Required: An Administrative Procedure Act for Ontario

Arnold Englander
Gordon Marantz

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The courts of law, with centuries of experience behind them, have worked out principles of procedure which everyone recognizes as being right and fair. Tribunals, and more particularly enquiries, have no general code of procedure, and it is mainly for this reason that there is dissatisfaction with them.¹

With the ever increasing proliferation of tribunals within the structure of modern government this cry has been echoed many times. Further, with this increase in number has come the recognition of their expanding importance and necessity in the complex structure of government life. In order to function efficiently there is a need for the actions of these tribunals to be brought within the realm of public confidence.

There is a current body of opinion that feels the best suited remedy for this dissatisfaction lies in extended employment of judicial review and appeals to the courts. Others, the authors of this article among them, believe that:

what is required is not opportunities for appeals, so much as opportunities for full consideration of all the relevant facts...²

In other words any attempt to improve the administrative picture should begin with an attack on the deficiencies in administrative procedure which give rise to the need for correction. To this end this article will advocate an administrative procedure act for Ontario.

A submission of this sort has been dealt with recently in the report of the Gordon Committee:

Suggestions were made to us that there should be a statutory code of procedure which would apply to all government agencies rendering administrative, judicial or quasi-judicial decisions, or that a minimum code be set up for such agencies. We have been impressed with the difficulty of classifying functions by the multiplicity of purposes that trial agencies serve. In view of this we do not believe that a single code of procedure could be drafted that would be workable in practice; a minimum code for general application would fall far short of requirements in some cases.³

¹ Messrs. Englander and Marantz are in the third year at Osgoode Hall Law School.


Yet the Committee’s report does not entirely negate the desire for uniform administrative procedure. Rather, in the next paragraph, they suggest that each agency or board pass its own code of procedure, with a view to having the codes as uniform as possible. What the Committee fails to recognize or consider is that it is possible to have a general code of procedure flexible enough to adapt itself to the divergent purposes of each tribunal.

The whole idea is to have a skeleton, on which administrative agencies may adopt their own rules of procedure.

The Gordon Committee has not been the sole body apprehensive of the workability of a general code of procedure. The Report of the Franks Committee on Administrative Tribunals and Enquiries, in the United Kingdom contains similar misgivings:

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

It appears therefore that the Franks Committee wished each tribunal to be master of its own procedure, in preference to either a general act governing tribunals or several acts applying to related groups of tribunals. At this stage the Committee dismisses a detailed code but overlooks the benefits to be attained from the general “skeleton type” act, which leaves the tribunal free to promulgate its own appropriate detailed rules.

However, the Franks Committee, at a later stage in the Report, shifts ground by recommending that a standard code or codes of procedure be published in statutory form and made available to the parties. It is difficult to reconcile these comments.

As a result of the recommendation of the Franks Committee, the Tribunals and Inquiries Act, 1958 was enacted. This Act set up a Council on Tribunals to oversee the general operations of tribunals. In relation to procedure, no tribunal may make rules except after

4 “Subordinate agencies should be empowered to establish, and should establish, rules of practice and procedure. We suggest, too, that it should be the general objective that the codes be as uniform as possible, setting out such fundamentals as adequate notice to interested parties; full particulars of the case that has to be met; the right to inspect, before the hearing, reports or other documents that are to be received as evidence and the right to be represented by counsel. It would seem desirable that these codes be subject to review . . . in order that they may be made as uniform and complete as possible.”


7 Ibid, para. 63.

8 Ibid, para. 310.

9 6 and 7 Eliz. 2, c. 66.
consultation with the council. This conceivably will achieve some uniformity in rule making among the tribunals.

More advanced measures have been taken with success in the United States.

The American Federal Administrative Procedure Act (commonly called the A.P.A.) passed in 1946, is a statement of the basic procedural principles which are to govern the administrative process. The Act states the essentials of proper administrative practice, and statutory forms and imposes the best existing procedure on the administration as a whole. These basic principles include provisions for notice, separation of the adjudicatory and prosecutory functions, rules of evidence, the right to cross examine, the right to counsel, the necessity that decisions be based on facts proved during a hearing, and reasons for these decisions. It is far from a comprehensive code of fair administrative procedure. It is a general framework rather than a detailed code. The Act thus imposes the best pre-1946 procedure upon all Federal departments and agencies.

The value of a statute can only be demonstrated by results. Nine years after the passage of the A.P.A. the Task Force of the Hoover Commission reported that experience had demonstrated the value of the A.P.A. in protecting the public interest and private rights. Professor B. Schwartz commented that:

though many of the administrative agencies themselves strenuously opposed the enactment of the Administrative Procedure Act, opposition to that law has now all but disappeared. Indeed, in the ten years that have elapsed since the enactment of the 1946 Act, the basic principles behind it have obtained well nigh universal acceptance among students of administrative law, even from those who had formerly opposed such legislation.

It is not American opinion alone that subscribes to the value of an administrative procedure act. A comparatively recent English study reached the same conclusion.

The Hoover Commission Report did not limit itself to a consideration of the status quo, but felt the Act was now accepted as so elementary and fundamental that the time had arrived for its strengthening and expansion. They advocated a more detailed prescription of administrative procedures.

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10 Ibid, s. 8(1).
12 B. Schwartz, Submissions, Minutes of Evidence, supra, footnote 1, p. 1008; for comment on this see (1957), 35 Can. Bar Rev. 743 at p. 747.
13 Commission on Organization of the Executive Branch of the Government, Herbert Hoover, Chairman; 1955 Report.
15 A study of the Inns of Court Conservative and Unionist Society, Rule of Law (1955), p. 26; the provisions of the American Act “are designed to rectify similar abuses and shortcomings to those which we have seen in our own administrative procedure; and they have additional value for us as being enacted within a society with similar traditions and problems to our own and in the context of a system of law of common origin.”
All this was accomplished in a complex, expensive federal juris-
diction, containing a large number of varied agencies with divergent
functions. Even further, a number of American states have passed
their own administrative procedure acts based on the Model State
Administrative Act. The Model Act, in the manner of its predecessor,
the Federal Act, constitutes a general framework of the essentials of
fair adjudicatory procedure. The detailed application of the principle
is left to the agencies concerned. Yet in face of all these efforts in
the United States, and perhaps in ignorance of them, the Gordon
Committee blandly assumes that this success cannot be duplicated
in Ontario.

Uniform administrative procedure is required in Ontario to
provide a general standard for tribunals to adhere to. The most
effective means to accomplish this object is through the medium of
an act to guarantee fairness to individuals. The areas presently open
to abuse will become self-evident later in this essay where the
specific topics to be encompassed by an act are dealt with.

Any proposed act should be devoted mainly to those requisites
of a hearing that ensure fair treatment of the individual before the
tribunal. These include among others, notice of the case which the
party has to meet, the requirement that decisions be reasoned and
based on facts proved during the hearing, and the rights to counsel
and cross-examination.

We have not attempted to draft an act, but rather, we have made
general recommendations as to the desired contents of an administra-
tive procedure act. Many of the requirements we have included are
standard administrative practice in Ontario. Therefore, there is no
reason why they should not be entrenched by means of a legislative
enactment.

