council.

     Where the presiding officer is either the accuser or witness against the person charged he should be disqualified from hearing the charge. (p. 2137)

942. The respective bodies having power to hear disciplinary matters should have power to summon witnesses either for the prosecution or defence in accordance with our recommendations in Report Number 1. (p. 2139)

943. Provision should be made for the payment of witness fees in accordance with our recommendations in Report Number 1. (p. 2139)

THE WORKMEN'S COMPENSATION BOARD

944. Section 50 should be amended to provide that the Board pay the compensation directly to infant employees unless a reasonable cause is shown why it should be paid to some other person. (p. 2147)
945. Section 37(4) should be clarified so as to provide that compensation should be paid wherever by reason of an industrial accident to a workman an illegitimate child has been deprived of maintenance which it was entitled to receive from the workman. (p. 2148)
946. Section 37(10) should be amended to provide that payment in respect of a child may be made to a person other than a parent when the Board has reasonable grounds to believe that payment to a parent would not be in the best interests of the child. (p. 2148)
947. Section 37(2) should be amended to provide that the Board shall on application extend the period of compensation to dependent children after the age of 16 for further or better education unless on reasonable grounds the Board is of the opinion it is not advisable. (p. 2149)
948. There should be statutory provision requiring the consent of the workman to commutation of periodic payments of compensation, or in the alternative, the workman should be given an opportunity to be heard on written notice before an order for commutation is made. (p. 2151)
949. The statute should provide that an order directing application of a lump sum in a matter other than as directed by the workman be made only after reasonable notice in writing to the workman. (p. 2152)
950. There should be a right of appeal from an order of commutation or order directing payment of a lump sum in a manner other than as directed by the workman where the order is made by a person or body exercising the powers of the Board by delegation. (pp. 2151-52)
951. Section 86(4) should be amended to provide that the additional percentage levied must be based on considerations affecting the fair distribution of assesssment; in

other cases the imposition of penalties should be left to the ordinary courts. (pp. 2153-54)

952. Section 86(6) should be redrafted to read:
"Where the Board finds that the ways, works, machinery and appliances in any industry conform to modern standards in such manner as to reduce the hazards of accidents to a minimum and all proper precautions are being taken by the employer for the prevention of accidents, and where the accident record of the employer has in fact been consistently good, the Board may reduce the amount of any contribution to the accident fund for which such employer is liable." (p. 2155)

953. Section 108 should be amended to provide that the percentage penalty be prescribed by regulation. (p. 2156)

954. If the purpose of the legislative powers to classify and reclassify industries is to provide an equitable distribution of the liability to contribute to the accident fund according to the hazards of industry, this should be clearly stated in the Act. (p. 2156)

955. Section 86(2) should be amended to provide that the power of the Board to subdivide classes of industries be subject to the approval of the Lieutenant Governor in Council and the words "for any other reason it is deemed proper to do so" be deleted. (p. 2157)

956. Sections 75 and 65 should be repealed and replaced by provisions:
(1) conferring on the Board powers of inquiry limited to the purposes of the Act;
(2) conferring on the Board power to delegate its powers of inquiry in proper cases;
(3) conferring a right to apply to the Supreme Court for an order enforcing the attendance of witnesses and compelling them to give evidence and produce documents and things. (p. 2158)

957. Section 92(1) should be amended to provide that the power to require information is limited to the purposes of the Act. (p. 2159)

958. Section 92(6) should be amended to delete the power of the Board to levy an additional percentage of assessment for a default punishable on summary conviction.

If the power of the Board to levy an additional assessment or interest is made an alternative to prosecution, a standard should be set in the Act or regulations passed by the Lieutenant Governor in Council limiting the amount that may be assessed. (p. 2159)

959. Provisions for the summons to witness, demand for production of documents and payment of witness' fees should conform to our recommendations in Report Number 1. (p. 2160)

960. Section 94(2) should be amended to provide that applications for orders to enter, search and seize be made to a provincial judge. (p. 2160)

961. If the power of seizure is not necessary it should be repealed. If it is necessary, the Act should provide that before the judge issues an order for seizure it should be shown that there are reasonable grounds to believe that a sufficient examination cannot be made in the absence of seizure or that there are reasonable grounds to believe than an offence under the Act has been committed, that the material seized will afford evidence of the offence and that it is located on specified premises. The Act should provide for a right to return of the material seized within a reasonable time. (p. 2161)

962. Section 97 should be amended to prohibit disclosure of information gained on an inquiry except for the purposes of the administration of the Act and the administration of justice. (p. 2162)

963. The procedure for considering claims should be set out in the statute.

(a) The first step in the consideration should be in the nature of an investigation and recommendation which can be accepted in whole or in part by the claimant.

(b) The claimant should receive a copy of the recommendation, with written reasons together with a statement that the Workmen's Adviser is available to him to assist in his decision whether to accept the recommendation.

(c) If the recommendation is accepted it should have the effect of a decision of the Board.

(d) If the recommendation is not accepted, the claimant should have a right to a further investigation and a further hearing in the first instance.

(e) On this investigation all matters should be open for full consideration and a final recommendation made which, if accepted, would have the effect of a decision of the Board.

(f) If the final recommendation is not accepted there should be a right to apply to the Review Committee if it is continued. Consideration should be given to abolishing the Review Committee and if this is done the application should be direct to the Appeal Tribunal.

(g) If the Review Committee is retained, the claimant should have access to all material which it will consider. The Review Committee should exercise wide powers of investigation; it should hear representations and witnesses and not confine its considerations to the file.

(h) If the recommendation of the Review Committee is accepted, the matter should be final unless reopened by the Board.

(i) If the recommendation is not accepted there should be a right to apply to the Appeal Tribunal.

(j) The claimant should have access to all material that will be considered by the Appeal Tribunal. The Appeal Tribunal should prepare written reasons for its decision which should be made available to the claimant. The claimant should be advised of his right to apply to have the decision of the Appeal Tribunal reconsidered by the Board. (pp. 2172-73)

964. Section 97a should be repealed and if it is desired to give members of the medical profession, etc., protection against malpractice suits in making reports, properly framed legislation should be enacted. (p. 2177)

965. The Act should provide that where compensation is refused on grounds other than a question of disability, the Board should be empowered to state a case for the opinion of the Divisional Court of the High Court of Justice on any question of law. The claimant should

have a right to apply to the Court for an order directing the Board to state a case if it refuses to do so. (p. 2179)

966. Where the Board has made an order under section 50 directing payment of compensation otherwise than to a workman, there should be a right of appeal to the Divisional Court of the High Court. (p. 2180)

967. Employers should have a right of appeal to the Minister from Board decisions on classifications or special assessments. (p. 2180)

968. Sections 16 and 72(1) should be repealed insofar as they purport to restrict judicial review. (p. 2182)

969. A Workmen's Adviser or Consultant should be appointed by Order-in-Council to assist and advise workmen with respect to claims and to assist them at hearings where he deems it advisable. He should have access to all relevant files and materials. He should not be considered to be an advocate of special interests but one who assists in promoting justice.

