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Commentary

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## The Statutory Powers Procedure Act, 1971

# THE STATUTORY POWERS PROCEDURE ACT, 1971\*

By RONALD G. ATKEY\*\*

On April 17, 1972 *The Statutory Powers Procedure Act* came into force. It represents a comprehensive code of administrative procedure that will be of immediate relevance and concern to all lawyers, civil servants and members of the public interested in the workings of the many boards, commissions, licensing bodies, tribunals, directors, superintendents and other public officials making decisions under an Act of the province of Ontario.

The purpose of this article is to provide a practical introduction to the Act and related statutes. It is not intended to provide a re-examination of the jurisprudential underpinnings of the complex mosaic of legislation enacted in the summer of 1971<sup>1</sup> based on the administrative law recommendations of the McRuer Commission.<sup>2</sup> This task has already been ably performed by Professor John Willis<sup>3</sup> and Mr. Robert Reid, Q.C.<sup>4</sup> Nor will it constitute an exhaustive section-by-section analysis accompanied by practice notes such as that which has been recently provided in the useful Manual of Practice prepared by Mr. D. W. Mundell, Q.C.<sup>5</sup> Rather, this article is geared to the needs of the busy practitioner or tribunal member approaching the Act for the first time and desiring easy access to its principal features and problem areas.

Before dealing with specific sections of the Act, a word or two should be said about its purpose. Essentially, the Act is intended to provide certainty through a codification of the minimum rules of natural justice which are to govern proceedings before tribunals that are authorized by statute to make decisions deciding or prescribing rights following a hearing. In addition, the Act specifically confers certain powers on these tribunals such as the calling of witnesses and compelling their attendance, or the requiring of production of documents.

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\*S.O. 1971, c. 47.

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<sup>1</sup> *The Statutory Powers Procedure Act*, S.O. 1971, c. 47;  
*The Judicial Review Procedure Act*, S.O. 1971, c. 48;  
*The Public Inquiries Act*, S.O. 1971, c. 49;  
*The Civil Rights Statute Law Amendment Act*, S.O. 1971, c. 50; and  
*The Judicature Amendment Act*, S.O. 1971, c. 57.

(all proclaimed in force on April 17, 1972)

<sup>2</sup> Royal Commission Inquiry into Civil Rights (Hon. J.C. McRuer, Commissioner) Report No. 1, Vol. 1 (1968) (hereinafter referred to as the McRuer Commission).

<sup>3</sup> J. Willis, *The McRuer Report: Lawyers' Values and Civil Servants' Values* (1968), 18 U. of T. L.J. 351.

<sup>4</sup> R.F. Reid, *Administrative Law and Practice* (Toronto: Butterworths, 1971) 461-468.

<sup>5</sup> D.W. Mundell, *Manual of Practice on Administrative Law and Procedure in Ontario* (Toronto: Queen's Printer Ontario, 1972).

To a certain extent, the Act is fashioned after the U.S. federal *Administrative Procedure Act, 1946* and the model *State Administrative Procedure Act, 1961*. But in true Canadian tradition it also draws on U.K. experience<sup>6</sup> by setting up a Statutory Powers Procedure Rules Committee to maintain under continuous review the existing practice and procedure of each tribunal above the codified minimum rules of natural justice and to act as a consultative expert body for each tribunal's rule-making activities.

#### A. TO WHAT TRIBUNALS DO THE MINIMUM RULES IN THE ACT APPLY?

This question can only be answered by satisfying *each* of the three conditions contained in Section 3 (1):

Subject to subsection 2, this Part applies to proceedings by a *tribunal* in the exercise of a *statutory power of decision* conferred by or under an Act of the Legislature, where the tribunal is *required by or under such Act or otherwise by law to hold or to afford to the parties to the proceedings an opportunity for a hearing* before making a decision. (emphasis added)

Let us consider each of the conditions separately:

##### 1. *There must be a "tribunal" as defined in the Act:*

1 (1) (e) "Tribunal" means one or more persons, whether or not incorporated and however described, upon which a statutory power of decision is conferred by or under a Statute

One limitation here is that power must be "conferred by or under a statute", which means that the tribunal must have received its power from an Act of the legislature or a regulation promulgated thereunder, and not from the mere exercise of the Crown prerogative.<sup>7</sup>

A second limitation, constitutional in nature, is that it must be an Ontario Act or regulation conferring the power, and not a federal Act or regulation.

##### 2. *There must be a "statutory power of decision" as defined by the Act:*

1 (1) (e) "Statutory power of decision" means a power or right conferred by or under a statute, to make a decision deciding or prescribing  
 (i) the legal rights, powers, privileges, immunities, duties or liabilities of any person or party, or  
 (ii) the eligibility of any person or party to receive, or to the continuation of, a benefit or licence, whether he is legally entitled thereto or not.

Note the use of the words "deciding or prescribing". This is one of the most significant features of the Act in that the use of both words in the context of "rights", "privileges", "benefits", etc. means, at least at first blush, that it is

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<sup>6</sup> See *The Tribunals and Inquiries Act* (1958), 6 & 7 Eliz. II, c. 66 which implemented, in the main, the recommendations of the Franks Committee (Committee on Administrative Tribunals and Inquiries, 1955, Sir Oliver Franks, Chairman).

<sup>7</sup> In England, the Criminal Injuries Compensation Board was created in 1964 not by statute or regulation but under prerogative Crown powers. Such a tribunal if brought into being in Ontario in this fashion would not fall within the definition of "tribunal" under *The Statutory Powers Procedure Act*. For a decision on the rules of natural justice required to be followed by that tribunal, see *R. v. Criminal Injuries Compensation Board, ex parte Lain*, [1967] 2 Q.B. 864.

no longer necessary to determine whether the tribunal is acting judicially or quasi-judicially as opposed to administratively, as a condition of entitlement. Had the above definition used only the word "deciding", then a statutory power of decision under the Act would have been restricted to judicial or quasi-judicial decisions. But the word "prescribing" encompasses purely administrative decisions and thus appears to remove the necessity of performing the type of verbal gymnastics which have permeated this area of the law.

Note also the finality element which the words "to make a decision in deciding or prescribing" convey. By implication this would seem to preclude investigations, inquiries or advisory reports from the application of the minimum rules in the Act. This view is fortified by the specific exemption in s.3(g):

- (g) of one or more persons required to make an investigation and to make a report, with or without recommendations, where the report is for the information or advice of the person to whom it is made and does not in any way legally bind or limit that person in any decision he may have power to make;

and the existence of a separate *Public Inquiries Act*<sup>8</sup> brought into force at the same time and prescribing separate minimum rules for "inquiries" as defined in each separate statute. Such inquiries are also specifically exempted from the application of the minimum rules by section 2(f).