In addition, we extend the scope of this article to include a
recommendation which had its origin in the American A.P.A. Every
government agency or department empowered to make rules or
regulations governing the general public should be obliged to give
notice of its intention to that portion of the public affected by its
regulations. This provision, we submit, should similarly apply to all
agencies of government in Ontario, irrespective of whether the
particular tribunal, board, agency, department or commission is or
is not required to hold a hearing.

The Scope of the Proposed Act

We do not believe that such an act should specifically enumerate
the tribunals, boards or commissions compelled to comply with it.
Rather, the act should apply generally to those tribunals, which are
by law, required to hold a hearing.\(^\text{16}\) Thus the act would not make

16 This introduces the concept of natural justice, which contains two
principles. The first is that the adjudicator shall not be biased. The second
principle, known as the *audi alteram partem* rule, provides that a tribunal
should not make a decision affecting the personal or proprietary rights
of a party without giving that party an opportunity to present his case.
Thus, if a statute authorizes an agency to adjudicate on these rights without
specifically providing a hearing for the individual, the courts usually require
any contribution to the law concerning the right of a hearing. Although the principle of *audi alteram partem*, is beyond dispute, the difficulty rests in its application. There are two ways to deal with the problem. The legislature may prescribe from case to case when a hearing must be held, or the courts may, in the absence of statutory direction, state in a given case whether a hearing should be held.

The provision that the act apply to those tribunals “required by law to hold a hearing” assigns to the courts the function of deciding when a hearing should be held. In the absence of a tribunal’s enabling statute providing for a hearing, the enforcement of the *audi alteram partem* principle rests with the courts. A statute on administrative procedure should not be concerned with the unintelligible distinctions between judicial and administrative functions. This matter is reserved for the consideration of the courts in deciding whether a hearing should be held or not; once a decision is reached in the affirmative, the supervisory provisions of the act prevails throughout.

**Enforcement of the Act**

Before formulating any proposals for an act, one must remember that at best it would only be a framework of general principles in the manner of the American Act, and as such it anticipates that each tribunal, while conforming to the act, will prescribe its own detailed rules of procedure. These details will cover such matters as the filing of papers, computation of time, the form and style of documents, and the rudiments of prehearing procedure. In our view it is desirable that tribunals exercising comparable functions should produce practice rules similar in character.

To ensure this end, and to ensure that the principles of the act are carried out, an officer or agency to administer the act is required. The Hoover Commission Task Force made recommendations of this sort. In England, a similar result was achieved via the establishment of the Council on Tribunals under the Tribunals and Inquiries Act.

The Council on Tribunals, among other things, exists to “keep under review the constitution and working of the tribunals... and, from time to time to report on their constitution and working.” Even

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the agency to grant a hearing; if it does not grant a hearing its decision will be quashed as contrary to national justice. The A.P.A. applies “in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing...” See s. 5 A.P.A., 5 U.S.C. c. 19, s. 1004, 1958 Code. This provision has sometimes been interpreted by the courts to include agencies whose enabling statute does not expressly require a hearing. In *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1949), the United States Supreme Court held that the provisions of the A.P.A. applied in those instances where the requirement of a hearing had to be read into the agency statute by the court. The court was of the opinion that an alien had a right to a hearing before a deportation order could be made against him, although the Immigration Act had no such proviso. Once the right to a hearing was read into the statute, the A.P.A. applied. This decision was followed by the Supreme Court of the United States in *Riss and Company Inc. v. United States*, 71 Sup. Ct. 620 (1951). For the approach in the British Commonwealth, as to when a hearing is required, see de Smith, *Judicial Review of Administrative Action* (London, Stevens and Sons Ltd., 1959), chapter 4.
more broad is the Council's power to consider and report on such particular matters as may be referred to it, or as the Council may determine to be of special importance, with respect to administrative procedures, whether or not they involve the holding of a hearing.

This Council is appointed by the Lord Chancellor and is responsible to Parliament through his office.

Also in line with the general policy considerations behind the A.P.A. were the Hoover Commission recommendations for some type of continuous supervision over administrative bodies. Something more than the sporadic commissions and inquiries which come up from time to time was needed. The 1941 Attorney General's Committee\(^{17}\) recommended the creation of an agency to improve administrative procedures by continuous study and supervision and to receive suggestions and criticisms. Although this proposed committee has not been formed, several American states have set up similar bodies.\(^{18}\)

It is recommended that some such body be instituted in Ontario; an independent agency to hear all representations on administrative practice in the province, and to act as a guide to the individual agencies in the formulation of their rules of procedure. Such an agency should not be attached to any branch of government but should be directly responsible to the legislature through the office of the Attorney-General. Its composition should include not only lawyers and career civil servants, but also members of the areas of industry and commerce that are affected by administrative action.

Separation of Adjudication and Prosecution

It is not uncommon to find that in Ontario, as in the United States, a large number of boards and commissions have concentrated within them the features of both a judge and prosecutor. Most characteristic are the licensing and regulating bodies, such as the Securities Commission and the Liquor Licence Board. These agencies have combined within themselves what has been described as:

both the power to initiate complaints and the power to determine whether the alleged facts which give rise to the complaints exist to such a degree as to justify the imposition of a penalty.\(^{19}\)

Thus, the Securities Commission receives a complaint concerning a person's activity in the securities field, investigates the complaint and takes action to suspend the party's licence. It may then hold a hearing to decide whether the decision at first instance, to suspend the licence, was proper. Or, again, the Liquor Licence Board will

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investigate a licencee's operation, and then has the power to hold a hearing to determine whether the licencee "is not a fit and proper person" and thus subject to losing his licence.

When a man sits as a judge in his own cause, as is the case where a board or commission exercises both prosecutory and adjudicatory functions:

the litigant often feels that in the combination of functions within a single tribunal or agency, he has lost all opportunity to argue his case to an unbiased official and that he has been deprived of safeguards that he has been taught to revere.20

In the United States, the A.P.A. has achieved a form of internal separation of functions by means of the appointment of a group of semi-independent hearing officers within each agency. Called examiners, their function is purely to hear the case and either make the final decision, or recommend a decision which is considered best by the agency.