He should be independent of the Board and should have sufficient staff. His salary and that of the staff should be paid out of the Consolidated Revenue Fund. (p. 2188)

Section 2

THE PROCEEDINGS AGAINST THE CROWN ACT, 1962-63

970. All statutory provisions relieving officers and servants of the Crown from liability for tortious acts should be repealed. (p. 2211)

971. Where by reason of the nature of the employment of officers or servants of the Crown it is considered just that they should be relieved of liability for damage caused by their wrongful acts, provision should be made,

(a) for their indemnification for loss suffered, or

(b) relieving them of liability while maintaining the liability of the employer be it the Crown, Crown agent or Crown corporation, notwithstanding that

the officer or servant is by statute not liable. (p. 2211)

972. In no case should the victim of tortious acts of officers or servants of the Crown, Crown agents or Crown corporations be left without a remedy. (p. 2212)
973. Section 2(2)(b) providing that nothing in the Act subjects the Crown to proceedings under the Act in respect of a cause of action that is enforceable against a corporation or other agency of the Crown should be repealed. (p. 2212)
974. There should be a right to apply to the court for an order extending the 10-day period for giving notice under section 6a(3). (pp. 2212-13)
975. The provision that in an action against the Crown the Crown may refuse to produce a document or answer a question on examination for discovery on the ground that the production or answer would be against the public interest should be repealed. The common law rules of Crown privilege should apply as in any other action. (p. 2214)
976. Section 10(b) should be repealed and the rules of court respecting examinations for discovery should be made to apply in all actions against the Crown as if the Crown were a corporation subject to the application of the common law rules as to Crown privilege. (p. 2215)

Table of Statutes

considered in Volume 5

Statutes Referred to in Volumes 1-4
appear in Volume 4, p. 1682ff.

TABLE OF STATUTES

Air Pollution Control Act, Ont. 1967, c. 2
- s. 6 1744
- s. 6(1)(2) 1743
- s. 7 1743
- ss. 8(2)(3)(4)(5), 9 1744
- s. 10(1) 1744, 1746
- s. 10(2) 1744
- s. 11(1) 1744
- s. 11(10) 1746
- s. 14(l)(k) 1745
- s. 16 1745

O.Reg. 449/67 as amended by O.Reg. 45/68
- s. 6 as amended by O.Reg. 45/68, s. 2 1745
- s. 6(2) 1746

Archaeological and Historic Sites Protection Act, R.S.O. 1960, c. 19
- ss. 2, 3, 4 1747

Athletics Control Act, R.S.O. 1960, c. 26
- s. 3 1748
- s. 5 1754
- s. 5(1) 1749, 1750
- s. 5(2)(3) 1749, 1750, 1751, 1755
- ss. 6, 7 1754
- s. 9(1) 1751, 1752, 1755
- s. 12 1755
- s. 12(1)(d)(e)(f)(g) 1753
- s. 12(1)(h) 1752, 1753, 1755
- s. 12(1)(l) 1748
- s. 12(1)(n) 1748, 1753, 1755

O.Reg. 26/67
- s. 1 1753
- s. 4 1754
- s. 5 .... 1752, 1754
- s. 11 1754

Farm Products Marketing Act, R.S.O. 1960, c. 137
- s. 1(b) as amended by Ont. 1962-63, c. 45, s. 1(1) 1761
- s. 1(e) as re-enacted by Ont. 1962-63, c. 45, s. 1(2) 1762
- s. 1(h) as re-enacted by Ont. 1962-63, c. 45, s. 1(4) 1764
- s. 2 as re-enacted by Ont. 1962-63, c. 45, s. 2 1756
- s. 3(1)(2) 1758, 1798
- s. 3(4a) enacted by Ont. 1965, c. 39, s. 1(2) 1758
- s. 3(5) 1758
- s. 4 1766
- s. 4(1) 1788
- s. 4(1)(a) 1788, 1800
- s. 4(1)(aa) as re-enacted by Ont. 1962-63, c. 45, s. 3(1) 1788
- s. 4(1)(b) 1788, 1800
- s. 4(1)(h) 1792
- s. 4(2)(3) as amended by Ont. 1961-62, c. 41, s. 1, Ont. 1962-63, c. 45, s. (1)-(2) and Ont. 1968-69, c. 37, s. 1(1)-(4) 1788
- s. 4(4) as amended by Ont. 1962-63, c. 45, s. 3 .... 1769, 1772
- s. 4(4)(a) as re-enacted by Ont. 1962-63, c. 45, s. 3(3) 1772
- s. 4(5) 1759
- s. 4(6) as re-enacted by Ont. 1968-69, c. 37, s. 1(5) 1797, 1798, 1802
- s. 5 repealed by Ont. 1962-63, c. 45, s. 4 1765
- s. 5(1) as re-enacted by Ont. 1962-63, c. 45, s. 4 1764
- s. 6 1768
- s. 6(1) 1769
- s. 6(1)(a) 1757, 1759, 1765
- s. 6(1)(f) as re-enacted by Ont. 1962-63, c. 45, s. 5(3) 1771, 1799
- s. 6(1)(g) 1771, 1799
- s. 6(3) 1759
- s. 6(4) 1760, 1798
- s. 7 .... 1789, 1801
- s. 8 .... 1766, 1775, 1778