Significantly however, this pattern in the Act of exempting investigatory-type proceedings where there is no decision is reversed for specific tribunals in the omnibus *Civil Rights Statute Law Amendment Act*<sup>9</sup> which amends some ninety-one statutes under which power is conferred on tribunals. For example, under the amendments to *The Archaeological and Historic Sites Protection Act*,<sup>10</sup> before the Minister can designate any land as an archaeological or historic site without the consent of the owner he must refer the matter to an advisory board for a hearing and report. While the proceedings of the board are clearly investigatory in nature since it is the Minister (in receipt of the board's report) who makes the decision, the amendments specifically provide that sections 6 - 16 and 21 - 23 of *The Statutory Powers Procedure Act, 1971* apply *mutatis mutandis* with respect to the hearing before the board. In effect, this brings into operation all the minimum rules except the right to a written decision with reasons if requested (section 17), notice of decision (section 18), and a record of the proceedings (section 20), all of which are of little consequence anyway because it is the Minister who makes the decision in the manner prescribed by statute. Thus the prudent lawyer, before writing off the minimum rules as inapplicable to investigatory-type proceedings will want to carefully check the individual statute authorizing the investigation to see if all or some of the minimum rules have not been incorporated by cross-reference to *The*

#### *Statutory Powers Procedure Act.*

3. *There must be a statutory or common law requirement to hold or afford to the parties an opportunity for a hearing before making a decision:*

<sup>8</sup> S.O. 1971 c. 49.

<sup>9</sup> S.O. 1971 c. 50.

<sup>10</sup> S.O. 1971, c. 50, S. 8(2), substituting a new section 2 of *The Archaeological and Historic Sites Protection Act*, R.S.O. 1970, c. 26.

In most cases, this will be clearly spelled out in the statute creating and conferring power on the tribunal. Indeed, it is the stated intention of the government that future statutes should expressly specify whether a hearing is required and that all existing statutes should be so amended if it is considered that the hearing requirement is appropriate.<sup>11</sup> But the phrase "required . . . or otherwise by law" (applied to a hearing) preserves the implied common law requirement for a hearing, thus giving rise to some uncertainty. It depends in large part whether a reviewing court (in most cases, the Divisional Court) will imply the hearing requirement from analagous words in the statute<sup>12</sup> or from the application of the maxim *audi alteram partem* in cases where the tribunal is thought to have a duty to act judicially or quasi-judicially.<sup>13</sup> What this means then, is that when the statute is silent as to a hearing, one is thrust back into the long line of cases which attempt to determine whether a tribunal is acting judicially or quasi-judicially and thereby required to hold a hearing. This highly acrobatic<sup>14</sup> area of the law is supposedly one which the draftsman of the Act sought to avoid by inclusion of the words "deciding or prescribing" in the definition of "statutory power of decision". Yet the troublesome legacy may be preserved by section 3(1) allowing the hearing condition to be required "or otherwise by law", thus continuing the relevance of the voluminous case law where the courts have implied a hearing.<sup>15</sup>

However, while certainty may be a desirable objective in terms of knowing exactly to what tribunals the minimum rules are to apply, the residual protection afforded by virtue of a reviewing court being able to say that a hearing is required "otherwise by law" is valuable in permitting the courts to supply legislative omissions in cases where individual rights might otherwise be subject to procedural injustices. In other words the courts will have ample scope to supplement the list of tribunals which the legislature has decided should be subject to the minimum rules in the Act.

## B. WHAT TRIBUNALS ARE SPECIFICALLY EXEMPTED FROM THE MINIMUM RULES?

Exemptions are obtained in three ways:

1. The proceedings of some tribunals are specifically exempted in section 3(2) of the Act:

- 3 (2) This Part does not apply to proceedings,
  - (a) before the Assembly or any committee of the Assembly;

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<sup>11</sup> See Mundell, *op. cit. supra*, note 5, at 4 - 5.

<sup>12</sup> See *Border Cities Press Club v. A.G. Ontario*, [1954] O.W.N. 663 (reversed on other grounds, [1955] O.R. 14) where the words "on sufficient cause being shown" were interpreted as shown by means of an oral hearing." Also, see *Cresswell v. Etobicoke-Mimico Conservation Authority*, [1951] O.R. 197 where the words "consider and determine" were held to imply a hearing. See, generally, Reid, *supra* note 4, at 15 - 19.

<sup>13</sup> *Board of Education v. Rice*, [1911] A.C. 179. See Reid, *id.* at 21 - 27, 33 - 38.

<sup>14</sup> Borrowed from John Willis in (1940), 53 Harv. L. Rev. 251 at 281.

<sup>15</sup> Both Reid, *supra*, note 4 at 1 - 52, and deSmith, *Judicial Review of Administrative Action* (London: Stevens 2d ed. 1968) 135 - 229 exhaustively cover the judicial-administrative distinction as related to the right to a hearing.

- (b) in or before,
  - (i) the Supreme Court,
  - (ii) a county or district court,
  - (iii) a surrogate court,
  - (iv) a provincial court established under *The Provincial Courts Act*
- (c) to which the rules of practice and procedure of the Supreme Court apply;
- (d) before an arbitrator to which *The Arbitrations Act* or *The Labour Relations Act* applies;
- (e) at a coroner's inquest;
- (f) of a commission appointed under *The Public Inquiries Act, 1971*;
- (g) of one or more persons required to make an investigation and to make a report, with or without recommendations, where the report is for the information or advice of the person to whom it is made and does not in any way legally bind or limit that person in any decision he may have power to make;
- (h) of a tribunal empowered to make regulations, rules or by-laws in so far as its power to make regulations, rules or by-laws is concerned.

2. The proceedings of other tribunals may be exempted for a maximum period of one year dating from April 17, 1972, by order of the Lieutenant-Governor in Council under section 36(1). Tribunals established and operating under the following statutes have been given one year exemptions:

*The Air Pollution Control Act* (now superceded by *The Environmental Protection Act*)

*The Athletics Control Act*

*The Blind Workmen's Compensation Act*

*The Farm Products Marketing Act*

*The Fire Marshalls' Act*

*The Hospital Services Commission Act*

*The Labour Relations Act*

*The Liquor Control Act*

*The Liquor Licence Act*

*The Milk Act*

*The Ontario Energy Board Act*

*The Ontario Municipal Board Act*

*The Ontario Water Resources Act*

*The Police Act*

*The Power Commission Act*

*The Securities Act*

*The Workmen's Compensation Act*<sup>16</sup>

Since there may well be further one-year exemption orders, a party or his lawyer should check the most recent Orders in Council before claiming the protections of the Act prior to April 17, 1973. A more limited Order in Council<sup>17</sup> exempting the "public hearing" requirement (section 9) for a maximum of one year has been made in respect of all tribunals exercising licensing and disciplinary powers over the self-governing professions.