But, as Prof. B. Schwartz indicates,21 this internal separation, although of value as far as it goes, only deals with problems at the level of initial or recommended decisions. The crux of the matter lies in the concentration of functions in the agency itself, and no attempt is made to deal with that. It is a problem of whether there can be a practical separation of the prosecutory and adjudicatory functions when both are subject to one ultimate authority. Salary and tenure of these officers is still subject to control of the Civil Service Commission, and although the agency itself may not directly control or influence the position of the examiners, they are still no more than civil servants liable to be removed by the Commission should it feel such removal to be expedient.22

Generally, most boards and commissions in Ontario which exercise licensing or regulatory powers are faced with the problem of combined functions. However, some of these boards have an effective internal separation, such as the Liquor Licence Board. This Board maintains an Inspection Department which visits licensed premises in the province to ensure that operations are up to Board standards. Premises not meeting the Board's requirements are obliged to take corrective action or run the risk of losing the licence. Such action is taken after a hearing before the three-man Board. In practice a limited area of discretion is open to abuse in cancellation of licences. Although the statute itself gives broad grounds for cancelling a licence, even if for no other reason that the holder, in the Board's opinion, is not a fit and proper person:

20 Supra, footnote 17 at p. 204.
22 For a judicial discussion of the position of hearing examiners within the federal civil service, and, particularly, of the agencies' influence over them, see Ramspeck et. al. v. Trial Examiners Conference et. al. (1953), 345 U.S. 128 at p. 133.
the practice of the present Board has been to cancel a licence only when the holder commits an offence or act that disqualifies him from having a licence for reasons specifically set out in the Act.\textsuperscript{23}

A situation of greater interfusion of functions is found in the Ontario Securities Commission. Here, the Chairman is the only full-time member of the Commission. The Commission receives and investigates complaints, doing so, it would appear, directly under the supervision of the Chairman. It is the Chairman that issues the \textit{ex parte} order of the Commission suspending or revoking a licence. However, this initial step of the Commission has been termed “administrative”,\textsuperscript{24} and, as no hearing is required, the ruling of the Commission may be given \textit{ex parte}.\textsuperscript{25}

The area of difficulty, however, rests in the exercise of s. 29 of the Securities Act, under the provisions for review, for here the full Commission sits. This means that the Chairman who may have instituted proceedings under s. 21, and later made the order, is now sitting as a “quasi-judicial”\textsuperscript{26} officer on review of his own decision. To any party appearing before the Board under this section it must appear that in reality he is appealing only to the other two members of the Board. The obvious solution to this overlap of the prosecutor and adjudicator, would be to separate the Chairman, or administrative head, from the three man Commission which acts in an adjudicatory capacity. Thus, we could obtain an internal separation of functions as exists under other boards, where an independent tribunal can hear both sides of a case argued, not having had any previous contact with the material before it at an “administrative” level.

The Gordon Committee Report provides some interesting commentary on the organization of the Securities Commission. The Report emphasized the broad discretion necessary in carrying out the purely administrative functions of the Commission and says:

\begin{quote}
The Chairman devotes his full time to the work; the other two members are called in from time to time when there are important questions which should be decided by the Commission as a whole.\textsuperscript{27}
\end{quote}

It is only to be assumed that this statement refers to other functions of the Commission, and does not apply to the review provisions of s. 29 of the Act, which requires more than a “time-to-time” meeting of the three Commissioners.

More disconcerting is the statement found a page later in this report. It reads:

\begin{quote}
It is important to the conception of organization just discussed that the administrative head also serve on the three-man Commission. The intention is not that doubtful or questionable matters should be taken out of the administrative machinery, but rather that they should receive the attention of the three-man Commission in plenary session. Therefore,
\end{quote}

\textsuperscript{23} \textit{Supra}, footnote 3, at p. 395-6.
\textsuperscript{24} \textit{Re The Securities Act and Gardiner et. al.}, [1948] O.R. 71 at p. 75.
\textsuperscript{25} \textit{The Ontario Securities Commission v. Dobson et. al.}, [1957] O.W.N. 183 at p. 186.
\textsuperscript{26} \textit{Supra}, footnote 3, at p. 69.
\textsuperscript{27} \textit{Ibid}, p. 69.
we believe that in the circumstances the present arrangements seem to create a conflict in the roles assigned to the Chairman, the appropriate safeguards lie in preserving governmental responsibility and in the statutory provisions for appeal.\(^{28}\)

The astonishing nature of this statement lies in the fact that while the Report does recognize the conflict in the two roles of the Chairman, it refuses to make any form of recommendation to remedy the defect. No recommendation is made to implement the general characteristics of “openness, fairness and impartiality” that the Committee itself suggests\(^{29}\) must attach to tribunals holding a hearing. Instead, the *status quo* is maintained. Moreover, this is the reverse of the attitude found in the recommendations regarding the Ontario Fuel Board, where the separation of the Board’s “administrative” and “quasi judicial” functions was advised.\(^{30}\)

At some levels the Government has presently recognized the need for complete external separation of the conflicting adjudicatory and prosecutorial functions, as is evidenced by two bills recently tabled in the Ontario Legislature.\(^{31}\) The combined provisions of the Energy Act and the Energy Board Act implement the recommendations of the Gordon Committee, and separate the dual functions of the Ontario Fuel Board, placing investigatory and prosecutorial matters in the hands of the Department of Energy Resources, while the process of adjudication rests with the newly proposed Energy Board. The reasons for this legislation were outlined by the Minister of Energy Resources:

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\ldots \text{at the moment the Fuel Board has been both judge and prosecutor. It has established the terms of reference, the codes, the offences, the penalties, and has then supervised these codes and has sat in judgment of any offence. At the same time it has to determine what franchises should be granted to what municipalities and what companies, as well as what rates should prevail. Consequently, one day it has been setting standards and the next day it has been hearing infractions and dealing with licences. So, the Fuel Board, in fact, has been policeman, prosecutor, judge and jury.}\]

\(^{32}\) The Minister goes on to say that until now the combination of functions was not to the detriment of the industry or the consumer, but at the present time the industry has grown too important to be left entirely within the jurisdiction of the Fuel Board. The standards are now to be set by the Department, and inspectors to investigate and launch prosecutions before the newly proposed Energy Board will be appointed by the Lieutenant Governor in Council. The Board appears to be free from governmental interference in all facets of its operation. It is responsible to the Legislature through the Minister of Energy Resources, although it is in no way a branch of his depart-

\(^{28}\) *Ibid*, p. 70.

\(^{29}\) *Supra*, footnote 6, para. 23.

\(^{30}\) *Supra*, footnote 3, at p. 73.


\(^{32}\) The Hon. Robert Macaulay, Debates of the Ontario Legislature, February 8, 1960, p. 196.
ment. This is a movement in the desired direction, towards effective and complete separation of functions.

One final comment must be made on a new office created by the Energy Act—that of the Energy Returns Officer. In applications before the Energy Board the company applying usually has all the information and knowledge regarding rates and services, but not so the municipality which has little knowledge of the details of battle. The Energy Returns Officer is party to every application before the Board for a rate hearing, and has the duty to bring forward all pertinent facts surrounding the applications, be they in favor of one side or the other. He is a member of the Department of Energy Resources, and his duty is to help the Board and other parties before it. His position could be said to be that of an "amicus curiae."

Notice

The purposes of an administrative procedure act is to ensure fairness to those whose rights are affected by agency action. To require the specification of issues before any hearing commences is one of the basic elements of fair procedure. Of what use can the right to a hearing be, unless those affected are informed beforehand of the matters in issue? Therefore, anyone entitled to a hearing should be given reasonable notice of the time and place of the hearing, and the issues involved therein. The notice ought to contain sufficient information to give the party knowledge of the case he has to meet. It would be desirable if the notice stated the legal authority under which the hearing is to take place.

The Franks Committee recommended that citizens be given notice in good time of the case they will have to meet, whether the issue to be heard by the tribunal is one between the citizen and the administration, or between citizen and citizen. The Committee did not suggest legal pleadings. Rather, the citizen should receive in good time, beforehand, a document setting out the main points of the opposing case.