s. 8(1) as amended by Ont. 1961-62, c. 41, s. 2; Ont. 1962-63, c. 45, s. 6(1)-(12); Ont. 1965, c. 39, s. 3; Ont. 1966, c. 56, s. 1; Ont. 1968, c. 40, s. 3 and Ont. 1968-69, c. 37, s. 3(1)-(2) 1761, 1769
s. 8(1), para. 1 .... 1758, 1762, 1774
s. 8(1), para. 2 1774
s. 8(1), para. 3 .. 1774, 1775, 1776, 1799
s. 8(1), para. 4 1774
s. 8(1), para. 5 as repealed by Ont. 1965, c. 39, s. 3(1) 1778
s. 8(1), para. 9 as re-enacted by Ont. 1962-63, c. 45, s. 6(3) 1767
s. 8(1), para. 11 1758
s. 8(1), para. 11a as enacted by Ont. 1962-63, c. 45, s. 6(4) and amended by Ont. 1966, c. 56, s. 1(1) 1758, 1778
s. 8(1), para. 11a (ii), (iii) as enacted by Ont. 1962-63, c. 45, s. 6(4) and (iv) as re-enacted by Ont. 1966, c. 56, s. 1(1) 1787
s. 8(1), para. 11b as enacted by Ont. 1962-63, c. 45, s. 6(4) and amended by Ont. 1966, c. 56, s. 1(1) 1758
s. 8(1), para. 12 .... 1769, 1799
s. 8(1), para. 12a as re-enacted by Ont. 1966, c. 56, s. 1(3) 1758
s. 8(1), para. 13 as amended by Ont. 1968-69, c. 37, s. 3(1) 1779, 1780
s. 8(1), paras. 16-19 as amended by Ont. 1965, c. 39, s. 3(3)(4) 1758
s. 8(1), para. 20 as re-enacted by Ont. 1968-69, c. 37, s. 3(2) 1758
s. 8(1), para. 22 as amended by Ont. 1962-63, c. 45, s. 6(9) 1770, 1799
s. 8(1), para. 24 1761
s. 8(1), para. 25 as enacted by Ont. 1962-63, c. 45, s. 6(10) 1765
s. 8(1), para. 28a as enacted by Ont. 1962-63, c. 45, s. 6(12) and amended by Ont. 1966, c. 56, s. 1(4) 1758
s. 8(5) as amended by Ont. 1962-63, c. 45, s. 6(14) .. 1759, 1761, 1769, 1775
s. 9 1766
s. 9(1) as amended by Ont. 1962-63, c. 45, s. 7(1)-(7); Ont. 1968, c. 40, s. 4 and Ont. 1968-69, c. 37, s. 4(1)-(3) 1769, 1770, 1799
s. 9(3)(f) 1768
s. 9(5)(a) 1768
s. 10(b) as re-enacted by Ont. 1962-63, c. 45, s. 8 1772
s. 10a as enacted by Ont. 1965, c. 39, s. 4 .... 1778, 1779, 1782, 1784, 1800
s. 10a(2)(b) as enacted by Ont. 1965, c. 39, s. 4 1785
s. 10a(7) as enacted by Ont. 1965, c. 39, s. 4 .... 1779, 1785
s. 12(3) as re-enacted by Ont. 1964, c. 31, s. 1 1769
s. 12(3)(f) as re-enacted by Ont. 1964, c. 31, s. 1 .... 1769, 1780
s. 12a as enacted by Ont. 1968-69, c. 37, s. 5 1792
s. 13 as re-enacted by Ont. 1968-69, c. 37, s. 6 .... 1790, 1792, 1801
s. 14 1801
s. 14(1) as re-enacted by Ont. 1968-69, c. 37, s. 7 .... 1793, 1801
s. 14(2) as re-enacted by Ont. 1968-69, c. 37, s. 7 1793
s. 14(2)(b) 1801
s. 17(1) 1794, 1795, 1801
s. 17(2) 1795, 1801
s. 18 as amended by Ont. 1962-63, c. 45, s. 11 and Ont. 1966, c. 56, s. 2 .... 1758, 1770, 1777
s. 18(1), para. 12 1770
s. 18(2) as enacted by Ont. 1962-63, c. 45, s. 11(2) and amended by Ont. 1965, c. 39, s. 5(1) and Ont. 1966, c. 56, s. 2(2) 1769
s. 18(2)(a) as enacted by Ont. 1962-63, c. 45, s. 11 .... 1776, 1777, 1799
s. 18(2)(b) 1778
s. 18(2)(b)(ii)-(iv) as enacted by Ont. 1962-63, c. 45, s. 11 and amended by Ont. 1965, c. 39, s. 5(1) and Ont. 1966, c. 56, s. 2(1)(2) 1787

s. 18(2)(d) as re-enacted by Ont. 1965, c. 39, s. 5(1) 1795, 1801
s. 18(4) as enacted by Ont. 1962-63, c. 45, s. 11(4) 1769, 1796
R.R.O. 1960
Reg. 147
s. 6(h) as remade by O.Reg. 95/67, s. 2(2) 1769
Reg. 151
s. 5(3) 1779
Reg. 173
s. 4(1)(p) as remade by O.Reg. 186/65, s. 1 and amended by O.Reg. 91/68, s. 1 1796
O.Reg. 184/66
s. 1 1766
O.Reg. 98/67
s. 2 1772
Fire Marshals Act, R.S.O. 1960, c. 148
s. 2(1)(2)(3)(4) 1803
s. 3 1803
s. 4 ....1803, 1806
s. 5 1806
s. 12 ....1803, 1805
s. 12(c) 1806, 1807, 1808
s. 13 1806
s. 19 as amended by Ont. 1960-61, c. 29, s. 1 1803
s. 19(2)(4) 1804
s. 19(5) as amended by Ont. 1960-61, c. 29, s. 1(1) 1805
s. 19(6) 1805, 1807
R.R.O. 1960, Reg. 183
s. 8 1806
s. 8(5) 1807
Hospital Services Commission Act, R.S.O. 1960, c. 176
ss. 8, 11 1965
s. 12 ....1971, 1972, 1974
s. 15 1966
s. 15(1)(c)(h) 1966, 1973
s. 15(1)(l) as re-enacted by Ont. 1968, c. 53, s. 3 1966
s. 20 ....1973, 1974
s. 21 1969
s. 21(1) 1970, 1973
s. 21(2) 1971, 1974
s. 22 ....1969, 1970, 1973
s. 23 1969
O.Reg. 1/67
s. 52 ....1970, 1973
s. 52(2)(3)(4)(5)(6)(7)(8) 1967, 1968
Labour Relations Act, R.S.O. 1960, c. 202
s. 5 as amended by Ont. 1966, c. 72, s. 2 1990
s. 6 1992
s. 6(1) 1993
s. 7(1) 1992
s. 7(2) 1992, 1993
s. 7(5) 1993
ss. 9, 10 1992
ss. 11, 12 1990
s. 13(3) 1991
ss. 28(a), 30(2)(3) 1995
ss. 32, 33 1993
s. 34 2000
s. 34(1)(2)(3) 1993
s. 34(7) 1995
ss. 43 as amended by Ont. 1966, c. 76, s. 16; 44, 45 as amended by Ont. 1964, c. 53, s. 4 1993
s. 45a as enacted by Ont. 1965, c. 53, s. 5 1992
ss. 47, 47a as enacted by Ont. 1962-63, c. 70, s. 1 and amended by Ont. 1966, c. 76, s. 18(1)(2) 1944
ss. 51(1), 59(1) as amended by Ont. 1964, c. 76, s. 22 1991
s. 65 as re-enacted by Ont. 1966, c. 76, s. 24(1) 1997, 2000, 2011
s. 65(2) 1997
s. 65(4) as re-enacted by Ont. 1966, c. 76, s. 24(2) 1998
s. 65(5) as re-enacted by Ont. 1961-62, c. 68, s. 8(2) 1994
s. 66 2000
s. 66(4)(5) as re-enacted by Ont. 1966, c. 76, s. 25 1994
ss. 67, 68, 74(1) 1994
s. 75(2) as amended by Ont. 1966, c. 76, s. 28(1) 1988