It would appear that section 36(1) of the Act was inserted to provide a maximum one-year reprieve for a large number of important tribunals which

<sup>16</sup> O/Reg. 162/72.

<sup>17</sup> O/Reg. 163/72.

are not yet in a position to operate effectively under the wholesale application of the minimum rules. But since the transitional period is limited to a maximum of one year, the onus is on the tribunals to either revise their procedures to comply within a reasonable period or to seek legislative sanction for a modification of the minimum rules as applied to their particular proceedings. This illustrates graphically the pervasive nature of the Act as a comprehensive code of minimum procedural rules, departures from which are permitted only through special legislative treatment.

3. The proceedings of some tribunals may be exempted from *The Statutory Powers Procedure Act* by specific provisions in other legislation. For example, a recent amendment to *The Department of Correctional Services Act* contained in *The Civil Rights Statute Law Amendment Act* provides:

34. *The Statutory Powers Procedure Act, 1971* does not apply to proceedings for the discipline of inmates in correctional institutions or to their transfer under section 10 or for the authorization under section 18 or 19 of temporary absences of inmates or to proceedings of the Board notwithstanding anything in that Act.

However, before such exemption can be effective, express words sufficient to satisfy the "notwithstanding" injunction of Section 32 of *The Statutory Powers Procedure Act* must be included in the other statute, otherwise the minimum rules prevail. Section 32 reads:

32. Unless it is expressly provided in any other Act that its provisions and regulations, rules or by-laws made under it apply notwithstanding anything in this Act, the provisions of this Act and of rules made under section 33 prevail over the provisions of such other Act and over regulations, rules or by-laws made under such other Act which conflict therewith.

#### C. *ASSUMING THE MINIMUM RULES DO APPLY, HOW CAN THEY BE MODIFIED OR AVOIDED?*

While the Act was intended to provide a comprehensive code of minimum rules and procedure for all tribunals deciding or prescribing rights following a hearing, there are a variety of situations in which, as a practical matter, it would be neither in the interests of the parties nor of the tribunal to have all the rules applied in their full force and effect. Flexibility is provided in the following provisions:

1. Section 4 provides that the parties may waive a hearing or compliance with any other requirement of the Act so that a tribunal can proceed to dispose of the matter by mere agreement, consent or decision without the fear of a subsequent challenge based on failure to observe procedural niceties. However, this is conditional on obtaining positive agreement from all parties. If one of the parties does not show up at a hearing in response to proper notice, then this may not be treated as an implied agreement to a consent order or decision and the tribunal is not absolved of the responsibility of compliance with the Act except that it is not required under section 7 to provide any further notice in the proceedings to the absent party. This means that the tribunal must still comply

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<sup>18</sup>S.O. 1971, c. 50, s. 27, adding new section 34 to *The Department of Correctional Services Act*.



with such rules as the public hearing requirement (section 9), the requirement of giving a written decision with reasons if requested (section 7), and the requirements respecting a record of the proceedings (section 20). While this might appear to be unduly cumbersome to some tribunals, it is a further protection for the party who does not realize the serious implications of non-attendance at a hearing until he receives the tribunal's adverse decision. For not only are his appeal rights preserved but it would seem that his right to make an application for judicial review to force compliance with all the minimum rules apart from notice requirements would still be open.

2. Concurrent with the enactment and coming into force of *The Statutory Powers Procedure Act* was *The Civil Rights Statute Law Amendment Act*<sup>19</sup> amending some 91 statutes under which power is conferred on tribunals. The purpose of these amendments was, *inter alia*, to clarify for each tribunal the nature and scope of its power, by whom it is to be exercised, whether and under what circumstances a hearing is required, who are the "parties" to a hearing, and the nature of the appeal rights from the decisions of each tribunal. But *The Civil Rights Statute Law Amendment Act* in certain cases also provides for particular modifications of the minimum rules of procedure in *The Statutory Powers Procedure Act*.

One example of such a modification can be found in the amendments to *The Family Benefits Act* respecting procedure before the Board of Review:

12 (3) Notwithstanding *The Statutory Powers Procedure Act, 1971*, all hearings of the board of review shall be heard *in camera*.<sup>20</sup>

This is a modification of section 9 of the minimum rules relating to public hearings. Likewise, modifications of the section 6 notice requirement of the minimum rules are expressly provided by amendments to *The Mining Act* for certain proceedings before the Mining Commissioner.<sup>21</sup> However, for a modification of the minimum rules to be effective, it must expressly stipulate that the section applies "notwithstanding *The Statutory Powers Procedure Act, 1971*" to overcome the paramountcy of the minimum rules expressed in section 32 of that Act.

3. A third way in which the rigours of the minimum rules can be avoided is through a claim that a breach of one of the rules is merely a defect in form or a technical irregularity. This is essentially a built-in protection of flexibility for the tribunals, as opposed to the parties appearing before them, and it is contained in section 3 of *The Judicial Review Procedure Act*.<sup>22</sup> This Act is the new procedural vehicle for obtaining judicial review as an alternative to the prerogative writs, and its procedure is open to any of the parties before a tribunal on a breach of one or more of the minimum rules. Section 3 of *The Judicial Review*

*Procedure Act* provides:

On an application for judicial review in relation to a statutory power of decision, where the sole ground for relief established is a defect in form or a technical

<sup>19</sup> S.O. 1971, c. 50.

<sup>20</sup> S.O. 1971, c. 50, s. 38(7).

<sup>21</sup> S.O. 1971, c. 50, s. 58 (13), substituting new sections 146 - 148 of *The Mining Act*.

<sup>22</sup> S.O. 1971, c. 48, s. 3.

irregularity, if the court finds that no substantial wrong or miscarriage of justice has occurred, the court may refuse relief and, where the decision has already been made, may make an order validating the decision, notwithstanding such defect, to have effect from such time and on such terms as the court considers proper.

The effect of this provision is to vest a broad judicial discretion in the Divisional Court to dismiss an application for judicial review even where a breach of the minimum rules in *The Statutory Powers Procedure Act* has been proved, if no real injustice has occurred. This section goes a long way to meet the criticism of Professor John Willis that mandatory codes of minimum rules of procedure before tribunals merely give a zealous lawyer a second string to his bow to make frivolous procedural objections in court after he has lost on the merits.<sup>23</sup>

#### D. *WHO ARE THE PARTIES WHO CAN CLAIM RIGHTS AND PROTECTIONS UNDER THE ACT?*

The Act itself provides virtually no assistance in answering this question. Section 5 states merely that:

The parties to any proceedings shall be the persons specified as parties by or under the statute under which the proceedings arise or, if not so specified, persons entitled by law to be parties to the proceedings.