The A.P.A. envisages a limited form of pleading. Where a private person commences proceedings before the tribunal, the opposing party, or the agency itself, as the case may be, is required to give prompt notice of issues controverted in fact or in law. This is intended to apprise the initiating party, of the issues he must sustain. Where an agency, of its own volition, requires a person to appear before it, the agency can require that person to file pleadings responding to the allegations set out in the formal notice.

This form of pleading is designed to accomplish the same result as that employed in court litigation—the narrowing of the issues and the consequent avoidance of prolonged proceedings. An innovation

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34 *Supra*, footnote 32, at p. 198.
35 *Supra*, footnote 6, paragraphs 71 and 72.
36 Section 5a A.P.A., 5 U.S.C. c. 19, s. 1004(a).
of this character in Ontario administrative practice could achieve the same result.

It is recognized that at the time of the original notice the agency may not be cognizant of all the possible issues. The section in the A.P.A. is so framed that the legal and factual issues can be communicated either by the formal notice initiating proceedings, or during the hearing itself. In either event, the party affected must have ample notice of these issues with due time to examine and prepare for them.

The Model State Act expressly provides for this. Section 8 states:

The notice shall state the time, place and issues involved, but if, by reason of the nature of the proceeding, the issues cannot be fully stated in advance of the hearing, or if subsequent amendments of the issues is necessary, they shall be fully stated as soon as practicable, and opportunity shall be afforded all parties to present argument with respect thereto.

It will be the duty of the court to decide whether the information contained in a notice, is sufficient to comply with the Act. Probably in no case will the notice be as inadequate as in Urban Housing v. Oxford. There, the town clerk sent a letter demanding that certain walls be torn down by the plaintiff, within a prescribed period of time. Inactivity, the plaintiff was warned, would prompt the clerk to take action to remove them. When the plaintiff failed to comply with the demand, the town engineers tore down his walls. It was held that the plaintiff did not receive adequate notice of the town's intended action. A threat by the town clerk to take action would convey an impression of legal proceedings, and not the physical action taken.

The American courts have interpreted their notice section in a very liberal manner, not requiring the same degree of exactness in the pleadings as is customary in those of a court of law. It is recommended that the same policy be applied to a proposed act. If a party has a clear knowledge of the issues of law and fact involved, he has no cause for complaint.

37 [1939] 4 All E.R. 211.
38 In Kuhn v. Civil Aeronautics Board, 183 F. 2d. 839 at 842 (D.C. Circ. 1950), a case concerning the sufficiency of an administrative complaint, the court said, "...if it is clear that the parties understand exactly what the issues are when the proceedings are had, they cannot thereafter claim surprise or lack of due process because of alleged deficiencies in the language or particular pleadings." In American Newspaper Publishers Association v. National Labour Relations Board, 193 F. 2d 782 (7th Circ. 1951), affirmed 345 U.S. 100 (1953), the court held that where an N.L.R.B. complaint failed to allege which subsection of the Labour Act was violated, or where the complaint alleged the wrong subsection, such failure or mistake, if it did not mislead the parties, did not prevent the Board from considering and deciding the charge presented in the complaint. The function of the complaint was to advise the party of the charge. It need not state a cause of action in the sense required in an action at law.
Prehearing Conference

In actual preparation for hearing before a board, the parties concerned may have very little to go on. For example, in an appeal from an order of the Ontario Securities Commission under the Securities Act, counsel for a client charged in a Commission disciplinary proceeding must move not only without the benefit of discovery but also without the assistance of subpoena. If counsel is allowed to look at transcripts of investigations he may not keep possession of them, but must leave them in the custody of the Commission. Even more fundamental, the appellant does not know what the Securities Commission’s case is, and exactly what he is charged with. He has no idea what the essential points in issue are.

This brings up the question of examinations for discovery, and, what the Americans call “prehearing conference.” Primarily, the Americans make effective use of the prehearing technique in agency hearings which are essentially disputes between private parties, but it is not used so extensively in accusatory proceedings, because of the principle against self-incrimination. However, where prehearing is used, it can compensate to a certain extent for the lack of an examination for discovery procedure in that it eliminates the element of surprise from the hearing proper. It is conducted in a manner far less formal than an examination for discovery, and its purpose has been:

- to simplify the issues, provide for the exchange of exhibits and fix the time for such exchange, obtain admissions of facts and of the authenticity of specified documents, limit the number of expert witnesses, agree upon matters of which official notice can be taken...40

This narrowing and defining of the issues cannot but be desirable. In hearings such as those before the Securities Commission, counsel would have an indication of what the important points at issue were, and would be able to direct argument to these points specifically instead of having to argue every point he can think of, as is the case at present. Also, effective use of prehearing techniques would cut down the time for adjournments that are required to deal with these technical problems.

Prehearing, when used in such matters as contested applications for permits before the Ontario Energy Board might result in the parties concerned reaching some degree of agreement and settlement as to the issues contested, and thus eliminate much of the time that might otherwise be spent before the Board in argument.

With these considerations in mind, it is recommended that provisions be made for the use of prehearing techniques before boards and commissions, whether they be boards exercising a prosecutory

39 R.S.O. 1950, c. 351, s. 29(1): “Any person or company ... who is primarily affected by any such direction, decision, order or ruling may ... request a hearing and review by the Commission of the direction, decision, order or ruling.”

function, as does the Securities Commission, or boards whose duties are only to weigh interests between private parties. Such prehearing machinery should be available under all these boards, but activated only upon the request of one of the parties. Upon request, the order for prehearing should then be written, as it is in the United States, by a member of the board, who subsequently conducts the conference, limiting its scope to those points and matters covered in the order. While provisions for examination for discovery as known in our civil courts might tend to formalize board hearings to too great a degree, it is suggested that a prehearing conference would be a more flexible instrument in achieving the desired elements of familiarity with the case to be met.

A further point must be made with respect to the availability of transcripts taken in antecedent proceedings. As has been mentioned, counsel before the Ontario Securities Commission do not have a right to obtain copies of transcripts for their own use, but must return them to the custody of the Commission. It is imperative that a person accused or brought into a disciplinary proceeding be entitled unqualifiedly to have access to evidence raised in an investigation which will be used against him. If as in the case of the Securities Commission counsel can examine such material in the chambers of the Commission, they would seem to be no logical reason why he should not be able to procure permanent copies of it at his own expense.

The A.P.A. provides for such guarantees, parties being entitled to obtain copies of documents. In the case of non-public investigatory hearings, the witness or party may for good cause be limited to an examination of the official transcripts only, especially where the agency may be planning to launch a later criminal prosecution. But:

parties should, in any case, have copies or an opportunity for inspection in order to assure that their evidence is correctly set forth, to refresh their memories in the case of stale proceedings, and to enable them to be advised by counsel. They should also have such copies whenever needed in legal administrative proceedings.

Subpoenas

In general, those boards and commissions of the Ontario government that hold hearings are empowered by their enabling statutes to summon any person and require him to give evidence on oath. An exception, in some respects, is the Ontario Securities Commission.