s. 75(2a) as enacted by Ont. 1966, c. 76, s. 28(2) 1988, 1989
s. 75(3) (3a) as amended by Ont. 1961-62, c. 68, s. 10(1) and Ont. 1966, c. 76, s. 28 1988
s. 75(5) as amended by Ont. 1966, c. 76, s. 28(4) 1990, 2009
s. 75(6) as amended by Ont. 1966, c. 76, s. 28(5) 1988
s. 75(7)(8) 1988
s. 75(9) as amended by Ont. 1961-62, c. 68, s. 10(2) 2000, 2002
s. 75(9a) as enacted by Ont. 1961-62, c. 68, s. 10(3) and amended by Ont. 1964, c. 53, s. 9 2000
s. 75(10) (12) (13) 1990
s. 77(2) 1996
s. 77(2)(a)(b)(c) 1995, 1996
s. 77(2)(d) as re-enacted by Ont. 1966, c. 76, s. 30(1) 1996
s. 77(2)(e) as amended by Ont. 1961-62, c. 68, s. 12(1) and further amended by Ont. 1966, c. 76, s. 30(2) 1996
s. 77(2)(f) 1996
s. 77(2)(g) 1995, 1996
s. 77(2)(h) as re-enacted by Ont. 1961-62, c. 68, s. 12(2) and amended by Ont. 1966, c. 76, s. 30(3) 1999, 2012
s. 77(2)(j) 1992
s. 79(1) as re-enacted by Ont. 1961-62, c. 68, s. 13(1) 2006, 2007, 2012
s. 79(3) as enacted by Ont. 1961-62, c. 68, s. 13(2) and amended by Ont. 1966, c. 76, s. 32 1999
s. 80 ....2006, 2007, 2012
s. 81 ....2007, 2011, 2012
s. 83 as amended by Ont. 1961-62, c. 68, s. 14 and Ont. 1964, c. 53, s. 11 ...2007, 2008, 2009, 2011, 2012
s. 83(1)(2)(2a)(2b)(2c)(3) 2010
s. 88 2001
s. 88(f)(g) 2001
ss. 90, 91 2000
s. 92 as enacted by Ont. 1961-62, c. 68, s. 16 ....1992, 2000
ss. 93-96 2000
O.Reg. 264/66
s. 2 1992
s. 48 1992
Liquor Control Act, R.S.O. 1960, c. 217
s. 1(1)(j) as amended by Ont. 1965, c. 58, s. 1(2) 1829
ss. 2, 3 1829
s. 8(1) as amended by Ont. 1965, c. 58, s. 2 1830
s. 8(1)(g) 1836, 1844
s. 8(2) 1830, 1843
s. 9 as amended by Ont. 1965, c. 58, s. 3 1830
s. 9(2)(o) 1831
s. 12 1836
s. 26(2) as amended by Ont. 1965, c. 58, s. 13(2) 1839, 1844
s. 28 ....1832, 1833, 1843
s. 29 as amended by Ont. 1965, c. 58, s. 15 ....1831, 1832, 1833, 1843
s. 47 ....1831, 1832, 1843
s. 47(1) as re-enacted by Ont. 1965, c. 58, s. 27 1831
ss. 53, 53a as enacted by Ont. 1965, c. 58, s. 32 ....1831, 1832, 1843
s. 55 as re-enacted by Ont. 1965, c. 58, s. 33 ....1831, 1832, 1843
s. 55a as enacted by Ont. 1965, c. 58, s. 33 ...1832, 1833, 1834, 1840, 1843
s. 78 as amended by Ont. 1965, c. 58, s. 49 ....1837, 1844
s. 81 1838
s. 84 1835
s. 84(1) 1834, 1835, 1843
s. 84(3) as re-enacted by Ont. 1965, c. 58, s. 53 1835
s. 97(1) as re-enacted by Ont. 1965, c. 58, s. 60 1835
s. 100(1) as re-enacted by Ont. 1965, c. 58, s. 61 ....1835, 1836
s. 101 ....1837, 1838, 1844
s. 110 as re-enacted by Ont. 1965, c. 58, s. 68 1838
s. 111 1837
s. 122 ....1839, 1844