It may be a laudable objective for the parties to be specified in the particular statute or regulation under which proceedings arise. At first blush this would appear to overcome the difficulty of applying the common law rules of "standing" in attempting to clearly determine who can take part in the hearing. However, upon closely examining the statutes which have been amended by *The Civil Rights Statute Law Amendment Act* to see how specific the general provisions are on this point, one soon realizes that many such provisions are little more than a delegation of the discretion back to the tribunal to determine in its wisdom who should be the parties to its proceedings. The following amendment to *The Ontario Highway Transport Board Act* is typical:

17a(2) Where the Board holds a rehearing under section 17, the parties to the proceedings relating to that rehearing are the persons who were parties to the initial hearing and such other persons as the Board may specify.<sup>24</sup>

By vesting such a discretion back in the tribunal, such legislation tends to provide an indirect statutory waiver of the common law rules of "standing" and gives the Board the ultimate discretion as to who can appear before it. It might have been better if section 5 had attempted merely to codify the common law rules by using language such as "any person who will be directly affected by the decision of the tribunal is entitled to be a party", and thereby not openly invite a specific statutory delegation back to the tribunal of the power to unilaterally determine who can be parties.

The question of who may be a party is an important one in hearings before such tribunals as the Ontario Municipal Board where there are often large numbers of citizens' and ratepayers' groups demanding "party" status and the procedural rights which come with it. One technique which a tribunal might be

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<sup>23</sup> Willis, *supra* note 3, at 359.

<sup>24</sup> S.O. 1971, c. 50, s. 62(4).

expected to adopt in cases where it is not known in advance who will be claiming party status is to advertise and hold a preliminary hearing at which all persons claiming to be "parties" would be requested to come forward to make submissions to the tribunal as to why they should be entitled to this status. Once such a preliminary hearing had been advertised and held, then it would seem unlikely that a person not appearing could subsequently claim "party status" provided of course that the holding of the preliminary hearing was properly and sufficiently advertised in the community to be affected by the tribunal's eventual decision.

#### E. *WHAT ARE THE MAIN RIGHTS AND PROTECTIONS UNDER THE MINIMUM RULES?*

The following is a summary list of the main rights and protections which can be claimed by a party:

1. The right to reasonable notice of the hearing (section 6).
2. The right to reasonable information of any allegations respecting his good character, propriety of conduct or competence if such matters are in issue (section 8).
3. The right to a public hearing unless public security or intimate financial or personal matters are involved (section 9).
4. The right to be represented by a lawyer or an agent (section 10(a)).
5. The right to call and examine witnesses, and to cross-examine other witnesses (section 10(b)(c)).
6. The right to protection against self-incrimination respecting the use of evidence in any subsequent civil or criminal proceedings (as far as the Province can grant that right) (section 14).
7. The right to reasonable adjournments of a hearing (section 21).
8. The right to a written decision, with reasons upon request (section 17).

In addition to the above eight rights and protections accorded to a party to the hearing, the Act makes the protection against self-incrimination (section 14) available to witnesses. Also, section 11 makes provision for the right of a witness to be advised by his counsel or agent when he is giving evidence.

While many of the above rights and protections are set forth in reasonably straightforward fashion, there are some which should be looked at in detail since they present problems or pose ambiguities.

##### (a) *Right to reasonable notice of the hearing*

The right to reasonable notice of a hearing is spelled out in section 6 as follows:

- (1) The parties to any proceedings shall be given reasonable notice of the hearing by the tribunal
- (2) A notice of a hearing shall include,
  - (a) a statement of the time, place and purpose of the hearing;
  - (b) a reference to the statutory authority under which the hearing will be held; and
  - (c) a statement that if the party notified does not attend at the hearing, the

tribunal may proceed in his absence and he will not be entitled to any further notice in the proceedings.

Bill 130, an earlier version of *The Statutory Powers Procedure Act* which was allowed to die on the order paper at the 1968-69 session of the Legislature, contained a more detailed section relating to notice requirements. In particular, it required "a concise statement of the issues" and "a reference to the rules of procedure applicable to the hearing", and at least to that extent provided a higher standard of right. There is considerable difference between providing "a concise statement of the issues" and "a statement of the . . . purpose of the hearing" as in present section 6(2)(a), yet no reasons are apparent for the watering down of the contents of the notice and thereby reducing the quality of the protection. However section 8 of the present Act does contain an additional protection requiring the tribunal under certain circumstances to furnish more detailed information in its possession prior to the hearing.

8. Where the good character, propriety of conduct or competence of a party is an issue in any proceedings, the party is entitled to be furnished prior to the hearing with reasonable information of any allegations with respect thereto.

Similarly, the removal of the earlier requirement that the notice contain "a reference to the rules of procedure applicable to the hearing" tends to water down the nature of the "notice" protection somewhat, particularly where a party does not have available the services of counsel or an informed agent to advise him of the particular tribunal's hearing procedures which are usually "buried" in recent statutory amendments or regulations.

There is a unique feature in the Act relating to the notice requirement in situations where the parties are so numerous that it would be impracticable to give the usual type of notice:

24. (1) Where a tribunal is of opinion that because the parties to any proceedings before it are so numerous or for any other reason, it is impracticable,
  - (a) to give notice of the hearing; or
  - (b) to send its decision and the material mentioned in section 18, to all or any of the parties individually, the tribunal may, instead of doing so, cause reasonable notice of the hearing or of its decision to be given to such parties by public advertisement or otherwise as the tribunal may direct.

This section sets up an unnecessarily wide loophole in the use of this alternative notice procedure by the words "for any other reason". Also, while the device of "public advertisement" is a reasonable alternative provided that the content requirements of section 6 are met in the public advertisement, yet another loophole is created by allowing reasonable notice to be given "otherwise as the tribunal may direct". Indeed, the two loopholes in this section may well constitute direct statutory authority permitting a tribunal to effectively vitiate the specific notice requirements of section 6.

#### (b) *Right to a public hearing*

Another procedural right requiring closer scrutiny here is the public hearing requirement in section 9(1), as follows:

- 9 (1) A hearing shall be open to the public except where the tribunal is of the opinion that,
  - (a) matters involving public security may be disclosed; or
  - (b) intimate financial or personal matters or other matters may be disclosed at the hearing of such a nature, having regard to the circumstances, that the

desirability of avoiding disclosure thereof in the interest of any person affected or in the public interest outweighs the desirability of adhering to the principle that hearings be open to the public,  
in which case the tribunal may hold the hearing concerning any such matters *in camera*.

While "matters involving public security" or "intimate financial or personal matters" are capable of reasonably precise definition, the inclusion of the words "or other matters" would appear to open up the exception to an unnecessarily wide degree by vesting in the tribunal a discretion virtually unfettered except for the balancing test requirement. Also, it is curious why the draftsman of section 9(1) did not see fit to subject the "public security" exception to the balancing test as he did in respect of "intimate financial or personal matters or other matters". It may be that he was attempting to broaden the discretion of the tribunal in the case of the latter so that it could not always opt for a closed hearing where intimate financial or personal matters were involved, while the right to a closed hearing for public security matters might be more certain.