41 Supra, footnote 11, s. 1086 (b).
43 See: The Ontario Highway Transport Board Act, 1955 (Ont.), c. 54, s. 8; The Ontario Municipal Board Act, R.S.O. 1950, c. 262, s. 41, provides that the Board has the powers of the Supreme Court in regard to the attendance and examination of witnesses, and the production and inspection of documents; section 11(c) of the Racing Commission Act, R.S.O. 1950, c. 329, empowers the Commission "... to summon any witness by subpoena ... and to require such person to give evidence on oath and to produce such documents and things as the Commissioner deems requisite in any such hearing."
The Securities Act grants the Commission power to subpoena witnesses and documents on an investigation into violations of the Act. If there is an appeal from the Chairman's ruling to the full Commission, there is no similar power.

This conceivably might result in the Commission having available on the hearing of an appeal copies of documents obtained during its investigation, whereas the appellant would be unable to call witnesses unwilling to testify or produce documents on his behalf. The Commission could ask a reluctant witness to testify for an appellant who discloses that the former's evidence is very valuable to him. However, such a demand would not have the force of law behind it, in the absence of a statutory subpoena power.

To ensure that an individual appearing before a board, has the same access to subpoenas as that available to the board, a provision similar to that in the A.P.A. is required. Section 6(c) of the U.S. Act states:

Agency subpoenas authorized by law shall be issued to any party upon request and, as may be required by rules of procedure upon a statement or showing of general relevance and reasonable scope of the evidence sought. Upon contest the court shall sustain any such subpoena or similar process or demand to the extent that it is found to be in accordance with law, and, in any proceedings for enforcement, shall issue an order requiring the appearance of the witness or the production of the evidence or data.

This section only applies to agencies having authority by statute to issue subpoenas. Thus, if applied to Ontario, the Ontario Securities Commission, lacking the subpoena power on appeals, would be unable to issue one to the appellant. Therefore, a clause giving particular tribunals the power of issuing subpoenas would be useful. Such a provision should encompass the Securities Commission and any other bodies possessing a great evidence-gathering advantage over the private party.

The 1955 Hoover Commission Report on administrative procedure at the U.S. federal level, recommended that agencies be authorized to issue subpoenas for appearance of witnesses or the production of evidence in proceedings required to be determined after a hearing. The Commission followed the A.P.A. requirements by stating that subpoenas be issued impartially on a showing of general relevance and reasonable scope of the evidence sought.

The person desiring the subpoena has the onus of showing that the evidence sought is relevant to the issues in the hearing. Any subpoenaed witness should be allowed to move before the agency that the subpoena be struck out or modified on the grounds that his evidence is not relevant to the matters in issue.

Supra, footnote 39, s. 21(3).
It is noteworthy that the Franks Committee, also recommended that parties in England have the right to apply to the tribunal for a subpoena.

**Legal Representation**

It is generally recognized that the right to legal representation before a tribunal is vital to the just adjudication of a case, and to the proper elicitation of the facts involved. To our knowledge there is no effective bar to such representation before tribunals in Ontario. Nonetheless, as a necessary safeguard, it should be entrenched as a part of administrative procedure.

In England, where tribunals are more numerous than in this country, and exercise a wider variety of functions, there may be some qualification to representation before certain boards. In some cases, representation is only allowed on permission of the tribunal concerned; in other cases it is not allowed at all. The Franks Committee recommended that such a right be curtailed only in the most exceptional circumstances, and also, that when a citizen was denied counsel before a board, the government department appearing against him should also be so denied.

The basic arguments in favour of permitting counsel rest on two considerations. Firstly, in presenting his case, the average man is unable to distinguish between evidence and argument, and this results in a less effective delivery of the case. Someone of experience speaking on a party's behalf can do much to present the case in a more successful manner. Secondly, it is almost impossible for a layman to cross-examine witnesses effectively. If a right of cross-examination is given, it follows that a means of its effective implementation should be given as well.

The right to legal representation should not be limited so as to qualify only lawyers to appear. As in England, any person capable of representing a party should be able to appear. Particularly, we refer to such persons as trade union representatives who are skilled in presenting workmen's cases before the Labor Relations Board and the Workmen's Compensation Board.

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45 Supra, footnote 6, para. 92 states: "In some cases, an applicant may be handicapped by the absence of some oral evidence or document, and we recommend that applicants should have the right to apply to the tribunal in such cases for a subpoena. The issue of a subpoena should, however, be in the discretion of the tribunal and under its authority."


47 Supra, footnote 6, para. 88 and para. 409 No. 15.

48 (1957) 121 J.P. 670, at p. 671.

49 Prof. F. H. Lawson, *Submission, Minutes of Evidence*, supra, footnote 1, p. 338.
Evidence

Tribunals are resorted to for their expeditiousness, expertise, and relatively low cost. These advantages over a court of law are due in part to their informality. But:

... informality without rules of procedure may be positively inimical to right adjudication, since the proceedings may well assume an unordered character which makes it difficult, if not impossible, for the tribunal properly to sift the facts and weigh the evidence.\(^{50}\)

Therefore, statutory rules of procedure to guide the tribunal in hearing the evidence are required. The most significant problems to be met by those rules are:

1) On whom lies the burden of proof?
2) Should the Common Law exclusionary rules of evidence be applied?
3) Should there be full opportunity to answer a case by cross-examination and rebuttal evidence?

1. Burden of Proof

The person seeking to alter the status quo should open the hearing and have the burden of proof. Thus, on an application for a licence, the onus would be on the applicant to demonstrate his merits to the tribunal. Where a tribunal conducts a hearing concerning the revocation of a licence, the burden would rest on the party advancing evidence against the licencee, since the attacker is seeking to disturb the status quo.

2. Common Law Rules of Evidence

Occasionally, the enabling statute will provide that the Board is not bound by "the legal or technical rules of evidence".\(^{51}\) This has been interpreted in Ontario so as to allow the tribunal to admit hearsay evidence.\(^{52}\) However, where a tribunal was expressly freed by statute from the legal rules of evidence in relation to one of its functions, it was held that the exclusionary rules applied to its other functions.\(^{53}\) On the other hand, where the statute had no provision as to procedure, the admission of hearsay by the Lieutenant-Governor in Council of British Columbia, was not necessarily incompatible with the judicial nature of the inquiry.\(^{54}\)

These cases illustrate the uncertainty existing in Canada as to whether tribunals should admit hearsay. The courts have been compelled to deal with each case on its merits, rather than formulating a general principle. Accordingly, the question proposes itself, should

\(^{50}\) Supra, footnote 6, para. 64.

\(^{51}\) Securities Act, R.S.O. 1950, c. 351, s. 29(3).

\(^{52}\) Supra, footnote 24.


\(^{55}\) For the viewpoint of a writer who advocates its admission, see Professor Kenneth Culp Davis, Evidence, 30 N.Y.U.L. Rev., p. 1309.
tribunals be permitted to act on hearsay? Frequently hearsay is the best evidence available. To refuse to accept it may result in there being little or no evidence available on an important issue.