s. 140 as amended by Ont. 1965, c. 58, s. 77 ...1832, 1833, 1834, 1840, 1844
s. 140(4)(5) 1841
s. 140(6)(14) 1842
s. 141 1840
s. 142 as re-enacted by Ont. 1965, c. 58, s. 78 1828
O.Reg. 35/66
s. 75 1837
Liquor Licence Act, R.S.O. 1960, c. 218
s. 1(f) as amended by Ont. 1965, c. 59, s. 1(3) 1857
ss. 2, 4 1847
s. 11 ....1860, 1862
s. 16 as amended by Ont. 1965, c. 59, s. 3 1855
s. 17(1) as amended by Ont. 1965. c. 59, s. 4(1) 1855
s. 17(2) as amended by Ont. 1965, c. 59, s. 4(2) 1856
s. 18(1) as amended by Ont. 1965, c. 59, s. 5 ....1856, 1857, 1862
s. 18(2) 1857
s. 20 as amended by Ont. 1961-62, c. 73, s. 1 ....1852, 1853, 1861
ss. 21(3), 28 as amended by Ont. 1965, s. 59, s. 11 1850
s. 29 as amended by Ont. 1965, c. 59, s. 12 1850
s. 32 1847
ss. 34, 35 ....1847, 1848
s. 41(1) as amended by Ont. 1965, c. 59, s. 16 ....1851, 1861
s. 43a as enacted by Ont. 1961-62, c. 73, s. 6 1853
s. 44 1852
ss. 48, 56 ....1858, 1862
s. 59 ....1859, 1860, 1862
s. 61(4) as re-enacted by Ont. 1965, c. 59, s. 19(2) 1858
Milk Act, Ont. 1965, c. 72
s. 1, para. 15 1872
s. 1, para. 18 1870
s. 1, para. 21 ....1866, 1869
s. 1, para. 24 1873
s. 1, para. 25 1872
s. 1, para. 28 1871
s. 1, para. 29 1873
s. 2 1863
s. 3(1) 1865, 1866, 1878
s. 3(2)(4) 1866
s. 3(8) 1892
s. 4(2) 1887
s. 4(2)(a) 1871, 1872
s. 4(2)(j) 1874, 1894
s. 4(3) 1887, 1896
s. 4(5)(a)(iii) 1876
s. 5 1872
s. 5(b) 1889, 1896
s. 5(d) 1871
ss. 6, 7 1866
s. 7(1) 1869, 1875
s. 7(1)(f)(g) 1877, 1895
s. 7(2) 1897
s. 7(4) 1865
s. 7(5) 1893
ss. 7(6), 8(1), para. 1 1892
s. 8(1), para. 3 ....1878, 1895
s. 8(1), para. 9 ....1875, 1894
s. 8(1), para. 11 ....1881, 1882
s. 8(1), para. 13 ....1873, 1893
s. 8(1), para. 21 1877
s. 8(1), para. 32 ....1874, 1894
s. 8(1), para. 39 ....1870, 1871
s. 8(1), para. 41 1867
s. 8(6) 1872, 1874
s. 8(8) 1870
s. 9 ....1887, 1888, 1896
s. 10 ....1887, 1896
s. 14 1878
s. 18, paras. 1, 2 ......1879, 1880, 1881
s. 18, para. 3 ...1879, 1880, 1881, 1895
s. 18, para. 28 1886
s. 18, para. 42 ....1870, 1871
s. 18, para. 59 ....1889, 1896
s. 18, para. 61 1886
s. 18, para. 63 ....1875, 1894
s. 19(2) 1880
s. 20 ....1889, 1896
ss. 21, 22 ....1890, 1897
s. 24 1891
s. 25(1) 1876, 1894
s. 26(1)(2) 1885

s. 27 1869
s. 29 1873
R.R.O. 1960, Reg. 427 as amended by O.Regs. 286/65 and 307/67
s. 6 as amended by O.Reg. 286/65 1869
s. 7 1869
Reg. 428
ss. 9, 10 as amended by O.Regs. 256/65 and 287/65 1877
Reg. 432
s. 46c(c) as amended by O.Reg. 86/66, s. 1(c) 1879, 1895
ss. 61, 62, 63 1886
s. 66(4) 1886
s. 67(1) 1886
s. 74(1) 1886
s. 97(3)(4) as made by O.Reg. 208/61, s. 11 and amended by O.Reg. 289/65, s. 2(2) 1886, 1896
Reg. 434
ss. 51, 52 1886
s. 59 1886
s. 67 1886
O.Reg. 202/65 as amended by O.Reg. 44/66
ss. 1, 2 1868
O.Reg. 294/65
s. 6(a) 1867
s. 6(*i*)(i) 1867
s. 6(o) 1867
s. 6(1) 1882
s. 7(a) 1868
O.Reg. 44/66
ss. 3(1), 6, 8(1) 1869
O.Reg. 52/68
s. 3(1) 1868
s. 4 as amended by O.Reg. 131/68, s. 1 1882
s. 4(1)(2) 1868
O.Reg. 68/68
s. 3(1) 1868
O.Reg. 69/68
s. 3(1) 1868
O.Reg. 70/68
s. 7(1) 1868
O.Reg. 71/68
s. 3(1) 1868
Mining Act, R.S.O. 1960, c. 241
s. 64 1901
s. 91 as amended by Ont. 1965, c. 73, s. 3 1900
s. 91(2) 1901
s. 92 1898
s. 92(1) as amended by Ont. 1962-63, c. 84, s. 26 and Ont. 1965, c. 73, s. 4 1900
s. 96 1904
s. 125(3) 1898
s. 126 1901
s. 128 1902
s. 130 1901
s. 133 1899
s. 134 1904
s. 137 1903
s. 138(1)(3) 1904
s. 142 ....1905, 1911
s. 143(1)(2) 1905, 1911
ss. 148, 149, 150 ....1906, 1911
s. 150(1) 1906
ss. 152(1), 155 1907
s. 156(1)(2) 1908
s. 157 ....1902, 1910
Ontario Energy Board Act, Ont. 1964, c. 74
s. 2 1915
s. 2(4) 1923
ss. 9, 10 1916
s. 11(2) 1934
s. 11(3) 1927
s. 13(1) 1923
s. 13(2) as amended by Ont. 1968-69, c. 81, s. 2 1924
s. 13(4) 1924
s. 13(4a) as enacted by Ont. 1967, c. 64, s. 2 ....1921, 1924, 1946
s. 14 1922
s. 15(2) 1925, 1946
s. 15(3) as amended by Ont. 1968-69, c. 81, s. 3 ....1924, 1925, 1946
s. 17 1925
s. 19 ....1917, 1950
s. 19(1) 1919