In any event, it should be remembered that some of the amendments contained in *The Civil Rights Statute Law Amendment Act* expressly enact a provision authorizing hearings to be held *in camera* notwithstanding anything in *The Statutory Powers Procedure Act*, thereby overriding section 9(1). This is the likely pattern to be developed with respect to hearing by self-governing professional bodies concerning a member's professional capacity or reputation.

#### (c) *Right to counsel*

Another procedural protection requiring a closer look is the right to be represented at a hearing by counsel or an agent, as provided by section 10(a). The inclusion of an agent in this protection is encouraging particularly in view of the diverse expertise required before the numerous tribunals in Ontario and the emergence of para-legal personnel who are not qualified to practice law in the Province but are nonetheless competent to properly represent or advise parties before certain tribunals. However, it does seem unfortunate that section 23(3) of the Act discriminates between a barrister and solicitor qualified to practice in Ontario and a person appearing as agent on behalf of a party or as an adviser to a witness when it comes to excluding the latter and not the former from a hearing if "such person is not competent properly to represent or to advise the party or witness or does not understand and comply at the hearing with the duties and responsibilities of an advocate or adviser". It may be that a tribunal needs this sort of protection to prevent abuse of its processes, particularly in cases where a hearing is being used as a platform for extraneous political purposes. However, there is no absolute guarantee that an Ontario barrister and solicitor could not be capable of the same potential abuses, and if the tribunal feels it needs protection it should have it against incompetent or irresponsible lawyers as well. While it is admitted that the discipline of the legal profession generally is the primary responsibility of the Law Society of Upper Canada, the purpose of section 23(3) is to give to a tribunal the power to prevent abuse of its own proceedings. There is no reason or justification for exempting the legal profession from being subject to that power.

(d) *Right to cross-examination*

The right to cross-examination of witnesses at a hearing in section 10(c) seems straightforward at first glance. However, on a closer reading there is a rather substantial restriction on the right, and a further problem created by specific statutory provisions permitting certain key government officials not to attend a hearing but to submit their evidence in writing. Section 10(c) provides that a party may conduct cross-examination of witnesses "reasonably required for a full and fair disclosure of the facts in relation to which they have given evidence". This sets up in effect a "relevance" test which is a higher standard than that which applies in the courts. The sanction to enforce this limitation is contained in section 23(2):

A tribunal may reasonably limit further cross-examination of a witness where it is satisfied that the cross-examination of the witness has been sufficient to disclose fully and fairly the facts in relation to which he has given evidence.

This sanction will likely be used where there are hearings with many parties involved, each with counsel or an agent.

A major problem related to cross-examination arises in the case of specific statutes where a key witness, generally a government official, is specifically authorized to submit his evidence in writing and thereby avoid being summonsed to the hearing and subjected to cross-examination. Consider the following section relating to submissions of the Director of Family Benefits at a Board of Review hearing under recent amendments to *The Family Benefits Act* contained in *The Civil Rights Statute Law Amendment Act*:<sup>25</sup>

(6) The Director may make his submissions at a hearing of the board or review in writing, but the applicant or recipient who is a party to the hearing shall be afforded an opportunity to examine before the hearing any such submission or any written or documentary evidence that the Director proposes will be produced or any report the contents of which the Director proposes will be given in evidence at the hearing.

This section may be construed as meaning that the Director is not required to attend the hearing. While his written statement must be provided to the parties for examination in advance of the hearing, it is unlikely that the Board of Review would issue a summons to the Director in view of the specific statutory direction allowing him to make his submissions in writing. Therefore, even though an applicant at the Board hearing may be faced with the damaging statements submitted by the Director, he is effectively prevented from challenging them through the usual device of cross-examination and his only protection is to lead his own evidence to contradict the written statements submitted.

F. *WHAT NEW POWERS ARE CONFERRED ON TRIBUNALS BY THE ACT?*

The new Act is best known for the fact that tribunals deciding or prescribing rights following a hearing are now required to observe certain minimum rules of procedure. However, a second purpose was to confer certain new or clarified powers on such tribunals to enable them to adequately discharge their adjudi-

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<sup>25</sup> S.O. 1971, c. 50, s. 38(7), amending s. 11a of *The Family Benefits Act*.

cative responsibilities. Prior to the Act, such powers of tribunals varied with each statute. Sometimes very broad powers were conferred by statutory phrases such as "the powers of a civil court" and these would include the power to issue bench warrants for the arrest and detention of witnesses and the power to direct imprisonment of persons for contempt. Occasionally these powers were conferred on a tribunal consisting of one person without previous experience in the exercise of such powers. In other situations, a tribunal would find its authorized powers too limited and would be unable to summons a witness or order the production of documents when requested by a party notwithstanding that the information was essential to the disposition of the case before it.

What the present Act does is to standardize the powers that are conferred on tribunals and to provide judicial controls to limit possible arbitrary action. The following is a brief review of the four main powers conferred on tribunals by the Act.

#### 1. *Summonses to witnesses and production of documents*

Section 12 grants to a tribunal the power to require any person, including a party, by summons to give evidence or produce documents. The specific form of the summons is included in the statute and must be signed by the Chairman of the tribunal. The two main limitations of the power are that the evidence and documents sought must be "relevant to the subject matter of the proceedings and admissible at a hearing". The person receiving the summons is entitled to be served personally and to receive like fees and allowances as he would if he had been summonsed to attend before the Supreme Court.

The sanction for non-compliance with a summons is achieved through application to a judge of the Supreme Court for a bench warrant upon proof of non-attendance, the payment of requisite fees and that the presence of the person summonsed is "material to the ends of justice".

An alternative and supplementary sanction is through contempt proceedings brought by means of a stated case to the Divisional Court under section 13 of the Act.

#### 2. *Evidence*

Section 15 is one of the most notable features of the new Act. It recognizes that tribunals must take a more open approach towards the scope of evidence that can be admitted at a hearing, and that the rules of evidence as applied in the courts are perhaps too restrictive for the administrative process. The section takes a "wide open" approach by providing that any oral testimony or document or other thing is admissible whether under oath or admissible in a court, subject only to four limitations:

- (a) it must be relevant to the subject matter of the proceedings;
- (b) it must not be unduly repetitious;
- (c) it cannot be inadmissible in a court by reason of any privilege under the law of evidence;
- (d) it cannot be inadmissible by the statute under which the proceedings arise or any other statute.