Among those who advocate the admission of hearsay, the most common expression used is "admit it for what it is worth." Some hearsay is worthless. Yet hearsay is relied on by responsible people in their everyday affairs and the degree to which a person acts on hearsay depends on his appraisal of its worth. The Model State Administrative Act focuses on the reaction of the individual, in prescribing a test for the admission of evidence. Section 9(1) states:

Agencies may admit and give probative effect to evidence which possesses probative value commonly accepted by reasonable prudent men in the conduct of their affairs. They may exclude incompetent, irrelevant, immaterial, and unduly repetitious evidence. (italics ours.)

If incompetent evidence means hearsay, then the agency is given a discretionary power to admit or exclude such evidence.

On this point, Section 7(c) of the A.P.A. provides:

Any evidence, oral or documentary, may be received, but every agency shall as a matter of policy provide for the exclusion of immaterial and unduly repetitious evidence and no sanction shall be imposed or rule of order be issued, except as supported by relevant, reliable, and probative evidence. . . .

The words "any evidence" indicate that the common law rules are not to apply. Hearsay is admissible if it is material. Every decision is to be based on relevant, reliable, and probative evidence.

Professor Kenneth Culp Davis, a leading American writer on Administrative Law, has suggested in connection with the question whether a tribunal should admit hearsay that:

Hearsay is sometimes better than no evidence. The reason for the hearsay rule is that cross-examined evidence is usually better than hearsay. The hearsay rule fails to take account of circumstances in which the only choice presented is between making a finding on the basis of no evidence and appraising particular hearsay so as to give it such weight as it may deserve. When this is the choice, I think the tribunal should be allowed to inquire whether the particular hearsay is in the particular circumstances the kind of evidence on which responsible persons would rely in serious affairs.56

Elsewhere in his article, he points out that the leading scholars on evidence assert that the jury trial rules are not suited to the administrative process where the arbiter of facts has special qualifications for deciding factual questions.

Therefore, subject to certain safeguards, hearsay should be admissible. The following conditions are designed to prevent an indiscriminate use of this "legally incompetent" evidence. If followed, the so-called evils of hearsay will be minimized: 1. the hearsay evi-

56 Ibid., p. 1333.
dence must be of probative value; 2. hearsay evidence should be received only if inconvenience or impossibility preclude the presence of the declarant. The more important the evidence, the greater should be the degree of inconvenience before hearsay evidence is admitted. The necessity for this second requirement will be more apparent when we discuss the right to cross-examine.

Should a decision based entirely upon hearsay evidence be upheld, or should it be necessary that the decision have some "legal" evidence to support it? This problem remains a great source of contention in American administrative law. The U.S. "Residuum Rule" was formulated by the New York Court of Appeal in Carroll v. Knickerbocker Ice Co. The court there held that even when an agency is not bound by the ordinary rules of evidence because of a statute, there must nevertheless be a residuum of legal evidence to support the claim before an award can be made; the court can inquire whether there was sufficient competent evidence to support the administrative finding.

Decisions can be found in the United States for and against this doctrine. The A.P.A. and the Model State Act fail to state whether hearsay evidence alone can support a finding. In Canada a Crown grant issued to a settler's executor by the Lieutenant-Governor in Council has been upheld even though the decision to make the grant was based entirely upon hearsay evidence.

It is suggested that the cogency of the probative value of the evidence determines whether hearsay alone can be the basis of a decision. Where all the circumstances, and the evidence taken together, inevitably lead to a particular conclusion, then that conclusion should be given effect to even though the evidence on which it is based is entirely hearsay.

3. Cross-Examination and Rebuttal Evidence.

Without the right to cross-examine witnesses and to present rebuttal evidence, there cannot be a real hearing. This was recognized by Lord Loreburn in Board of Education v. Rice, where he said that the tribunal could...

... obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view.

58 Supra, footnote 54.
59 A test enunciated by Judge Learned Hand in National Labour Relations Board v. Remington Rand Inc., 94 F. 2d 862, at 873, (2nd Circ. 1938), certiorari denied, 304 U.S. 576 (1938), has been followed occasionally in the United States. Dealing with a statute providing that in a proceeding before the N.L.R.B., the rules of evidence prevailing in courts of law or equity should not be controlling, Judge Hand stated, "that mere rumour will not serve to 'support' a finding, but hearsay may do so, at least if more is not conveniently available, and if in the end the finding is supported by the kind of evidence on which responsible persons are accustomed to rely in serious affairs."
60 [1911] A.C. 179, at p. 182.
Cross-examination, the device employed to check the accuracy of the witness' testimony, is a cherished part of our legal process. It is the greatest legal engine ever invented for the ascertainment of the truth.\textsuperscript{61}

However, where the Lieutenant-Governor in Council of British Columbia refused in a proceeding of a judicial character to allow a party, about to be deprived of his property, to cross-examine or adduce rebuttal evidence, the Privy Council held there was no failure of natural justice.\textsuperscript{62} The decision can be justified only on the basis that the statute, under which the hearing was held, permitted the Lieutenant-Governor in Council to find as a question of fact that there was sufficient evidence whose weight would not be diminished either by cross-examination or by the production of further evidence in rebuttal. The Globe Case\textsuperscript{63} has affirmed the right to cross-examine in a judicial proceeding. There is no doubt that this right should be included in any act on administrative procedure.

The admission of hearsay evidence and the right of cross-examination may be incompatible. Frequently the hearsay is in the form of a letter written by an individual who is unable to appear in person. The opposite party cannot cross-examine a letter. The introduction of letters and other documents without the presence of the writer may erode the right of cross-examination. Similarly, a frequent use of a witness to testify as to what the declarant told him could have the same effect. The witness can only be cross-examined on the accuracy of his recollection of what the declarant told him, and not as to the truth of the facts.

The conflict between hearsay and the right to cross-examine is demonstrated in Southern Stevedoring Co. v. Voris et al.\textsuperscript{64} The Longshoremen's and Harbour Workers' Compensation Act provided that in conducting a hearing the Deputy Commissioner was not to be bound by the common law rules of evidence. At the compensation hearing in question, the issue was the cause of a worker's injury. Letters from two doctors as to the source of his injury were admitted. Admission of the letters prevented the company from cross-examining the doctors as to their findings. The two doctors resided in the city where the hearing took place. The United States 5th Circuit Court of Appeal upheld the objection of the company and ordered a new hearing. The court held that even under the liberal provisions of the Act, it could not sanction what had occurred.

the more liberal the practice in admitting testimony, the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted or defended.\textsuperscript{65}

\textsuperscript{62} \textsuperscript{Supra,} footnote 54.
\textsuperscript{64} 190 F. 2d 275, (1951).
\textsuperscript{65} Ibid, p. 277.
The A.P.A. guaranteed the opportunity to cross-examine witnesses. The Compensation Act's provision does not, indeed it could not, dispense with a right so fundamental in Anglo-Saxon Law as the right of cross-examination.66

The company was entitled to ascertain in cross-examination whether there were any additions or explanatory facts, and to test the knowledge and competence of the witnesses and the basis of their professional opinion.