s. 19(3) 1919, 1929, 1947
s. 19(6) as re-enacted by Ont. 1967,
c. 64, s. 3(2) 1919
s. 20 1917
s. 21 as amended by Ont. 1968-69,
c. 81, s. 5
..1917, 1918, ,1929, 1933, 1938, 1943
1950
s. 22 1950
s. 23 .. 1917, 1918, 1942, 1943, 1945,
1948, 1950
s. 23(2) as enacted by Ont. 1968-69,
c. 81, s. 6 ....1942, 1945
s. 24 ....1918, 1950
s. 24(a)(b)(c) 1917
s. 25 1950
s. 25a as enacted by Ont. 1968-69,
c. 81, s. 7 ....1917, 1950
s. 26 1950
s. 27(1) as re-enacted by Ont. 1965,
c. 83, s. 2 1928
s. 29(1) 1926, 1947
s. 29(3)(4)(5) 1928
s. 30 ....1931, 1935
s. 31 ....1938, 1947
s. 31(1) 1932
s. 31(2) 1932
s. 32 .....1935, 1936, 1937, 1938, 1940
s. 32(1) 1933, 1938
s. 32(4) 1933
s. 32(6) 1933, 1947
s. 33 ....1935, 1942, 1943, 1948
s. 33(1) 1933, 1939
s. 34(1)(2) 1927
s. 35 as amended by Ont. 1965,
c. 83, s. 3 1928
s. 35(1)(a) 1928
s. 35(1)(b) 1919
s. 35(1)(f) 1929,1947
s. 35(1)(k) 1917, 1950
s. 35(2) 1950
s. 36 ....1921, 1946, 1950
s. 37 1917
s. 38 1950
s. 39 1931
s. 39(8) 1918
s. 39(10) 1930, 1950
s. 40 1950
s. 41 as re-enacted by Ont. 1968-69,
c. 81, s. 10 ....1930, 1931
s. 42 1950
ss. 43, 44 ....1930, 1931
s. 45 ....1935, 1948
s. 47(2) 1928
s. 53(2) 1926, 1946
s. 56(1) 1940
O.Reg. 323/64
s. 2(1)(2) 1929
s. 4 1919
Ontario Food Terminal Act, R.S.O.
1960, c. 272
ss. 1(b), 2, 4 1952
ss. 5, 12, 13, 14 1953
R.R.O. 1960
Reg. 461
s. 1 1952
Ontario Highway Transport Board Act,
R.S.O. 1960, c. 273
s. 5 as amended by Ont. 1961-62,
c. 92, s. 2 1959
s. 5a as enacted by Ont. 1961-62,
c. 92, s. 3 1959
s. 9 1960
s. 11 1963
ss. 13, 16 1962
s. 17 1960
s. 19 1961
s. 20 1962
s. 21(1) 1961
s. 21(2)(4)(6) 1962
s. 24 1960
Ontario Human Rights Code, Ont.
1961-62, c. 93
s. 2 as amended by Ont. 1965,
c. 85, s. 1 1979
s. 3 as re-enacted by Ont. 1967,
c. 66, s. 1 1979
ss. 8, 12(1) 1977
s. 13(1) 1978
s. 13(2) 1978, 1984, 1985
s. 13(3)(5) 1979
s. 13(6) 1979, 1981
s. 14 as amended by Ont. 1968-69,
c. 83, s. 3 1980

s. 15 ....1980, 1983, 1985
s. 17 1982
Ontario Municipal Board Act, R.S.O. 1960, c. 274
s. 5(1)(2) 2016
s. 5(3) as enacted by Ont. 1964, c. 81, s. 1 2017
ss. 7, 12(1), 14, 15(1) 2017
s. 15(2) as re-enacted by Ont. 1967, c. 68, s. 1 2017
ss. 21, 22, 26(1)(2), 32, 33, 34, 35 ..2018
s.36 ....2019, 2020
s. 36(1)(c) 2024, 2025, 2042
s. 37 .....2020, 2025, 2027, 2031, 2032, 2043
s. 38 ....2021, 2041, 2055
s. 40(1) 2021, 2055
s. 40(2) 2021
s. 41 ....2022, 2042
s. 42 ....2017, 2022, 2041
ss. 43, 44, 45, 46(1) 2023, 2055
s. 47 ....2024, 2025, 2042
s. 48, 49 ....2025, 2042
ss. 50, 51 ....2026, 2042
s. 52 ....2027, 2043
s. 53 2027
s. 53(1) as amended by Ont. 1961-62, c. 96, s. 1 2028
ss. 63(1), 64, 64(1) 2056
s. 70 ....2028, 2056
ss. 72(1), 74 ....2029, 2056
s. 82 ....2029, 2043
s. 83, 84(1) 2030
s. 84(2) 2030, 2043
s. 85 .....2020, 2030, 2031, 2032, 2043
s. 90 2032
s. 92 2034
s. 93(1) 2035, 2036
s. 93(2) 2035
s. 94 as re-enacted by Ont. 1961-62, c. 96, s. 3(1) and amended by Ont. 1965, c. 89, s. 2 ...2031, 2036, 2040, 2041
s. 95 ....2023, 2035, 2039, 2041
s. 95(1) 2036, 2037
s. 95(2) 2038, 2044
s. 95(3) 2035, 2037
s. 95(4)(5)(6) 2037
s. 95(7) 2041, 2044
Ontario Water Resources Commission Act, R.S.O. 1960, c. 281
ss. 3, 10 2105
s. 16 2112
s. 16(1) as amended by Ont. 1962-63, c. 99, s. 2 2107
s. 17 as amended by Ont. 1961-62, c. 99, s. 3 2107
s. 18 2123
s. 18(1) as re-enacted by Ont. 1966, c. 108, s. 1 2108
s. 18(3) 2108
s. 19a as enacted by Ont. 1966, c. 108, s. 2 2109
s. 19(1) 2108, 2109, 2123
s. 26(1) 2110
s. 27(1) as re-enacted by Ont. 1961-62, c. 99, s. 5 2113
s. 27(2) 2113, 2114, 2124
s. 28(1) as re-enacted by Ont. 1962-63, c. 99, s. 3 and amended by Ont. 1964, c. 86, s. 4(1) 2115, 2124
s. 28a 2124
s.28a(2) as enacted by Ont. 1960-61, c. 71, s. 3 and amended by Ont. 1961-62, c. 99, s. 6(1) and Ont. 1964, c. 86, s. 5(1) 2115
s. 28a(4) as enacted by Ont. 1960-61, c. 71, s. 3 2115
s. 28a(5) as enacted by Ont. 1964, c. 86, s. 5(3) and amended by Ont. 1966, c. 108, s. 4 ....2116, 2124
s. 28b as enacted by Ont. 1961-62, c. 99, s. 7 ....2122, 2124
s. 28b(1) as enacted by Ont. 1961-62, c. 99, s. 7 ....2114, 2124
s. 28b(2)(3)(4) as enacted by Ont. 1961-62, c. 99, s. 7 2114
s. 29 2124
s. 29(1)(4) 2117
s. 30 as amended by Ont. 1961-62, c. 99, s. 8 and Ont. 1964, c. 86, s. 7 ....2122, 2125
s. 30(2)(3) 2118