Therefore, providing the general intent of the section is not undermined by express evidentiary limitations in other statutes, section 15 sanctions a general departure from the strict common law and statutory rules. This will permit tribunals to conduct their proceedings more informally and expeditiously since they will not be hampered by evidentiary objections such as those usually based on the exclusionary hearsay rules of evidence.

### 3. *Judicial notice*

As with the evidence provisions, a tribunal under section 16 has wider powers respecting judicial notice than a court:

16. A tribunal may, in making its decision in any proceedings,
  - (a) take notice of facts that may be judicially noticed; and
  - (b) take notice of any generally recognised scientific or technical facts, information or opinions within its scientific or specialized knowledge.

The expended power in sub-section (b) may put a party at an unfair disadvantage however, particularly if "notice of any generally-recognized scientific or technical facts, etc." is taken after the conclusion of a hearing but before the rendering of a decision. A party may thereby be deprived of the right to challenge the validity of the facts, information or opinions "noticed". The McRuer Commission, along with a recommendation that a tribunal's power of judicial notice be extended as above, recommended that "parties should be notified either before or during the hearing, of matters officially noticed in order that they might contest them".<sup>26</sup> This latter recommendation was carried forward into Bill 130, the earlier version of *The Statutory Powers Procedure Act*, but was dropped from the present Act.

While it might be unduly onerous to expect a tribunal to reveal in advance the exact details of all its expert facts, information or opinions, it would seem reasonable for it to be required to reveal a summary of such matters, particularly where they will eventually form an important part of the tribunal's decision. A reviewing Court should be able to sort out whether such a summary was fair and equitable as notice to the parties in order to give them an opportunity to challenge the Board's facts, information or opinions.

Mr. Mundell in his *Manual of Practice*<sup>27</sup> states that:

Where a tribunal proposes to take notice of facts, information or opinions under clause B without taking evidence on them, the *sound practice* for the tribunal to follow is to inform any parties at the hearing of such matters, if they are not already aware of them, and to give them an opportunity to contest them before the tribunal makes its decision. (emphasis added)

It is curious that what is regarded as "sound practice" was not translated into legislation, as suggested above.

### 4. *Administration of oaths*

Prior to this Act, there was some doubt as to whether a member of a tribunal in the absence of statutory sanction had the right to administer an oath

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<sup>26</sup> McRuer Commission, *supra* note 2, at 217.

<sup>27</sup> Mundell, *supra*, note 5 at 21.



or affirmation. This is now clarified by section 22 which specifically confers this power as follows:

22. A member of a tribunal has power to administer oaths and affirmations for the purpose of any of its proceedings and the tribunal may require evidence before it to be given under oath or affirmation.

The effect of this section coupled with the permissive words of section 15 allowing a tribunal to admit any oral testimony or document whether or not given or proven under oath or affirmation, is that the tribunal has a discretion as to whether to require evidence to be proven under oath or affirmation or not to be so proven.

#### G. *WHAT ARE THE CONSEQUENCES IF A TRIBUNAL FAILS TO OBSERVE ONE OF THE MINIMUM RULES?*

The Act is silent on this question. However, one may look to *The Judicial Review Procedure Act* under which an aggrieved person may make an application for judicial review to prevent or set aside the tribunal's decision based on the exercise of any power to which the rules apply if there is a failure to follow them. This is not much different in substance from the old-style application for an order in the nature of prohibition and certiorari in Weekly Court when a tribunal in the purported exercise of judicial or quasi-judicial powers failed to observe the common law rules of natural justice. The only differences under the new procedure will be that the application normally<sup>28</sup> will be to the three-man Divisional Court<sup>29</sup> rather than a single High Court judge sitting in Weekly Court, and what will be proved is a breach of a statutory rule rather than an implied common law rule. A third difference, assuming that the tribunal is one obliged by statute to hold a hearing before making its decision, is that it is no longer necessary to establish that the tribunal was acting judicially or quasi-judicially as opposed to administratively, because of the broad definition of "statutory power of decision" discussed in Section A above.<sup>30</sup>

Where there is a statutory right of appeal from a tribunal's decision, then it may not be necessary to proceed under *The Judicial Review Procedure Act* since the failure to observe one of the minimum rules may itself be a ground of appeal. This assumes, of course, that the party complaining of the non-observance of a rule is willing to wait for the tribunal's decision before seeking

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<sup>28</sup> Section 6(2) of *The Judicial Review Procedure Act* keeps open the right to make application for judicial review to a single High Court judge, but such application may be made only with leave and relief granted only "where it is made to appear to the judge that the case is one of urgency and that the delay required for an application to the Divisional Court is likely to involve a failure of justice."

<sup>29</sup> Proceedings before the Divisional Court involve the Chief Justice of the High Court (or his designee) presiding, and two other judges of the High Court. There may be two more sections of the Divisional Court, as directed by the Chief Justice of the High Court from time to time. See *The Judicature Act*, R.S.O. 1970, c. 228, ss. 6 and 48.

<sup>30</sup> However, if the statute conferring power on the tribunal does not expressly require a hearing before a decision is made, the judicial and administrative distinction then becomes relevant in determining whether the obligation to hold a hearing may be implied, i.e. "required . . . otherwise by law." See the discussion in Section A.

relief. The following section of *The Day Nurseries Act*<sup>31</sup> provides a right of appeal from a decision or order of the Day Nursery Review Board to the Divisional Court, and the language used is typical of appeal provisions respecting a number of tribunals covered in *The Civil Rights Statute Law*

*Amendment Act:*

13. (1) Any party to the proceedings before the Board may appeal from its decision or order to the Supreme Court in accordance with the rules of court.
- (2) Where notice of an appeal is served under this section, the Board shall forthwith file with the Registrar of the Supreme Court the record of the proceedings before it in which the decision or order appealed from was made, which, together with the transcript of evidence before the Board if it is not part of the Board's record, shall constitute the record in the appeal.
- (3) The Minister is entitled to be heard, by counsel or otherwise, on the argument of an appeal under this section.
- (4) The Supreme Court may affirm the decision of the Board appealed from or may rescind it and make such new decision as the court considers proper and, for such purpose, the court may exercise all the powers of the Board after a hearing before it and may substitute its opinion for that of the Board.

The above provisions provide for an appeal on all questions whether of law or fact or both, and the Divisional Court is given full power to overrule the Board in virtually every respect including substituting its own opinion for that of the Board.

Some of the provisions providing appeals from other tribunals (contained in *The Civil Rights Statute Law Amendment Act*) provide for a more restricted appeal, e.g. one limited to "any question that is not a question of fact alone." Even though this more restricted language is used, it is clear that a failure to observe one of the minimum rules would be within the scope of such an appeal since as a statutory breach it would involve a question of law.