The case does not stand for the proposition that hearsay evidence should always be excluded. Rather, it supports our earlier recommendation that hearsay be admitted only when it is inconvenient or impossible to have the declarant testify. Since the doctors' evidence was directed to the central issue of the hearing, and since they resided in the locality, there was no reason to exclude the right of cross-examination and permit their hearsay. The more important the evidence, the greater should be the effort to produce the declarant.67

When the Ontario Municipal Board had the jurisdiction to grant certificates of public necessity and convenience, after a hearing, to transport firms and truckers, letters were received from shippers throughout the province, and other interested parties, reciting their need for service; although hearsay the letters were admitted in evidence. It would have been inconvenient for the writers to testify, and, in any case, their evidence did not carry much weight.68 These circumstances fulfill the requirement for admitting hearsay. In such a situation the inability to cross-examine does not work a hardship.

Decision Based On The Transcript

American administrative terminology attaches a wide meaning to the term “the record”; the Canadian and English practice is to attach a narrower meaning to the term.69 In terms of Ontario practice,

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67 The Virginia Statute on Administrative Procedure emphasizes the desirability of the presence of the declarant or the original document. Va. S. Code Ann., s. 9-6 11(a) (Supp. 1954) states: “all relevant and material evidence shall be received, except that: . . . (2) hearsay shall be received only if the declarant is not readily available as a witness; and (3) . . . any evidence of the contents of a document shall be received only if the original is not readily available. In deciding whether a witness or document is readily available the agency shall balance the importance of the evidence against the difficulty of obtaining it, and the more important the evidence is the more effort should be made to produce the eye-witness or the original document.”


69 On a motion for certiorari, the record is brought up to the High Court, where the decision is either quashed or upheld. One of the grounds for certiorari is an error of law appearing on the face of the record. It is at this point that the meaning of the word “record” becomes important. The definition determines where the Court can look to find the error of law. In R. v. Northumberland Compensation Appeal Tribunal, Ex Parte Shaw, [1952] 1 K.B. 338, Denning L. J., stated at p. 352, “. . . I think the record must contain at least the document which initiates the proceedings; the pleadings, if any; and the adjudication; but not the evidence, nor the reasons, unless the tribunal chooses to incorporate them. If the tribunal does state its reasons, and those reasons are wrong in law, certiorari lies to quash the decision.”
the record consists of the documents initiating proceedings and the document recording the decision. The United States concept includes the entire transcript of the testimony and the exhibits, together with all papers filed in the proceeding.

The A.P.A. requires that the decision be based on the record. This assures a party appearing before an agency that the decision rendered will be based entirely upon the evidence given during the proceedings. He need not worry that the agency will consider, in making its order, matters not adduced in evidence during the hearing.

It is suggested that this decision-reaching process be adapted to the Ontario scene. The record, as we know it, should be retained for certiorari purposes, but the transcript of the evidence taken should form the exclusive basis on which the decision is made. To ensure "the sanctity of the transcript", the tribunal would be compelled to inform the party of the policy considerations that play a role in its decision. Once the tribunal's general policy on a particular topic is made a part of the transcript, the party appearing can point out how a decision favourable to him will perpetuate that policy.

A New York State administrative expert has emphasized the exclusiveness of the record. He advocated that nothing be taken into account by the administrative tribunal in reaching its decision that was not introduced in some manner into the record of the hearing.70

Section 9(2) of the Model State Administrative Act follows these dictates:

All evidence, including records and documents in the possession of the agency of which it desires to avail itself, shall be offered and made a part of the record in the case and no other factual information or evidence shall be considered in the determination of the case.

By substituting "transcript" for "record" in this clause, Ontario could have a requirement of like effect. The underlying motive for this provision is that the decision should not rest on information outside the transcript, for this would be information which the parties have had no opportunity to test for trustworthiness and to explain or rebut.

Re Fairfield Dairy and The Milk Control Board of Ontario71 affords an illustration of an Ontario court upholding this principle. At a hearing before the Board, the dairy was charged with supplying customers who had not paid in advance. This was contrary to the regulations. The Chairman refused to furnish the names and addresses of any person so supplied. The dairy argued that a hearing under the relevant legislation meant one where the dairy charged had an opportunity to hear the evidence against it. The court agreed and held there was no hearing where the evidence in support of the charge is

70 Benjamin, Administrative Adjudication in the State of New York, p. 207.
not adduced. If the evidence is not revealed, the alleged offender is incapable of presenting a case in rebuttal.\textsuperscript{72}

This administrative tenet has prevented an American court from following the \textit{Arlidge} case\textsuperscript{73} in regard to a report which was from a subordinate hearing officer and was prepared for the benefit of the agency. Whereas the House of Lords in the \textit{Arlidge} case held that non-disclosure of an inspector's report of a local inquiry did not cause the Local Government Board to violate the rules of natural justice, the Supreme Court of New Jersey, in \textit{Mazza v. Cavicchia},\textsuperscript{74} held that the failure of an agency to reveal a subordinate's report vitiating the statutory right to a hearing. The New Jersey court felt that an agency decision based on a secret report violated a private party's right to have a decision based only upon materials which he knows about and is given an opportunity to meet; such a report must be revealed and made part of the record so as to give the party an opportunity of controverting the findings of fact, conclusions of law, and recommendations made therein, and only after the report's disclosure could the agency use the report as an aid in reaching a decision.

The hearing by a subordinate officer of the agency, a fundamental part of English and American administrative practice, is not the custom in Ontario. Here, the administrative tribunal that makes the decisions holds the hearing itself. Yet the \textit{Mazzo v. Cavicchia} case is important in our jurisdiction because it is based on the principle against \textit{ex parte} evidence. This principle was the crux of the decision in \textit{Errington v. The Minister of Health}\.\textsuperscript{75} The Minister, after holding an inquiry, received \textit{ex parte} statements from one party to the controversy. No opportunity was afforded the plaintiff to contest the evidence adduced in his absence. This was held to be contrary to natural justice.

The procedure act would require that nothing be used as evidence unless it formed a part of the transcript. The parties would then be cognizant of the materials on which the tribunal could base its decision.

There are some facts that need not be proved. In a court of law, the judge takes judicial notice of facts that are common knowledge and indisputable. In the United States, the administrative law counterpart of judicial notice is "official notice." The difference between the two is that an administrative tribunal, because of its expertise and research in a particular field, has at its command facts

\textsuperscript{72} For other cases on the right of the party to see the evidence that the tribunal has access to, see: \textit{R. v. Archbishop of Canterbury; Ex Parte Morant}, [1944] 1 K.B. 282; \textit{R. v. Architects' Registration Tribunal, Ex Parte Jagger}, [1945] 2 All E.R. 131; \textit{Memorial Gardens v. Colwood Cemetery Company}, [1958] S.C.R. 353.

\textsuperscript{73} [1915] A.C. 120.

\textsuperscript{74} (1954), 105 A. 2d. 545 (N.J.).

\textsuperscript{75} [1935] 1 K.B. 249.
less well known and less undisputed by the community than those
that may be judicially noticed. American courts have permitted
official notice to be taken of information in the agencies' files, or
otherwise readily accessible. All facts so noticed are communicated
to the parties, who are afforded an opportunity to refute them and
challenge their veracity. The A.P.A. requires that the agency state
in its decision that it has taken notice of material facts not appearing
on the record. Any party can then contest the facts noticed and
attempt to persuade the agency to reach another conclusion. The
Model Act's provision is probably better in that the agency informs
the parties during the hearing that it is taking notice of certain
technical or scientific facts within its specialized knowledge; the
parties can immediately controvert the facts so noticed.