s. 31 as amended by Ont. 1961-62, c. 99, s. 9; Ont. 1964, c. 86, s. 8 and Ont. 1965, c. 91, s. 3 ....2118, 2122, 2125
s. 32 2125
s. 32(5) as re-enacted by Ont. 1966, c. 108, s. 5 2119
s. 32(5)(c) as re-enacted by Ont. 1966, c. 108, s. 5 2120
s. 32(6) as re-enacted by Ont. 1966, c. 108, s. 5 ....2120, 2125
s. 33 ....2120, 2125
s. 34 ....2121, 2123
s. 47 2121
s. 47(1) 2108
s. 47(1)(ja) as enacted by Ont. 1961-62, c. 99, s. 14(1) 2122
s. 47(1)(ka) as enacted by Ont. 1961-62, c. 99, s. 14(2) 2122
s. 47(1)(kb) as enacted by Ont. 1962-63, c. 99, s. 7(1) 2123, 2125
s. 47b as enacted by Ont. 1961-62, c. 99, s. 15 ....2121, 2125
Police Act, R.S.O. 1960, c. 298
s. 4 as re-enacted by Ont. 1961-62, c. 105, s. 2 and amended by Ont. 1964, c. 92, s. 4 2126
s. 5(1) as re-enacted by Ont. 1964, c. 92, s. 5(1) and amended by Ont. 1967, c. 76, s. 3(1) 2126
s. 7(2) 2129
s. 8(2) as amended by Ont. 1965, c. 99, s. 3 2130
s. 12 ....2128, 2129, 2131, 2139
s. 14 2129
s. 15 ....2131, 2132, 2139
s. 16(1) 2129
s. 18(1) as enacted by Ont. 1965, c. 99, s. 5 and Ont. 1967, c. 76, s. 5 2127
s. 18(3) as enacted by Ont. 1967, c. 76, s. 5 2127
s. 39a(1) as enacted by Ont. 1961-62, c. 105, s. 6 2126
s. 39b(1)(a) as enacted by Ont. 1962-63, c. 106, s. 4 2127
s. 39b(1)(e)(f)(g)(h) as enacted by Ont. 1962-63, c. 106, s. 4 and amended by Ont. 1966, c. 118, s. 11(4) 2127
s. 40(3) as re-enacted by Ont. 1961-62, c. 105, s. 7 ....2127, 2129, 2139
s. 48a(1) as enacted by Ont. 1964, c. 92, s. 17 2128
s. 48a(3) as enacted by Ont. 1964, c. 92, s. 17 ....2128, 2129, 2139
s. 48a(6)(7)(9) as enacted by Ont. 1964, c. 92, s. 17 ....2128, 2129, 2139
s. 48(1) as amended by Ont. 1961-62, c. 105, s. 9(1); Ont. 1965, c. 99, s. 10(1, 2); Ont. 1966, c. 118, s. 16, and Ont. 1968, c. 97, s. 12(1) 2127
s. 48(2) as amended by Ont. 1961-62, c. 105, s. 9(3) 2128, 2129, 2139
s. 61 as amended by Ont. 1965, c. 99, s. 13 2127
s. 62 2131
s. 62(1)(a) 2132
O.Reg. 451/69
s. 2(1) 2134, 2135
s. 3 ....2134, 2135
ss. 5(1)(2)(11), 6 2133
ss. 10, 16 2138
s. 16(1) 2134
s. 16(4) 2133
s. 16(5)(9)-(13)(15) 2134
s. 17 2138
ss.17(1)(5)(6), 18(1) 2135
s. 19(1)(4)(5) 2137
s. 20(2) 2133
ss. 20(3), 24, 24(6)(9) 2138
s. 25 2139
ss. 40(11), 51(4), 52(8) 2133
R.R.O. 1960, Reg. 486 as remade by O.Reg. 200/64, s. 1
s. 7, (1) as remade by O.Reg. 200/64, s. 1 2137
Power Commission Act, R.S.O. 1960, c. 300
s. 1(c) 1811
s. 7(5) 1822, 1823, 1826
s. 24 ....1812, 1817
s. 24(1) 1812
s. 24(2)(g) 1816

s. 33 ....1816, 1817, 1825
s. 33(1)(2) 1816
ss. 33(7), 34 1817
s. 42 ....1819, 1821, 1825, 1826
s. 42(4) 1820
s. 42(5) 1821, 1826
s. 42(6) 1819
s. 42(8)(10) 1820
s. 42(12) 1821
s. 46 1822
s. 96(1) 1824, 1826
s. 96 (2) 1826
s. 97(12) 1822

Proceedings Against the Crown Act, 1962-63, Ont. 1962-63, c. 109
s. 2(2)(b) 2211, 2212, 2215
ss. 3, 5(1) 2201
s. 5(2) 2202
s. 5(3) 2201
s. 5(4) 2202, 2203
s. 6a(3) as enacted by Ont. 1965, c. 104, s. 1 ....2212, 2215
s. 10 as re-enacted by Ont. 1965, c. 104, s. 2 ....2213, 2214
s. 10(a) 2214
s. 10(b) 2215, 2216

Securities Act, Ont. 1966, c. 142
s. 2 as amended by Ont. 1968, c. 123, s. 2 2069
s. 2(1) as amended by Ont. 1968, c. 123, s. 2 2070
s. 2(2) 2069
s. 2(3) 2070, 2094
s. 3 2069
s. 3(2) 2070
s. 4(6) 2091
s. 5 ....2070, 2071
s. 5, para. 1 2094
s. 5, para. 2 as re-enacted by Ont. 1968, c. 123, s. 4(2) 2071, 2082, 2095
s. 5, paras. 3, 4 ....2074, 2095
s. 5, para. 5 ....2072, 2095
s. 5, para. 6 ....2073, 2095
s. 5, para. 7 2073
s. 6 as amended by Ont. 1968, c. 123, s. 5 ....2077, 2092
s. 7(1)(2)(3) 2078
s. 8 ....2079, 2091
s. 8(2) as re-enacted by Ont. 1968, c. 123, s. 6 2080
s. 14 2078
ss. 18, 19 2078
s. 19(1)(3) 2076
s. 19(5) 2076, 2078
s. 19(6) 2079
s. 20 ....2092, 2097
s. 21 .....2081, 2082, 2083, 2088, 2089
s. 21(1) 2080, 2096
s. 21(2) as re-enacted by Ont. 1968, c. 123, s. 8 ....2080, 2081, 2096
s. 21(3) 2082
s. 21(4) 2082, 2095
s. 21(5) 2082
s. 21(6) 2082, 2090
s. 21(7)(9) 2082
s. 23 as amended by Ont. 1968, c. 123, s. 9 ...2081, 2082, 2083, 2088
s. 24 ....2082, 2096
s. 25 2082
s. 26 2096
s. 26(1) 2083, 2084, 2085
s. 27(3) 2085
s. 28 2075
s. 29 ....2075, 2096
s. 29(2) as amended by Ont. 1968, c. 123, s. 11(1) 2075
s. 29(5) 2076
s. 30(b) 2089
s. 35 2092
s. 59 .....2075, 2076, 2085, 2096, 2097
s. 59(1) 2075, 2085
s. 59(3) 2076, 2085
s. 61(3) as enacted by Ont. 1967, c. 92, s. 1(2) 2068
s. 62 2092
s. 89 2097
s. 99 2091
s. 100(a)(i) 2093
s. 107 2068
s. 109 ....2088, 2092
s. 111 2091
s. 111(4) 2092, 2097
s. 115 2068
s. 116 ....2068, 2097