If a party during the tribunal's proceedings but prior to the decision wishes to raise a procedural objection (e.g., the failure to comply with the notice provisions of section 6), then an application for judicial review would be the only appropriate remedy. But in many situations a party will prefer to await the outcome of the hearing on its merits since the procedural defect may be rendered moot by a decision in his favour. Under these circumstances the prudent lawyer on behalf of the party will raise the procedural objection as soon as it becomes apparent during the hearing, and see that it is duly noted as part of the record (particularly if there is no transcript of the oral evidence being taken) so that his client will not later be prejudiced by *laches* or estoppel from bringing an application for judicial review or statutory appeal should he be unsuccessful on the merits.

Faced with a choice of an application for judicial review or a statutory appeal in pursuing a breach of one of the minimum rules, most lawyers will prefer the statutory appeal route because of the wider powers available to the Divisional Court on an appeal as compared with a review. For not only will the appeal route allow a party to combine an appeal on the merits with the procedural defect, but section 5 of *The Statutory Powers Procedure Act* provides that

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<sup>31</sup> S.O. 1971, c. 50, s. 25(2) substituting new sections 5 - 14 of *The Day Nurseries Act*.

an appeal, but not a review, will stay proceedings before the tribunal thus precluding implementation or enforcement of the tribunal's decision until the appeal is disposed of. Section 25 reads:

25. (1) Unless it is expressly provided to the contrary in the Act under which the proceedings arise, an appeal from a decision of a tribunal to a court or other appellate tribunal operates as a stay in the matter except where the tribunal or the court or other body to which the appeal is taken otherwise orders.
- (2) An application for judicial review under *The Judicial Review Procedure Act, 1971*, or the bringing of proceedings specified in subsection 1 of section 2 of that Act is not an appeal within the meaning of subsection 1.

Notice that the appeal will not operate as a stay if express words to the contrary are provided in the Act under which the proceedings arise, or if the Appellate Court otherwise orders. Conversely, while an application for judicial review does not stay proceedings, section 4 of *The Judicial Review Procedure Act* provides that the court "can make such interim order as it considers proper pending the final determination of the application." This power would include an interim order to stay proceedings if considered proper.

One problem that arises in combining a breach of the minimum rules with an appeal on the merits in a single statutory appeal is whether the procedural defect, if proven, renders the tribunal's decision void or merely voidable. If it is void, the Court has no choice but to declare the decision a nullity and the parties must start proceedings before the tribunal over again, with no decision forthcoming from the Court on the merits of the appeal. If the tribunal's decision is merely voidable, then the Court can still adjudicate on the merits notwithstanding the procedural defect, and the parties can thus be spared the necessity of going back before the tribunal for a new hearing and awaiting a second appeal to determine the merits.

This is a problem on which the Divisional Court or the Court of Appeal may well have to rule in the near future. There is some support to be found for the "voidable" alternative in section 2(5) and 3 of *The Judicial Review Procedure Act* in respect of applications for judicial review. Section 2(5) preserves the reviewing Court's common law discretion<sup>32</sup> to refuse to grant any relief on such applications. Section 3 permits the Court to refuse relief where the sole ground is a defect in form or a technical irregularity and no substantial wrong or miscarriage of justice has occurred. While none of the provisions providing for statutory rights of appeal in *The Civil Rights Statute Law Amendment Act* make reference to these sections of *The Judicial Review Procedure Act* in respect of breaches of the minimum rules which are raised as part of the statutory appeal, one would hope they could be read into the court's powers on such appeals thus sanctioning the "voidable" approach. To do otherwise would be to promote a multiplicity of proceedings before the Divisional Court with statutory appeals being restricted to appeals of the merits and separate applications for judicial review being brought in respect of procedural defects. Not only would this add to the potential delay and expense of the parties, but it

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<sup>32</sup> Relief has been refused where an alternative remedy exists, or where the applicant is in bad faith, or where the relief requested would bring no substantial benefit to the applicant, or where the alleged defect is trivial. See Reid, *op. cit. supra*, note 4, at 350 - 358.

would add a large element of uncertainty for counsel as to which proceeding to commence first and what grounds to include in the statutory right of appeal.<sup>33</sup>

#### H. WHAT IS THE ROLE OF THE STATUTORY POWERS PROCEDURE RULES COMMITTEE?

This is a seven-man Committee charged with the responsibility of maintaining under continuous review the practice and procedure of (1) all tribunals required to observe the minimum rules; (2) tribunals making statutory powers of decision but not required to hold a hearing; (3) investigatory tribunals; and (4) coroners inquests. The Committee has no power to make procedural rules. This power is generally given to the tribunals themselves (above and beyond the minimum rules), a pattern which appears throughout *The Civil Rights Statute Law Amendment Act*. However, section 28 of *The Statutory Powers Procedure Act* sets up a requirement of compulsory consultation:

28. No rules of procedure to govern the proceedings of a tribunal to which Part I applies shall be made or approved except after consultation with the Committee.

In addition, section 29 gives the Committee power to require any tribunal

29. . . . to report to the Committee the rules of procedure governing its proceedings or, where there are no such rules, information as to the procedure followed by it and to formulate and report to the Committee rules to govern its proceedings.

The combination of sections 27, 28 and 29 would appear to be an attempt to put the Committee in the best of both worlds — on the one hand to let the tribunals themselves make their own rules of procedure in the first instance since its members and not the Committee are most familiar with the nature of its proceedings — yet on the other hand to require the tribunal to consult with the Committee as a condition of having its rules made or approved by the Lieutenant-Governor in Council and to allow the Committee to require a tribunal to start making rules and to eventually report them. The idea of providing a Committee with purely consultative functions is based in large part on the Council of Tribunals in the United Kingdom and is clearly intended to avoid the sort of paternalism that might otherwise develop with an all-powerful Committee. Yet one of the principal defects in the working of the U.K. Council of Tribunals is that it has no power to force a tribunal to get started in its rule-making and this is the defect which section 29 above attempts to overcome.

The Rules Committee under this Act is not as powerful as that contemplated by the McRuer Commission. Mr. McRuer envisaged the Committee as a decision-maker, having the power to make rules requiring: (1) that findings of fact by a tribunal be based exclusively upon evidence put before it at the

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<sup>33</sup> If the tribunal has made its decision, then taking heed of the potential roadblock posed by s. 2(5) of *The Judicial Review Procedure Act* (the preservation of the Court's discretion) a party would likely opt for the statutory appeal. But he might be reluctant to include any procedural defect in the appeal because the court might seize on it to declare the tribunal's decision void without adjudicating on the merits. Therefore he would appeal only on the merits. If he loses the appeal, he might then move for an application for judicial review based on the procedural defect but then the Court might exercise its discretionary power under s. 2(5) to refuse relief on the basis that he did not pursue the matter on the appeal and is thereby estopped from raising it subsequently.

hearings and on matters officially noticed and disclosed to the parties; (2) that consultation by the tribunal during or subsequent to the hearing be limited; (3) that members who participate in a decision be present throughout the entire hearing; and (4) that wherever practical all evidence at a hearing be taken down by a skilled reporter or otherwise recorded. In addition, he recommended that the Committee should have the power to specify the tribunals to which the above rules applied, and that additional detailed rules for various tribunals be made by the Committee in consultation with the departments concerned.