Length of Proceedings

Frequent adjournments and other time-consuming delays pro-
long proceedings in some cases far beyond the time required to reach
a just decision. A provision to the effect that every tribunal should
proceed with reasonable despatch to conclude any matter presented
to it, but that due regard he had for the convenience and necessity
of the parties, is included in the A.P.A. A similar stipulation would
serve as a necessary guide to Ontario administrative tribunals.

Reasoned Decisions

Our final comment on the hearing itself rests on the practice of
tribunals giving reasons for their decisions. There is such a uniform
and widespread support for this practice that we can but repeat what
has been said before. Prof. Schwartz comments that

the obligation to give a reasoned decision is a substantial check upon
the misuse of power. The giving of reasons serves both to convince those
subject to decisions that they are not arbitrary, and to insure that they
are not, in fact, arbitrary.

To this end, the decisions should be based on evidence contained in
the transcript, and not on independent material.

The Gordon Report says that

It is a general presumption that the quality of decisions cannot
but be favourably affected. The practice tends to exert a discipline on
the process by which a decision is reached. And, at the very least, the
decision will be made to appear less arbitrary. Where the policy is not
settled, or must in the nature of things change from time to time, the
existence of a record of reasoned decisions, if regarded as the agency's
jurisprudence, might tend to harass its work. It might be charged with
inconsistency. But where inconsistency is not improper, we would regard
this as a lesser charge than that the agency was wielding its power in the
dark.

76 Supra, footnote 3, at p. 29; supra, footnote 6, para. 98; supra, footnote
77 Supra, footnote 12, Minutes of Evidence p. 1020, and (1957), 35 Can.
Bar Rev. 767.
78 Supra, footnote 3, p. 29.
The Americans have seen fit to provide a requirement for reasoned decisions.\(^{79}\) And, in line with the comment of the Franks Committee that it was

convinced that if tribunal proceedings are to be fair to the citizens, reasons should be given to the fullest practicable extent...\(^{80}\) section 12 of the Tribunals and Inquiries Act was passed, and it provides:

It shall be the duty of the tribunal or Minister to furnish a statement, either written or oral, of the reasons for the decision if requested, on or before the giving or notification of the decision, to state the reasons.\(^{81}\)

It is our opinion that as reasons are salutary to good decision-making, they should be given in all instances, whether requested by the parties or not. Those tribunals not adhering to this practice should accordingly be compelled to do so.

Rule-Making

Under the American Act a distinction is drawn between the adjudicatory functions of an agency and its rule-making power.\(^{82}\) Although comment on rule-making powers is not within the scope of any recommendations we may have for an administrative procedure act, we nonetheless feel some mention should be made of their exercise.

Before such power is exercised, there is a desire that there be some antecedent publicity and consultation with the parties concerned. This was the purpose of section 4 of the American Act, which required general notice of proposed rule-making to be published in the Federal Register:

Said notice is to include: (1) a statement of the time, place, and nature of the rule-making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. The agency must then afford interested persons the opportunity to participate in the rule-making through submission of written data, views, or arguments, and all relevant matters so presented must be considered by the agency.\(^{83}\)

From these requirements are excepted interpretive rules, general policy statements, and rules of agency organization, procedure, and practice. Under the public rule-making procedures the agencies must, in addition to publication of notice, confer with industry advisory committees, consult organizations, hold informal hearings, and take other similar steps to keep abreast of public desires.

\(^{79}\) Supra, footnote 11, s. 1006 (d).
\(^{80}\) Supra, footnote 6, para. 98.
\(^{81}\) Supra, footnote 9.
\(^{82}\) Supra, footnote 11, s. 1003, 1958 Code.
\(^{83}\) Supra, footnote 21, p. 48.
Somewhat similar terms for such prior notice were also found in the former English Rules Publication Act, 1893,84 which was superseded by the Statutory Instruments Act, 1946.85 The 1946 Act curiously did away with the provisions for prior notice of rule-making.

With the increased scope of government activity and control in the fields of private industry, it becomes more and more desirable for the industries concerned to have notice of rule-making that will affect their operation. Parliamentary enactments are subject to public scrutiny and open debate, and interested parties can make representations to their members in the legislature. However, the enactment of broad, general statutes which set no standards, but merely provide for the Lieutenant-Governor in Council to make regulations to carry out effectively the intent and purpose of this act86 places an extensive power in the hands of the delegatee drafting the regulations. We do not suggest that this process was adopted to facilitate secretive rule-making, but rather to enable a government department to deal with rule-making matters in a speedy and efficient manner.

In the absence of any statutory requirements, what is the practice in Ontario? An example of rule-making procedure may be seen in the circumstances surrounding the passage of Regulations 36/60 under the Public Commercial Vehicles Act.87 Circular notices were sent out to all interested members of the trucking industry, and their representatives had several meetings with the Department of Transport in order to discuss and straighten out the details of the proposed regulation. Although the finished product was not entirely satisfactory to all parties, at least an opportunity had been provided for open discussion of the proposals, and the areas of disagreement were known to all parties concerned.

Some practice, from the point of view of the citizen affected, is unquestionably laudable. But is it the general practice? Most government officials, when approached on this subject, are emphatic that it is. They say that regulations dealing with the public are made to cover problems existing outside the government and therefore are relatively ineffective unless they take full cognizance of the public's requirements. The officials convey the impression that the practice of providing for the hearing of the opinion of the public on proposed rules is a standard, though not formally required, procedure. However, this is directly contrary to the situation as reported in the Gordon Report, where the following submission made to the Committee is reproduced:

84 56 and 57 Vict. c. 66.
85 9 and 10 Geo. 6, c. 36.
86 The Tourist Establishments Act, R.S.O. 1950, c. 393, s. 2(1)(p).
87 The Public Commercial Vehicles Act, R.S.O. 1950 c. 304.
On the other hand, the proceedings through which regulations are established are not public. Unless the Government makes some pre-announcement, which is unusual in Ontario, there is no advance knowledge of the contents of regulations prior to their publication in the Ontario Gazette. As a result, opportunity is not given for public discussion and the presentation of representations by those affected until after the regulations have become law.\(^8\)

We can only conclude that no matter what the Government may feel its practice is in this respect, the public concerned is far from convinced of its adequacy. The recent example set by the Department of Transport is only a single instance of progressive and responsible rule-making. Such practice should be all encompassing, and be compulsory for all Government departments, boards, and commissions faced with the responsibility of making regulations directly affecting the public.

Any projected Ontario administrative procedure legislation should contain, as does the United States Act, a section imposing a duty on these departments to give official notice of their proposed rule-making activity. Such notice should be printed in the Ontario Gazette, and should state the times and places where representations may be made by interested parties. In addition, it would seem desirable that letters or circulars be sent out to those members of the public most directly concerned with the proposed regulations. It is far more effective to initially draft a regulation that complies as closely as possible with general requirements than to pass one "ex parte" and then have to revise it to fit the circumstances as they are found to exist.

\(^8\) Supra, footnote 3, at p. 18.