s. 118(b)(i) 2093
s. 131 .... 2093, 2097
ss. 135, 136 as amended by Ont. 1968, c. 123, s. 38 2091
s. 137(1) 2092, 2097
s. 139(2) 2088, 2097
s. 141a as enacted by Ont. 1968, c. 123, s. 40 2088
s. 141b as enacted by Ont. 1968, c. 123, s. 40 2092
s. 142 2091
s. 142(1) 2089, 2097
s. 142(1)(a) as amended by Ont. 1968, c. 123, s. 41(1) 2092
s. 142(2) as amended by Ont. 1968, c. 123, s. 41 .... 2089, 2097
s. 144 as amended by Ont. 1967, c. 92, s. 3 .... 2068, 2088

Telephone Act, R.S.O. 1960, c. 394
ss. 2(1), 6(1)(2) 2098
s. 7 .... 2098, 2103
s. 11 2098
s. 13 2104
s. 13(1)(2) 2099
s. 14 2098
s. 17(1) 2101
s. 18 2102
s. 19(1) 2101
s. 19(3), 22, 26 2102
s. 83 2103

Workmen's Compensation Act, R.S.O. 1960, c. 437
s. 1(1)(i) 2145
s. 3 as amended by Ont. 1968, c. 143, s. 2 2144
s. 3(1) as amended by Ont. 1968, c. 143, s. 2 2144
s. 7 2145
s. 13 .... 2143, 2169
s. 15 2143
s. 16 .... 2178, 2180, 2193
s. 21 2163
s. 22 2163
s. 22(1) 2181
s. 23 2168
s. 23(2) 2181
s. 27 as amended by Ont. 1964, c. 124, s. 3 2151
s. 27 (3) 2152
s. 27(3)(a) 2151
ss. 28, 29, 30 2151
s. 37(1)(a) 2149
s. 37(1)(c)(d) as re-enacted by Ont. 1968, c. 143, s. 7(1) 2147, 2149
s. 37(1)(e) as re-enacted by Ont. 1968, c. 143, s. 7(1) 2147, 2148, 2149
s. 37(f) 2149
s. 37(2) as amended by Ont. 1964, c. 124, s. 4(2) 2148, 2189
s. 37(3) as re-enacted by Ont. 1968, c. 143, s. 7 2149
s. 37(4) 2147, 2148, 2188
s. 37(10) 2148, 2188
s.40 as re-enacted by Ont. 1968, c. 143, s. 8 2149
s. 41 as amended by Ont. 1962-63, c. 145, s. 5 2149
s. 42(1) as re-enacted by Ont. 1968, c. 143, s. 10(1) 2150
s. 42(4) 2150
s. 43 as amended by Ont. 1968-69, c. 140, s. 1(1) 2150
s. 43(b) as re-enacted by Ont. 1968-69, c. 140, s. 1(1) 2150
s. 44 as amended by Ont. 1962-63, c. 145, s. 6 and further amended by Ont. 1968, c. 143, s. 11 2150
ss. 46, 47 2130
s. 49 .... 2145, 2146
s. 50 as re-enacted by Ont. 1968, c. 143, s. 12 .... 2146, 2179, 2188, 2193
s. 51(1) as re-enacted by Ont. 1968, c. 143, s. 13(1) 2150
s. 51(6) 2150
s. 52 2174
s. 54 2141
s. 65 .... 2157, 2158, 2190
s. 72 .... 2169, 2170
s. 72(1) 2169, 2181, 2193
s. 75 .... 2157, 2158, 2160, 2167, 2190
s. 75(1) 2163
s. 80 2180

s. 86 as amended by Ont. 1964, c. 124, s. 9 by adding sub-section (6a) and further amended by Ont. 1968, c. 143, s. 18 2143
s. 86(1) 2143, 2156
s. 86(2) 2143, 2157, 2190
s. 86(4) 2153, 2189
s. 86(5) 2153
s. 86(6) 2154, 2189
s. 86(6a) as enacted by Ont. 1964, c. 124, s. 9 and amended by Ont. 1968, c. 143, s. 18 . . . . . . 2154, 2155
s. 92(1) 2190
s. 92(3) 2159
s. 92(6) 2159, 2190
s. 94 2160
s. 94(1) 2159, 2160
s. 94(2) 2191
s. 95(1)(2) 2155
s. 97 . . . . 2162, 2191
s. 97(a) as enacted by Ont. 1968-69, c. 140, s. 2 . . . . 2174, 2192
s. 99(2) 2145
s. 106 2180
s. 108 . . . . 2155, 2190
s. 115 as amended by Ont. 1968, c. 143, s. 21 2163
s. 116 2145
s. 116(13) 2145, 2156
s. 123 2143

TABLE OF CASES

Adcock et al v. Algoma Steel Corp. Ltd., et al (1968), 70 D.L.R. (2d) 246 1991

Adderly v. Bremner, [1968] 1 O.R. 621 1972

Atkins et al v. Ontario Flue-Cured Tobacco Growers' Marketing Board, [1964] 1 O.R. 56, affirmed p. 653, affirmed [1965] S.C.R. 431 1786

Attorney General for New South Wales v. Perpetual Trustee Co. (LD.) and Others, [1955] A.C. 457 2208

Bainbridge v. Postmaster General, [1906] 1 K.B. 178 2212

Brampton Jersey Enterprises Limited v. The Milk Control Board of Ontario, [1956] O.R. 1 (C.A.) 1776, 1879, 2157

B.C. Power Corporation Ltd. v. Attorney-General of British Columbia and British Columbia Electric Co. Ltd. (1962), 34 D.L.R. (2d) 25 2204

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164117