The present Act puts the tribunals themselves in the position of decision-maker respecting their own detailed rules, at least in the first instance. This is emphasized by section 30 which specifies that the four requirements referred to above are to be included as "rules of procedure" to be made voluntary by the tribunals themselves (assuming that the power to make rules of procedure generally is so conferred). The Committee is merely a consultant and a catalyst in the rule-making process. The ultimate decision-maker, of course, is the Lieutenant-Governor in Council which must approve and promulgate the detailed rules as regulations under the statute conferring the rule-making power.

As a practical matter, it is to be expected that the Committee and the various tribunals will work closely together in coming up with detailed rules satisfactory to both groups. It is only in cases where the tribunal, having commenced its rule-making activities, differs from the Committee as to the nature and extent of detailed rules to be promulgated that the Lieutenant-Governor in Council will be required to adjudicate on the matter. This is consistent with the general approach of the Act whereby statutory variations from the minimum rules of procedure are permitted if specific legislation to this effect is introduced and enacted.<sup>34</sup> While this may represent a significant drift away from the notion of a single mandatory code of procedure for all tribunals, it is a guarantee of flexibility which implies a faith in each tribunal's ability to come up with procedures both consistent with the norm yet suited to its particular processes.

In any event the effectiveness of the Committee will depend on the skill with which it performs its reviewing, consultative and initiating functions. The Committee draws its membership from a variety of sources.<sup>35</sup> One would expect that if it manages to accommodate the exigencies of each individual tribunal as well as secure adherence to the statutory norm, it will become the *de facto*

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<sup>34</sup> See s. 34 of *The Statutory Powers Procedure Act*.

<sup>35</sup> The seven-man Committee is comprised as follows:

- (a) The Deputy Minister of Justice and Deputy Attorney General (or his nominee).
- (b) The Chairman of the Ontario Law Reform Commission.
- (c) A Judge of the Supreme Court.
- (d) A senior civil servant who is or has been a member of a Part I tribunal.
- (e) A member of the Law Society of Upper Canada.
- (f) A representative of the public who is not a civil servant.
- (g) A professor of administrative law on the law faculty of an Ontario university.

In addition to the above, the Committee is to have one or more secretaries assigned from members of the staff of the Department of Justice, and the Committee is empowered to prescribe the duties of the secretary or secretaries.

decision-maker in respect of the more detailed rules for each tribunal, and also the government's chief advisor in respect of requests for statutory exemptions from the minimum rules.

Finally, section 33 of the Act provides that the Committee can make rules respecting the reporting, editing and publication of decisions of tribunals to which Part I applies, subject to the approval of the Lieutenant-Governor in Council. One would hope that the Committee moves quickly in this area since the reporting of decisions will tend to promote cross-fertilization and ultimate consistency among the tribunals and counsel appearing before them in their approach to the minimum rules.

# I. *WHAT WILL BE THE EFFECT OF THE NEW ACT ON THE ADMINISTRATIVE PROCESS IN ONTARIO?*

The most obvious effect will be that it will increase rather than diminish the incidence and importance of judicial review of administrative action. At least this will be the short-run effect. A lawyer, seeing procedural rights clearly spelled out in a statute and no longer plagued by the judicial-administrative distinction will be quick to seize the opportunity of attacking a tribunal's decision on procedural grounds when his client has or is about to receive an adverse decision on the merits or when he wishes to delay the tribunal to buy his client time. Proceedings before tribunals therefore are likely to become more formalized as lawyers attempt to erect their roadblocks and tribunal members attempt to avoid them.

But in the long run a number of factors will mitigate against formalism. First and foremost is the power of the Divisional Court under section 3 of *The Judicial Review Procedure Act* to dismiss the application where the sole ground for relief is a defect in form or a technical irregularity and there has been no substantial wrong or miscarriage of justice. The jurisprudential flesh which the Divisional Court attaches to the bare bones of section 3 will be very important in determining the nature and extent of judicial review to be permitted for breaches of the minimum rules. Also, it must be remembered that section 2(5) preserves the common law discretion in the Court to refuse to grant relief on the same grounds as under old prerogative writs.

However, the greatest factor mitigating against judicial review is that over the course of time the tribunals themselves, with the assistance of the Statutory Powers Procedure Rules Committee, can be expected to fully incorporate the minimum rules into their day-to-day procedures so that procedural challenges in court will become increasingly rare. This will certainly be true for the better known tribunals regularly making statutory powers of decision following a hearing. It may be that the minimum rules will become the subject of judicial review mostly with some of the more obscure tribunals which make statutory powers of decision only rarely. This will be particularly true in the case of various Directors and Superintendents whose primary functions are administrative in nature but who on occasion are required to make a statutory power of decision following a hearing. In any event, the primary issue before the court on such applications will likely be whether the minimum rules apply at all, as opposed to whether there has been a breach of one of them.

For those who would oppose mandatory codes of procedure for administrative tribunals, the present version of the Act may not be as bitter a pill to swallow as would appear at first blush. While there is a common base of minimum rules, we have already seen in *The Civil Rights Statute Law Amendment Act* a substantial number of variations from the norm which are clearly permitted under section 32 of *The Statutory Powers Procedure Act* as long as they are said to "apply notwithstanding anything in this Act". We can expect to see further variations as the government completes its comprehensive review of all statutes conferring statutory powers of decision and as the tribunals granted a one-year reprieve under section 36(2) come up with proposed amendments indicating the extent to which they can or cannot live with the minimum rules. The allowing of such variations in the minimum rules does not appear to have been contemplated by the McRuer Commission<sup>36</sup> or Bill 130.<sup>37</sup> Happily, the present Act moves away from the idea of a strict mandatory code and combines the provision of a firm guideline with the flexibility permitted through express statutory variations. The presumption is still in favour of the minimum rules but they can be altered if justification is clearly shown. Coupled with the power to draft its own more detailed rules, each tribunal is provided with a framework in which it can attempt in its own way to reconcile the competing demands of procedural justice and administrative efficiency. This approach is a decided improvement.

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<sup>36</sup> P. 222 of the McRuer Commission Report states: "The rules should be statutory guides to those engaged in the administrative process of government and be binding in law."

<sup>37</sup> In Bill 130, section 20 reads:

Notwithstanding any provision of any other Act, where there is conflict between a provision of any other Act, regulation, bylaw or rule and a provision of this Act or of a rule made under this Act, the provision of this Act or of a rule made under this Act prevails.

